

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

In the Matter of)
)
Loral Satellite, Inc.)
(Debtor-in-Possession) and)
Loral SpaceCom Corporation)
(Debtor-in-Possession),)
Assignors,) File Nos. SAT-ASG-20030728-00138
) SAT-ASG-20030728-00139
and)
)
Intelsat North America LLC,)
Assignee,)
)
Applications for Consent to Assignments)
of Space Station Authorizations)

To: The Commission

COMMENTS OF SES AMERICOM, INC.

Scott B. Tollefsen
Nancy Eskenazi
SES AMERICOM, INC.
4 Research Way
Princeton, NJ 08540
(609) 987-4000

Phillip L. Spector
Patrick S. Campbell
Kira A. Merski
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1615 L Street, N.W.
Suite 1300
Washington, D.C. 20036
202-223-7300

Attorneys for SES AMERICOM, Inc.

September 15, 2003

TABLE OF CONTENTS

SUMMARY i

I. INTRODUCTION2

 A. SES AMERICOM2

 B. The Applicants3

 C. The Proposed Transaction7

II. INTELSAT ENJOYS MARKET POWER IN THE PROVISION OF SATELLITE SERVICES IN MANY PARTS OF THE WORLD.....7

III. THE ACQUISITION OF LORAL’S SATELLITES WILL GIVE INTELSAT THE ABILITY AND INCENTIVE TO LEVERAGE ITS MARKET POWER IN FOREIGN MARKETS TO REDUCE COMPETITION IN THE U.S. GOVERNMENT MARKET FOR SATELLITE SERVICES. 13

 A. Competition Currently Exists in the Market for the Purchase of Satellite Services by the U.S. Government. 13

 B. The Acquisition will Allow Intelsat to Distort Competition in the U.S. Government Market. 15

IV. THE COMMISSION SHOULD IMPOSE CONDITIONS ON THE ACQUISITION TO PREVENT INTELSAT FROM HARMING COMPETITION AND THE PUBLIC INTEREST IN THE UNITED STATES. 18

 A. There are Strong Legal Bases for Imposing Conditions to Prevent Intelsat from Leveraging its Market Power Outside the United States to Harm Competition in the United States. 19

 B. The Conditions Must be Imposed Now, Not Later 22

 C. The Commission Should Impose Bundling Restrictions and/or Related Conditions on Intelsat’s Use of the Loral Satellites. 23

V. CONCLUSION..... 25

DECLARATION

SUMMARY

SES AMERICOM hereby comments on the above-captioned Applications for consent to the assignment to Intelsat of certain space station authorizations currently held by Loral. Intelsat will use the satellites that are the subject of the Applications to enter the U.S. domestic satellite services market. SES AMERICOM is not asking the Commission to deny the Applications. Instead, SES AMERICOM requests that the Commission impose appropriate conditions on the proposed acquisition in order to limit Intelsat's ability to leverage its dominant position in many foreign countries to harm competition in the market for domestic satellite services provided to the U.S. Government.

Intelsat enjoyed a monopoly in the provision of international satellite services for almost two decades after its creation pursuant to international treaties among numerous nations. When other companies began to compete with Intelsat, they faced numerous barriers to market entry in country after country, often from regulators that were also Intelsat's Signatories and owners. In 2000, the U.S. Congress sought to limit Intelsat's competitive advantage by passing the ORBIT Act, which required Intelsat, among other things, to become a private company and complete an initial public offering. Although Intelsat has since become a private company, it has repeatedly delayed its IPO, and to this day most of its shares remain owned by its former Signatories.

Intelsat has thus retained in many nations the virtually unrestricted market access that it was granted pre-privatization. The company continues to hold a dominant position in the provision of international satellite service between the United States and many foreign countries. By contrast, Intelsat's global competitors (primarily SES AMERICOM and PanAmSat) have had to battle for market access in many countries. The regions where

Intelsat is particularly strong and its competitors face the greatest difficulty are the ones of most interest to the DOD, DHS, FBI and other U.S. Government agencies in the post September 11, 2001, environment: Africa, the Middle East, and Central and South Asia.

Intelsat's international dominance does not presently harm competition in the market for purely domestic U.S. Government business, as Intelsat provides almost no domestic satellite service to the U.S. Government. Instead, U.S. domestic providers compete for domestic U.S. Government business. To meet U.S. Government requirements in areas where entities other than Intelsat do not or cannot provide service, these U.S. domestic providers purchase international capacity from Intelsat for resale to the U.S. Government. If Intelsat is permitted to enter the U.S. domestic satellite market, Intelsat will be able to leverage its dominant market access on many international routes, to offer bundled international and domestic service to the U.S. Government, in a manner that will harm competition in the United States.

