A CHRONICLE OF POLICY AND PROCEDURE: THE FORMULATION OF THE REAGAN ADMINISTRATION POLICY ON INTERNATIONAL SATELLITE TELECOMMUNICATIONS

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Introduction

On August 31, 1962, President John F. Kennedy signed into law the Communications Satellite Act of 1962[1] (Satellite Act). This unique piece of legislation which had widespread bipartisan support in the United States Congress and was opposed by a handful of liberal Senators[2] contained provisions of far reaching consequence in a number of respects, including statements of telecommunications and foreign policy. It created the Communications Satellite Corporation (COMSAT), required the National Aeronautics and Space Administration (NASA) to launch satellites for civilian commercial purposes, and was the first step in the establishment of INTELSAT, the International Telecommunications Satellite Organization.

The Satellite Act stated:[3]

> (a) . . .it is the policy of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will

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[1]Communications Satellite Act, Pub. L. No. 87-624, 76 Stat. 419 (1962), 47 USC §701 *et seq.* [hereinafter referred to as the "Satellite Act"].

[2]*See* Glassie, *Note: Analysis of the Legal Authority for Establishment of Private International Communications Satellite Systems*, 18 GEO. WASH. J. INT'L L. & ECON. 355, 361-368 (1984) The legislation was "filibustered" by Senator Kefauver and several other Democratic senators, embroiling the Senate in one of its most bitter debates resulting in the first cloture vote passed by the Senate since 1927. *Id.* at 364. *See also Note. The Communications Satellite Act of 1962*, 76 HARV. L. REV. 388, 389 (1962). The final passage of the Satellite Act was by 354 to 9 in the House and by 66 to 11 in the Senate. *See* CONG. REC., August 27, 1962, at 16605; May 3, 1962 at 7133; and August 17, 1962, at 15874. *See also* Colino, *INTELSAT: Doing Business in Outer Space*, 6 COLUM. J. INT'L L. 31, 32 (1967)

[3]Satellite Act, Sec. 102(a) and (b), 47 USC §§701(a) and (b).

> contribute to world peace and understanding.
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> (b) The new and expanded telecommunication services are to be made available as promptly as possible and are to be extended to provide global coverage at the earliest practicable date. In effectuating this program, care and attention will be directed toward providing such services to economically less developed countries and areas as well as those more highly developed, toward efficient and economical use of the electromagnetic frequency spectrum, and toward the reflection of the benefits of this new technology in both quality of services and charges for such services.

From these origins, INTELSAT was established in 1964[4] as a "single global commercial communications satellite system"[5] to

> provide expanded telecommunications services to all areas of the world,. . .contribute to world peace and understanding. . .[and] provide, through the most advanced technology available, for the benefit of all nations of the world, the most efficient and economical service possible consistent with the best and most equitable use of the radio spectrum. . .

U.S. policy in 1962 contemplated that the United States and other countries could and would establish and operate domestic satellite systems[6] and foresaw the establishment of other international systems when it stated: ". . .(it is not the intent of Congress) to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in the national interest."[7] At the time of the creation of INTELSAT in 1964, and the negotiation of and entry into force of the INTELSAT definitive arrangements (1969 to 1971 for the negotiation of these complex agreements and the entry into force in 1973 of the Agreement and Operating Agreement of INTELSAT[8]), the U.S. policy position was that

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[4]International Telecommunications Satellite Consortium "INTELSAT" Agreement Between the United States of America and Other Governments, done at Washington, August 20, 1964, with Special Agreement and Supplementary Agreement on Arbitration concluded by certain Governments and Entities designated by Governments, 15 UST 1705, TIAS No. 5646 [hereinafter referred to as the "Interim Agreement" and the "Special Agreement"].

[5]*Id.*, Preamble to the Interim Agreement.

[6]Satellite Act, Sec. 102(d), 47 USC § 701(d). *See Hearings before the Subcommittee on Communications of the Committee on Commerce*, 89th Cong., 2nd Sess., Aug. 10, 17, 18 and 23, 1966, Serial 89-78, at pp. 14-18, 67-69, 81-83, 88-89, 100-107, 113-116, 128-140, 148, 155-157, 173-177, 215-217. *See also* Glassie, n. 2 *supra*, at 364-368.

[7]*Id.*

[8]The Agreement relating to the International Telecommunications Satellite Organization (INTELSAT) and the Operating Agreement, done at Washington D.C., August 20, 1971, entered into force February 12, 1973. TIAS No. 7532.

the INTELSAT agreements contemplated a single global commercial communications satellite system. This objective was seen as the purpose of the Satellite Act, i.e., to authorize one unique international satellite system which became the INTELSAT system, and to espouse the view that other international systems were unnecessary and at odds with the creation of INTELSAT.[9]

With the exception of a number of domestic satellites and certain limited international satellite systems, this represented the state of events until 1983.[10]

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[9]*See* Colino, "The INTELSAT Definitive Arrangements: Ushering in a New Era in Satellite Telecommunications," European Broadcasting Union (EBU), Legal and Administrative Series, Monograph No. 9 (1973), pp. 88-96.

[10]From 1973 through 1983 the following coordinations were completed under Article XIV(d):

(a) U.S. MARISAT System:
  - (i) original coordination for Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) through 1979 (First Assembly of Parties (AP), February 1974);
  - (ii) inclusion of Indian Ocean Region (IOR) and extension through 1981 (Second AP, September 1976);
  - (iii) extension through 1985 (Seventh AP, October 1982);

(b) European Communications Satellite Network (ECS):
  - (i) original coordination of primary network through 1991 (Fourth AP, April 1979);
  - (ii) ECS EUTELSAT (the European Telecommunications Satellite Organization) 1-2 (Spare) Network through 1992 (Sixth AP, October 1981);
  - (iii) Expanded Use of ECS through 1988 (Seventh AP, October 1982);

(c) The Indonesian PALAPA Satellite Systems:
  - (i) PALAPA B network through 1990 (Fourth AP, April 1979);
  - (ii) PALAPA A network until introduction of PALAPA B network (Fifth AP, April 1980);

(d) The Arab Satellite Telecommunications Organization (ARABSAT) - coordination through 1990 (Fifth AP, April 1980);

(e) Use of the Soviet-sponsored INTERSPUTNIK system by Algeria - coordination through 1985 (Sixth AP, October 1980);

(f) Use of MARECS networks by INMARSAT (the International Maritime Satellite Organization, on behalf of INTELSAT members who are members of INMARSAT) - coordination through 1989 (Seventh AP, October 1982);

(g) Use of U.S. RCA SATCOM domestic satellite systems for TV reception in Bermuda - coordination through 1987 (Seventh AP, October 1982);

(h) Use of Canadian and U.S. domestic satellite systems for transborder services between Canada and the U.S. - coordination involving 20 individual satellites through 1987 (Seventh AP, October 1982).

These systems were found to be compatible with the INTELSAT system either because they are an alternative to existing terrestrial networks (ECS, ARABSAT), or they will carry a very small amount of international traffic originating or terminating in remote areas (PALAPA), or the international traffic to be carried is a very minor addition to a domestic system already in existence and will not require additional investments in

In short, it was "expected" that INTELSAT would provide virtually all of the long distance facilities needed to carry public international telecommunications services to all parts of the globe with the exception of certain "spillover" from domestic satellites and certain rationalized "regional" systems generally established for reasons other than telecommunications requirements, including such reasons as industrial development, cultural, pan-ethnic integration and the like.[11] No overt "challenge" to the exclusive role of INTELSAT for long distance international, transoceanic and intercontinental purposes had emerged until 1983.

In the first quarter of 1983, an application was filed before the United States Federal Communications Commission (FCC) which proposed that a communications satellite system separate from that of INTELSAT be author-

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space segment facilities (U.S./Canadian transborder traffic, RCA-SATCOM traffic to Bermuda), or the amount of traffic that might be diverted from INTELSAT is extremely small (22 circuits in 1985 in the case of Algeria's use of INTERSPUTNIK). All of these instances of favorable coordination with INTELSAT have in common the fact that the separate system was not established with the main purpose of carrying traffic already carried, planned to be carried, or reasonably anticipated to be carried by INTELSAT on routes already served by INTELSAT. It should also be noted that, in considering the question of whether a particular system will or will not cause significant economic harm to INTELSAT, the Assembly of Parties — the principal organ of INTELSAT, in which every member country is represented — has taken the position that in the case of any future use of the INTERSPUTNIK system, the question of economic harm should be considered not only with respect to the specific request for coordination, but also from the long-term perspective of the economic harm that would be done by a series of similar cases. (AP-6-3 ¶24b). *See* Board of Governors (BG) documents BG-60-69, August 22, 1984, and BG-60-63, August, 1984.

