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

In the Matter of	)	
	)	
Amendment to the Commission's	)	IB Docket No. 95-41
Regulatory Policies Governing	)	
Domestic Fixed Satellites and	)	
Separate International Satellite	)	
Systems	)	
	)	
and	)	
	)	
DBSC Petition for Declaratory	)	File **No**. DBS-88-08/94-13DR
Rulemaking Regarding the Use of	)	
Transponders to provide	)	
International DBS Service	)	

ORDER ON RECONSIDERATION

Adopted: August 10, 2001 Released: August 16, 2001

By the Commission:

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I. INTRODUCTION

1. In this Order, the Commission considers several petitions for reconsideration filed in response to the Report and Order[1] in the *DISCO I* proceeding.[2] In *DISCO I* , the Commission adopted a policy permitting all U.S.-licensed fixed-satellite service (FSS) systems, mobile satellite-service (MSS) systems and direct-broadcast satellite service (DBS) systems to offer both domestic and international services. The Commission also decided to treat all such satellite systems alike for regulatory purposes. In this order, we consider challenges to the Commission's decision to apply the one-step financial standard to satellite systems intended for international services, the adequacy of the provision to waive the one-step standard in certain cases, the Commission's conclusions under the Regulatory Flexibility Act, the decision to process both domestic and international satellite systems in consolidated processing rounds and the deferring of action on the request of Comsat Corporation to use INTELSAT and INMARSAT space segment to provide domestic service. We conclude that, with the exception of a modification to the

[1] *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems,* 11 FCC Rcd 2429 (1996) (*DISCO I*). DISCO is an acronym for Domestic International Satellite Consolidation Order.

[2] Four companies filed Petitions for Reconsideration (Petitions): Communications Satellite Corporation (COMSAT), Columbia Communications Corporation (Columbia), Orion Network Systems, Inc. (Orion) and PanAmSat Corporation (PanAmSat). Seven companies filed Oppositions to the Comsat Petition: AMSC Subsidiary Corporation (AMSC), AT&T Corporation (AT&T), Columbia, Motorola Satellite Communications, Inc., Orion, PanAmSat, and TRW Inc. Two companies, GE American Communications, Inc. (GE Americom), and Hughes Communications Galaxy, Inc. (Hughes), filed Oppositions to the Columbia, Orion and PanAmSat Petitions. Columbia, Comsat, Orion and PanAmSat filed Replies. Additionally, the Chief Counsel for Advocacy of the U.S. Small Business Administration filed a Reply to the GE Americom and Hughes Oppositions.

financial-qualification waiver, reconsideration is not warranted. Petitioners have not offered new facts or evidence that was not before the Commission at the time it adopted the Report and Order, nor have they demonstrated a material error or omission.[3] Consequently, on reconsideration, we deny the petitions in part and reaffirm the Commission's Report and Order in most respects. As a separate matter, we conclude that the freeze on international satellite applications we adopted in 1985 is no longer needed and, therefore, we repeal it.

II. BACKGROUND

2. In the Report and Order, the Commission adopted a series of proposals[4] designed to eliminate regulatory distinctions between U.S. domestic satellite systems (domsats) and U.S.-licensed international separate satellite systems (separate systems).[5] Prior to *DISCO I*, domsats and separate systems were subject to different policies. Under the Transborder Policy, the Commission allowed domsats to provide limited international services to overseas points that fell within the coverage areas, or "footprints," of their satellites.[6] For the most part, the Commission required these services to be "incidental" to the system's primary domestic transmissions—that is, licensees could provide international services only to customers to whom they were already providing domestic service. Under the Separate Systems Policy, the Commission restricted the ability of international separate systems to provide domestic services to those "ancillary" to the international services they provided to their existing customers.[7]

3. In *DISCO I*, the Commission concluded that globalization of satellite markets had rendered prior distinctions between domestic and international system licensees unnecessary. The

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[3] *See, e.g., American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, Order on Reconsideration, FCC 00-283 (released, August 9, 2000), 21 C.R. 1005 (2000), 15 FCC Rcd 15448 (2000); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Order on Reconsideration, 13 FCC Rcd 14583 (1998).

[4] *See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, Notice of Proposed Rulemaking, 10 FCC Rcd 7789 (1995) (*DISCO I* Notice).

[5] *See Establishment of Satellite Systems Providing International Communications*, 101 FCC2d 1046 (1985) (*Separate Systems Decision*), *recon. grtd*, 61 R.R. 2d 649 (1986), *further recon. grtd* 1 FCC Rcd 439 (1986). The term "separate satellite system" refers to U.S.-licensed international systems that are owned and operated separately from the INTELSAT global satellite system.

[6] *See* Letter from James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology, to FCC Chairman Mark Fowler (July 23, 1981) (printed in Appendix to *Transborder Satellite Video Services*, 88 FCC 2d 258, 287 (1981) (*Transborder Satellite Decision*).

[7] *See Separate Systems Decision Reconsideration*, 61 R.R. 2d at 667.

Commission decided to eliminate the prior distinctions between domsats and separate systems. That is, it decided to allow satellite systems licensed as "domestic" to provide service to any international point within the footprints of their satellites and to allow systems licensed as "international" to provide service between any points in the United States that lie within the footprints of their satellites.[8] The Commission concluded that allowing such expanded operations would benefit system operators by giving them additional sources of revenue and benefit users by giving them more options in meeting their communications needs.

