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

In the Matter of	)	
	)	
Intelsat North America, LLC,	)	File No. SAT-STA-20040615-0016
	)	
	)	
Request for Extension of Special Temporary Authority	)	
	)	

To: The Commission

APPLICATION FOR REVIEW

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to Section 1.115 of the Rules of the Federal Communications Commission (the "FCC" or the "Commission"),[1] hereby applies for Commission review of an Order (the "*Extension Order*") issued by the International Bureau (the "Bureau") on July 30, 2004.[2] The *Extension Order* granted a request filed by Intelsat North America LLC ("Intelsat")[3] for extension of a grant of Special Temporary Authority ("STA") that permits Intelsat to provide certain "additional services," as defined in the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act").[4]

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1 47 C.F.R. § 1.115.

2 *In the Matter of Intelsat North America, LLC, Request for Extension of Special Temporary Authority,* DA 04-2445, File No. SAT-STA-20040615-00116 (July 30, 2004).

3 Letter from Bert Rein, Counsel to Intelsat, to Marlene Dortch, FCC, June 15, 2004 (the "*Intelsat Extension Request*").

4 ORBIT Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), as amended, Pub. L. No. 107-233 § 1, 116 Stat. 1480, codified at 47 U.S.C. § 646 *et seq.* (2002).

I. BACKGROUND

The original STA was granted by the Bureau on February 11, 2004, in an order that authorized the assignment to Intelsat of certain space station licenses held by Loral Satellite Inc. and Loral SpaceCom Corporation (collectively, "Loral").[5] SES AMERICOM filed an *Application for Review* of the *Loral-Intelsat Order*, challenging both the Bureau's cursory treatment of certain competitive issues highlighted by SES AMERICOM, and the unlawful grant of the STA.[6] SES AMERICOM also requested expedited treatment of its *Application for Review*.[7] The Commission has yet to rule on this matter.

On June 15, 2004, Intelsat requested an extension of the STA. On July 19, 2004, SES AMERICOM filed a Petition to Deny the extension request, based on two primary reasons: (i) the Bureau lacked the power to grant the original STA in light of the ORBIT Act's specific prohibition on the provision of additional services to customers in the United States; and (ii) even if the original grant were proper, Intelsat had not demonstrated that the original STA time period of 180 days was inadequate to accomplish the narrow, transition-related purpose set

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[5] Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America, LLC, *Applications for Consent to Assignment of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139, Order and Authorization (Feb. 11, 2004) (the "*Loral-Intelsat Order*")

[6] SES AMERICOM, Inc., *Application for Review* (March 12, 2004) (the "*Application for Review*"). The *Application for Review* is appended hereto and, by reference, incorporated herein. SES AMERICOM demonstrated in the *Application for Review*, and again in its Petition to Deny the *Intelsat Extension Request*, File No. SAT-STA-20040615-00116 (the "*Petition to Deny Extension*"), at n.11, 8 & n.31, that SES AMERICOM is a party in interest with respect to Intelsat's STA. These demonstrations are incorporated herein by reference. *See also* note 24 *infra.*

[7] SES AMERICOM, Inc., *Motion for Expedited Consideration in Part of Application for Review* (March 12, 2004) (the "*Motion for Expedited Consideration*").

forth by the Bureau.[8] Before the pleading cycle had been completed, the Bureau issued the *Extension Order*, which authorized Intelsat to continue to provide "additional services" to Loral's former customers for an additional 180 days (to March 14, 2005) in order "to maintain the *status quo*" while the *Application for Review* is pending.[9]

Because the *Extension Order* is unlawful under the ORBIT Act and is inconsistent with the Bureau's limited justification for the original STA, the Commission must vacate the *Extension Order* on an expedited basis.

II. THE BUREAU LACKED AUTHORITY TO GRANT THE ORIGINAL STA.

In both the original grant and the extension of the STA, the Bureau relied upon authority granted to it in Sections 4(i), 303(r), and 309(f) of the Communications Act of 1934, as amended.[10] Those statutory provisions, however, do not empower the Bureau to authorize services that are otherwise expressly prohibited by statute.[11] The Bureau's utilization of an STA to circumvent the restrictions imposed by the ORBIT Act was therefore unlawful. In previous filings, SES AMERICOM has fully demonstrated that the Bureau was without power to grant the STA; that demonstration, contained in both the *Application for Review* and the *Petition to Deny*, is incorporated by reference here.[12]

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[8] *Petition to Deny Extension* at 4-9.

[9] *Extension Order*, ¶ 6.

[10] 47 U.S.C. §§ 4(i), 303(r), 309(f). *See Extension Order* ¶ 7; *Loral-Intelsat Order*, ¶ 75.

[11] The Bureau itself made clear in the *Loral-Intelsat Order* that Section 602(a) of the ORBIT Act "specifically prohibits any successor entity of INTELSAT from expanding to provide certain additional services in the transition period prior to privatization," that Intelsat cannot be "privatized" until it completes an initial public offering ("IPO") of its stock, and that therefore the "ORBIT Act prohibits the provision of 'additional services' until Intelsat has completed its IPO." *Loral-Intelsat Order,* ¶¶ 58-61, 64. Intelsat had not then, and has not yet, completed an IPO, and apparently has no plans to do so. *See* "Intelsat to be Acquired by Consortium of Private Investors," Intelsat Press Release, Aug. 16, 2004.

[12] *See Application for Review* at 20-24; *Petition to Deny Extension* at 4-6.

III. THE LIMITED PURPOSE SET FORTH BY THE BUREAU FOR THE STA CANNOT JUSTIFY AN EXTENSION.

Assuming *arguendo* that the STA had been properly granted, the limited rationale underlying the Bureau's original decision cannot be stretched to accommodate Intelsat's unfounded request for an extension. The *Loral-Intelsat Order* leaves no room for doubt concerning the Bureau's reason for granting an STA: its sole purpose was "to allow time for Loral's existing DTH customers to transition to other service providers."[13] The Bureau was very clear in its notice to Intelsat that, once the STA expires, it "must discontinue providing these services unless it is no longer subject to the prohibition under the ORBIT Act."[14]

The Bureau confirmed its reasoning for the STA when it declined to grant Intelsat's request to defer notification to former Loral customers.[15] Intelsat had argued that it should not be required to notify customers until 10 days after the Commission ruled on the *Application for Review* of SES AMERICOM.[16] The Bureau rejected Intelsat's argument that such a deferral was made necessary by any legal uncertainty created by the Commission's review, restating that "the purpose of the STA was to afford an orderly transition for Loral customers should they desire to seek another service provider."[17] The Bureau confirmed that the 180-day time period provided for in the original STA was sufficient to enable customers to make the transition to other service providers that are lawfully allowed (unlike Intelsat) to serve them:

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[13] *Loral-Intelsat Order*, ¶ 65.