In order to ensure that such competition continues after the proposed acquisition, the Commission should condition any grant of the Applications to prohibit Intelsat from bidding to provide bundled international and domestic services to the U.S. Government (directly or indirectly) using the satellites being acquired from Loral, unless Intelsat can demonstrate that it (1) sought bids for subcontracting the domestic portion of its offering from all other domestic providers in addition to its U.S. subsidiary, on a non-discriminatory basis; and/or (2) offered to serve as a subcontractor to each of the other domestic satellite providers for the international portion of such providers' bundled offering, on the same terms and conditions as applied to its U.S. subsidiary.

by Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession) (together, “Loral”).³

SES AMERICOM is not asking the Commission to deny the Applications. Nor is SES AMERICOM seeking any constraints on Intelsat as to most of the business activities that would be conducted by Intelsat via the satellites that are the subject of the Applications. As SES AMERICOM demonstrates below, however, Intelsat’s acquisition of Loral’s satellites will give Intelsat the ability and incentive to distort the currently competitive market for the provision of U.S. domestic satellite service to the U.S. Government, including especially the Department of Defense (“DOD”), the Department of Homeland Security (“DHS”), and the Federal Bureau of Investigations (“FBI”). Accordingly, SES AMERICOM requests that the Commission impose certain conditions on the proposed acquisition, in order to assure continued vigorous competition in the U.S. Government market for domestic satellite services, and thereby to advance the goals of the ORBIT Act⁴ and to protect the public interest.

I. INTRODUCTION

A. SES AMERICOM

SES AMERICOM and its subsidiaries provide U.S. and international satellite services through a fleet of 18 geosynchronous satellites. SES AMERICOM is

³ For purposes of simplification, all Intelsat-related entities are hereinafter referred to as “Intelsat,” and all Loral-related entities are hereinafter referred to as “Loral.”

⁴ Open-Market Reorganization for the Betterment of International Telecommunications (“ORBIT”) Act, 47 U.S.C. §§ 646 *et sec.*

one of the largest U.S. providers of fixed satellite service (“FSS”) transponder capacity. Through its Americom Government Services, Inc., subsidiary, the company also provides satellite services to the U.S. Government, including particularly the DOD, the DHS, and the FBI. SES AMERICOM’s parent company, SES GLOBAL S.A., is the premier global FSS operator. Through its European-based subsidiary, SES ASTRA S.A., and its equity interests in satellite service providers in other parts of the world, the SES GLOBAL family of companies provides satellite services in North America, Latin America, Asia and Europe.

B. The Applicants

1. Intelsat

The International Telecommunications Satellite Organization, Intelsat’s predecessor, was formed in 1971 pursuant to international treaties among numerous nations, for the purpose of developing and operating a global telecommunications satellite system to serve the communication needs of member countries.⁵ Because Intelsat’s underlying agreements had the legal status of treaties, the consortium was established as an intergovernmental organization (“IGO”), with all of the corresponding privileges and immunities.⁶

⁵ See generally *Comsat Study—Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, Final Report and Order, 77 F.C.C.2d 564 (1980); see also Intelsat LLC Request for Extension of Time Under Section 621(5) of the ORBIT Act, File No. ___ (FCC, filed Aug. 22, 2003) (hereinafter “IPO Extension Request”).

⁶ As the host country, the United States granted Intelsat “the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act.” Exec. Order 11966, 42 Fed. Reg. 4331 (1977).

For the first 17 years after its creation, Intelsat enjoyed a monopoly in the provision of international satellite services. In the mid-1980s, a few companies began to challenge Intelsat's monopoly, including SES ASTRA in Europe. In 1985, the Commission adopted its "separate systems" policy,⁷ pursuant to which several companies were licensed to launch satellites competing with Intelsat. In 1988, the first separate system satellite, PanAmSat's PAS-1, was launched, ushering in an ostensible era of competitive international satellite services. In practice, however, PanAmSat and those that followed it into the provision of international satellite services -- including a company today owned by SES AMERICOM, Columbia Communications Corporation -- faced numerous barriers to entry in country after country. The Intelsat Signatories (who were principally government-owned entities and even regulators)⁸ resisted any competition to the monopolistic organization that they owned.⁹ As discussed below, this market access problem continues in many parts of the world to favor Intelsat at the expense of would-be competitors.

⁷ See *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985).

⁸ Intelsat's Signatories were the entities named by the member nations to operate the Intelsat assets in each country (*e.g.*, COMSAT in the United States). These Signatories were also the entities that had ownership interests in the IGO.

⁹ PanAmSat filed an antitrust suit in 1990, alleging monopolization by Intelsat and its Signatories. The suit was ultimately dismissed because of the immunities enjoyed by Intelsat and the Signatories, without any resolution on the merits. See *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168 (2d Cir. 1991) (affirming dismissal of antitrust suit filed by PanAmSat and others against COMSAT on the basis that COMSAT was entitled to statutory immunity from antitrust liability for actions taken in its capacity as U.S. representative to Intelsat).

The U.S. Congress in 2000 passed the ORBIT Act, primarily out of concern for Intelsat's ability to exploit unfairly its status as an IGO and its special relationship with its member governments. The ORBIT Act established a framework and timetable for the pro-competitive privatization of Intelsat, including an October 1, 2001, deadline for the completion of an initial public offering ("IPO"), and, as detailed below, the prohibition of practices involving exclusive market access in its member nations.¹⁰

Intelsat became a privatized company in July 2001. To do so, it simply gave shares to the same entities that had been its Signatories.¹¹ Since then, at Intelsat's request, both Congress and the FCC have extended the company's IPO deadline, with the last such extension running through December 31, 2003.¹² Intelsat now has pending before the Commission a request to extend the IPO deadline yet again, until June 30, 2004.¹³

Today, Intelsat is owned by over 220 entities representing more than 145 nations.¹⁴ Many of its owners are state-owned or controlled postal, telephone and

¹⁰ 47 U.S.C. §§ 763, 765(g).