4. The Commission also concluded that the application of different regulatory policies to domsats and international separate systems was no longer warranted. Accordingly, it adopted several changes to its satellite policies, as well as changes to Part 25 of its rules,[9] to reconcile those differences. The most important of these changes was to apply to international separate systems the unified or "one-step" financial-qualification standard that it had previously applied only to domsats. Under the one-step standard, the Commission requires domsat applicants to include with their applications information to show that they have the funding needed to construct, launch and operate the proposed satellite systems for one year. In contrast, the Commission had applied a two-step standard to separate systems, requiring applicants to submit a business plan and information on the cost of their systems, but allowing them to come in later to show that they have obtained the needed funding. The Commission also concluded that the new policy permitting expanded service would allow separate systems to earn more domestic revenues and make it easier for them to obtain financing. This expanded service opportunity, the Commission found, should help separate system operators comply with the one-step standard.[10]

5. The Commission recognized that some applicants intending to provide primarily international services may request orbital locations that were further to the east or west of the United States and, thus, would not be able to provide domestic service to the entire United States. Because the Commission had not traditionally received mutually exclusive applications for locations in those portions of the orbital arc, it decided to allow such applicants, upon an appropriate request, to seek a waiver of the one-step financial standard to make their financial showing in two steps.[11]

6. Another major change the Commission adopted was its announcement that it would consider future separate systems applications under the "consolidated" processing-rounds

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8 *DISCO I*, 11 FCC Rcd at 2430.

9 47 C.F.R. Part 25 (2000).

10 *DISCO I*, 11 FCC Rcd at 2434.

11 *Id*. at 2435 .

procedure it has traditionally used to process domsat applications.[12] Under this approach, the Commission considers, as a group, all applications for a particular frequency band that have been filed on or before a specified cutoff date. The Commission defers action on applications filed after the cutoff date until it has acted on all applications in the round. The Commission stated that it would consider all pending applications for international satellite systems individually, but would consider subsequent applications for international satellite systems in consolidated "domsat/separate system" processing rounds.[13]

7. Finally, the Report and Order deferred to a future proceeding the decision on whether operators of satellite systems that had not been authorized by the United States could use those systems to provide service within or into the United States.[14] Although not expressly discussed, this decision had the effect of deferring action on Comsat's request that the Commission allow it to use space segment obtained from INTELSAT and Inmarsat to provide service between points in the United States.[15]

III. DISCUSSION

8 Petitioners ask us to reconsider three aspects of the Commission's Report and Order in *DISCO I*. First, several Petitioners ask us to reconsider two aspects of the rules the Commission adopted to treat U.S.-licensed domestic and international satellite systems operators under the same regulatory framework. PanAmSat, Columbia and Orion seek reconsideration of our decision to impose the one-step financial qualification standard on applicants for international FSS satellite licenses. Second, Columbia and PanAmSat also seek reconsideration of the determination that the Commission will consider future satellite applications in consolidated processing rounds. Third, Comsat seeks reconsideration of the decision to defer action on the use of INTELSAT and Inmarsat facilities to provide U.S. domestic service and asks for interim relief to allow it to provide domestic service using those facilities.

A. Financial Qualifications

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12 *Id.* at 2436.

13 *Id.*

14 *Id.* at 2430. The Commission addressed those issues in *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations provide Domestic and International Satellite Service in the United States*, Notice of Proposed Rulemaking (*DISCO II*), 11 FCC Rcd 18178, 18199-202 (1996); Report and Order, 12 FCC Rcd 24094 (1997)

15 Comsat has a subsidiary, Comsat General Corporation, that owns a domestic satellite system authorized by the Commission. The *DISCO I* policy treats Comsat General's domestic satellite the same as all other U.S.-licensed domsats.

9. **Background.** In *DISCO* I the Commission determined that it would require all U.S.-licensed FSS operators to comply with the one-step financial standard it had previously applied only to domestic satellite operators. The one-step financial showing requires applicants to include in their applications evidence that they have adequate funding to cover the cost of constructing, launching and operating proposed systems for one year.[16] The Commission developed this standard for acting on applications for domestic satellite systems when it received several mutually exclusive applications, that is, where the Commission received more applications than orbital locations available for grant. The one-step financial standard ensures that any applicants granted licenses are able to build and operate the proposed systems for one year. The one-step standard also ensures that applicants that do not have financing do not tie up orbital locations while they seek—often unsuccessfully—to arrange financing and thereby prevent other, financially qualified applicants from implementing their systems.[17]

10. When the Commission licensed the first international separate satellite systems, there were fewer applicants than available orbital locations. Because there were no mutually exclusive applications, the Commission did not have to be concerned that licensing a system that had not already arranged its financing would lead to the warehousing of orbital locations. For this reason, the Commission decided to allow the separate-system applicants to make their financial showing in two steps. Although the Commission wanted to ensure that separate system licensees are also financially qualified, it recognized that the operators of such systems might need more flexibility in arranging their financing. The Commission noted that operators of international satellite systems must negotiate operating agreements with foreign countries and coordinate their systems with INTELSAT under Article XIV (d) of the INTELSAT Agreement.[18] The Commission concluded that it would be impossible for applicants to obtain financing until they had completed these requirements. Accordingly, the Commission issued separate systems applicants a conditional authorization on the basis of their business plans and the evidence in their applications as to the costs of their systems. The Commission issued a final authorization after

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16 47 C.F.R. § 25.140(d).

17 *See Licensing Space Stations in the Domestic Fixed-Satellite Service*, 58 R.R. 2d 1267 (1985).