[11] *See Hearings Before the Subcommittee on Arms Control, Oceans, International Operations and Environment of the Senate Committee on Foreign Relations*, 98th Cong., 1st Sess., October 19, 1983, S. Hrg. 98-483 p. 154-164 (Testimony of Abbott Washburn); *Hearings Before the Subcommittee on Commerce, State, Justice and Related Agencies of the House Committee on Appropriations*, April 18, 1985 (statement by Abbott Washburn); Mr. Washburn noted that the type of regional systems now in existence (EUTELSAT, ARABSAT and PALAPA) were contemplated from the beginning but that transoceanic, intercontinental systems which siphon traffic and revenues from the heavy duty North Atlantic streams were *never* contemplated at the time of the negotiation of the INTELSAT Agreements. (*See* p. 9). Ambassador Washburn served as chairman of the international negotiating conference that drafted the INTELSAT Agreements. *See also* statement of France at the Ninth Assembly of Parties (Extraordinary) held in Washington January 29-31, 1985, which noted that although INTELSAT "must accept regional systems as demonstrated by the number of such systems already coordinated under Article XIV(d). . .transoceanic satellite systems must be provided by INTELSAT and continue to be provided by INTELSAT." Assembly of Parties (AP) document AP-9-3, ¶120. *See also* "The Report of the Board of Governors to the Assembly of Parties Pursuant to Article XIV(d) Concerning Coordination of the European Communications Satellite System". Assembly of Parties doc. AP-4-7, at p. 6 (March 16, 1979).

ized to permit the provision of certain international services between the United States and Europe.[12] This application raised some fundamental questions of law and policy which various branches of the United States Government were obliged to address and caused other governments, their telecommunications administrations and various bodies of the INTELSAT organization to face issues which by and large had been dormant for more than a decade, i.e., during the negotiation of the definitive arrangements. This article endeavors to trace these developments, primarily from a procedural perspective, to the adoption of a decision of the FCC on July 25, 1985, its issuance of a Report and Order on September 3, 1985,[13] and actions taken by the U.S. Congress which resulted in President Reagan signing two pieces of legislation, on August 15 and 16, respectively, which address these issues.[14]

The INTELSAT Background

INTELSAT owns and operates the space segment of the global commercial communications satellite system consisting of satellites and related equipment required to maintain and operate the satellites. This unique international organization is run on business principles as it exploits high technology but is essentially a non-profit cooperative.[15]

INTELSAT was formed on August 20, 1964, when representatives of 11 nations signed interim agreements establishing the International Telecommunications Satellite Consortium.[16] At that time, the commercial application of satellite communications technology was more of a theoretical possibility than a practical reality and, as noted in Article I of the Interim Agreement, communications satellites located in geosynchronous orbit were deemed "experimental."[17] As commercial viability was proven and the global satellite communica-

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[12]Application of Orion Satellite Corporation, File No. CSS-83-002-P, March 11, 1983.

[13]Report and Order in the Matter of Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, FCC 85-399.

[14]1985 Supplemental Appropriations Act, Pub. L. No. 99-88, 99 Stat. 293 (1985); State Department Authorization Act, Pub. L. No. 99-93, §146 (1985) (to be codified at 22 USC §2651).

[15]*See* Colino, *supra* n. 9, at 22-24 and 27-31.

[16]TIAS No. 5646. *See supra* n. 4.

[17]Article I stated in pertinent part:

> "(a) The Parties to this Agreement shall cooperate to provide, in accordance with the principles set forth in the Preamble to this Agreement, for the design, development, construction, establishment, maintenance and operation of the space segment of the global commercial communications satellite system to include (i) an experimental and operational phase in which it is proposed to use one or more

tions system established over the next few years, many more countries joined the Consortium, and by the end of 1968 the number of member countries had reached 63.[18] As called for by the Interim Agreement, a Plenipotentiary Conference was held in Washington, D. C. during the 1969-1971 period to determine a permanent charter for INTELSAT. This Conference resulted in the conclusion of two agreements that came into effect in 1973: the INTELSAT Agreement and the Operating Agreement.[19]

As of August 31, 1985, INTELSAT had 110 members and provided services to more than 170 countries and territories.[20] Its satellite system comprises a network of sixteen satellites in geosynchronous orbit over the Atlantic, Indian and Pacific Ocean Regions, and provides two-thirds of the world's international telephone service and virtually all international television.[21]

INTELSAT and other Satellite Systems

Article XIV of the INTELSAT Agreement addresses various rights and obligations of INTELSAT members. Subsection (d) specifically addresses the establishment of space segment facilities separate from INTELSAT for the provision of international public telecommunication services. Article XIV(d) states:

> To the extent that any Party or Signatory or person within the jurisdiction of a Party intends individually or jointly to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its international public telecommunications services requirements, such Party or Signatory prior to the establishment, acquisition or utilization of such facilities shall furnish all relevant information to and shall consult with the Assembly of Parties, through the Board of Governors, to insure technical compatibility of such facilities and in their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment and to avoid significant economic harm to the global system of INTELSAT. Upon such consultation, the Assembly of Parties, taking into account the advice of the Board of Governors, shall express, in the form of recommendations, its findings regarding the considerations set out in this paragraph, and further

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satellites to be placed in synchronous orbit in 1965. . ."

[18]*See* "Report of the Interim Communications Satellite Committee on Definitive Arrangements for an International Global Communications Satellite System," Doc. ICSC-36-58 at p. 4 (Dec. 1968). *See also* Colino, *supra* n. 9, at 15.

[19]*See supra* n. 8.

[20]See *INTELSAT* News, vol. 1, no. 1, p. 5 (Summer 1985).

[21]*See* INTELSAT doc. AP-10-13. *See also* INTELSAT Report 1984-1985, March 31, 1985, at 1.

> regarding the assurance that the provision or utilization of such facilities shall not prejudice the establishment of direct telecommunication links through the INTELSAT space segment among all the participants.

The INTELSAT Agreement, including Article XIV(d), reflects a carefully balanced compromise between the INTELSAT members supporting a single global system designed to provide all international public telecommunications services,[22] with a corollary prohibition of other international systems (the position strongly argued by the United States), and those countries which desired the latitude at some future time to construct and operate other international satellite systems. The result is that the Parties to the INTELSAT Agreement are committed to "the aim of achieving a single, global, commercial telecommunications satellite system."[23] However, the existence of international satellite systems separate from the INTELSAT system is permitted under certain conditions.

Article XIV(d) establishes a mechanism to balance the rights of its member nations to establish and use other international systems with the protection of INTELSAT from certain negative effects that may be caused by the establishment, acquisition or utilization of other satellite systems carrying public, international services. Each proposed separate satellite system is to be coordinated with INTELSAT following a procedure which requires that, prior to its establishment, acquisition, or utilization, each separate system be ex-

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[22]"Public telecommunications services" are defined by the Agreement (Article I(k)) to mean:

> [F]ixed or mobile telecommunications services which can be provided by satellite and which are available for use by the public, such as telephony, telegraphy, telex, facsimile, data transmission, transmission of radio and television programs between approved earth stations having access to the INTELSAT space segment for further transmission to the public, and leased circuits for any of these purposes; but excluding those mobile services of a type not provided under the Interim Agreement and the Special Agreement prior to the opening for signature of this Agreement, which are provided through mobile stations operating directly to a satellite which is designed, in whole or in part, to provide services relating to the safety or flight control of aircraft or to aviation or maritime radio navigation;

[23]TIAS No. 5646, Preamble to the INTELSAT Agreement. The main purpose of INTELSAT is described as "to continue and carry forward on a definitive basis the design, development, construction, establishment, operation and maintenance of the space segment of the global commercial telecommunications satellite system,"INTELSAT Agreement, *Id.* at Article II(a). Its prime objective is declared to be "the provision, on a commercial basis, of the space segment required for international public telecommunications services of high quality and reliability to be available on a non-discriminatory basis to all areas of the world."

amined: (i) to ensure the *technical compatibility* of the system and its operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment; (ii) to avoid *significant economic harm* to the INTELSAT system; and (iii) to ensure that the provision or utilization of the separate system *shall not prejudice the establishment of direct telecommunications links* through the INTELSAT space segment among all the participants.

The Assembly of Parties, the principal organ of INTELSAT, implements these provisions.[24] Under established procedures, the analysis of whether or not a separate system meets these three tests is undertaken by the Director General and given to the INTELSAT Board of Governors with recommendations, and the Board in turn tenders advice to the Assembly of Parties. The Assembly, taking into account the advice received, expresses its "findings" in the form of recommendations to the interested Parties. It is the responsibility of each INTELSAT Party or Signatory to carry out the obligation to coordinate separate systems under Article XIV(d).

The coordination process under Article XIV(d) was used on thirteen occasions between 1973 and 1983 and always resulted in a positive recommendation.[25] However, every case presented a situation in which the separate system was not established with the main purpose of carrying public international traffic of the type already carried by INTELSAT on the same routes currently served by INTELSAT.

The Orion Application

On March 11, 1983, Orion Satellite Corporation (Orion) filed an application[26] with the FCC for authority to construct and operate an international communications satellite system linking the United States and Europe. Orion proposed a "private" international satellite facility which would not provide a common carrier service, but would sell or lease transponder capacity on a non-

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[24]INTELSAT consists of four organs (INTELSAT Agreement, Article VI): the Assembly of Parties, in which each Government Party to the Agreement has an equal voice and a single vote (Article VII); the Meeting of Signatories, composed of all who have signed the Operating Agreement — either the States which are Parties to the Agreement or their designated telecommunications entities, each having one vote (Article VIII); the Board of Governors, composed of approximately 20 Governors representing the Signatories or groups of Signatories with the greatest investment shares and no more than five Governors representing regional groups (of at least five Signatories each) which are not otherwise represented on the Board, each Governor voting on substantive issues in proportion to the investment shares he represents (Article IX); and the staff called the Executive Organ, headed by a Director General who is the chief executive officer and legal representative of INTELSAT (Article XI). *See also* Colino, *supra* n. 9 at 36-59.

[25]*See supra* n. 10.