¹¹ See IPO Extension Request at 4; see also Intelsat Form 20-F (2003).

¹² See *Intelsat LLC Request for Extension of Time Under Section 621(5) of the ORBIT Act*, 16 FCC Rcd 18185 (2001) (granting extension to December 31, 2002); Public Law No. 107-233 § 1, 16 Stat. 1480 (Oct. 1, 2002) (extending deadline through December 31, 2003).

¹³ See IPO Extension Request at 5.

¹⁴ See Applications at 16 n.33.

telegraph agencies (“PTTs”),¹⁵ some of which maintain strict monopolies over the provision of telecommunications services in their respective countries. Intelsat operates a 24-satellite global fleet (along with leased capacity on two additional satellites) providing international communications connectivity for carrier, corporate network, video, and Internet applications in over 200 countries and territories.¹⁶ As stated in the Applications, however, the company currently provides “virtually no U.S. domestic service.”¹⁷

2. Loral

In competition with SES AMERICOM, Loral provides satellite communications services in the United States, and also operates satellites for the provision of international services. As stated in the Applications, Loral has sought Chapter 11 protection in the United States Bankruptcy Court in the Southern District of New York.¹⁸ After the sale of satellites to Intelsat as contemplated in the Applications, Loral intends to emerge from bankruptcy protection and utilize its remaining satellite assets for the provision of international satellite service only.¹⁹

¹⁵ *See Id.*, Attachment (Intelsat Shareholders as of 28 July 2003).

¹⁶ *See* Intelsat Form 20-F (2003).

¹⁷ Applications at 6.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8.

C. The Proposed Transaction

The Applications seek authorization to assign from Loral to Intelsat all FCC authorizations and pending applications relating to six satellites and related assets currently owned and operated by Loral: Telstar 4, Telstar 5, Telstar 6, Telstar 7, Telstar 8, and Telstar 13.²⁰ The authorizations would be held by an Intelsat entity called Intelsat North America LLC.²¹ The Telstar satellites to be sold to Intelsat are today used almost exclusively for the provision by Loral of domestic satellite service in the United States, including to the U.S. Government.²² The transaction, if approved, would thus provide Intelsat with full access to the U.S. domestic satellite services market – a market in which Intelsat does not presently operate – and allow Intelsat to expand its direct service offerings to U.S. customers, including the U.S. Government.

II. INTELSAT ENJOYS MARKET POWER IN THE PROVISION OF SATELLITE SERVICES IN MANY PARTS OF THE WORLD.

Over the past few years, Intelsat has taken some steps towards privatization. In 1999, for example, the organization transferred a portion of its assets to a separate, Netherlands-based private company, New Skies N.V.²³ In 2001, following passage of the ORBIT Act, the IGO transferred substantially all of its

²⁰ Applications at 9.

²¹ *Id.*

²² *Id.* at 7-8.

²³ *See* IPO Extension Request at 3.

remaining assets to the privatized Intelsat.²⁴ The company has not yet, however, completed the most critical privatization requirement imposed by the ORBIT Act, as it has yet to complete an IPO. As a result, most of its shares remain owned by, and the company continues to benefit tremendously from its special historical relationship with, its former Signatories.

Intelsat has thus managed to retain in many nations the privileged access that it was granted as an IGO. The virtually unrestricted market access of the pre-privatization Intelsat has transferred over to the privately-owned commercial entity. The company continues to hold a dominant position in the provision of international satellite service between the United States and many foreign countries. It is particularly strong in areas of most interest to the DOD, DHS, FBI and other U.S. Government agencies in the post-September 11, 2001, environment: Africa, the Middle East and Central and South Asia.

By contrast, Intelsat's global competitors (primarily SES AMERICOM and PanAmSat) have had to battle for the regulatory approvals required for market access country by country, particularly outside of North America and Western Europe. In many cases, the foreign regulator making a determination regarding SES AMERICOM's or PanAmSat's market entry also owns (directly or indirectly) the country's stake in Intelsat. These same regulators have thrown up a host of *de jure* and *de facto* barriers to competitive satellite market entry, making it difficult, and sometimes impossible, for competitors of Intelsat to obtain significant market access.

²⁴ See *id.* at 4.

Many of the nations where companies like SES AMERICOM and PanAmSat face the greatest difficulties are in Africa, the Middle East and Central and South Asia -- countries where the U.S. Government, including the DOD, DHS, FBI and other agencies, have strong interests from a defense and/or anti-terrorism perspective, and in which Intelsat has clear built-in advantages in terms of market access.