18 Domsats were required to coordinate their systems to ensure that they did not cause any technical harm to the INTELSAT system. International separate systems, however, not only had to coordinate on technical-harm but also to ensure that they did not cause INTELSAT significant economic harm. Coordination of domsats was relatively straightforward, because the INTELSAT Agreement specifically contemplated that Member countries might authorize domestic satellite systems. International systems were more difficult because international systems potentially affected INTELSAT's core revenue base of international switched traffic. To protect that base, the Commission initially restricted separate systems to providing services through the sale or long-term lease of capacity for communications not interconnected to the public switched network, services INTELSAT had not traditionally provided.

applicants had completed the coordination process and had shown that they had received full financing.[19]

11. In the *DISCO I* Notice, the Commission had reasoned that the ability of international satellite systems operating under the new policy to earn additional revenues from domestic service would allow such systems to arrange their financing in advance and permit them to comply with the one-step financial standard.[20] In the Report and Order, the Commission concluded that the justified expectation of greater domestic revenues should help separate-system applicants to arrange their financing before filing their applications and, thus, reduce the need for the two-step financial standard. Furthermore, because some international satellite systems located outside the domestic orbital arc can serve large portions of the United States, the Commission expected that the flexibility afforded by *DISCO I* would induce more entities to seek authority to operate in those portions of the orbital arc.[21] The Commission was concerned that an increase in international-systems applications could create congestion in the international arc and result in an increase in the filing of mutually exclusive applications for orbital locations in that arc.[22] The Commission, therefore, concluded that application of the one-step standard was necessary to ensure that such licensees had the means to implement their systems. To the extent that international orbital resources become scarcer under the new policy, the Commission found that the one-step standard could help avoid a proliferation of under-financed applicants and the resultant delay in bringing international satellite service to users.[23]

12. Petitioners, all operators of international separate satellite systems, have asked us to reconsider the decision to apply the one-step standard to international systems. They argue that, even with the additional revenues from domestic service, most applicants for international satellite systems would not be able to meet the one-step standard.[24] Operators of domestic satellite systems oppose reconsideration. They argue that the Commission was correct that the one-step standard is needed to prevent warehousing of international orbital locations.[25]

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19 *Separate Systems Decision,* 101 FCC 2d at 1164-5.

20 *DISCO I*, 11 FCC Rcd at 2434.

21 *Id.* at 2435.

22 *Id.*

23 *Id.*

24 Columbia Petition at 6. *See also* Orion Petition at 6-7.

25 GE Americom Opposition at 3; Hughes Opposition at 4-5.

13. **Discussion.** We reaffirm the decision in the Report and Order to apply the same one-step financial standard test generally to applications for all U.S.-licensed satellite systems, international as well as domestic. We continue to believe that a general policy of treating all satellite systems alike will best serve the public interest. At the outset, we recognize that entities that can finance their proposed systems with internal resources have an easier time getting their systems built than those who must seek outside financing. As the Commission noted in *DISCO I*, we are sympathetic to the problems such entities face.[26] This is why we have in the past adopted policies that help such entities where possible. Indeed, the expansion of domestic service the Commission ordered in *DISCO I* itself should help separate international systems to compete more successfully.

14. However, as the Commission indicated in *DISCO I*, our primary concern must be to protect the public interest. One of the problems that the Commission has encountered in the past with licensing under-financed systems has been the warehousing of scarce orbital resources. Our experience has been that licensing applicants that do not have adequate financing to build out their systems has often resulted in delays in getting satellite service to users. Indeed, we have often found that applicants that have not arranged financing before filing their applications find it difficult or impossible later to obtain financing.[27] It was to avoid such delays and to ensure that financially qualified applicants can proceed with their systems that prompted the Commission to opt for a stricter application of the one-step financial standard. Therefore, to the extent that the liberalized policy in *DISCO I* leads to greater congestion in the international portion of the orbital arc, we continue to believe that application of the one-step standard is needed to ensure that licenses go only to financially qualified applicants. The need to prevent warehousing of orbital locations would be the same in congested portions of the international arc as it is in the congested domestic arc. We must ensure that our liberalized policies do not delay implementation of international systems because under-financed applicants are unable to go forward with their proposals. Therefore, in congested portions of the international orbital arc, we shall continue to require international satellite system applicants to meet the one-step financial standard.

15. We recognize that there are differences between international and domestic

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[26] *DISCO I*, 11 FCC Rcd at 2435.

[27] In a number of cases where we have issued conditional authorizations, we later had to dismiss the applications because the applicants were unable to find financing. *See, e.g., Financial Satellite Corporation*, 8 FCC Rcd 803 (1993*); McCaw Space Technologies, Inc.*, 8 FCC Rcd 804 (1993). *See also* Letter dated December 22, 1992, from John Dunlop, President, International, Inc. (ISI), to Cheryl Tritt, Chief, Common Carrier Bureau, relinquishing ISI's authorizations and permits. Indeed, these conditional authorizations had been pending so long that the Commission had to implement a freeze on the processing of new applications in the portion of the orbital arc between 60° and 30° West Longitude. *See Processing of Pending Applications for Space Stations to Provide International Communications Service*, FCC 85-296 (released June 6, 1985) (*Freeze Order*).

satellite systems. We find, however, that Petitioners have not shown that those differences are so great as to require a different financial-qualification standard in all cases. Petitioners argue that the Commission based its decision in *DISCO I* to impose the one-step standard on international satellite system applicants upon an erroneous conclusion that permission to provide more extensive domestic service would allow such applicants to obtain advance financing.[28] Petitioners argue, rather, that orbital locations used for international satellite systems are too far east or west to allow them to serve the whole of the United States.[29] The Commission, however, did not base its decision in *DISCO I* to impose the one-step standard on international-system applicants on expanded domestic service but, as indicated above, on the need to prevent the warehousing of international orbital locations. The Commission did not find that systems primarily intended to provide international service could duplicate the breadth of domestic coverage provided by domestic satellites.[30] We agree with Columbia that proponents of international systems will need to justify those systems on the basis of international traffic. We think it is reasonable to conclude, however, that allowing international systems to offer more extensive domestic traffic should make them more potentially profitable and, therefore, should help them in arranging their financing.