[26]*See supra* n. 12.

tariffed basis to users on both sides of the Atlantic. Its system would consist of two in-orbit satellites and one ground spare with the in-orbit satellites positioned in the mid-Atlantic region of the geostationary orbit. Each satellite would carry 22 Ku-band transponders with footprints covering most of Europe and the eastern half of North America.[27]

The INTELSAT Agreement requires coordination for "public" international telecommunications services under Article XIV(d) and "specialized" domestic and international services under Article XIV(e). Orion argued that since its system would be used to sell or lease space segment capacity rather than provide any "service," it was not subject to any coordination under Article XIV. In the alternative, Orion argued that its proposed activities could, at most, be classified as specialized telecommunications, since they would not constitute any common carrier offering to the public. Under Article XIV, the distinction between subsection (d), relating to public international telecommunications services, and subsection (e), relating to specialized telecommunications services, is very significant. As explained previously, subsection (d) requires coordination on three separate grounds: technical compatibility, significant economic harm, and prejudice to the establishment of direct telecommunications links. Subsection (e) requires only coordination on the basis of technical compatibility. Finally, Orion argued that its privately operated facilities would advance important public policy objectives by meeting specialized needs of users and serving as a complement to existing common carrier networks, and, even if its operations were to be held to the test of Article XIV(d), it would satisfy such requirements.

Orion's arguments demonstrate recognition of the limitations placed on separate systems by the INTELSAT Agreements, and an attempt to circumvent those restrictions.[28] The classification of Orion's system was ultimately resolved by a State Department memorandum of law which analyzed both the Orion and the ISI[29] separate system applications under the terms of the INTELSAT Agreement and concluded that "the proposals would appear to contemplate providing public international telecommunications and require coordination with INTELSAT both to avoid economic harm and for technical

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[27]As a point of reference, the INTELSAT V and V-A satellites carry 27 and 32 transponders, respectively.

[28]*See* Cowhey & Aronson, *The Great Satellite Shootout*, REGULATION: ADIJ. GOV. & SOC. 27, 30-31 (May/June 1985).

[29]International Satellite, Inc. (ISI) filed its application with the Federal Communications Commission (FCC) on August 12, 1983, for authority to construct, launch and operate a North Atlantic Regional satellite system for the provision of international satellite service between the U.S. and Europe. ISI proposed to provide satellite capacity on a common carrier basis as well as sell or lease capacity. Its 32-transponder 11-12/14 GHz satellites would be designed to provide video, audio and data transmission services. File No. CSS-83-004-P(LA) I-O-C-83-073 (August 12, 1983).

compatibility."[30]

FCC Treatment of the Orion Application

In view of the fact that the Orion application presented the FCC with a new and unique proposal for international satellite services which presented the possibility of a conflict with U.S. obligations under the INTELSAT Agreements, it might have been expected that such a federal agency would react in a slow, circumspect manner. Instead, the FCC acted with remarkable speed in placing the Orion application on public notice. Within three business days, the FCC had released its public notice requesting comments from interested parties.[31] The shortened time frame was extremely unusual when compared to FCC actions in other cases. For example, in *Transponder Satellite Video Services* (FCC 81-492), the time between filing dates and public notice dates for eleven separate applications ranged from 10 days to 37 days. In another docket, the FCC accepted applications to operate space stations in the domestic fixed satellite service. In August, 1983, the FCC took actions which established a November 7, 1983, cut-off date for filing applications. Despite the filing cut-off, the public notice was not issued until March 12, 1984, more than four months later.

The unusual speed with which the FCC placed the Orion application on public notice indicated, at a very early state, a policy predisposition on the issue. As observed by Cowhey and Aronson, in their article entitled "The Great Satellite Shootout," Orion's strategy ". . .is a textbook example of how to play the regulatory game in the United States."[32]

Deregulatory Predisposition of the FCC

The FCC, under its current Chairman, Mark Fowler, has established a reputation throughout the communications community, both domestic and international, for its deregulatory zeal. Mr. Fowler has been quoted as defining his mission as FCC Chairman as one of "pruning, chopping, slashing, eliminating, burning, and deep-sixing" long-established regulations involving the business over which the FCC has power.[33] The results have been profound, in some cases altering the entire environment of certain elements of the communica-

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[30]Memorandum of Law regarding Orion and ISI Applications for International Satellite Communications Facilities, prepared by the Legal Adviser, Department of State, p. 8 (undated).

[31]FCC Public Notice, Rept. No. I-2051 (March 16, 1983). *See generally* C.F.R. §25.166 (1984) (FCC may receive public comments concerning communications satellites).

[32]*See* Cowhey & Aronson, *supra* n. 28, at 30.

[33]Bus. Wk. at p. 48 (August 4, 1985).

tions community. The circumstances governing domestic tariff regulations, licensing procedures, programming rules, ownership regulations, connection rules, equipment manufacture, long-distance servicing and other areas have all been remolded over the past few years.

FCC efforts to remold the circumstances of international communications have been equally unflagging. Among these have been the FCC's actions in opening up international record carriers to competition, freeing providers of so-called "enhanced services" from regulatory oversight (thus throwing into confusion an established process by which foreign telecommunications authorities looked on FCC oversight as a kind of certification of such providers), the elimination or major revision of circuit-loading and composite rate-making requirements, the restructuring of COMSAT, and numerous others, all under the conceptual umbrella of replacing existing international communications methods with the forces of a competitive market. However, even supporters of these efforts to deregulate domestically have sounded warnings of caution in the unilateral application of such an approach to the international communications community. For example, an extensive article by Richard Frieden in the *Columbia Journal of Transnational Law*[34] suggests that the FCC "temper its zeal to revamp and revise with an appreciation of the differences between international and domestic telecommunications policymaking."[35]

As Mr. Friedan notes, "A plethora of institutional, behavioral, structural and economic limitations prevent the development of a fully deregulated, unsupervised international telecommunications marketplace. The pervasive nature of government participation in either the regulation or actual provision of telecommunications services stems from legitimate political, social and financial concerns."[36]

INTELSAT Director General Expresses Concern

On April 5, 1983, the Director General of INTELSAT, Santiago Astrain, sent a letter to the Deputy Secretary of State, Kenneth Dam, which warned that favorable U.S. action on the Orion application to construct and operate a transatlantic satellite system would result in a proliferation of such systems, the eventual undermining of the single global system and the potential relegation of INTELSAT to a thin-route system.[37] Astrain stated that "Orion's application challenges the fundamental underpinnings of the INTELSAT Agree-

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[34]Frieden, *International Telecommunications and the Federal Communications Commission*, 21 COLUM. J. TRANSNAT'L L. 423 (1983).

[35]*Id.* at 481.

[36]*Id.*

[37]*See Hearing on S.999 Before the Senate Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 24, at 81-119 (1983) (testimony of S. Astrain, Director General, INTELSAT).

ment and puts to a test the U.S. Government's will to continue to support the existence of a single, global, commercial satellite system."

The letter explained that INTELSAT's basic commercial, financial and technical principles were derived from the concept of a single global system: systems planning on the basis of worldwide traffic forecasts, achieving the advantages of economies of scale, rate averaging to allow all users affordable access, etc. Accordingly, the establishment of other systems would entail serious financial consequences for INTELSAT. If transatlantic traffic were diverted from the INTELSAT system, INTELSAT's revenues would decrease while its capital costs would remain the same. Consequently, the rate-averaging system used by INTELSAT would be directly affected, and INTELSAT's rates would increase for users throughout the world. The adverse impact of such a worldwide rate increase would be felt most intensely by Third World countries.

Further, the letter reminded the State Department that the United States Government was the principal proponent of the INTELSAT system and, through successive Administrations since 1962, has been a key supporter of the basic concept of a single global telecommunications system. With such support, the INTELSAT cooperative has grown and constitutes the primary means by which developing countries communicate with the rest of the world. Thus, the letter questioned whether this major international cooperative effort should be needlessly jeopardized.

The letter was never responded to directly.

NTIA and State Department Officials React to the Separate Systems Issue

On April 6, 1983, David J. Markey, Assistant Secretary-Designate for Communications and Information of the Department of Commerce, and Diana Lady Dougan, Coordinator, International Communications and Information Policy of the Department of State, jointly signed and sent a letter to the FCC Chairman urging the FCC to take no action on the Orion proposal pending review of the national interest and foreign policy issues it raises.[38] Explaining that the Orion proposal raised complex issues and that the Executive Branch wished to review the proposal in light of national needs and priorities, treaty obligations, and relations with other countries, the letter stated that the Executive Branch should complete its review of national and foreign policy before the FCC proceeds with a public interest determination on the application. The letter expressed an expectation that the review would be completed promptly.

INTELSAT Meeting of Signatories, April 1983

As noted earlier in the text and at footnote 24, under the INTELSAT Agreements, the organizational structure of INTELSAT contains four tiers: (i) the Assembly of Parties; (ii) the Meeting of Signatories; (iii) the Board of Governors; and (iv) the Executive Organ, headed by the Director General. The

[38]49 TELECOM. REP. 18-19 (Apr. 18, 1983).

Meeting of Signatories is composed of representatives of all Signatories (governments or their designated telecommunications entities) to the Operating Agreement. Generally, it considers resolutions, recommendations or views put to it by either the Assembly of Parties or the Board of Governors, and also considers matters relating to the financial, technical and operational aspects of the system.[39]

In April, 1983, INTELSAT held its thirteenth Meeting of Signatories in Bangkok, Thailand. At that meeting, INTELSAT members from around the world unanimously adopted a resolution[40] which expressed deep concern over the possibility of international transoceanic satellite communications systems separate from INTELSAT. The resolution stated that such separate systems challenge the underlying purpose for which the INTELSAT system was created. Furthermore, "the establishment of one or more competitive satellite systems diverting international transoceanic or other heavy route traffic from the INTELSAT system would have a fundamental impact on the viability of the single, global, commercial telecommunications satellite system, and would entail serious financial consequences for all INTELSAT users." The resolution concluded by requesting the INTELSAT Director General, Mr. Astrain, to convey these concerns to the United States Government, the INTELSAT Board of Governors, all INTELSAT members, and the INTELSAT Assembly of Parties.