[14] *Id.* ¶ 76.

[15] *In the Matter of Loral Satellite, Inc. and Loral SpaceCom Corp., and Intelsat North America LLC, Applications for Consent to Assignments of Space Station Authorizations*, Order, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139 (Apr. 16, 2004) (the "*Notification Order*").

[16] Intelsat North America, LLC, *Request for Deferral of Notification* (Apr. 9, 2004).

[17] *Notification Order* at ¶ 4.

> The notification requirement was intended to provide further assurance against disruption and/or discontinuance of service to end-users as it would make customers aware of the limited duration of the 180-day STA and would provide customers adequate time in which to consider alternative service providers.[18]

The only new argument offered by Intelsat in its *Extension Request* is that Loral's former customers face "marketplace uncertainty resulting from the full Commission review of the Loral-Intelsat Order."[19] Intelsat further contended that its customers may switch to another provider, only to find out later that Intelsat was in fact authorized to provide additional services.[20]

There are several reasons why the Bureau should have rejected Intelsat's "marketplace uncertainty" argument. First, the Bureau has twice reminded Intelsat that it had the option of first completing an IPO and then consummating the Loral acquisition -- and thus proceeding without restrictions on additional services -- if Intelsat felt that such a delay would better serve its customers or business purposes.[21]

Second, when Intelsat made this "uncertainty" argument in mid-June 2004, it was half-way into the six-month STA period originally authorized by the Bureau, at a time when Intelsat itself claimed that Loral's former customers needed to make decisions just 2-3 months prior to transferring their services to another provider.[22] These customers had, at that point, precisely three months, from mid-June to mid-September, within which to make the transition.

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[18] *Id.*

[19] *Intelsat Extension Request* at 4.

[20] *Id.*

[21] *Extension Order* ¶ 7; *Loral-Intelsat Order*, ¶ 64 ("Of course, if Loral and Intelsat believe that a delay until after the IPO is manageable, they will have the option of waiting until then to proceed without restrictions on Intelsat's provision of the additional services obtained from Loral.").

[22] *Intelsat Extension Request* at 4.

Third, as to Intelsat's alleged concern about confusing its customers, the Bureau months ago addressed this and concluded that Loral's former customers had to be notified then -- in mid-April 2004 -- that they would have to transition to a new service provider by mid-September.[23] Presumably Intelsat long ago complied with this Bureau directive. Its affected customers could now be only further confused if, having been told in April that they had to find a new satellite service provider, they are told in August that they may have a few more months on the former Loral satellites.[24]

Fourth, if Intelsat were truly concerned about transmitting information to its customers while the validity of the STA was at issue, it had the opportunity to join SES AMERICOM in requesting expedited resolution of the issue. Instead, Intelsat opposed SES AMERICOM's *Motion for Expedited Consideration* and argued that the Commission was "under no obligation to consider it."[25] Intelsat should not be permitted to extend the STA based on marketplace uncertainty that is, in large part, of its own making.

Finally, and most importantly, both Intelsat and the Bureau mischaracterized the nature of the pending review by the Commission of the validity of the STA. Intelsat erroneously suggested that the Commission's review includes the question of whether Intelsat has authority to provide additional services "whether by *license* or STA."[26] The Bureau likewise relied heavily on the pendency of SES AMERICOM's *Application for Review* to the Commission. Neither

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[23] *See Notification Order*.

[24] There are other satellite operators, including SES AMERICOM, with satellites capable of serving Loral's former customers, including those in Alaska and Hawaii. *See Petition to Deny Extension* at 8 & n.31.

[25] Intelsat North America, LLC, *Opposition to SES's Motion for Expedited Consideration in Part of Application for Review and Cross-Motion to Dismiss in Part SES's Application for Review* (Mar. 29, 2004).

[26] *Intelsat Extension Request* at 2 (emphasis added).

Intelsat nor the Bureau, however, explained how any decision that might be made by the Commission in connection with the *Application for Review* (either way) could justify an extension of the STA.

The SES AMERICOM *Application for Review* is the only request pending before the Commission relating to the Intelsat STA, and, as to the STA, there is only one question pending on review: whether the Bureau had authority to grant the STA. Intelsat did not submit its own application for review of the *Loral-Intelsat Order*. Intelsat's later attempt to "supplement and clarify" its opposition by means of a 22-page *ex parte* letter[27] came well after the pleading cycle had closed on SES AMERICOM's *Application for Review*, and even longer after the time had expired within which Intelsat could have sought reconsideration or Commission review of the Bureau's initial STA decision. The Intelsat letter is clearly not a substitute for a timely pleading made in accordance with the Commission's Rules.[28]

Therefore, although the Commission may either agree or disagree with SES AMERICOM that the Bureau was without authority to grant the original STA, in neither event would the Commission's decision justify an *extension* of the STA. Either the Bureau was initially correct in granting Intelsat an STA for the limited purpose of giving Loral's former customers a six-month transition period, or (as SES AMERICOM believes) the Bureau lacked statutory authority to grant the STA. In either case, however, the pendency of the *Application for Review* provides no basis for extending an STA that was granted for a limited purpose within a limited timeframe intended solely to allow for an orderly transition.

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[27] Letter from Burt Rein, Counsel to Intelsat, to Marlene Dortch, FCC, June 4, 2004.

[28] SES AMERICOM promptly filed a motion to strike the brief as an untimely pleading. *See* SES AMERICOM, Inc., *Motion to Strike* (June 24, 2004).

IV. THE BUREAU ERRED IN ITS ATTEMPT TO PRESERVE THE *STATUS QUO.*

As discussed above,[29] the Bureau believed that its *Extension Order* preserved the *status quo* during the pendency of SES AMERICOM's *Application for Review.*[30] In fact, however, the Bureau's extension of the STA drastically alters the *status quo*.

Previously, the STA was to expire on September 13, 2004, if the Commission had denied the *Application for Review* or had failed to render a decision as of September 13, or at an earlier time if the Commission granted the *Application*. In other words, the *status quo* was clear: Loral's former customers would have had to (and – pursuant to a Bureau order, over Intelsat's objection[31] -- were told they would have to) transition to other service providers on or before September 13. It is now the case, however, that, if the *Application for Review* is denied, or even if it is granted at some time either before or after September 13, Intelsat will be able to provide additional services to customers beyond the original expiration date of the STA, and for as long as six months thereafter, unless the Commission overturns the *Extension Order*.

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[29] *See* text at note 9 *supra.*

[30] *See Extension Order*, § 6

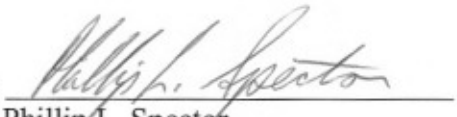
[31] *See* text at notes 15-16 *supra*.