16. We are also not persuaded that the ability of applicants successfully to enter the international satellite market is so uncertain that no such applicant would be able to meet the one-step financial standard. Indeed, one of the uncertainties cited by Petitioners has been essentially removed. Over the years since we authorized the first international separate satellite system in 1985, the INTELSAT Article XIV (d) coordination process has been progressively streamlined. Furthermore, as a result of Congressional legislation[31] and INTELSAT's recent privatization,[32] U.S. operators no longer have any Article XIV(d) coordination obligations. While Columbia is correct that international satellite operators will continue to be required to negotiate operating agreements with foreign governments, and there is no guarantee that such an entity will be successful in doing so,[33] that task is not as difficult as it was in 1985. International separate satellite systems are no longer novel. The success of such systems has persuaded other governments that satellites are useful, making them more willing to enter into operating agreements. We see no reason why the negotiation process should not become even easier in the future. These improvements also should help international system operators comply with the one-

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28 Columbia Petition at 5-6; Orion Petition at 6.

29 *Id.*

30 *DISCO I*, 11 FCC Rcd at 2435.

31 Pub. Law 106-180, § 644(a).

32 INTELSAT privatized its system on July 18, 2001. *See* note 78, *infra*.

33 Columbia Petition at 8.

step financial standard.[34]

17. We are similarly unpersuaded that the one-step financial standard will be ineffective in dealing with the warehousing of international orbital locations. Orion argues that the Commission's reliance on the one-step standard to control warehousing is misplaced because large, self-financed applicants could apply for orbital locations to foreclose their use by competing firms.[35] We find this to be unlikely because applicants for international orbital locations will be required to meet the same construction milestones that applicants for domestic orbital locations must meet. As part of applying the one-step standard, every domsat license sets construction deadlines that each licensee must meet in building out its system.[36] Because future licenses for international systems will also contain such milestones, licensees will be forced to move expeditiously in implementing their proposed systems and we will be able to monitor their progress. If a licensee fails to meet a milestone, we can terminate its license and authorize its orbital location to another, financially qualified applicant, depending upon the status of the filing in accordance with ITU cost recovery requirements.

18. In addition to challenging the application of the one-step financial standard to international systems, Orion also argues that we need to change the way the Commission administers the standard. Orion argues that we impose a more stringent standard of proof on international systems regarding their financing than we do for self-financed domestic systems.[37] Orion noted that we allow self-financed applicants to satisfy the financial showing requirement simply by presenting a balance sheet that shows that the entity has sufficient assets to construct

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[34] We note that, as a result of a transfer of control and a merger involving Orion and PanAmSat, Petitioners should have fewer problems finding financing. On April 4, 1997, the Commission authorized the merger of Hughes Communications, Inc. and PanAmSat. *See Hughes Communications, Inc., and Anselmo Group Voting Trust/PanAmSat Licensee Corp.*, 12 FCC Rcd 7534 (1997). On March 2, 1998, the Commission approved a transfer of control of Orion to Loral Space and Communications Ltd, creating Loral Orion Network Systems, Inc. *See Loral Space & Communications Ltd and Orion Network Systems, Inc., Application for Transfer of Control of various Space Station, Earth Stattions, and Section 214 Authorizations*, 13 FCC Rcd 4592 (1998). On June 27, 2000, The Chief, International Bureau, released an Order approving the transfer of control of Columbia to GE Americom. *See GE American Communications, Inc., CCC Merger Sub, Inc., and Columbia Communications Corp. Application for Consent to Transfer of Earth Station License of Columbia Communications Corp*, 15 FCC Rcd 11,590 (2000)

[35] Orion Petition at 8.

[36] These milestones are 1) the beginning of construction, when the licensee has signed an irrevocable construction contract (typically within one year of issuance of the license), 2) the completion of construction (typically 2-3 years after licensing) and 3) launch (typically a few months after end of construction).

[37] Orion Petition at 11-2.

and operate the system.[38] We do not, argues Orion, require such entities to certify that the assets are unencumbered or immediately available to finance the system.[39] Where the applicant is a subsidiary of a larger company, Orion argues that we accept a simple management letter from the parent that it intends to finance the subsidiary's proposal. Orion further argues that we do not require commitments from large, well funded companies to be irrevocable or unconditional, allowing them to condition funding upon the absence of a "material change in circumstances."[40] In contrast, Orion asserts that we require entities seeking outside financing to demonstrate that the financing commitments they obtain from third parties are binding and non-contingent.[41] Orion argues that the prior two-step standard ameliorated to some degree the inequity of this differential treatment by allowing applicants more time to arrange their financing. Orion argues that adoption of the one-step standard has worsened the competitive disadvantage facing non-self-funded applicants, a fact which is particularly unfortunate given that it has been the small, non-self-funded applicants who have been the most innovative in technology and service offerings.[42]

19. To the extent that future licensees for international satellite systems must meet the one-step financial standard, Orion's arguments concerning the rigidity with which we currently administer the two-step standard are moot. Such systems will have to meet the one-step standard, which Orion argues that we administer more leniently. In any event, Orion is correct that we do not require applicants under the one-step standard for domsats to certify the balance sheets they submit with their applications. Section 25.140(c) of the rules requires applicants to submit their financial-qualification showing under an affidavit that the information in the showing is true to the best of the applicant's knowledge and belief.[43] Furthermore, under Section 1.52 of our rules, the signature of the applicant or its lawyer upon a submission has the effect of a certification by the

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38 *Id*. at 11.