In addition to barriers to market entry, SES AMERICOM suffers other competitive disadvantages to Intelsat in many markets around the world. These disadvantages come in various forms:

- There are a number of countries (*e.g.*, Mexico, Brazil, and India) where SES AMERICOM currently has market access, but where it has taken the company significant time to gain access. Intelsat's access was granted prior to privatization and continued subsequent to privatization, thus giving it a significant early-entry advantage over other providers.
- In other countries (*e.g.*, Bahrain, Jordan, Liberia, Oman, and Qatar, and many others in the Middle East and Africa) SES AMERICOM has not formally attempted to gain market access, but Intelsat continues to have a very significant built-in advantage because the PTT continues to be an owner of Intelsat and the markets have not been deregulated.
- There are many nations where, although Intelsat may not have specific legal advantages (*e.g.*, where the Intelsat owner is a private entity not controlled by the government), Intelsat has a competitive advantage in terms of satellite coverage and/or the presence of an established distribution network in the country, due primarily to its previous financial and ongoing business relationships with the PTT.²⁵

Other Intelsat competitors have had similar, and sometimes worse, experiences. PanAmSat, for example, has provided the Commission with extensive

²⁵ This information is based both upon the actual experiences of SES AMERICOM personnel in attempting to provide – and inquiring about providing -- services in these nations, and upon information collected from a variety of third-party sources.

data regarding the difficulties that it and other companies (including SES AMERICOM) face in obtaining market access in certain parts of the world as a result of Intelsat's legacy. In comments to the Commission in April 2003 regarding implementation of the ORBIT Act, PanAmSat said:

PanAmSat [in earlier comments] further identified markets where access is blocked or proscribed because of Intelsat agreements or arrangements with national governments and network operators. To this day, PanAmSat is told by national operators around the world that they cannot use PanAmSat services because the operator has an exclusive relationship with Intelsat, or that its investment in Intelsat requires them to use Intelsat in order to affect an enhanced return on their investment. More insidiously, international operators make market entry so complicated and expensive that companies such as PanAmSat are effectively shut out because of such barriers.²⁶

PanAmSat also provided specific information regarding the market entry barriers that U.S. satellite providers face in other countries. PanAmSat explained that in Mexico, for instance, "Intelsat's early market dominance, privileged access, and the fact that it does not have to fulfill the following onerous regulatory requirements [have] further enabled it to retain a significant competitive advantage."²⁷ PanAmSat then went on to list a host of requirements and conditions imposed by the Mexican government on non-Mexican operators but not on Intelsat, including the

²⁶ See Comments of PanAmSat Corporation in response to Report No. SPB-182 (FCC, filed Apr. 17, 2003), at 2. See also Comments of PanAmSat Corporation in response to Report No. SPB-177 (FCC, filed Apr. 12, 2002); Comments of PanAmSat Corporation in response to Report No. SPB-167 (FCC, filed Apr. 27, 2001).

²⁷ PanAmSat Comments on Report No. SPB-182, at 3-5.

payment to the Mexican government of an annual fee in the form of free capacity.²⁸ PanAmSat also highlighted other countries where barriers to market entry or other restrictions negatively impact Intelsat's competitors, such as Cameroon (where the PTT apparently told PanAmSat that "they cannot use PanAmSat's satellites because only Intelsat is allowed to provide satellite capacity"), the Central African Republic, Madagascar, Senegal, and Kenya.²⁹ SES AMERICOM's own experiences corroborate many of PanAmSat's statements set forth above.

In many of the nations where Intelsat also has to comply, as a technical matter, with some of the same or similar formal requirements as other companies, Intelsat provides its services directly through or in conjunction with the state-run PTTs. These state agencies, by virtue of their significant ownership interest in Intelsat, have an incentive to assist Intelsat in its compliance with formal requirements (and to excuse any Intelsat non-compliance), while discriminating against Intelsat's competitors.

The ownership stakes of some of these countries in Intelsat would have been diluted -- and hence their incentive to discriminate against Intelsat's competitors would have been diminished -- had Intelsat conducted the IPO required by the ORBIT Act. Indeed, the Commission has previously recognized the threat to competition posed by the continued ownership of Intelsat by its former Signatories, by

²⁸ *Id.* at 4. SES AMERICOM estimates that this capacity is worth between \$400,000 to \$500,000 per year.

²⁹ *Id.* at 3; PanAmSat Comments on Report No. SPB-167, at 2-3.

conditioning Intelsat's authorization to provide international service in the United States on its carrying out its IPO, and requiring Intelsat to file information with the Commission "to demonstrate that there has been substantial dilution of the aggregate ownership in the company of its former Signatories."³⁰ Instead of complying with these requirements, Intelsat has repeatedly sought to postpone this mandatory IPO, most recently using the pendency of the Loral transaction (a factor of its own creation) in asking the FCC for an extension to June 30, 2004.³¹

The extent to which Intelsat's market power is a problem for the U.S. Government in terms of procurement of global satellite services is currently the subject of a government review. At the request of members of Congress, the General Accounting Office (the "GAO") is studying the extent to which Intelsat's dominant position affects the procurement of satellite services by the U.S. Government. Specifically, in February 2003, Senator Hollings and Congressman Markey requested that the GAO examine whether Intelsat still enjoys competitive advantages over its competitors, and whether the ORBIT Act has improved access to foreign markets for U.S. companies.³² Similarly, in November 2002, Senators Inhofe, Akaka, and Lieberman requested that the GAO review current DOD commercial satellite

³⁰ See *Applications of Intelsat LLC for Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band satellites that Form a Global Communications System in the Geostationary Orbit*, Memorandum Opinion Order and Authorization, 16 FCC Rcd 12280, 12289 (2001).