V. CONCLUSION

For the foregoing reasons, SES AMERICOM requests that the Commission vacate, on an expedited basis, the Bureau's grant of the extension of the Intelsat STA for additional services.

Respectfully submitted,

SES AMERICOM, Inc.

By: 

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August 30, 2004

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

APPLICATION FOR REVIEW

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SUMMARY

SES AMERICOM hereby requests that the Commission review an Order and Authorization issued by the International Bureau on February 11, 2004, granting authorization for the assignment to Intelsat of FCC authorizations for six U.S. domestic satellites currently operated by Loral.

In prior comments, SES AMERICOM warned that this transaction would harm competition in the market for domestic satellite services provided to the U.S. Government. Specifically, SES AMERICOM explained that Intelsat's unfettered entry into the domestic satellite market would enable it to leverage its dominant position in various international markets to eliminate competition with respect to certain U.S. Government contracts. Presently, to meet U.S. Government requirements in areas where entities other than Intelsat cannot provide the required service, U.S. providers purchase capacity from Intelsat on a competitive basis for resale to the U.S. Government as part of a bundled package. Following the transaction, Intelsat will possess the incentive and ability to foreclose competition by the remaining domestic providers, by itself providing such bundled service to the U.S. Government in an anticompetitive manner.

SES AMERICOM requested that the Bureau, as a condition to approving the transaction, prohibit Intelsat from bidding to provide bundled service unless it can demonstrate that it: (i) sought bids, on a non-discriminatory basis, for subcontracting the domestic portion of its offering from all domestic providers in addition to its U.S. subsidiary; and/or (ii) offered to subcontract 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.

In its Order, the Bureau dismissed SES AMERICOM's concerns and conditions almost out of hand, applying an erroneous analysis that warrants review by the full Commission. The cryptic nature of the Bureau's response leaves the reader to guess the underlying nature of

the Bureau's reasoning. It relies solely on the fact that the domestic satellite market is competitive, but offers no explanation as to why this condition would make anticompetitive foreclosure impossible. The Bureau's analysis conflicts with more than a decade of decisions by the Federal antitrust enforcement authorities and the Commission itself. To the extent that the Bureau relies on the "single monopoly profit argument," it is now widely recognized that its application requires very specific conditions that are rarely present and are not present here.

In addition, the Bureau incorrectly concluded that the U.S. Government can design procurement procedures to protect itself from any anticompetitive effects of the acquisition. But without the protection of the proposed safeguards, Intelsat's anticompetitive behavior would be difficult or impossible to detect and guard against. Moreover, the Commission has an independent statutory obligation to protect competition by applying appropriate conditions. The Commission must thus reverse the Bureau's refusal to apply conditions.

Finally, the Bureau exceeded its statutory and delegated authority in granting a Special Temporary Authorization ("STA") to Intelsat to provide DTH service to former Loral customers for six months. The ORBIT Act expressly prohibits the Commission from authorizing Intelsat to provide such services prior to completion of its IPO, and provides no basis for the Commission to circumvent this rule via an STA. Under the ORBIT Act, the parties must either delay the closing of the acquisition of Loral's assets until after the Intelsat IPO, or divest the prohibited customers and services before consummation of the acquisition. The Commission must therefore vacate the STA, and must do so on an expedited basis to avoid any violation of the ORBIT Act, and to act before the issue becomes mooted by the passage of time.

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Applications for Consent to Assignments	)	
of Space Station Authorization	)	

To: The Commission

APPLICATION FOR REVIEW

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to Section 1.115 of the Rules of the Federal Communication Commission (the "FCC" or the "Commission"),[1] hereby requests Commission review of an Order and Authorization issued by the International Bureau (the "Bureau") on February 11, 2004 (the "Order").[2] The Order, subject to certain conditions, grants applications filed by Loral Satellite Inc., Loral SpaceCom Corporation (together, "Loral"), and Intelsat North America, LLC ("Intelsat"), for authority to assign to Intelsat certain domestic space station licenses held by Loral.

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[1] 47 C.F.R. § 1.115.

[2] *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America, LLC, Applications for Consent to Assignment of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139, Order and Authorization (Feb.11, 2004).

In comments before the Bureau, SES AMERICOM requested that the Bureau impose appropriate conditions on the proposed acquisition, in order to limit Intelsat's ability to leverage its dominant position in many foreign markets to harm competition in the market for domestic satellite services provided to the U.S. Government. In issuing the Order, however, the Bureau employed an erroneous, unsupported analysis of the potential impact of the acquisition on competition, and refused to apply the proposed conditions. In addition, although the Bureau concluded that the ORBIT Act prohibits Intelsat from providing certain "additional services" until it completes its initial public offering, the Bureau nonetheless ignored this statutory prohibition and permitted Intelsat to provide such services on a temporary basis.[3]

The Order is based on erroneous findings of fact and conclusions of law, involves questions of law and policy that have not previously been resolved by the Commission, and involves the exercise of delegated authority in a manner in conflict with statute.[4] The Commission should therefore modify the Order to adopt the conditions proposed by SES AMERICOM. The Commission should also revoke, on an expedited basis, the temporary authorization granted to Intelsat to provide additional services.

I. INTRODUCTION AND BACKGROUND

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 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.

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[3] In its Comments, SES AMERICOM also made arguments regarding the impact of the ORBIT Act on the transaction. *See* Comments at 18-20.

[4] *See* 47 C.F.R. §§ 1.115(b)(2)(i), (ii), (iv).

Government, including the Departments of Homeland Security ("DHS") and Defense ("DOD") and the Federal Bureau of Investigation ("FBI"). SES AMERICOM's parent company, SES GLOBAL S.A., is the premier global FSS operator.

B. *The Applicants*

1. Intelsat

Intelsat is a successor entity to the International Telecommunications Satellite Organization, which was formed by treaty in 1971 as an intergovernmental consortium[5] charged with developing and operating a global telecommunications satellite system to service member states.[6] For the first 17 years of its existence, Intelsat enjoyed a monopoly in the provision of global telecommunications services. Even after competition emerged in the international satellite markets in the mid-1980s, Intelsat largely maintained its dominant position due to the efforts of Intelsat's Signatories to resist competition.[7]

In 2000, the U.S. Congress passed the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act"),[8] primarily out of concern for Intelsat's ability to exploit unfairly both its status as an IGO and its special

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[5] As an Intergovernmental Organization ("IGO"), Intelsat was granted by the United States, its the host country, "the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act." Exec. Order 11966, 42 Fed. Reg. 4331 (1977).

[6] *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).

[7] Intelsat's Signatories, which included government-owned entities and even regulators, were 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.