39 *Id*.

40 On this point Orion cites a Letter from Michael B. Targoff, Sr., Vice President of Loral Corporation, to the FCC, dated November 14, 1994 (providing funding assurance on behalf of Loral/Qualcomm Partnership, L. P., to construct, launch and operate the Globalstar Satellite System); Declaration of Ronald Sugar, Executive Vice President and Chief Financial Officer of TRW, Inc., dated November 9, 1994 (providing funding assurance on behalf of TRW, Inc., to construct, launch and operate the Odyssey System).

41 Orion cites *Orion Satellite Corporaton*, 5 FCC Rcd 4937, 4945, n. 45, which cites *Pan American Satellite*, 2 FCC Rcd 7011, 7012, in which the Chief, Common Carrier Bureau, stated that "any documents of credit arrangements . . . must show committed funds which do not require any further action by either party. Similarly, equity or debt financing . . . must also be executed and non-contingent." (Letter from Albert Halprin, Chief, Common Carrier Bureau, to Norman P. Leventhal, Esq., dated November 14, 1985).

42 Orion Petition at 12.

43 47 C.F.R. § 25.140(c).

signing party that the information is true.[44] Similarly, where a parent is making a commitment for its subsidiary, the parent corporation's signature falls within Section 1.52. A parent corporation that commits to finance its subsidiary is risking its own assets. It can protect itself because it owns and controls the subsidiary and can ensure that the subsidiary does everything in its power to protect its investment. With respect to third-party financing, however, the provider of the financing does not control the applicant, nor can the applicant bind the entity providing the financing. Under such conditions, we find that requiring the provider of the financing to commit itself gives us reasonable assurance that the applicant will have the money it needs to build out its proposed system. Again, our primary concern is to ensure that we grant authorizations only to financially qualified licensees. If an applicant applies for an orbital location in a congested portion of the international orbital arc, it is just as important for us to assure ourselves of the applicant's financial qualifications as it would be for an applicant in the congested domestic orbital arc.

B. Effect of Waiver

20. **Background**. Although the Commission in *DISCO I* decided to apply the one-step financial standard generally to domestic and international FSS applicants, it recognized that in some circumstances application of the standard could cause unwarranted hardships. The Commission, therefore, provided that applicants for international systems that seek orbital locations in uncongested portions of the international orbital arc could, upon an appropriate showing of need, seek a waiver of the one-step standard to make their financial showing in two steps.[45] The Commissiion concluded that, in such uncongested portions of the orbital arc, allowing applicants greater time to arrange their financing would not prevent financially qualified applicants from implementing their systems.[46] The Commission stated that applicants seeking a waiver must show in their application the cost of constructing, launching and operating their proposed system for one year. Additionally, the Commission requires the applicant to include "specific information regarding attempts to obtain adequate financing and an explanation as to why they could not obtain such financing."[47] Petitioners challenge the waiver provision arguing that it does nothing to ameliorate the "harsh" effect of the decision to apply the one-step standard to international system applications.

21. **Discussion.** We continue to believe that a waiver process, in uncongested portions of the international orbital arc, correctly balances the interest of non-self-financed

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44 47 C.F.R. § 1.52 (2000).

45 *DISCO I*, 11 FCC Rcd at 2435.

46 *Id.*

47 *Id.*

applicants in obtaining greater flexibility in arranging financing against the public's interest in avoiding delays in obtaining satellite service. We are not persuaded that Petitioners have shown that the *DISCO I* waiver provision will not be adequate to deal with such situations. A waiver will put the applicant into the same position it would have been in before *DISCO I*, that is, it will allow the applicant to make its financial showing in two steps. The only difference is that under *DISCO I* the applicant must affirmatively request permission to use the two-step standard. We do not agree that requiring an applicant to request a waiver is unduly onerous. The cost information the applicant must provide in support of a waiver request is the same as that it is already required to include in its application. The only additional information the applicant must include for a waiver is information about its need for financing and why it has not been able to obtain such financing. We do not believe this information will be difficult for the applicant to provide or that it is unreasonable to require an applicant to explain its financial position.

22. We do agree with Petitioners, however, that applicants should not be required to solicit rejection from financing sources in order to obtain a waiver. We agree with Columbia's argument that such a course could cast doubt on the credibility of an applicant.[48] We further agree that it would be sufficient for an applicant in its waiver request to explain why the uncertainties of launching an international satellite precludes it from making a full financial showing prior to the grant of a conditional authorization. We also agree with the argument of Petitioners that granting financing flexibility to applicants for locations in uncongested portions of the orbital arc is unlikely to foreclose other financially qualified applicants from implementing satellite systems intended to provide primarily international services. We shall, therefore, modify the *DISCO I* waiver policy to give applicants in uncongested portions of the orbital arc maximum flexibility to arrange financing. Rather than formally return to the two-step financial standard that prevailed prior to *DISCO I*, we shall not require recipients of a waiver to show they have actually obtained financing. Instead, to prevent the waiver process from causing congestion in the international orbital arc, we will require these licensees to meet construction milestones like those we impose on other FSS licensees. Failure to meet the milestones will result in the cancellation of their licenses.