In accordance with the INTELSAT resolution, the Director General wrote a second letter to the Department of State on April 27, 1983, informing the U.S. Government that the issue of separate systems had been discussed at length at the Meeting of Signatories held in Bangkok, Thailand and explained that the INTELSAT Signatories shared the concerns expressed previously by the Director General.

This letter, as was the case with the earlier letter to Mr. Dam, never received a direct response from the Department of State.

Comments Filed on ORION's Application at the FCC

In mid-April, 1983, comments on Orion's application were received by the FCC from COMSAT, AT&T and RCA. All three agreed that favorable consideration by the FCC would require a change in current U.S. policy on the provision of international satellite services, but they differed in their recommendations for FCC action. COMSAT asked the FCC to deny Orion's application on

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[39]An ordinary meeting of the Meeting of Signatories is held every calendar year, with extraordinary meetings as required, and each Signatory is entitled to one (1) vote. Decisions on procedural matters are taken by an affirmative vote cast by a simple majority of the Signatories whose representatives are present and voting. Decisions on matters of substance are taken by an affirmative vote cast by at least two-thirds of the Signatories whose representatives are present and voting. (*See* Article VIII of the INTELSAT Agreement.)

[40]INTELSAT Meeting of Signatories (MS) document MS-13-16.

the grounds that its proposed services would duplicate services already provided by INTELSAT, or planned to be provided by INTELSAT. Thus, Orion's proposal would not satisfy the provisions of the Satellite Act which permit the establishment of systems only where such systems meet unique government needs or otherwise are required in the national interest.[41] COMSAT further argued that the Orion application failed to address not only the Satellite Act standards, but also the tests laid out in a State Department letter of July 23, 1981 on transborder services. That letter, signed by James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology, indicated certain exceptional circumstances justifying the use of space segment (usually domestic facilities) separate from INTELSAT for the provision of international public telecommunications services: (i) where the global system could not provide the service required, and (ii) where the service would be clearly uneconomical or impractical using the INTELSAT system.[42] Based on these standards, COMSAT concluded that a grant of the Orion application would be contrary to existing national and foreign policy.

AT&T commented that it was reliant upon INTELSAT to meet a substantial portion of its global circuit needs and that, whatever action the FCC took regarding the Orion application, the FCC should assure that the vitality of INTELSAT is not eroded or endangered.[43]

RCA Global Communications commented that favorable FCC action on the Orion application would require the FCC to modify its policies on international satellites and that a broad rule-making proceeding would be in order.[44]

U.S. Senate Actions: S.999

In early April, 1983, there was introduced in the Senate a bill called the International Telecommunications Act of 1983, S.999.[45] This bill was introduced by Senator Barry Goldwater (R.-Arizona), Chairman of the Commerce, Science and Transportation Committee's Subcommittee on Communications. Co-sponsors of the bill were Senator Ernest F. Hollings (D.-South Carolina) and Senator Larry Pressler (R.-South Dakota). The bill's aim was to deregulate international telecommunications services.[46] S.999 provided the same in-

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[41]*See* Satellite Act, *supra* n. 6, at §102d.

[42]49 TELECOM. REP. 27 (Apr. 25, 1983)

[43]*Id.*

[44]*Id.*

[45]*See* Hearing on S.999 Before the Senate Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 1st Sess. 24, §1 at 3.

[46]*Id.* §2(2) at 4. Not only was competition to be preferable to regulation, but competition with INTELSAT would have been encouraged. *Id.* §2(3) at 4.

structions to the FCC to deregulate services wherever competition existed as were contained in a previous Senate bill, S.2469, but S.999 contained new language which reflected events since that time, including a government agency's report criticizing current policy coordination efforts and both regulatory and competitive moves affecting the communications satellite industry. S.999 incorporated a recommendation made by the National Telecommunications and Information Administration (NTIA) to establish a White House Special Representative for Telecommunications and Information, who would have all the policy power then held in the State and Commerce Departments and the International Communication Agency; the Special Representative would be appointed by the President and would hold the rank of Ambassador.

There were various provisions in the bill which were germane to INTELSAT and which may be categorized as: (i) new provisions not in existence in the current legislation; (ii) provisions amending the Communications Act of 1934; and (iii) provisions amending the Communications Satellite Act of 1962. New provisions included the proposed finding by Congress in Section 2(3) of the bill that "it is essential to encourage the entry of new carriers in the offering of international telecommunications services and facilities." Section 202(b) of the bill also proposed that the policy of the United States be "to encourage and assist the competitive provision of telecommunications and information goods and services in international commerce" and "to ensure the existence of effective non-political international telecommunications organizations and other entities."

Among those provisions which would amend the Communications Act of 1934 was a section which would introduce a new Title VI, "International Telecommunications," into the Communications Act. The "statement of policy" provided in Section 602(a) of the bill stated:

> It is the policy of the United States to rely whenever and wherever possible on marketplace competition and on the private sector to provide international telecommunications services and to reduce unnecessary regulation and to encourage entry by new carriers into the international telecommunications marketplace. Marketplace competition will result in technological innovation, operating efficiencies, and availability of a wide variety of telecommunications technologies that are new or may become available in the future, and will promote the equitable and efficient use of such technologies to provide international telecommunications services. Where effective competition does not now exist, it is the policy of the United States to encourage the development of such competition. Whenever the Commission finds it necessary to regulate international telecommunications services or facilities which are not subject to effective competition, such regulations shall be the minimum needed to accomplish the purposes of this Act. It shall be presumed that there are no basic technological, operational, or economic factors which would necessarily preclude the provision of any international telecommunications service under conditions of competition.

However, recognizing the importance of coordination with foreign telecommunications entities, the bill declared that the interests of sovereign nations were to be considered in the implementation of United States policy. The bill went on to state that it should also be the policy of the United States to promote the deregulation of the resale or shared use of any international telecommunications service, and to seek to implement this policy through meetings with foreign telecommunications entities.

Provisions amending the Communications Satellite Act of 1962 were perhaps the most significant to INTELSAT. Section 304(a) would have modified Section 102(d) of the Satellite Act. This amendment would have made it clear that it was not the intent of Congress to preclude the creation of additional international communications satellite systems "if required to meet unique governmental needs or if otherwise required in the national interests *or if such other communications satellite systems will otherwise serve the public interest, convenience and necessity.*" (Emphasis added). Enactment of this provision would have permitted competing international satellite facilities if those facilities could meet the basic FCC standards for any authorization (public interest, convenience and necessity). It is interesting that the sponsors of the bill evidently thought it necessary to codify into law enabling provisions and amendments to the Communications Act of 1934 and the Satellite Act in order to permit the FCC to authorize separate systems such as that proposed by Orion.

Other proposed modifications of the Satellite Act could have had an indirect effect on INTELSAT through changes in the way INTELSAT capacity is used by the United States. Sections 301(g), (j) and (k) would have made it clear that COMSAT could provide service directly to the public and that entities other than carriers could be authorized to acquire channels of communication directly from COMSAT. Section 301(i) would have made it possible for entities other than COMSAT and the common carriers to be authorized to construct stations accessing the INTELSAT system.

Senator Goldwater said, in a prepared statement, that although the bill aimed to extend pro-competitive U.S. policies into the international arena, it recognized, nonetheless, that both international services and the facilities by which they are delivered are provided jointly with foreign nations and that the U.S. could not unilaterally deregulate the provision of services.[47]

On May 10 and 11, 1983, hearings on S.999 were held before the Senate Commerce, Science and Transportation Committee's Communications Subcommittee. Among those who testified before the Subcommittee was INTELSAT Director General Santiago Astrain. According to information available, Mr. Astrain's appearance represented either the first time the head of an international organization appeared before the legislative branch of one of the organization's member countries or at the least a very rare appearance.

In his testimony, Mr. Astrain reviewed for the subcommittee the very substantial achievements of INTELSAT during its existence, including how some

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[47] 49 TELECOM. REP. 8 (April 11, 1983).

170 countries and territories relied on INTELSAT for international services and how many of them also relied on INTELSAT for domestic services. He stated the concerns referred to earlier and, in particular, he cited Section 304(a) of the bill to amend the Satellite Act and open the door to the establishment of other satellite telecommunications systems to carry international traffic without imposing upon them any of the obligations or conditions imposed on the INTELSAT system. He stated that he recognized that the United States was then in the process of opening up its internal communications sector to competitive entry and acknowledged that that was certainly the prerogative of the United States. However, he wished to bring to the subcommittee's attention that there were many differences between domestic and international telecommunications environments and submitted that the principles and mutual obligations contained in agreements such as INTELSAT's could not be amended by legislation in one country alone. Mr. Astrain brought to the subcommittee's attention the action taken by the INTELSAT Meeting of Signatories in Bangkok the previous month.

S.999 was never approved.