³¹ See IPO Extension Request at 2.

³² See Letter from Senator Hollings and Congressman Markey to David Walker, Comptroller General, General Accounting Office, dated February 4, 2003.

procurement practices on an expedited basis to determine if DOD has an appropriate, competitive procurement environment.³³ The GAO report is expected to be released shortly.

III. THE ACQUISITION OF LORAL'S SATELLITES WILL GIVE INTELSAT THE ABILITY AND INCENTIVE TO LEVERAGE ITS MARKET POWER IN FOREIGN MARKETS TO REDUCE COMPETITION IN THE U.S. GOVERNMENT MARKET FOR SATELLITE SERVICES.

Intelsat currently provides almost no domestic service in the United States, including to the U.S. Government. Instead, U.S. companies such as SES AMERICOM, PanAmSat and Loral compete freely for U.S. Government business. However, many government contracts require capacity in markets where Intelsat is the only company with landing rights or satellite coverage. The domestic providers therefore must purchase such capacity from Intelsat for resale to the U.S. Government. If Intelsat is permitted to enter the U.S. domestic satellite market, Intelsat will be able to leverage its legacy of dominant market access on many international routes, to offer bundled international and domestic service to the U.S. Government, in a manner that will harm competition in the United States.

A. Competition Currently Exists in the Market for the Purchase of Satellite Services by the U.S. Government.

Today, Intelsat provides virtually no domestic services in the United States. Intelsat's absence from the domestic service market is understandable. As

³³ See Letter from Senators Inhofe and Akaka to David Walker, Comptroller General, General Accounting Office, dated November 13, 2002; and Letter from Senator Lieberman to David Walker, Comptroller General, General Accounting Office, dated November 14, 2002.

explained in the Applications, the treaties establishing Intelsat as an IGO essentially allowed the organization to provide only international and inter-continental service, leaving most domestic service to its PTT-Signatories and other domestic providers.³⁴ For this reason, Intelsat does not have satellites that provide coverage throughout the continental United States.

Intelsat's inability to provide U.S. domestic service is particularly relevant with respect to the U.S. Government market. While Intelsat is presently a major U.S. Government contractor for international and inter-continental satellite services, the government purchases no U.S. domestic satellite capacity from Intelsat. Rather, the U.S. Government purchases all of its domestic service from SES AMERICOM, PanAmSat or Loral, which compete vigorously in the domestic market. Thus, Intelsat's market power in the provision of international service has no adverse impact on competition for purely domestic U.S. Government business.

For government contracts that require service to international routes, the domestic satellite providers must often purchase such capacity from Intelsat. In many instances, the U.S. providers essentially have no choice acceptable to the U.S. Government other than Intelsat capacity, because (1) due to the market access constraints described above, Intelsat is the only company that has landing rights in particular countries or is the only company that can obtain necessary regulatory approvals rapidly enough to meet U.S. Government requirements; and/or (2) Intelsat

³⁴ Applications at 6.

is the only company that can meet the necessary technical and capacity requirements specified in the U.S. Government's Requests for Proposals ("RFPs").

Thus, in order to satisfy many U.S. Government contracts for joint domestic and international services, U.S. providers often purchase international capacity from Intelsat (which then acts as a subcontractor) for areas they do not or cannot serve, and sell such capacity to the U.S. Government as a combined package. In those instances, Intelsat generally offers SES AMERICOM, PanAmSat and Loral the same prices for the international services necessary to meet the U.S. Government's requirements, allowing those domestic providers to compete with each other for U.S. Government contracts as a whole. Under this system, despite Intelsat's global dominance, the market for U.S. Government domestic satellite business remains competitive.

B. The Acquisition will Allow Intelsat to Distort Competition in the U.S. Government Market.

The Applications propose the acquisition by Intelsat of six satellites currently owned by Loral and used for U.S. domestic service. The acquisition will thus give Intelsat the facilities that it needs to enter the market for U.S. domestic service, including the provision of such services directly to the U.S. Government.³⁵ Entry of any new company as a domestic operator, particularly one taking over from another in Chapter 11, should make domestic commercial satellite competition all the more vigorous, and SES AMERICOM welcomes that.

³⁵ See Applications at 6.

But Intelsat is not just any other company; as shown above, Intelsat possesses market power in many parts of the world, and often is the sole holder of international capacity that is essential to fulfilling the U.S. Government's requirements. Full entry by Intelsat into the U.S. market through the acquisition of Loral's satellites would thus enable Intelsat, through certain bundling, tying or other arrangements, to leverage its market dominance overseas into lessening competition in the market for U.S. Government domestic satellite business.