23. **Regulatory Flexibility Act.** Comments filed in this proceeding by the Chief Counsel for Advocacy of the Small Business Administration (SBA) assert that the *DISCO I* Report and Order failed to meet the requirements of the Regulatory Flexibility Act of 1980 (RFA) because the Final Regulatory Flexibility Analysis failed to indicate how the Commission took small businesses into account in developing the new financial-qualifications policy.[49] The SBA particularly cites the failure of the Report and Order to discuss 1), the impact on small businesses

[48] Columbia Petition at 19-20.

[49] Small Business Administration, Reply of the Chief Counsel for Advocacy of the United States Small Business Administration to Oppositions [of GE Americom and Hughes] to Petitions for Reconsideration, (filed May 31, 1996).

of eliminating the two-stage financial standard and 2), any "significant alternatives" to the one-step standard that might avoid adverse impact on small businesses.

24. We disagree. In the Initial Regulatory Flexibility Analysis in the *DISCO I* Notice, the Commission stated its view that the proposed policy changes it was considering would enhance service options and price competition and, thus, would benefit small businesses involved in the provision of international telecommunications services over U.S.-licensed satellite systems.[50] This language covers both small business entities directly affected by the rule changes--those that seek authorization for satellite systems--and those indirectly affected by the changes--small businesses that use international satellite-based services. In the Final Regulatory Flexibility Analysis in the *DISCO I* Report and Order, the Commission noted that it had received no comments in response to the Initial Regulatory Flexibility Analysis.[51] The Commission further stated that it had taken into account all comments from the public on the proposed policy changes[52] and that it had, in some instances, modified its proposed rules accordingly.[53] One example of such a change was the Commission's proposal to eliminate the two-step financial standard for international satellite applications. In response to comments from operators of international systems, the Commission adopted a provision allowing international satellite applicants that cannot obtain advance financing to seek a waiver of the one-step standard.[54] It is, thus, evident that the Commission did consider the impact of its proposed policies on small businesses. Indeed, the waiver of the one-step standard is a significant alternative that will help minimize the economic impact on small businesses that can meet the standard for grant of a waiver. The modification to the waiver provision that we discuss in paragraph 21, *supra.*, will make it even easier for small businesses to comply with the new *DISCO I* policy. The waiver could encourage additional applicants to seek licenses and, thus, provide more options for small business users of international satellite services.[55] We, thus, conclude that the Commission in *DISCO I* considered a number of alternatives before settling on the approach it adopted. We further conclude that the approach adopted, given our interest in efficient spectrum use, accommodates small businesses seeking to enter the satellite market to the greatest extent

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50 *DISCO I Notice*, 10 FCC Rcd at 7798.

51 *DISCO I*, 11 FCC Rcd at 2441.

52 *Id.*

53 *Id.*

54 *Id.* at 2435.

55 We note, in any event, that we may certify this proceeding under the RFA, *see* 5 U.S.C. § 605, because none of the entities directly affected by the rule changes is a "small" entity. Additionally, there are only three such directly affected entities. *See, e.g.*, footnote 34, *supra.*

possible.

C. Processing Rounds

25. **Background.** In the Report and Order, the Commission stated that it would consider applications filed after the date it adopted *DISCO I* in "consolidated" FSS processing rounds. The Commission further stated that it would act on any such applications only after it had acted on all applications for international systems that were pending on that date.[56] Petitioners argue that this decision is defective both procedurally and substantively.[57]

26. **Discussion.** We reaffirm the Commission's decision in *DISCO I* to apply the same procedures to all FSS applications, domestic as well as international. More specifically, we conclude that the Commission's decision to process all FSS applications filed after the date on which *DISCO I* was adopted in consolidated processing rounds was justified on the merits and that it complies with the Administrative Procedure Act (APA).[58]

27. *Compliance with the APA*. We acknowledge that the Notice in *DISCO I* did not specifically propose to process future applications for satellite systems that are intended for international service in processing rounds. The Notice did state that the Commission was undertaking a review of the policies it had applied to domestic and international satellite systems and that it proposed "to treat all U.S.-licensed geostationary fixed-satellites under a single regulatory scheme."[59] The Notice also proposed to eliminate references to "domestic" and "international" where those terms occur in Part 25 of the Commission's rules.[60] As a result, we believe that the Notice fairly apprised parties to the *DISCO I* proceeding that it intended a thorough review of its satellite policies and that it intended for all purposes to treat all U.S.-licensed fixed-satellite systems alike. We, therefore, do not agree with PanAmSat or Orion that the *DISCO I* Notice failed to give parties notice of, or opportunity to comment on, its intention to treat *all* applications for U.S. space-station licenses together in consolidated processing rounds, regardless of whether the proposed satellite is intended to provide primarily international or primarily domestic service. Section 553(b)(3) of the APA does not require a regulatory agency to include in its notice of proposed rulemaking specific proposed language for every new rule it

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56 *Id.* at 2436.

57 Orion Petition at 13-16; PanAmSat Petition at 1-6.

58 5 U.S.C. §§ 551-9.

59 *DISCO I Notice*, 10 FCC Rcd at 7789.