[8] ORBIT Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), as amended, Pub. L. No. 107-233 § 1, 116 Stat. 1480, codified at 47 U.S.C. § 646 *et seq.* (2002) (the "ORBIT Act").

relationships with 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 the prohibition of practices involving exclusive market access in its member nations.[9]

Intelsat became a private company in July 2001 by distributing its shares to the same entities that had been its Signatories.[10] Since then, at Intelsat's request, both Congress and the Commission have extended the company's IPO deadline, with the last such extension running through June 30, 2004.[11] Intelsat is currently owned by over 220 entities representing more than 145 nations.[12] Many of its owners are state-owned or controlled postal, telephone and telegraph agencies, some of which maintain strict monopolies over the provision of telecommunications services in their respective countries. Intelsat operates a global satellite fleet providing international communications connectivity.[13] Intelsat currently provides virtually no U.S. domestic service.

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[9] 47 U.S.C. §§ 763, 765(g).

[10] *See Intelsat LLC Request for Extension of Time Under Section 621(5) of the ORBIT Act*, 16 FCC Rcd 18185, ¶ 9 (2001); *see also* Intelsat Form 20-F (2003).

[11] *Intelsat LLC Request for Extension of Time Under Section 621(5) of the ORBIT Act, File No.* SAT-MSC-20030822-00292 (Dec. 17, 2003).

[12] *See Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America, LLC, Applications for Consent to Assignment of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139 (July 28, 2003) (the "Applications") at 16 n.33.

[13] *See* Intelsat Form 20-F (2003).

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. Loral has sought Chapter 11 protection in the United States Bankruptcy Court in the Southern District of New York. After the sale of satellites to Intelsat, Loral has stated that it intends to emerge from bankruptcy protection and utilize its remaining satellite assets for the provision of international satellite service only.

C. Procedural and Factual Background

1. The Applications

On July 28, 2003, Loral and Intelsat filed the Applications with the Commission requesting authority for Loral to assign to Intelsat all FCC authorizations and pending applications relating to six satellites and related assets currently owned and operated by Loral.[14] These satellites are used almost exclusively for the provision by Loral of domestic satellite services in the United States, and would thus provide Intelsat with full access to the U.S. domestic satellite services market. The Bureau issued a Public Notice on August 15, 2003, affording interested parties an opportunity to comment on the Applications.[15] SES AMERICOM was among those parties that filed comments.[16]

2. Comments of SES AMERICOM

SES AMERICOM's Comments focused on the potential anticompetitive impact of the proposed transaction on the market for satellite services procured by the U.S.

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[14] *See* Applications at 1.

[15] Public Notice (filed Aug. 15, 2003).

[16] Comments of SES Americom, Inc. (filed Sep. 15, 2003) ("Comments").

Government.[17] Specifically, SES AMERICOM explained that Intelsat, largely as a product of its legacy as an IGO with privileged ties to member states, has remained the dominant, if not the exclusive, provider of satellite capacity between the United States and many international markets, including those markets that have emerged as objects of intense U.S. Government (and in particular, DOD, FBI and DHS) interest.[18] Intelsat, for example, has pre-existing regulatory access to many markets in the Middle East, Africa, and Central and South Asia, whereas competitors like SES AMERICOM and PanAmSat are often forced to engage in protracted, if not futile battles for similar access.[19] Often, the same regulatory authorities with which competitors must negotiate business are themselves shareholders in Intelsat with vested interests in foreclosing competition.[20]

As SES AMERICOM explained in its Comments, Intelsat's international dominance has not to date threatened the domestic component of the U.S. Government market for satellite services because Intelsat does not currently provide domestic satellite capacity to the U.S. government, or to U.S. customers generally.[21] Instead, the domestic component of the U.S. Government market has been provided by companies such as SES AMERICOM, PanAmSat, and Loral.[22] To the extent that the U.S. Government has sought combined domestic and international

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[17] *Id.* at 15-18.

[18] *Id.* at 8.

[19] *Id.* at 9-11, citing prior comments filed with the Commission by PanAmSat, in which PanAmSat detailed its difficulty procuring access to markets in which national satellite operators maintain favorable, and at times exclusive, relationships with Intelsat.

[20] *Id.* at 11.

[21] *Id.* at 13-14.

[22] *Id.* at 13.

service, with an international component involving one of the many markets in which Intelsat is the only feasible provider, domestic providers typically arrange to purchase international capacity from Intelsat, then offer to resell such capacity to the U.S. government as part of a packaged bid.[23]

SES AMERICOM warned in its Comments that the fragile competitive balance that exists from this system would be threatened by the unfettered entry of Intelsat into the U.S. domestic market.[24] Simply put, Intelsat would be able, and would have every incentive, to leverage its dominance in overseas markets to foreclose competition for the domestic portion of U.S. Government contracts.[25] SES AMERICOM highlighted the potential for Intelsat either to deny outright a competitor's request to subcontract international capacity, or to subcontract such capacity at higher prices than it would otherwise charge as part of its own bundled bid.[26] In either case, Intelsat could easily foreclose competition for a large number of contracts, to the disadvantage of both competitors and the U.S. Government.[27]

To safeguard against potential anti-competitive behavior without denying the entry of Intelsat as a new competitor into the domestic market, SES AMERICOM urged the Commission to attach conditions to any approval of the Applications.[28] Specifically, SES AMERICOM urged the Commission to prohibit Intelsat from bidding for the provision of

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[23] *Id.* at 14.

[24] *Id.* at 16.

[25] *Id.*

[26] *Id.* at 17-18.

[27] *Id.*

[28] *Id.* at 18-25.

bundled services to the U.S. Government using satellites subject to the Application, 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 are applied to its U.S. subsidiary.[29]

As SES AMERICOM explained, these conditions would help ensure that Intelsat would not use its market dominance outside of the United States to the detriment of U.S. Government customers and the public interest.[30]

3. Opposition of Intelsat

In opposing SES AMERICOM's Comments, Intelsat devoted much of its attention to disputing SES AMERICOM's characterization of Intelsat's dominance in foreign markets.[31] Intelsat further argued that SES AMERICOM's proposed conditions are unnecessary due to existing mechanisms that, according to Intelsat, adequately safeguard against anticompetitive conduct.[32] Even if such safeguards are insufficient, Intelsat claimed, the U.S.

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[29] *Id.* at 23-24.

[30] *Id.* at 24.

[31] Opposition of Intelsat North America, LLC (filed Sep. 30, 2003) ("Opposition") at 5-8.

[32] Mechanisms cited include Intelsat's Distribution Agreement and its Wholesale Customer Agreement, which Intelsat characterized as permitting all similarly situated competitors to procure satellite capacity for their own use or as a component of a bundled service on a nondiscriminatory basis. Intelsat also cited its commitment not to increase rates on non-competitive routes, it's being subject to the Commission's dominant carrier safeguards on certain non-competitive routes, and the ORBIT Act's prohibition on exclusive arrangements. *Id.* at 8-9.