However, as the issues received increasing attention, other voices were heard from within the United States. Concerns were repeatedly expressed over the fragmented approach in the U.S. Government to developing international telecommunications policy, perhaps due in part to the disbanding of the White House Office of Telecommunications Policy in 1978. Among those concerned was Senator Charles Percy (R.-Illinois), Chairman of the Foreign Relations Committee, who wrote to Secretary of State George Shultz in June, 1983, raising a number of potential problems in the areas of international communications and information policy, including the importance of the United States proceeding skillfully if it were to reap the "gains of competition and enhance the competitive position of the United States. . .while preserving important foreign policy objectives." He drew attention to the dangers of not being sensitive to the views of other governments and forcing them into rigid defenses of their preferences for governmental monopolies for telecommunications and perhaps pushing the lesser developed countries into ideological insistence on orbital slots for future satellites and radio frequency spectrum allocations as part of the "common heritage of mankind."[48]

ISI, RCA, and CYGNUS Applications[49]

On August 12, 1983, an application was filed before the FCC by International Satellite, Inc. (ISI)[50] for authority to construct, launch, and operate a transatlantic satellite system. The proposed system would serve primarily the

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[48]Letter from Senator Charles Percy, Chairman of Senate Foreign Relations Committee to Secretary of State George Shultz (June 22, 1983).

[49]*See* Cowhey & Aronson, *supra* n. 28, at 35; *see also* ISI application, *supra* n. 29.

[50]File No. CSS-83-004-P (LA) I-P-C-83-073.

video distribution and data markets, would sell at least half the capacity of the system, and make the remainder of the capacity available on a common carrier basis. ISI proposed services to areas covering the continental United States, Western Europe, and small areas within the continental United States and Western Europe. No service would be provided to Latin America, Africa or the Middle East.[51] On February 13, 1984, RCA American Communications, Inc. (RCA Americom) became the third U.S. corporation to file an application[52] with the FCC to provide competitive international satellite services. RCA Americom asked the FCC for permission to amend its authorization to construct and launch its existing C-band Satcom VI satellite to permit "coverage on command of portions of Europe and Africa on six transponders." It proposed generally tariffed services, leased channels and transponders providing video distribution, teleconferencing and commercial/business communications including private-leased channel voice, low-speed data, medium speed data, and high speed data.

RCA Americom addressed the question of potential harm to INTELSAT, stating, "there is no reason to believe that the service described herein will cause significant harm to the global system. There is, however, reason to believe that demand for service will increase through the stimulation of competition, and that the global system may well benefit from the increase in demand." Furthermore, RCA Americom asserted that even if INTELSAT's revenues were affected by this proposed service, "there is no longer any reason to provide a totally protected status to it, especially in a market which accounts for such a small percentage of its revenues. Indeed, we do not believe that there was ever any intent to shield INTELSAT from all competition for all services for all time. The needs of customers and the forces of the marketplace should be determinative, as they have been in the domestic market."

On March 7, 1984, Cygnus Satellite Company (Cygnus) followed with an application[53] to the FCC for an Atlantic regional satellite system and stated that it planned to file for a Pacific regional satellite system in the near future. While the geographic coverage proposed by Cygnus was primarily the continental United States and Western Europe, there was also specified in the Cygnus application spot beam coverage of Puerto Rico, the U.S. Virgin Islands, the Caribbean Basin and portions of Central America. The application proposed the sale or long-term lease of transponder capacity on both a preemptible and non-preemptible basis. The particular service capabilities specified were: video program distribution; video teleconferencing; other video services including teletext, videotext, captioning, stereo TV, high definition

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[51]Public comments on the ISI application were filed with the FCC by interested parties in mid-September, 1983. Consistent with its comments on the Orion application, COMSAT urged the FCC to deny ISI's application on the ground that it duplicated services which were or would be offered by INTELSAT.

[52]File No. I-T-C-84-085.

[53]File No. CSS-84-002-P(LA).

TV; audio services; high speed digital facsimile; computer-to-computer communications; electronic mail; remote satellite printing; telex, TWX, batch data processing, distributed data processing; and private voice services.

The Senior Interagency Group (SIG) and NTIA Study the Issue

Under various pieces of legislation, including the Satellite Act, the Executive Branch has special responsibilities in the field of telecommunications. Among other things, during 1983, the Senior Interagency Group on International Communication and Information Policy (SIG)[54] reviewed U.S. international satellite policy to determine under what conditions separate satellite systems would be: (i) consistent with prevailing U.S. law, practice and international treaty obligations; (ii) compatible with sound foreign policy and telecommunications policy goals; and (iii) in the national interest.

In a letter to FCC Chairman Fowler, David Markey, the Assistant Commerce Secretary and NTIA Administrator, stated:[55]

> The Orion and ISI applications both raise novel and complex issues affecting U.S. national interest, foreign policy, and established communications policy. Applicable law and Executive Branch authority mandate our careful analysis of these proposals, in light of national needs and priorities and long-standing treaty obligations. The introduction of the ISI application will result in a more protracted review process than previously anticipated.

Officials of the Executive Branch agencies comprising the SIG continued to study the public policy issues in an attempt to reach an Executive Branch recommendation. Although it ordinarily is one of the agencies that participates in the group's deliberations, the FCC did not take part in the SIG policy review due to its *ex parte* obligations.

By December, 1983, the NTIA staff recommended that the entry of Orion and ISI be permitted, under restrictions barring use of their transponders for common carrier, public-switched voice services, after Article XIV(d) consultation had been completed. The staff concluded that such restricted authorizations would serve U.S. national interests, and would not cause significant economic harm to INTELSAT.[56] When questioned about the potential effect of a

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[54]The Senior Interagency Group (SIG) is composed of representatives of the Departments of State, Justice, Defense and Commerce; the Offices of Management and Budget, Science and Technology Policy, Policy Development, and the U.S. Trade Representatives; the National Security Council; the Central Intelligence Agency; the U.S. Information Agency; the Board of International Broadcasting; the Agency for International Development; and the National Aeronautics and Space Administration. The Departments of Commerce and State co-chair the SIG.

[55]49 TELECOM. REP. 19 (Sept. 5, 1983).

[56]49 TELECOM. REP. 11 (Dec. 12, 1983).

negative recommendation by the INTELSAT Assembly of Parties under Article XIV(d) for the Orion and ISI systems, an NTIA spokesman responded that such a finding would not be dispositive for U.S. policy[57] and by implication would not prevent the FCC from approving separate systems.

In a letter to the NTIA Administrator in late December, COMSAT commented on NTIA's staff recommendation. COMSAT's President, Irving Goldstein, expressed his belief that the NTIA staff report presented many problems and was not a basis for sound public policy. He warned that any modification in the U.S. historic policy should be considered only in the context of the broad international and commercial issues it raised, and in cooperation with other nations and INTELSAT.[58]

In January, 1984, the SIG reached a unanimous decision to recommend that the Secretaries of Commerce and State support both pending applications, so long as the service they were allowed to provide was limited, and they were coordinated with INTELSAT.[59] The decision, however, had not been finalized. Nor was it clear whether a "successful" coordination need take place. Discussions continued on a number of sub-issues. The basic limitations adopted in the SIG decision were essentially the same as those adopted by an NTIA staff study, which was then nearing final endorsement by Commerce Secretary Malcolm Baldridge.

INTELSAT Assembly of Parties, October 1983

Ordinary meetings of the Assembly of Parties[60] are held every two years to consider those aspects of INTELSAT that are primarily of interest to the Parties as sovereign states, as well as the resolutions, recommendations or views put to it by either the Meeting of Signatories or the Board of Governors. Extraordinary meetings can be held at any time. The Assembly can formulate policies and long-term objectives consistent with the principles, purposes and scope of INTELSAT's activities. Each Party has one vote, and decisions on matters of substance require an affirmative vote cast by at least two-thirds of the Parties whose representatives are present and voting. Decisions on procedural matters require only an affirmative vote cast by a simple majority of the Parties whose representatives are present and voting.

In October, 1983, INTELSAT's eighth meeting of the Assembly of Parties was held. Two days of intense debate were devoted to the issues raised by the two applications filed with the FCC for the provision of separate international satellite service. After most Parties had expressed their deep concern over events in the United States, the Assembly unanimously adopted a decision to:

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[57] *Id.*

[58] 49 TELECOM. REP. 31 (Dec. 26, 1983).

[59] 50 TELECOM. REP. 25 (Jan. 23, 1984).

[60] *See supra* n. 24 and Article VII of the INTELSAT Agreement.

(i) urge all Parties to ensure that their commitments to the INTELSAT system continue to be fulfilled; (ii) reaffirm the importance that all Parties refrain from actions that would imperil the viability of the single, global satellite system; (iii) express its fullest support to the Director General in his pursuit of the INTELSAT aim of developing the single global satellite system in the most efficient and economical manner possible; and (iv) request the Board of Governors and the Director General to review this matter regularly and report to the Parties any new developments.[61]

Views of U.S. Industrial Firms, Further Comments, and Infighting Among the Applicants

On February 22 and 27, 1984, Orion and ISI respectively attempted to accelerate the issuance of an Executive Branch recommendation to the FCC by submitting letters to the Department of Commerce addressing concerns that their entry into the field would prove deleterious to U.S. industry.[62] Such concerns had been raised in January by the U.S. firms manufacturing the INTELSAT V and VI series of satellites, Ford Aerospace and Communications Corporation, and Hughes Aircraft Company, respectively, in letters to concerned government officials to the effect that, should the U.S. approve separate systems, INTELSAT could seek to shift more of its substantial aerospace procurement activities to foreign suppliers.[63] Ford's letter also raised national security issues. In their letters to Commerce, ISI and Orion asserted that such a concern was "completely unsustainable and deserves very short shrift." ISI noted that INTELSAT was bound by strict ground rules in its procurement policies, and dismissed Ford's national security concerns.