60 *Id.* at 7794.

proposes to adopt but must "include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved."[61] The Notice clearly disclosed that the Commission was considering a complete change in the way it regulated domsats and international separate systems and the reasons, such as the globalization of the marketplace, it was proposing to make the change. The Notice also made clear that the Commission intended to apply the same regulatory policies to both international and domestic satellite systems. Furthermore, the change was premised on the Commission's stated intention to allow all U.S. space-station licensees to provide whatever mix of domestic and international services that best meet their business plans, regardless of orbit location. The use of processing rounds has been a cornerstone of the Commission's processing of domsat applications since 1983.[62] We, therefore, conclude that the decision to include applications for all U.S. satellites, regardless of the mix of domestic and international services proposed, in consolidated "domestic-international" processing rounds was a logical outgrowth of the Commission's proposal to treat domestic and international systems alike.

28. In any event, the use of processing rounds is a rule of agency procedure or practice that is exempt from the notice requirement in Section 553. Section 553(b)(3)(A) provides that the notice requirement does not apply to an agency's "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice."[63] The use of processing rounds to act on applications seeking authority to provide international satellite services concerns only the issue of when the Commission will consider an application for these satellites; it does not affect the substantive rights of the applicants**.** The United States Court of Appeals for the DC Circuit has upheld a similar rule in the terrestrial broadcast area that the Commission adopted without notice. In *Neighborhood TV Co. v. FCC,*[64] the Commission had decided without prior notice to freeze action on certain applications for television translators and to process future applications in accordance with new guidelines.[65] In upholding the Commission, the court concluded that neither the freeze nor the processing guidelines affected rights of applicants to compete with other applicants for licensing and, thus, did not affect the interests that were ultimately at stake in the proceeding.[66] Thus, the Court held that the freeze and the decision to use processing rounds were

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61 5 U.S.C. § 553(b)(3).

62 *See Processing of Pending Space Station Applications in the Domestic Fixed Satellite Service*. 90 FCC 2d 1 (1982).

63 5 U.S.C. § 553(b)(3)(A).

64 742 F.2d 629 (D.C. Cir. 1984).

65 *Id.* at 636-9.

66 742 F.2d at 637. *See also JEM Broadcasting Co. v. FCC*, 23 F.3d 320, 327 (DC Cir. 1994).

lawfully adopted without prior notice and comment.[67] Because the use of processing rounds in processing international satellite applications does not determine whether the Commission issues a license to a particular applicant, we conclude that the rule consolidating applications previously considered as "domsat" and those previously considered as "separate international systems" into single processing rounds is procedural. We further conclude that the Commission was, therefore, not obligated to give notice in the *DISCO I* Notice that it proposed to apply such a rule to international satellite applications.

29. *Support in the Record*. We also find that use of processing rounds is justified on the merits. We have used processing rounds in the past to help identify and resolve mutually exclusive applications by freezing the number of applications to be processed at a particular time. While the filing of multiple applications for the same orbital locations has in the past occurred more often in that portion of the arc better suited to provide domestic rather than international services, that may not always be the case. As demand for international satellite services increases, that portion of the arc may also become more congested. At the time the Commission initiated the *DISCO I* proceeding, it had two applications for international satellite systems pending before it.[68] It stated in the Report and Order that it anticipated that its liberalization of international satellite systems could result in an increase in the filing of applications for such systems.[69] Indeed, experience since the adoption of *DISCO I* has shown that the filing of applications has increased. We believe it was, therefore, reasonable for the Commission to postpone consideration of any future applications for international systems until it had completed its then current workload.

30. With respect to future applications, we do not agree with Petitioners that the Commission's decision to apply processing rounds was flawed because international orbital locations are not identical to domestic orbital locations. Petitioners are correct that one of the theoretical underpinnings of processing rounds is the idea that orbital locations are fungible--that is, in deciding mutually exclusive applications, the Commission may treat each available orbital location as essentially identical to other ones.[70] Treating orbital locations as fungible has allowed us to grant multiple applications for the same location, without holding comparative hearings or devising another time-consuming procedure to select among applications requesting the same orbital location.[71] We have been able to assign each applicant an orbital location that will allow it

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67 742 F.2d at 637.

68 *DISCO I Notice*, 10 FCC Rcd at 7789.

69 *DISCO I*, 11 FCC Rcd at 2435.

70 *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 94 FCC 2d 129, para. 4 (1983).

71 Under the Open-market Reorganization for the Betterment of International Telecommunications Act, Pub. Law 106-180, 114 Stat. 48 (2000), Title VI-Communications Competition and Privatization, Section 647,

to provide the services for which it applied, even though it may not be the exact location for which it applied. We agree that many orbital locations in the international arc are not perfect substitutes for locations in the domestic arc because they are too far to the east or the west of the United States to cover the entire country. The Commission did not in *DISCO I* suggest that it would license to an applicant seeking authority to provide primarily domestic services a substitute orbital location that would not permit the applicant to serve the entire continental United States. This does not mean, however, that, if the Commission in the future must act on mutually exclusive applications for satellites proposing to provide international service, it may not properly treat international-arc locations as fungible with respect to each other.[72] Furthermore, where applicants can agree to an assignment plan that can accommodate all requests for satellites outside the more congested "domestic" arc, we may consider authorizing these satellites first, as we did in the first processing round for Ka-band satellite systems.[73] We, therefore, conclude that use of processing rounds will not unduly delay the authorization of satellite systems seeking to provide international services. As a result, we are not persuaded that processing rounds will disadvantage U.S.-licensed international systems *vis à vis* systems licensed by foreign governments. For the same reason we are not persuaded that processing rounds would give U.S. systems a greater incentive to seek licensing from a country other than the United States.