Government could itself remedy any problems by adjusting its own procurement procedures or by choosing to procure international access from non-U.S. providers other than Intelsat.[33] Intelsat also disputed SES AMERICOM's contention that Intelsat is poised to reap anticompetitive benefits from the acquisition.[34] According to Intelsat, if it "could somehow exact monopoly profits from its international market access and carry over those profits to its U.S. domestic business . . . it would have already done so," having already been authorized by the Commission to offer domestic service.[35]

4. Reply of SES AMERICOM

In its Reply Comments, SES AMERICOM noted Intelsat's general failure in its Opposition to address or alleviate the concerns raised by SES AMERICOM.[36] As SES AMERICOM explained, Intelsat failed to demonstrate how the regulatory mechanisms it cited would adequately safeguard competition for domestic satellite services provided to the U.S. Government. In addition, SES AMERICOM rebutted Intelsat's assertion that if it desired to exact monopoly profits by leveraging its international dominance, it would have done so already.[37] SES AMERICOM noted that, although Intelsat could indeed already offer bundled bids by purchasing domestic capacity and reselling it along with its international service,

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[33] *Id.* at 11-12.

[34] *Id.* at 14.

[35] *Id.*

[36] Reply of SES AMERICOM, Inc. (filed Oct. 10, 2003) ("Reply Comments") at 2.

[37] *Id.* at 16.

Intelsat's doing so would not afford it the same anticompetitive benefits as would the transaction, because in the former scenario, all of Intelsat's rates would necessarily be transparent.[38]

5. Order and Authorization, and Supplemental Order

On February 11, 2004, the Bureau issued the Order granting the Applications, subject to certain conditions and limitations not including the conditions proposed by SES AMERICOM. In considering SES AMERICOM's showing that the proposed assignment would harm competition in the market for domestic satellite services provided to the U.S. Government,[39] the Bureau framed its analysis in terms of the antitrust theory of "vertical foreclosure," concluding as follows:

> [W]e find no evidence in the record that participants in the provision of domestic services possess market power and could earn more than competitive profits. Because the firms are not earning more than a competitive return on domestic services, we do not find that the proposed transaction will provide an opportunity for a vertical foreclosure strategy. A vertical foreclosure strategy might be profitable (and therefore provide incentive to a supplier to engage in such strategy) if a supplier can limit access to or raise the price of its input in order to extract a larger share of the profits in the other market. If, as is the case here, firms providing domestic services are not earning more than a competitive return, no vertical foreclosure opportunity would become available with the proposed transaction. To the extent that Intelsat might have preferential access to some markets, the proposed transaction does not provide Intelsat with the ability to extract additional profits. It follows that there is no evidence that a foreclosure strategy would be profitable and thus would allow the merged firm to increase its profits.[40]

The Bureau also agreed with Intelsat that existing treaties, laws and regulations would deter anticompetitive conduct.[41] Furthermore, the Bureau concluded, U.S. Government

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[38] *Id.* at 16-17.

[39] *Order* at ¶ 30.

[40] *Id.* (footnote references omitted).

[41] *Id.* at ¶ 31.

agencies can design procurement procedures to address the problems that SES AMERICOM cited.[42] The Bureau thus determined that the proposed assignment does not raise significant anticompetitive issues, does not offend the public interest, and ultimately, does not warrant the imposition of the conditions put forth by SES AMERICOM.[43]

The Bureau also examined the impact of the ORBIT Act on the proposed assignment.[44] The Bureau specifically considered whether, and to what extent, the transaction would be restricted by Section 602(a) of the ORBIT Act, which provides that Intelsat and its successor entities "shall not," until privatized in accordance with the ORBIT Act, "be permitted to provide additional services," meaning "direct-to-home ('DTH') or direct broadcast satellite video services, or services in the Ka or V bands."[45] The Bureau flatly rejected Intelsat's assertion that it is no longer subject to the strictures of Section 602,[46] concluding instead that its "grant of authority to Intelsat North America prohibits Intelsat North America from providing additional services until successful completion of the IPO process as required by the ORBIT Act."[47]

Nevertheless, the Bureau claimed that "requiring Intelsat North America to cease to provide additional services . . . immediately upon approval of the Assignment application

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[42] *Id.*

[43] *Id.* at ¶¶ 30-31.

[44] *See id.* at ¶¶ 49-68.

[45] ORBIT Act, §§ 602, 681(a)(12(B).

[46] *Order* at ¶ 60 (citing *Applications of Intelsat LLC for Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, Memorandum Opinion and Order and Authorization, 16 FCC Rcd 12280 (2001) ("*Intelsat LLC ORBIT Act Compliance Order*")).

[47] *Id.* at ¶ 63.

would result in disruption and/or discontinuance of service to existing Loral customers who provide such services e[sic] to end-users."[48] Although it acknowledged that the applicants could avoid such disruptions by delaying the transaction until after Intelsat conducts its IPO, the Bureau expressed concern that such a delay could result in the demise of the transaction.[49] Instead, the Bureau granted Intelsat a Special Temporary Authorization ("STA") to "continue to provide the DTH services currently provided by Loral for a period of 180 days in order to allow time for Loral's existing DTH customers to transition to other service providers."[50] On March 4, 2004, the Bureau issued a Supplemental Order clarifying the date by which the parties must notify Loral's customers that certain services are to be provided pursuant to an STA.[51]

II. THE BUREAU ERRONEOUSLY CONCLUDED THAT INTELSAT'S ACQUISITION OF LORAL'S DOMESTIC SATELLITES WOULD NOT HARM COMPETITION IN THE MARKET FOR DOMESTIC SATELLITE SERVICES PROVIDED TO THE U.S. GOVERNMENT.

SES AMERICOM demonstrated in its Comments and Reply Comments that, unless the FCC imposes appropriate conditions on its approval of Intelsat's acquisition of Loral's domestic satellites, Intelsat will have the ability and incentive to harm competition in the market for domestic satellite services provided to the U.S. Government. The Bureau, however,

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[48] *Id.* at ¶ 64.

[49] *Id.*

[50] The Bureau also stated that the parties could wait to consummate the transaction until the completion of Intelsat's IPO, and thereby avoid the strictures of Section 602 altogether, if they believed that such a delay would be "manageable." *Id.* at ¶¶ 64-65.

[51] *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors and Intelsat North America, LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Supplemental Order (Mar. 4, 2004).

dismissed SES AMERICOM's concerns virtually with the back of its hand. In fact, the Bureau's "analysis" is so brief that a reader is left having to guess as to the foundations on which it rests.

A. *The Bureau's Conclusion That The Acquisition Will Not Harm Competition Conflicts With Decisions By The Federal Antitrust Enforcement Authorities And The Commission Itself.*

The sole guidance the Bureau provides is that, "[b]ecause the firms are not earning more than a competitive rate of return on domestic services, we do not find that the proposed transaction will provide an opportunity for a vertical foreclosure strategy."[52] The rationale for this conclusory language is never explained, and it is far from self-evident that a competitive return in the downstream market (*i.e.*, the domestic satellite market) must necessarily mean that no anticompetitive effect is possible.