Intelsat's potential bundling of domestic and international services poses a great threat to the U.S. Government services market for a number of reasons. *First*, the U.S. Government is inclined to seek "one-stop shopping" solutions. By contrast, sophisticated commercial customers often purchase domestic and international capacity separately. *Second*, the U.S. Government cannot, by its regulations, commit to capacity for more than one year and often seeks capacity on very short notice.³⁶ This means that operators apart from Intelsat do not have adequate time to plan their fleet locations and engage in potentially lengthy foreign market access procedures. *Finally*, the U.S. Government's needs (especially for DOD and DHS purposes) typically involve less developed nations. These nations often have less transparent legal and regulatory systems and barriers to market entry for companies that do not have Intelsat's IGO heritage and resulting fleet ubiquity.

³⁶ See generally David Helfgott, *DOD SATCOM Procurement: Time for a Change*, SATMAGAZINE.COM, Sep. 2003, at 24-25.

If Intelsat is able to provide domestic satellite service directly to the U.S. Government, then Intelsat will gain a newfound ability to leverage its legacy of dominant or superior market access on many international routes, to offer bundled international and domestic service to the U.S. Government, in a manner that will harm competition in the United States. For U.S. Government contracts involving combinations of international and domestic services, with Loral's satellites at its disposal Intelsat could simply decline to act as a subcontractor to PanAmSat or SES AMERICOM, and instead offer the international portion -- with respect to which Intelsat's dominance often makes it the only acceptable provider -- bundled with the domestic portion, which would previously have been bid on a competitive basis among the domestic providers. This would effectively foreclose Intelsat's competitors in the domestic arena from participating in many U.S. Government RFPs. Without a choice of providers, the prices paid by the U.S. Government for end-to-end services are certain to be much higher than in the current competitive environment.

Intelsat could achieve the same result by agreeing to subcontract with other providers, but offering to them a higher subcontract price than it is using for its internal combined (domestic/international) bidding purposes. Thus, to give a simplified example, assume Intelsat's offered price might be \$1,000,000 for international service, with a domestic service component that would, pre-acquisition, be bid by Loral and its competitors at about \$500,000, for a combined price to the Government of \$1,500,000; after the acquisition, Intelsat might offer the same international service for \$1,250,000 to its competitors, thereby forcing them to bid

\$1,750,000, while Intelsat would win the bid by offering the combined service for \$1,700,000 -- *i.e.*, \$200,000 more than the \$1,500,000 that should have been the winning bid, but still lower than the other bidders. There is thus a real likelihood that satellite service prices to the U.S. Government, at least for combined U.S./international contracts, will increase.

IV. THE COMMISSION SHOULD IMPOSE CONDITIONS ON THE ACQUISITION TO PREVENT INTELSAT FROM HARMING COMPETITION AND THE PUBLIC INTEREST IN THE UNITED STATES.

In passing the ORBIT Act, Congress specifically sought to restrict Intelsat's ability to affect adversely competition in the U.S. satellite market. To achieve that objective, Congress charged the FCC, as the licensing authority for entities seeking to provide service in the United States, with the responsibility of ensuring that Intelsat would not expand its access to U.S. markets under circumstances that would allow the company to leverage its market dominance in other parts of the world to distort competition in the United States. Section 3 of the ORBIT Act provides as follows:

"The Commission may not issue a license . . . to any separated entity, or renew or permit the assignment or use of any such license . . . 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 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.”³⁷

Accordingly, under the ORBIT Act, before the Commission can authorize the assignment to Intelsat of Loral’s FCC licenses, the Applicants must meet the burden of demonstrating to the Commission that the assignment “will not harm competition in the telecommunications market of the United States.” For the reasons set forth above, the Applicants have failed to meet that burden in this case with respect to the market for U.S. Government business. Thus, if the Commission grants the Applications, it must impose conditions and restrictions to protect competition in that market.

A. *There are Strong Legal Bases for Imposing Conditions to Prevent Intelsat from Leveraging its Market Power Outside the United States to Harm Competition in the United States.*

To add force to its prohibition on Intelsat’s using its international market power to harm competition in the United States, the ORBIT Act authorizes the FCC to “limit through conditions” any grant of authorization to Intelsat in order to protect competition.³⁸ Even apart from the ORBIT Act, leveraging market dominance in one market to the detriment of competition in another market is generally not permissible under other U.S. antitrust laws and regulations.³⁹

³⁷ 47 U.S.C. § 761(a)(1) (emphasis added).

³⁸ *See id.* at 761(b)(1)(B).

³⁹ *See United States v. Griffith*, 334 U.S. 100, 106 (1948) (“the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful”). *See also Sun Newspapers v. Omaha World-Herald Co.*, 713 F.2d 428, 429 (8th Cir. 1983) (upholding

Additionally, in reviewing applications under Sections 214 and 316 of the Communications Act, the FCC has long considered, as a part of its public interest analysis, the effects of any proposed transaction on competition in the telecommunications market.⁴⁰ If the FCC finds the potential for harmful effects, it will “attach to the certificate [of authorization] such terms and conditions as in its judgment the public convenience and necessity may require.”⁴¹ Even in circumstances where there is no specific statutory provision for imposing particular competition-related terms and conditions, the FCC has claimed, and the courts have confirmed that the FCC possesses, “ample authority to require them on an ad hoc basis.”⁴²

There is a long line of precedents in which the FCC has imposed restrictions and conditions in declaratory rulings and approvals to applications to ensure that an applicant’s dominant market power in one market does not result in anticompetitive behavior in another market. In the BT/MCI merger, for example, the Commission imposed several conditions to ensure that the merged company did not

preliminary injunction where evidence suggested that defendant had monopoly power in one market “and used that monopoly power to gain competitive advantage in a related product market”); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978) (holding that the linking of patented and unpatented products was an improper use of the legal patent monopoly to enhance sales of products facing competition).