By this time, various applicants and other parties were beginning to trade charges. ISI attacked the Cygnus application, charging that in fact both Cygnus and Orion were controlled by the same company, M/A-Com, and urged the FCC to review the application. AT&T Communications (AT&T), in commenting on the Cygnus application, stated that the issues involving economic coordination with INTELSAT "are not easily disposed of as Cygnus suggests." Cygnus had argued that no economic coordination was necessary on the basis of domestic legal concepts of common carriage. ISI, for its part, asked the FCC to deny RCA Americom's application, while Orion opposed RCA's request to be given the same processing treatment as the original applicants.

Referring to many letters from foreign telecommunications authorities[64] to

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[61]INTELSAT document AP-8-3, para. 21.

[62]50 TELECOM. REP. 31 (March 5, 1984).

[63]*Id.*

[64]During January, February and March 1984, a substantial number of countries wrote letters to the FCC expressing their concerns about separate satellite systems. These included: Afghanistan, Australia, Austria, Belgium, Brazil, Cameroon, Chile, China, Colombia, Cyprus, Denmark, Dominican Republic, Ecuador, Finland, Haiti, Ice-

the FCC in preceding weeks, AT&T said that Cygnus' entry "can only exacerbate" their concerns. The "perception of harm to INTELSAT and unilateral action may not be accurate from the U.S. perspective, but in the international sphere, perceptions are as likely as reality to cause significant damage to the delicate fabric of international cooperation."

Differences Between the Departments of State and Commerce

As noted earlier, concern was expressed at various times in 1983 with respect to the absence of and the need for cohesive and coherent development of U.S. policy. By March, 1984, differences between the Departments of State and Commerce were reported to focus on the SIG recommendation.[65] Apparently, Department of Commerce attorneys were concerned over too much detailed language in the proposed determination language, preferring instead simple statements to the effect that alternative systems not connected to public-switched networks are in the national interest, with separate instructions to the State Department about Article XIV(d) coordination. Apparently, the State Department favored language to the effect that the U.S. affirm its Article XIV(d) obligations, and viewed the Commerce Department's suggestions as a significant deviation from agreed-upon language. The Commerce Department saw the language difference as a legal issue, not a policy matter, and expressed strong concern that the FCC might deviate from a detailed determination, and thereby invite an appeal to the courts.[66]

On March 28, Secretary of Commerce Baldridge forwarded his Department's recommendations to the White House separately from the State Department's recommendations which followed the next day. Substantive differences were minimal; however, the two recommendations clashed on the proper manner in which the President should address the Article XIV(d) coordination process, and on the respective functions and roles of the Departments of State and Commerce.[67]

These separate actions raised the specter of what was referred to as a "turf war" over telecommunications policy responsibility being waged between the two Departments.[68] The State Department viewed the Commerce Department's proposal as an attempt to seize the preeminent role in setting international policy, while the Commerce Department claimed that it was merely following the guidance of a 1978 Executive Order 12046, which transferred such

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land, Japan, Korea, Madagascar, Malaysia, Netherlands, Norway, Peru, Philippines, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Syria, Tanzania, United Arab Emirates, and Vatican City State.

[65]50 TELECOM. REP. 29 (March 19, 1984).

[66]*Id.*

[67]50 TELECOM. REP. 31 (April 2, 1984).

[68]*Id. See* Cowhey & Aronson, *supra* n. 28, at 33.

policy functions out of the disbanded White House Office of Telecommunications Policy, and charged the Secretary of Commerce with serving as the principal advisor to the President on "telecommunications policies pertaining to the nation's economic and technological advancement and to the regulation of the telecommunications industry." The Executive Order also stated that the Commerce Secretary "shall provide for the coordination of the telecommunications activities of the Executive Branch."[69]

With the State and Commerce Departments submitting independent recommendations to the White House, the original proposal for a joint recommendation on Presidential language to incorporate the policy decisions made by SIG was abandoned. The problem of adopting a final Executive Branch position was left in the laps of the White House staff.

On April 10, NTIA Administrator Markey, addressing SATCOM '84, stated that the Executive Branch was still debating the U.S. approach to separate systems; "I think that kind of competition is inevitable," he said. Markey also said in his address that NTIA considered it important to protect INTELSAT, calling it an obvious foreign policy and economic success. Any decision to allow other systems, he said, "should be conditioned on the applicants coordinating their systems with INTELSAT."[70] He said that the separate systems applications were part of an evolution in competitive overseas services, including the 1981 Record Carrier Competition Act, the transborder use of domestic satellite systems, regional systems, and FCC deregulatory actions. He guessed that the White House would act "within a week or ten days."

In mid-April, as the White House considered the varying proposals before it, Representative Timothy Wirth (D.-Colorado), Chairman of the Subcommittee on Telecommunications of the House Energy and Commerce Committee, and Representative James Broyhill (R.-North Carolina), ranking minority member of the House Energy and Commerce Committee, endorsed the SIG-Commerce position.[71]

INTELSAT Meeting of Signatories, April 1984

In mid-April, INTELSAT held its Fourteenth Meeting of Signatories. Again, the separate systems issue was intensely debated, and the Signatories voted unanimously to urge all INTELSAT Signatories to resist efforts to estab-

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[69]Other language in the Executive Order, however, directed Commerce to develop policy "in coordination with" State, and to "provide advice and assistance to the Secretary of State on international telecommunications policies." It also stated that "with respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of U.S. positions and the conduct of U.S. participation in negotiations with foreign governments and international bodies."

[70]50 TELECOM. REP. 13 (April 16, 1984).

[71]*Id.* at 29.

lish such separate systems. Adopted without objection by the 73 Signatories present, after having been proposed by 49 of them, the resolution urged Signatories "to refrain from entering into any arrangements which may lead to the establishment and subsequent use of" separate systems "to carry traffic to or from their respective countries."[72]

Further Complications in the Development of U.S. Policy

In late May, 1984, the White House, unwilling to accept either the State or Commerce proposal, instructed NTIA Administrator Markey and Under Secretary of State for Security Assistance, Science and Technology, William Schneider to coordinate their policy recommendations. Still under discussion was whether the coming determination should be a Presidential Determination, or whether it should be issued through the Secretary of Commerce. The Department of State favored the former because it felt it would be weightier and thus easier to use as a basis for dealings with foreign governments. The House Energy and Commerce Committee entered the turf fray by siding entirely with the Commerce Department under Executive Order 12046. The Committee said it was "extremely concerned with the lack of cooperation other [Cabinet] departments have shown with the efforts of the Secretary of Commerce to implement his responsibilities."[73] Conflict broke out again when Secretary of State Shultz on May 30, 1984, wrote a letter to Representative Dante Fascell (D.-Florida), Chairman of the House Foreign Affairs Committee, opposing the language in the NTIA authorization bill, even though the language mirrored a 1983 NTIA-State memo of understanding.[74] The White House effort to get the two agencies to develop mutually agreeable compromise language on the separate systems issue was seen not to have succeeded.[75] Procedural disagreements were cited, but a more substantive reason emerged: the State Department wanted a Presidential Determination on the issue to cover ISI and Orion only, while the Commerce Department wanted a generic approach.

At a June 13, 1984, hearing of the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, Committee Chairman John Dingell (D.-Michigan), in his opening statement, said that "the FCC alone has the statutory authority to grant or deny petitions for entry into the international satellite market." "As a purely procedural matter," he added, "a general policy might best be formulated in the public forum provided by an FCC rulemaking, rather than behind closed doors in the Executive Branch." Chairman Dingell later continued to press for an FCC "public forum" in a

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[72]INTELSAT document MS-14-3, ¶22.

[73]50 TELECOM. REP. 14 (May 28, 1984).

[74]50 TELECOM. REP. 33 (June 11, 1984).

[75]*Id.*

letter to Chairman Fowler.[76] At that hearing, Ambassador Abbott Washburn, a former FCC Commissioner and head of the U.S. delegation that negotiated the INTELSAT Agreements, hailed INTELSAT's spectacular success, compared it to the Marshall Plan, and stressed that the U.S. re-examination of policy "should be a very careful and thorough effort." Ambassador Washburn called for a "broad FCC inquiry."[77]

Orion and ISI, on the other hand, thought that there had been enough discussion of the matter in the course of the SIG's work. They saw their opportunities eroding and feared a full-blown FCC proceeding might take several years more. Such a proceeding, said ISI's attorney, was "utterly unnecessary" because the policy issues for all applicants were the same, and the FCC had before it all necessary information.[78]

PANAMSAT Application

On June 1, 1984, a somewhat different type of separate system issue arose when the Pan American Satellite Corporation (PanAmSat) asked the FCC for authority to construct and operate an international sub-regional, Western Hemisphere video and audio distribution and hemispheric domestic satellite system.[79] The system was intended to provide internal, national satellite service in various Latin American nations, and sub-regional video and audio distribution satellite service between New York and Miami and Latin American countries. "Incidental" coverage of the Iberian Peninsula was also included, and thus another transatlantic system was proposed. The types of services that the system would be capable of providing included video and audio distribution, domestic service offerings including video and radio programming; video text and teletext; telex facsimile and electronic mail; telephone service; and data and computer communications.[80]

While the "international" aspects of this application raised most of the same concerns as the other applications, it added a different element in the introduction of the concept that a company sought authorization ostensibly to provide internal domestic services to countries other than the country of the authorizing country's licensing agency (i.e., the United States). Although un-

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[76]50 TELECOM. REP. 19 (June 18, 1984).

[77]*Id.* at 19-20.

[78]*Id.* at 20-21.