In reaching its conclusion, the Bureau apparently relied upon an outdated antitrust doctrine that is now well recognized as having so many exceptions that the exceptions basically swallow the rule.[53] During the 1980s, federal antitrust enforcement authorities pursued little or no vertical merger or restraint cases, often relying on what is known as the "single monopoly profit theory" to justify lesser levels of enforcement. Under this theory, a monopolist in one market has no incentive to acquire a monopoly in an adjacent market because, the argument goes, it can obtain all of the monopoly profits in its original market. But it is now well understood that this argument requires numerous strong assumptions that are often not true,[54] and they are clearly not true here.

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[52] *Order* at ¶ 30.

[53] *See* Joseph Farrell & Philip J. Weisner, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech 85, at 105 (2003).

[54] *See id.*

Federal antitrust enforcement in the vertical area has moved far beyond the overly restrictive view of the 1980s. Economic understanding has grown significantly and has impacted the enforcement decisions of the antitrust agencies.[55] Challenges to vertical mergers by the Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC") have been much more extensive over the last 10 years,[56] including by the current administration.[57] Several such cases are virtually indistinguishable from the instant one, as they involve a monopoly input supplier (here, Intelsat for certain non-competitive international routes) and several downstream or adjacent market competitors (here, the existing domestic suppliers SES AMERICOM, PanAmSat and Loral).

The DOJ, for example, sued to block Lockheed's acquisition of Northrop Grumman in 1998 because, *inter alia*, the acquisition would leave the merged firm as the only supplier of numerous subsystems for certain military aircraft and ships, and the DOJ feared that Lockheed would deny its platform competitors access to these critical subsystems, or provide them in a discriminatory fashion.[58] Similarly, in 1997 the DOJ required a divestiture in connection with Raytheon's acquisition of the Texas Instruments' defense electronics business.[59]

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[55] *See* Thomas B. Leary, The Essential Stability of Merger Policy in the United States, Remarks before the Joint U.S./E.U/ Conference on Guidelines for Merger Remedies: Prospects and Principles, at 25 (January 17, 2002), *available at* http://www.ftc.gov/speeches/leary/learyuseu.htm.

[56] *See* ABA Section of Antitrust Law, *Antitrust Law Developments* at 364-65 nn.302-03 (5th ed. 2002).

[57] *See, e.g.*, *Biovail Corp.*, 2002 W.L. 1944313 (F.T.C. 2002); FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp., *available at* http://www.ftc.gov/opa/2002/06/cytyc_digene.htm (Jun. 24, 2002);

[58] *See* Verified Complaint, at 35-36, ¶¶ 106-109, *United States v. Lockheed Martin Corp.*, 1998 WL 306755 (D.D.C. 1998) (No. CivA1:98CV00731EGS).

[59] *See United States v. Raytheon Corp.*, 1997 W.L. 811048, at *3 (D.D.C. 1997).

Absent the divestiture, the DOJ concluded that Raytheon would have been a monopoly input supplier for certain highly sophisticated military radar systems, and would have had the incentive and ability to deny the monopoly input to competing radar suppliers or provide it on discriminatory terms.[60] As with the Lockheed transaction, the DOJ was concerned that the vertical aspects of the merger would increase prices to the DOD.[61]

More recently, the FTC required Biovail to divest an exclusive patent license it had recently acquired that allegedly was necessary for the production and sale of an anti-anxiety drug and its generic equivalents.[62] Biovail was the producer of the branded drug and was about to be subjected to generic entry when it acquired exclusive rights to the patent.[63] Thus, the patent constituted a monopoly input which would have been applicable to a competitive downstream market absent the acquisition.

But perhaps the most interesting cases for our purposes involve mergers in the cable industry -- AOL/Time Warner and Time Warner/Turner. With respect to the former transaction, both the FTC and the FCC imposed conditions on the parties in order to obtain regulatory approval. The FCC in particular was concerned that Time Warner's cable business would have the ability and incentive to disadvantage or refuse access to AOL's ISP competitors.[64] Similarly, the FTC in the Time Warner/Turner case was concerned about Time

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60 *See* Complaint, at ¶ 23, *Raytheon Corp.* (No. 97-1515).

61 *Id.* at ¶ 26.

62 *See Biovail Corp.*, 2002 W.L. 1944313 (F.T.C. 2002).

63 *See id.* at ¶¶ 1, 12-15.

64 *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 F.C.C.R. 6547, 6484-85 (2001).

Warner's incentives to foreclose unaffiliated cable programming services from its cable systems.[65] These concerns are almost indistinguishable from the concerns raised by SES AMERICOM. In all of these cases, there is a firm with substantial market power in one market, and there is an adjacent competitive market. The fact that the adjacent market was competitive had no bearing on the FCC or FTC decisions in AOL/Time Warner and Time Warner/Turner. Nor should that fact matter here.[66]

B. *Even Under the Outdated Economic Theory Apparently Relied Upon By the Bureau, the Bureau's Conclusions Are Erroneous.*

Even if the Commission concludes that a decade of Federal antitrust enforcement has been wrong-headed -- and that the FCC was guilty of similar miscues in Time Warner/Turner and elsewhere – that conclusion would still be irrelevant to the instant matter. Assume, *arguendo*, that the thinking of the most ardent adherents to the classical Chicago School single monopoly profit doctrine have been frozen in time and their minds have been unaffected by twenty years of advancements in economic learning. Even under these unlikely circumstances, the members of that prominent group of antitrust scholars have always recognized at least one exception to the single monopoly profit argument: evasion of rate regulation. The basic assumption of the single monopoly profit argument is that the monopolist

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[65] *See In the Matter of Time Warner, Inc.*, 123 F.T.C. 171, at *15, ¶ 38 (1997); *see also id.* at *55-56 (Statement of Chairman Pitofsky, and Commissioners Steiger and Varney).