D. Comsat use of INTELSAT and Inmarsat space segment

31. **Background**. In the Report and Order the Commission deferred consideration of whether to allow Comsat to use INTELSAT and Inmarsat space segment to provide U.S. domestic satellite service. In its petition for reconsideration, Comsat challenged this determination and asked the Commission to authorize it to use such space segment to provide domestic service on an interim basis.

32. **Discussion**. We need not address Comsat's arguments, or its request for interim relief, in this proceeding. Since release of *DISCO I*, the Commission addressed the issue of Comsat's using INTELSAT and Inmarsat to provide U.S. domestic service in the *DISCO II* proceeding.[74] Although the Commission there concluded that Comsat could use INTELSAT and Inmarsat space segment to provide domestic U.S. service, it imposed a condition upon any such

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approved March 17, 2000 (ORBIT Act), the Commission does not have the authority to award licenses for global satellite systems through competitive bidding process.

[72] The Commission recognized in its *Separate Systems* decision that orbital locations in the "international" portion of the orbital arc are fungible. *See Separate Systems*, 101 FCC 2d at para. 262.

[73] *Assignment of Orbital Locations to Space Stations in the KA-Band, 11 FCC Rcd 13,737 (1996).*

[74] 12 FCC Rcd at 24148-9.

use. The Commission concluded that intergovernmental organizations (IGOs) such as INTELSAT and Inmarsat derive a competitive advantage in their provision of space segment from the fact that they are treaty-based organizations and, therefore, immune to suit—including suit under U.S. antitrust laws.[75] The Commission stated that Comsat, as a Signatory to those organizations, derived a benefit from those advantages.[76] As a result, the Commission required Comsat, as a condition precedent to using INTELSAT or Inmarsat space segment to provide domestic service, to waive its immunity to suit under U.S. law.[77] Because the Commission addressed Comsat's request for a determination of its ability to offer domestic satellite services in *DISCO II*, we need not consider it again here.[78]

E. Other Issues

33. In light of the policies adopted in *DISCO I*, we believe that there is no longer any basis to maintain a freeze on the acceptance or processing of applications, or amendments to applications, requesting orbital positions between 60° and 30° West Longitude in the FSS frequency bands.[79] This portion of the orbital arc, located over the Atlantic Ocean, is used for satellite systems intended for international communications. The Commission adopted the freeze in 1985 to prevent the filing of new applications, or amendment to already filed applications, while it considered the record in the *Separate Systems* rulemaking.[80] The Commission in 1985 had received a large number of applications for separate satellite systems and had initiated the rulemaking that led to the *Separate Systems Decision* to determine an overall policy for handling international separate satellite systems. The Commission was concerned that the filing of additional applications during the pendency of the rulemaking could delay the development of a sound orbital deployment plan for international separate satellite systems. After the issuance of the *Separate Systems Decision*, the Commission issued a number of conditional authorizations to the separate system applicants under the two-step financial qualifications standard. Congestion in

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75 ` *Id*. at 24148.

76 *Id.* at 24149.

77 *Id.*

78 Subsequent to the adoption of *DISCO II*, Inmarsat, on April 15, 1999, privatized its system. *See* Inmarsat, Report of the Twelfth Session of the Inmarsat Assembly of Parties, Assembly/12/Report (May 8, 1998); Report of the Thirteenth (Extraordinary) Session of the Assembly of Parties, Assembly/12/Report (October 8, 1998). INTELSAT privatized its system on July 18, 200l. *See* FCC Press Release, "INTELSAT Privatizes Its Commercial Operations," (July 19, 2001),

79 *See* note 26, *supra*.

80 *See Separate Systems Decision,* 101 FCC 2d at 1173.

this portion of the orbital arc continued for years while several separate satellite system applicants sought unsuccessfully to obtain financing. As a result, some applications remained pending for extended periods, allowing the applicants to tie-up orbital locations for systems that they never implemented.

34. Because of the passage of time and changed conditions in the international satellite market, we see no need to maintain the freeze. The applications that gave rise to the freeze have all either been implemented or withdrawn. Indeed, since the issuance of the *Separate Satellite Decision*, the Commission has, on several occasions, waived the freeze policy to process applications of separate satellite system operators who had demonstrated the ability to construct and operate their systems.[81] The adoption of the one-step financial standard and consolidated processing rounds removes any remaining justification for the freeze policy. The one-step financial standard, coupled with construction milestone requirements, ensures that an applicant has the financial means to implement its proposal and protects against an applicant tying up valuable orbital resources. Consolidated processing rounds permit the Commission to better manage applications filed for this portion of the orbital arc. Under these circumstances, we find that the freeze is no longer necessary and we hereby remove it.

IV. CONCLUSION

35. For the reasons set forth above, we grant the portions of the petitions for partial reconsideration of the *DISCO I* Report and Order seeking greater flexibility in obtaining a waiver of the one-step financial-qualifications requirement, *see* paragraph 22, *supra.*, but otherwise deny the petitions in all respects. With the exception of arguments related to the financial standard, the petitions do not present any new arguments but merely disagree with the conclusions that are adequately supported by the record. We are convinced that the *DISCO I* policies, as modified herein, will result in increased service opportunities and innovative satellite service offerings while eliminating artificial regulatory barriers. At the same time, our approach provides adequate safeguards to ameliorate any undue hardship for some applicants.

V. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that petitions for partial reconsideration filed by Orion, PanAmSat, Columbia ARE GRANTED in part, and DENIED in part.

37. IT IS FURTHER ORDERED that the freeze in accepting applications for FSS frequency satellite systems requesting orbital locations between 60º and 30º West Longitude IS HEREBY LIFTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[81] *Id.*