⁴⁰ *See, e.g., MCI Communications Corporation and British Telecommunications PLC*, 9 F.C.C.R. 3960 (1994).

⁴¹ 47 U.S.C. § 214(c).

⁴² *See, e.g., Atlantic Tele-Network, Inc., v. Federal Communications Commission*, 59 F.3d 1384, 1389 (D.C. Cir. 1995); *Western Union Tel. Co. v. FCC*, 665 F.2d 1112, 1118 (D.C. Cir. 1981).

take undue advantage of BT's market power in the United Kingdom when providing service to or from the United States. Recognizing the concerns raised by commenters, the FCC found that the transaction gave BT a distinct financial incentive to use its dominant position in the U.K. telecommunications markets to discriminate in favor of MCI over competing U.S. international carriers. The FCC conditioned grant of the application on a "no special concessions" obligation, which would preclude MCI from accepting any preferential treatment from BT.⁴³

Similarly, in granting a Section 214 authorization to Atlantic Tele-
Network, Inc. ("ATN"), which held an 80% interest in the sole provider of local telephone service in Guyana (GT&T), the Commission imposed several conditions in order to protect competition.⁴⁴ The FCC's Common Carrier Bureau concluded that ATN, through its controlling interest in GT&T, had exclusive control over bottleneck facilities in Guyana, and that "ATN could abuse this position to exclude new entrants and to engage in discriminatory practices to the detriment of competing U.S. carriers."⁴⁵ The Bureau thus required ATN to accept only its proportionate share of return traffic from Guyana and prohibited it from entering into any exclusive arrangements for the interchange of traffic to or from the United States. In affirming the Bureau's conclusions, the FCC stated that "the imposition of certain nondiscrimination conditions, including the prohibition against accepting exclusive

⁴³ *MCI* at ¶ 37.

⁴⁴ *Atlantic Tele-Network, Inc.*, 8 F.C.C.R. 4776 (1993).

⁴⁵ *Id.* at ¶ 4.

arrangements, is necessary to guard against anticompetitive conduct by a U.S. carrier with a majority interest in a foreign carrier with monopoly control over essential facilities.”⁴⁶ The FCC has routinely imposed similar conditions in numerous other cases where it has found that applicants had the ability and incentive to discriminate against U.S. carriers.⁴⁷

B. The Conditions Must be Imposed Now, Not Later

As demonstrated by the precedents discussed above, when the FCC finds that there is the ability, incentive or opportunity on the part of a particular applicant to engage in discrimination or other anticompetitive behavior, the FCC imposes appropriate conditions at the time of the issuance of its approval in order to protect the public interest. This is done as a safeguard against *potential* anticompetitive behavior that could harm U.S. consumers. The FCC thus need not and should not wait until there is evidence that Intelsat has actually attempted to use its market power to the detriment of the U.S. Government as a customer.

Behavior of the type discussed above will be almost impossible to detect in the absence of the kind of pricing transparency inherent in conditions requiring, for example, equal treatment by Intelsat of its U.S. subsidiary and other U.S. providers.

⁴⁶ *Id.* at ¶ 10.

⁴⁷ *See, e.g., Sprint Corporation*, 1995 FCC LEXIS 8071 (Int’l Bur., Dec. 15, 1995) (imposing conditions on the acquisition by France Telecom and Deutsche Telekom of a 10% equity interest in Sprint); *AmericaTel Corporation*, 9 F.C.C. Rcd 3993 (1994) (imposing conditions on domestic acquisition by company affiliated with monopoly telephone service provider in Chile); *Telefonica*, 8 F.C.C.R. 106 (1992) (imposing conditions on acquisition of domestic company by Spain’s government controlled monopoly telephone company).

Even if, *arguendo*, some of the behavior could somehow be detected, the damage to competition in the U.S. Government services market would by then already have been done, particularly because of the length of time required for the necessary legal proceedings to correct such behavior. It is thus critical, and consistent with FCC precedents, that prophylactic conditions be imposed now, as part of the context in which Intelsat takes control of the Loral domestic satellites.

C. *The Commission Should Impose Bundling Restrictions and/or Related Conditions on Intelsat's Use of the Loral Satellites.*

As explained above, the Commission has the legal authority and a statutory obligation to impose appropriate conditions on Intelsat's use of the Loral satellites, in order to prevent Intelsat from using its superior market access on many international routes to restrict competition in the market for U.S. Government services. Any grant of the Applications should state explicitly that Intelsat is prohibited from bidding to provide bundled international and domestic services to the U.S. Government (directly or indirectly) using the satellites that are the subject of the Applications, unless Intelsat can demonstrate that it:

- 1) sought bids for subcontracting the domestic portion of its bundled offering from all other domestic satellite providers in addition to its U.S. subsidiary, and in such bidding process treated its U.S. unit on an arm's-length, non-discriminatory basis; and/or
- 2) offered to serve as a subcontractor to each of the other domestic satellite providers for the international portion of such providers'

bundled offering, at the same prices and on the same terms and conditions as applied to its U.S. subsidiary.