[79]File No. CSS-84-004-P(LA)

[80]*See supra* n. 50-53. On June 12, 1984, Systematics General Corporation (SGC) requested FCC authority to launch and operate international satellite systems to provide North Atlantic and Pacific service to U.S. federal government agencies. The system would use the C-band portion of the NASA east and west tracking and data relay satellites (TDRS). SGC withdrew these two applications on July 27, 1984, reserving the right to refile at a later date when "user requirements are further defined."

usual in the international community in the sense that "receiving" States had not endorsed this application to provide service within their national boundaries, the "domestic" aspect of the PanAmSat application did not raise the identical concerns for INTELSAT as did the other applications. (Should any INTELSAT member State decide to establish, acquire, or utilize the separate system for domestic purposes only, then such a country's party would be required to comply with Article XIV(c).[81])

New Viewpoints and Issues Emerge

1. Foreign Policy Sensitivity

The cumulative effect of the developments described above was to stimulate interest and activity from other quarters in the United States, including a greater emphasis on examining foreign relations implications for the United States. Perhaps the implications of potential "unilateral" action by a U.S. agency to license a firm to construct, launch and operate a satellite for services to be provided primarily for *other countries'* domestic purposes (i.e., the PanAmSat application) heightened foreign policy concerns and sensitivity.

In order to help define various options available in the formulation of U.S. policy, and the repercussions for most or all INTELSAT Parties and Signatories, INTELSAT commissioned an independent study of various ways to bring about changes in international telecommunications policies and understandings. These efforts by Wiley, Johnson & Rein produced a document entitled "Implementation of a U.S. 'Free Entry' Initiative for Transatlantic Satellite Facilities: Problems, Pitfalls and Possibilities."[82] Following the PanAmSat application, comments were filed by Philip H. Trezise and Wiley, Johnson & Rein. Trezise's paper, "Internationalism in International Trade: Will We Ever Learn?" and the paper of Wiley, Johnson and Rein both concluded that the U.S. faced two alternatives for handling the issue of separate systems: it could license new systems first and deal with other governments later, or it could

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[81]Article XIV(c) states:

> (c) To the extent that any Party or Signatory or person within the jurisdiction of a Party intends to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities to meet its domestic public telecommunications services requirements, such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities, shall consult the Board of Governors, which shall express, in the form of recommendations, its findings regarding the technical compatibility of such facilities and their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment.

[82]Rein, McDonald, Adams, Frank & Nielsen, *Free Entry Initiative for Transatlantic Satellite Facilities: Problems, Pitfalls and Possibilities*, 18 GEO. WASH. J. INT'L. L. & ECON. 3 (1985) [hereinafter cited as Rein & McDonald].

negotiate with other governments first and license in accordance with the outcome of those negotiations.[83] Both papers cited unsuccessful U.S. attempts to impose deregulation of international air service, 1978-1982, and argued that the license-first approach might produce inconclusive intergovernmental confrontation, and lead to negotiations in a crisis atmosphere. The negotiate-first approach was better because it was less confrontational, facilitated establishing a hierarchy of negotiating goals, and permitted post-agreement licensing on a fair, comparative basis, taking into account realistically available opportunities.[84]

A negotiate-first approach, as the Wiley, Johnson and Rein paper argued, held out possibilities for increased transoceanic competition if the U.S. were sensitive to foreign interests in setting its goals, did not attempt to force open entry initiatives, had an established negotiation mechanism, adjusted its licensing policy to international reality, and was able to offer commercially meaningful concessions to other sovereigns.[85] Mr. Trezise argued that "for the FCC now to license the satellite applicants would be to announce a policy that, whatever its abstract merits, would threaten to disrupt time-honored arrangements for the conduct of transatlantic telecommunications."[86]

A full airing of policy matters was "essential," Mr. Trezise argued, and neither the SIG approach nor the FCC licensing procedure represented suitable forums. He called for closer consultation with relevant Congressional committees. Mr. Trezise suggested oversight hearings "because what is at issue is the first fundamental change in U.S. international telecommunications policy since Congress passed the Communications Satellite Act in 1962." He also called for a "broad rulemaking inquiry by the FCC, in which all relevant policy considerations, including foreign policy ones, can be properly weighed."[87] NTIA Administrator Markey later responded by letter to Mr. Trezise that the Executive Branch policy review of the issues had covered every major matter.[88]

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[83]Comments of Philip Trezise in File No. CSS-84-004-P(LA); *See Studies by Consultant, Law Firm Conclude Broad U.S. Policy Review, Followed by Talks with Foreign Administrators, Should Come Before F.C.C. Licensing of Private Satellites*, 50 TELECOM. REP. 33 (July 16, 1984) (hereinafter cited as *Studies*). Mr. Trezise, formerly Assistant Secretary of State for Economic Affairs, is a Fellow of the Brookings Institute.

[84]*Studies, supra* n. 83, at 33.

[85]Rein & McDonald, *supra* n. 82, at 8.

[86]*Studies, supra* n. 83, at 10.

[87]*Id.* at 13.

[88]*See Markey Defends Executive Branch's Policy Review on Alternative International Satellites*, 50 TELECOM. REP. 23 (July 23, 1984).

2. The Congressional Office of Technology Assessment

On July 25, 1985, the Congressional Office of Technology Assessment (OTA) entered the debate with its belief that INTELSAT faced long-term economic harm if many applicants joined those already in the fray. In a report to the House Science and Technology Space Sciences and Applications Subcommittee, the Congressional Office asserted that INTELSAT, a notable example of cooperation, had already withstood "competition" from regional systems, and theorized that other countries might choose to become further involved in competition should the U.S. point the way.[89]

3. Further Congressional Hearings

Also on July 25-26, State and Commerce officials appeared before the House telecommunications subcommittee. Attempting to downplay the appearance of a policymaking turf fight, they cited the memorandum of understanding they had co-signed; however, under questioning, they made it clear that it still left considerable room for disagreement. Notably, State Undersecretary Schneider, while agreeing that Commerce had "the lead responsibility for formulating domestic and international policy," cited the government's "pervasive interest" in telecommunications and information issues, and the important international consequences arising from the U.S. deregulation policy. "We can't have an international communications policy," he said, "that would sabotage national security or key alliances with foreign powers."[90]

In the course of the hearings, Representative Al Swift (D.-Washington) expressed his concerns that the U.S. might be on the verge of a decision that would be widely opposed by developing nations who benefited from INTELSAT's global rate averaging. Representative Swift praised INTELSAT as a U.S. foreign policy success, and hoped that "at the White House level, they will make a balanced judgment and not blow one of the best moves we've ever made."[91]

4. Congressional Concerns Intensify

Concurrently, Chairman John Dingell was making efforts to involve Congress more substantively in the debate and to infuse the decision-making process with the full due process considerations that he believed a matter of this

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[89]"International Cooperation and Competition in Civilian Space Activities." Report to the Subcommittee on Space Sciences and Applications of the House Committee on Science and Technology, Office of Technology Assessment, July 1984. This report was expanded and published as a formal OTA document under the same title (OTA-ISC-239, July 1985). *See also* 50 TELECOM. REP. 16 (July 30, 1984).

[90]*Id.* at 18-19.

[91]*Id.* at 20.

weight merited. In a June 15, 1984, letter to FCC Chairman Fowler, Dingell wrote that "the cumulative effect of many satellite systems may pose risks that need to be addressed by a general policy." He cited a number of issues that required further examination through a rulemaking proceeding by the FCC and further hearings by the Energy and Commerce Committee. Some of these issues were foreign policy considerations; the effect of unrestricted growth of alternative systems on global telecommunications and equal access by all countries to international communications; the importance of restricting traffic diversion to hold down global rates; the potential adverse effects of alternative systems on some U.S. industries; and the adverse impacts on U.S. bargaining positions in other areas such as the International Telecommunications Union (ITU) of unilateral actions by the United States in this area.[92]

On October 9, 1984, the Chairmen of the House and Senate Commerce committees, Representative Dingell and Senator Bob Packwood (R.-Oregon), rather than pursuing a legislative amendment at that time, wrote a joint letter to the Chairman of the FCC asking him to initiate a study on the economic, trade and industrial issues pertaining to separate satellite systems. According to the letter, the study should have considered: the effects on rates and services for domestic U.S. users; the effect on INTELSAT's averaged rates; the economic impact on INTELSAT; the effects on U.S. industry; effect on the orbital arc needs of the U.S.' and the alternative mechanisms that could increase efficiency in the provision of international telecommunications services. The legislators sought concrete, factual evaluations, and asked that the study begin immediately and be completed by the next Congressional Session.[93] The in-depth study was never undertaken by the Commission. At about the same time more than fifty House members wrote a letter to the President asking him to defer adoption of a policy on the separate systems question until the Congress had an opportunity to study in detail the issue of separate systems. The signatures were solicited by Chairman Dingell, who continued to seek a direct role for Congress in the charting of any change in U.S. international

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[92]During this same period, the authorization bill for the National Telecommunications and Information Administration (NTIA) was moving through both Houses of Congress. Committee Chairman Dingell and several House and Senate colleagues, including Committee Chairman Packwood of the Senate Committee on Commerce, Science and Transportation, continued to feel strongly about the need to examine the potential introduction of alternative international satellite systems in the context of its full impact on various domestic telecommunications policies, including those involving interstate and foreign commerce. In this context, they sought an independent commission, jointly appointed by both Houses, to study and report on the matter. In September, Chairman Dingell's office led an attempt to reach a compromise with other key staff of the Commerce committees to include such a study commission in the NTIA authorization bill. However, joint opposition to any compromise by the offices of Subcommittee Chairman Wirth, Representative Broyhill, and Senator Ernest Hollings blocked the effort.