[66] It is of no import that the DOJ did not seek to block Intelsat's acquisition of Loral's satellites. As SES AMERICOM explained in its Reply Comments, given the nature of the DOJ's antitrust review process, it is far from clear that the early termination was a focused DOJ decision with respect to Federal Government procurement. *See* Reply Comments at 15, n. 36. In any event, whatever the meaning of the DOJ's early termination decision, the FCC has an independent obligation under the ORBIT Act and the Communications Act to consider the implications of the acquisition on competition in the United States. *See id.* Indeed, the FCC has expertise that the DOJ and FTC do not possess, in identifying Intelsat's non-competitive "thin routes" and applying dominant carrier regulation to service on those routes.

can obtain all of the monopoly profit in its primary market. Where regulation prevents that from happening, however, serious scholars and commentators across the ideological spectrum have consistently recognized that vertical integration through merger or otherwise does provide an incentive for anticompetitive foreclosure. This rationale was in fact the basis for William Baxter, as head of the Antitrust Division, pushing to break up AT&T and signing the Modified Final Judgment.[67]

There are at least two types of rate regulation that can be evaded through vertical integration. One relates to rate of return regulation and the other relates to regulatory restraints on rates themselves. The latter category is at play here. Intelsat concedes that it "voluntarily made additional price commitments on thin routes, including annual rate reductions for switched voices, and rate caps for private line service with no future rate increases."[68] These types of rate regulation are exactly the type that can be evaded by vertical merger.[69]

Clearly, Intelsat will not argue that it is currently charging anywhere near the full monopoly price for these services, and it concedes that FCC orders preclude it from doing so. Thus, it cannot recover the full monopoly profit on its thin international routes. The acquisition of Loral's domestic satellite business coupled with a vertical foreclosure strategy, however, would give Intelsat the ability to recover on domestic service the monopoly rents that it is precluded from collecting on its thin international routes by virtue of FCC regulation.

Moreover, in this context, the Bureau's argument that a competitive downstream market ensures no anticompetitive foreclosure from the merger is exactly backwards (assuming

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[67] *See also* U.S. Dep't of Justice, Merger Guidelines § IV.3 (1982), *reprinted in* 4 Trade Reg. Rep. (C.C.H.) at 13, 102.

[68] *Opposition of Intelsat North America, LLC*, at 8-9.

[69] Joseph Farrell & Philip J. Weisner, *supra* note 53, at 105-106.

the validity of the single monopoly profit argument). Where the upstream monopoly price is competitive by regulation, and the downstream market is monopolized, one could argue that the only monopoly profit to be earned had already been earned, and no further competitive damage is possible from vertical integration. Where the downstream market is perfectly competitive, in contrast, the full amount of the monopoly overcharge remains to be had, which provides the vertically integrating firm with the incentive to increase price more than otherwise.

In sum, far from supporting Intelsat's contention that the conditions proposed by SES AMERICOM are unnecessary to protect competition, the existing caps on Intelsat's rates in some markets provide the backdrop for SES AMERICOM's concerns; the proposed conditions are necessary to protect those safeguards. The Bureau's conclusion that Intelsat's acquisition of Loral's satellites will not adversely affect competition in the market for U.S. Government services is therefore legally and factually erroneous.[70] The Bureau's refusal to apply the requested conditions also involves the Bureau's impermissible attempt to resolve, on delegated authority, "a question of law or policy which has not previously been resolved by the Commission."[71] Accordingly, the Commission should reverse the Bureau's decision.

C. *The Bureau Erroneously Concluded That The U.S. Government Could Design Procurement Mechanisms That Are Adequate To Protect Competition.*

The Bureau also based its refusal to adopt the proposed conditions on the erroneous assumption that "U.S. Government agencies can design procurement procedures to address the concerns raised by SES AMERICOM on their behalf."[72] But relying on the U.S. Government to protect itself from anticompetitive conduct is no different from claiming that

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[70] *See* 47 C.F.R. § 1.115(b)(2)(i), (iv).

[71] *Id.* § 1.115(b)(2)(ii).

[72] *Order* at ¶ 31.

monopolies are not bad simply because customers can choose not to buy the monopolist's products. It is the Commission that has the affirmative, independent obligation under the Communications Act to protect the public interest. It is also the Commission that is charged with enforcing the competition-protection mandates of the ORBIT Act. The Bureau's abdication of the FCC's obligation to protect competition, and its reliance on safeguards to be implemented by the very customers that the Commission is required to protect, are unfounded and unprecedented.

It may be true that, in some cases, U.S. Government agencies can opt to buy services on an unbundled basis, buy from other suppliers, or impose restrictions on Intelsat's ability to engage in anticompetitive conduct. But those possibilities cannot constrain the Commission from imposing appropriate conditions to prevent anticompetitive conduct. Clearly, the U.S. Government should not be denied the efficiencies that undoubtedly arise from purchasing certain services on a bundled basis or from particular suppliers, simply because the Commission is unwilling to take steps to protect competition. In addition, as SES AMERICOM explained in its Reply Comments, without the pricing transparency and non-discrimination afforded by the proposed safeguards, Intelsat's anticompetitive pricing and conduct will be difficult or impossible for its customers to detect and guard against.[73] It is therefore erroneous for the Bureau to leave it to U.S. Government agencies to protect themselves.

In sum, none of the assumptions upon which the Bureau based its refusal to apply the conditions proposed by SES AMERICOM can bear scrutiny.[74] Accordingly, the

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[73] Reply Comments at 16-17.

[74] The only other stated basis for the Bureau's decision in this regard is its claim that "we do not believe that the acquisition of the [Loral] satellites by Intelsat will increase the market power of the merged company in any relevant market" because "we do not find that the transaction will cause concentration to rise in any individual domestic product or geographic

Commission must reverse the Bureau's decision, and modify the *Order* to include the proposed conditions.

III. THE BUREAU WAS WITHOUT POWER TO GRANT SPECIAL TEMPORARY AUTHORITY TO PERMIT INTELSAT TO PROVIDE ADDITIONAL SERVICES PRIOR TO THE COMPLETION OF ITS IPO.

In the Order, the Bureau also concluded that Section 602(a) of the ORBIT Act explicitly prohibits Intelsat from providing "additional services" until it completes its IPO. Nevertheless, the Bureau granted to Intelsat an STA to continue providing such additional services to former Loral customers for 180 days after the consummation of the assignment.[75] In doing so, the Bureau relied upon authority granted to it in Sections 4(i), 303(r), and 309(f) of the Communications Act of 1934, as amended.[76] Those provisions, however, do not empower the Bureau to authorize services that are otherwise expressly prohibited by statute. The Bureau's utilization of an STA to circumvent the restrictions imposed by the ORBIT Act is therefore unlawful. The Commission must vacate the grant of the STA, and must do so on an expedited basis to avoid a violation of the ORBIT Act, and to prevent the issue from becoming moot.

The first provision upon which the Bureau relied, Section 4(i), delegates general authority to the Commission to take discretionary action, "not inconsistent with the Act," that is necessary for the Commission to execute its functions.[77] As the plain language of this provision

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market." *Order* at ¶ 32. However, SES AMERICOM has not claimed that the acquisition will increase concentration in any market, but that it will allow Intelsat to use its dominance in one market – for international services -- to eliminate competition in the market for certain domestic services provided to the U.S. Government. Accordingly, the Bureau's analysis of the effects of the acquisition on concentration has no bearing on SES AMERICOM's concerns.

[75] *Order* at ¶¶ 63-66.

[76] *Id.* at ¶ 75.