Imposition of these conditions would help ensure that Intelsat could not use its market dominance outside the United States to the detriment of U.S.

Government customers and the public interest. *First*, the requirement for Intelsat to afford other U.S. domestic satellite providers equal treatment would sustain the existing competition among the three major competitors for domestic U.S.

Government business. Such a prohibition on discriminatory treatment by a dominant foreign carrier of its U.S.-based affiliate is precisely what the Commission has required in *BT/MCI* and other cases in order to maintain existing competition.⁴⁸

Second, by requiring that Intelsat serve as a subcontractor to other U.S. domestic satellite providers at the same price and on the same terms as it offers to its U.S. subsidiary, the conditions would help to ensure that Intelsat cannot artificially inflate the prices that U.S. Government customers pay for bundled international and domestic services. As long as Intelsat is unable to shut other domestic competitors out of the U.S. Government market, or charge higher prices than those used in its own combined bids, prices should remain at fairly competitive levels for the benefit of U.S. Government customers.

Finally, imposition of the conditions would send a message to Intelsat and its owners that the ORBIT Act means what it says: transactions that have the potential to harm competition will be disallowed, or granted with conditions intended to protect

⁴⁸ See Part IV.A, *supra*.

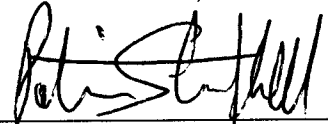
competition. By appointing the FCC as arbiter of Intelsat's compliance with the ORBIT Act, Congress has entrusted the FCC with the responsibility of carefully scrutinizing any application filed by Intelsat for U.S. market access and placing the burden on Intelsat to prove that such access will not have the potential to hurt competition in U.S. markets. Imposition of the proposed conditions is necessary because the Applicants have clearly not met that burden here.

V. CONCLUSION

Any grant by the Commission of the requested authorizations for assignment of Loral's satellite licenses to Intelsat should be conditioned as set forth above.

Respectfully submitted,

SES AMERICOM, INC.

By: 

Phillip L. Spector
Patrick S. Campbell
Kira A. Merski
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1615 L Street, N.W.
Suite 1300
Washington, D.C. 20036
202-223-7300

Scott B. Tollefsen
Nancy Eskenazi
SES AMERICOM, INC.
4 Research Way
Princeton, NJ 08540
(609) 987-4000

Attorneys for SES AMERICOM, Inc.

September 15, 2003

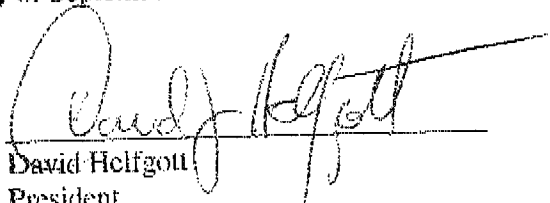
DECLARATION

I, David Helfgott, President of Americom Government Services, Inc., a wholly-owned subsidiary of SES AMERICOM, Inc., hereby declare under penalty of perjury that:

(1) I have read the foregoing "Comments of SES AMERICOM, Inc." concerning the applications for consent to the assignment to Intelsat North America LLC of certain space station authorizations currently held by Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession); and

(2) The facts set forth therein are true and correct to the best of my knowledge, information, and belief.

Executed this 15th day of September 2003.



David Helfgott
President
Americom Government Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2003, I caused a copy of the foregoing Comments of SES AMERICOM, Inc., to be served via e-mail (*), and/or by hand, on the following:

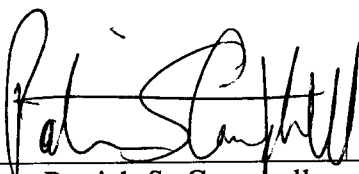
Patrick J. Cerra
Vice President
Intelsat North America LLC
3400 International Drive, NW
Washington, DC 20008-3006

Laurence D. Atlas
Vice President, Government Relations
Loral Space and Communications Ltd.
1755 Jefferson Davis Hwy., Suite 1007
Arlington, VA 22202-3501
larry.atlas@dc.loral.com

Qualex International(*)
Portals II
Federal Communications Commission
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554
qualexint@aol.com

JoAnn Lucanik(*)
Associate Division Chief
Satellite Division, International Bureau
Federal Communications Commission
445 12th Street, S.W, Room 6-A660
Washington, D.C. 20554
JoAnn.Lucanik@fcc.gov

Jennifer Gilsenan(*)
Associate Division Chief
Satellite Division, International Bureau
Federal Communications Commission
445 12th Street, S.W, Room 6A520
Washington, D.C. 20554
Jennifer.Gilsenan@fcc.gov


Patrick S. Campbell