[77] 47 U.S.C. § 154(i).

suggests, actions "not inconsistent with the Act" are actions that conform to limitations contained elsewhere in the Communications Act. The remaining two provisions, sections 303(r) and 309(f), also contain similar limitations on the Commission's licensing authority. Section 303(r) provides that the Commission may only prescribe conditions and restrictions that are "not inconsistent with law."[78] Likewise, Section 309(f), which serves as the Commission's primary authority for granting STAs, directs that grant of an STA is proper only where it is "otherwise authorized by law."[79] Read together, these provisions clearly deny the Commission any discretion to grant interim relief in the form of an STA where the Commission is not otherwise authorized by law to do so, or (at the very least) where doing so would be directly contrary to other laws.

Permitting Intelsat to provide additional services prior to completion of its IPO plainly flouts the ORBIT Act. On its face, Section 602(a) of the ORBIT Act declares that Intelsat and its successor entities "*shall not be permitted* [by the Commission] to provide additional services" pending the completion of its privatization in accordance with statutory

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[78] 47 U.S.C. § 303(r).

[79] Section 309(f) provides in full:

> When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days . . .

47 U.S.C. § 309(f).

requirements.[80] Similarly, Section 621(4) provides that "[d]uring the transition period prior to privatization under this title, INTELSAT . . . *shall be precluded* from expanding into additional services."[81] This language -- "shall not be permitted" and "shall be precluded from" – does not merely suggest that Intelsat and its successors should not be allowed to provide additional services pending full privatization; it affirmatively directs the Commission to prevent or stop Intelsat from doing so. Lest there be any doubt or ambiguity as to this affirmative obligation of the Commission, the ORBIT Act provides further that "[t]he Commission shall take all necessary measures to implement this requirement, including the denial by the Commission of licensing for such services."[82] The obligations imposed on the Commission are therefore mandatory.[83]

Nowhere else in the Orbit Act did Congress include any qualifying or excepting language. Moreover, although Section 601(b)(1)(D) of the ORBIT Act has been construed as "providing the Commission discretion to authorize Intelsat LLC services pending Intelsat, Ltd.'s conducting an IPO within the timeframe provided in the ORBIT Act,"[84] there is no statutory basis to construe this provision to be a general grant of discretionary authority for the Commission also to authorize "additional services" otherwise prohibited by Section 602(a). Section 601(b)(1)(D) merely provides that none of the competition criteria encompassed in 601(b) is intended to prevent the Commission from acting upon applications of Intelsat to

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[80] ORBIT Act, § 602(a) (emphasis added).

[81] *Id.* at § 621(4) (emphasis added).

[82] *Id.* at § 602(a).

[83] *See Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 (6th Cir. 1999) ("Where the word 'shall' appears in a statutory directive, Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory" (quoting *U.S. v. Monsanto*, 491 U.S. 600, 607 (1989)).

[84] *Order* ¶ 60, citing *Intelsat LLC ORBIT Act Compliance* Order at 12288.

provide service prior to privatization.[85] This does not in any way negate the force of the prohibition in Section 602(a).

In addition to being inconsistent with the ORBIT Act's plain meaning, the grant of the STA conflicts with the underlying purpose of the statute, which is to "leverag[e] access by INTELSAT to the most lucrative telecommunications market in the world [in] the United States as an incentive to achieve a rapid pro-competitive privatization."[86] By permitting Intelsat to offer additional services pending its IPO, even for a limited purpose and for a limited time, the Bureau has diminished much of the leverage that Congress intended for the Commission to use to encourage Intelsat to complete its IPO.[87] Indeed, the Bureau's action gives away precisely what Congress stated it intended to hold in reserve: "the ability [of Intelsat] to expand [its] market presence and solidify a broader customer base" prior to its privatization.[88]

Nor was the Bureau's grant of an STA by any means a necessary or even typical means of requiring an applicant to divest prohibited services. When a proposed merger would result in an applicant's providing services that are otherwise prohibited by law, such that the applicant must divest itself of particular customers or services, the Commission generally

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[85] ORBIT Act, § 601(b)(1)(D).

[86] Senate Committee on Commerce, Science, and Transportation, Sen. Rep. No. 106-100, at 2 (Jun. 30, 1999).

[87] Although the Commission has previously determined that the purpose of the ORBIT Act is not to "penalize" Intelsat by delaying its access to the U.S. market, pending its IPO, where its privatization is otherwise consistent with the Act's criteria, *see Order* at ¶ 60 (citing *Intelsat LLC ORBIT Act Compliance Order*, 16 FCC Rcd at 1288, ¶ 24.), it is also clear that the purpose of the Act is not to reward Intelsat for its repeated failures to complete the privatization process in a timely fashion.

[88] Sen. Rep. No. 106-100, at 2.

requires that the divestiture occur prior to the closing of the transaction, rather than afterwards.[89] The applicants have provided no compelling reason for the Commission to depart from such precedent here. Indeed, in granting the STA, the Bureau has impermissibly exercised its delegated authority to resolve "a question of law or policy which has not previously been resolved by the Commission."[90]

Because the Bureau exceeded its statutory and delegated authority in granting the STA, SES AMERICOM requests that the Commission vacate that portion of the Order, and prohibit Intelsat from providing additional services until completion of its IPO. This would require the parties either to divest the prohibited customers and services prior to the consummation of the acquisition, or to delay the closing until Intelsat conducts its IPO.

Furthermore, as set forth in the accompanying Motion for Expedited Consideration In Part, SES AMERICOM requests that the Commission immediately vacate the STA. The applicants could consummate the acquisition at any time, thus commencing Intelsat's provision of DTH services for the six-month period of the STA. The Commission must act expeditiously to prevent Intelsat's provision of such additional services prior to its IPO, in violation of the ORBIT Act. Immediate action by the Commission is also required to ensure that this important matter is not mooted by the passage of the six-month period of the STA.

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[89] *See, e.g., Qwest Communications International Inc. and U.S. West, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 11,909 (2000)

[90] 47 C.F.R. § 1.115(b)(2)(ii).

IV. CONCLUSION

For the foregoing reasons, SES AMERICOM requests that the Commission modify the Bureau's Order to adopt the conditions proposed by SES AMERICOM. SES AMERICOM further requests that the Commission vacate, on an expedited basis, the Bureau's grant of the STA for additional services.

Respectfully submitted,
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March 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2004, I caused a copy of the foregoing Application for Review to be served by U.S. First-Class Mail, postage prepaid, on the following:

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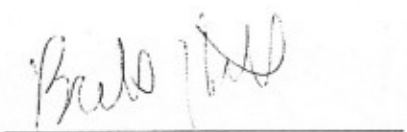

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2004, I caused a copy of the foregoing Application for Review to be served by U.S. First-Class Mail, postage prepaid, on the following:

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