[93]50 TELECOM. REP. 19 (Oct. 15, 1984).

satellite telecommunications policy.[94]

The Presidential Determination

On November 28, 1984, the long anticipated Determination by the President was issued.[95] It said that "separate international communications satellite systems are required in the national interest," and that the U.S. would "consult with INTELSAT regarding such separate systems as are authorized by the FCC" in order to meet its obligations under the agreement. . ." The full text is as follows[96]

The White House
Washington
November 28, 1984
Presidential Determination
No. 85-2

Memorandum for the Secretary of State
the Secretary of Commerce

By virtue of the authority vested in me by the Constitution and statutes of the United States, including Sections 102(d) and 201(a) of the Communications Satellite Act of 1962, as amended (47 U.S.C. 701(d), 721(a)), I hereby determine that separate international communications satellite systems are required in the national interest. The United States, in order to meet its obligations under the Agreement Establishing the International Telecommunications Satellite Organization (INTELSAT) (TIAS 7532), shall consult with INTELSAT regarding such separate systems as are authorized by the Federal Communications Commission. You are directed jointly to inform the Federal Communications Commission of criteria necessary to ensure the United States meets its international obligations and to further its telecommunications and foreign policy interests.

This determination shall be published in the *Federal Register*.

/s/Ronald Reagan

Also, on November 28, 1984, the Secretaries of State and Commerce sent a joint letter[97] to the Chairman of the FCC to discharge their responsibility "to inform the Federal Communications Commission of criteria necessary to ensure the United States meets its international obligations and to further its telecommunications and foreign policy interests" and to advise that:

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[94]*Id.*

[95]It will be recalled that this "determination" emanates from section 201 of the Satellite Act. *See also supra* n. 6.

[96]20 Weekly Comp. Pres. Doc. 1853 (Nov. 28, 1984).

[97]50 TELECOM. REP. 7 (Dec. 3, 1984).

> Prior to final authorization by the Commission of any systems to assure that the United States meets its obligations as a Party to the Agreement Establishing the International Telecommunications Satellite Organization (INTELSAT) (TIAS 7532):
>
> (1) each system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service); and,
>
> (2) one or more foreign authorities are to authorize use of each system and enter into consultation procedure with the United States Party under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm. The President's determination, its conditions, and these criteria are premised on our review of the issues prompted by the applications now before the Commission. If proposals substantially different are forthcoming, further Executive Branch review may be required.

Further, on November 30, 1984, Secretary Baldridge sent a letter to Secretary Shultz which stated:[98]

> There are two matters regarding the President's determination on new international satellite systems that need to be clarified. First, the White House has directed our departments to examine the scope of INTELSAT's pricing flexibility. Second, our position on the related issue of direct access to INTELSAT should be made clear.
>
> The executive agreement establishing INTELSAT generally requires uniform pricing for each service. Prices on heavily trafficked routes may now exceed costs while those on thin routes may be below costs. It is not clear whether INTELSAT could vary its prices under the agreement. If INTELSAT's prices on busy routes are artificially inflated, inefficient entry by new systems may be induced. INTELSAT should have pricing flexibility when confronted with actual or potential competition as long as the prices it charges cover its costs.
>
> A related issue is direct, cost-based access to the INTELSAT space segment. Allowing users and carriers in addition to COMSAT the option to deal with INTELSAT directly for competitive services would foster competition based on superior efficiency and foresight and tend to deter entry by inefficient systems.
>
> We should express clear positions on these two important points in the filing we will soon be submitting jointly to the Federal Communications Commission. I have asked Dave Markey to work with Bill Schneider to ensure this is done.

Undoubtedly, taking into account everything that preceded these actions, the Presidential Determination, the joint letter to the FCC and the letter of Secretary Baldridge to Secretary Shultz represent a sincere attempt by Administration officials to strike a fair balance between the authorization of competi-

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[98]50 TELECOM. REP. 28 (Dec. 10, 1984).

tive systems and the protection of INTELSAT from significant economic harm.[99]

FCC Issues a Notice of Inquiry and Proposed Rulemaking

The FCC met on December 19, 1984, and decided to issue simultaneously a Notice of Inquiry and Proposed Rulemaking (NOI-PRM). On January 4, 1985, the NOI-PRM was released.

In view of the number and complexity of the issues raised by the FCC's NOI-PRM, it came to some observers as a procedural surprise that the FCC would issue a joint Notice of Inquiry *and* Proposed Rulemaking without proposing a specific rule. Besides the format of a joint Notice of Inquiry and Proposed Rulemaking, the FCC also adopted an extremely short period for the parties to develop meaningful comments and reply comments. The date of release of the NOI-PRM was January 4, 1985, and comments and reply comments were initially due February 14, 1985, and March 7, 1985, respectively. Generally, in complex rulemaking proceedings, the FCC in the past has issued a Notice of Inquiry allowing for comments and reply comments which would supply the FCC with information necessary for it to formulate a proposed rule. Thereafter, the FCC has used the information received to propose a specific rule which is explained in a Notice of Proposed Rulemaking. Then, parties to the proceeding are entitled to submit comments and reply comments on the proposed rule. This two-phased approach has, in the past, guaranteed a thorough consideration of the information and opinions available on the subject raised. By issuing a joint Notice of Inquiry and Proposed Rulemaking without proposing a specific rule, the FCC combined the two phases into one and thus provided only one opportunity to submit comments and reply comments. From the FCC's point of view, this approach substantially accelerated the administrative process, but, in doing so, the FCC necessarily sacrificed the notice and opportunity for interested parties to comment on a specific proposed rule. Such an opportunity is generally granted to the public before an administrative rule is approved and is thought by some to be required to guarantee due process.

A number of members of Congress recognized that the approach adopted by the FCC had its shortcomings. Several Congressmen wrote to the FCC imploring it to extend its due dates for comments and reply comments, and to follow this procedure with adequate opportunity to consider a proposed rule.[100] Finally, in an order issued January 25, 1985, the FCC admitted that the estab-

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[99]The Administration's reliance on "service" and physical "interconnect" restrictions to protect INTELSAT from significant economic harm may not be adequate. The enforcement of the restrictions on separate systems raises significant problems, including whether the restrictions themselves are enforceable and will be enforced.

[100]CC Docket No. 84-1299; *see* letter of January 28, 1985, to FCC Chairman signed by Representatives Roth, Lagomarsino, Zschau, Berman and Leach (hereinafter cited as *Letter*).

lished comment period "may not accord parties the time necessary to accurately collect the requested information and to properly prepare comments." Accordingly, the FCC Common Carrier Bureau extended the comment deadline, allowing the parties until April 1, 1985, to file comments and until June 5, 1985, to file replies.[101]

Although the FCC finally relented and adopted a more traditional deliberative time period for comments and reply comments, it was clear that the FCC did so only under a substantial amount of pressure exerted by members of the Congress. The FCC did not yield on the truncated procedural approach it had chosen.

INTELSAT Assembly of Parties, January 1985

In December 1984, INTELSAT received legal opinions from outside law firms concluding that the INTELSAT Agreement committed INTELSAT to rate averaging and universal charges. The legal opinions were sought in response to questions raised by INTELSAT Signatories and others regarding legal constraints on INTELSAT's ability to compete with separate systems for business by adjusting its rates on individual routes to be served by separate systems. This problem raised the issue of the necessity of an amendment to Article V(d) of the Agreement if INTELSAT were to be able to compete for business with potential separate system operators. As the Director General, Mr. Richard Colino, stated to the Ninth Assembly of Parties, in January 1985, in an extraordinary session convened primarily for certain Article XIV(d) intersystem coordinations: "[W]hile INTELSAT has flexibility with respect to various forms of pricing (provided they are cost based), it cannot charge different rates for the same service on the basis of the route to be served."[102] During that Assembly, members discussed and expressed their concerns about the development of separate systems in the United States, and questioned the U.S. Party delegation. Questions raised during the Assembly received no particularized response from representatives of the U.S. Party.

On January 31, 1985, the full Assembly adopted a resolution reaffirming the Organization's previous expressions of concern about such systems. It urged all INTELSAT Parties to express their concerns to the U.S. Government.[103] The resolution passed by the Assembly reaffirmed an earlier resolution adopted by the Eighth Meeting of the Assembly of Parties which, *inter alia*, urged all Parties "to refrain from actions that would imperil the viability of the single global satellite system," and resolutions of the Thirteenth and Fourteenth Meetings of the Signatories which, *inter alia* (fourteenth meeting) urged Signatories "to refrain from entering into any arrangements which may lead to establishment and subsequent use of" separate international systems

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[101]50 Fed. Reg. 4711 (1985).

[102]INTELSAT Document AP-9-4 ¶ 106, 107.

[103]INTELSAT Document AP-9-3 ¶ 13.

linking the U.S. and Europe.[104]

Executive Branch and Congress "Speak" to FCC

1. SIG White Paper

On February 8, 1985, the Departments of State and Commerce jointly submitted to the FCC the SIG's White Paper on New International Satellite Systems[105] detailing the grounds for the Executive Branch determination that separate satellite systems are in the public interest, and discussing to some extent the issues arising thereunder. Basically, the White Paper followed the Presidential Determination. The White Paper also stated, in proposing limitations for such systems, that "such services involve the sale or long-term lease of transponders or space segment capacity for communications that are not interconnected with public-switched message networks."

2. Further Developments in Congress

In a letter to the FCC dated January 28, 1985, Chairmen of the House Foreign Affairs Subcommittees on International Operations and on International Economic Policy and Trade requested that the Commission delay making any final decision in the rulemaking proceeding until the Congress had had an opportunity to consider the issues and take appropriate action.[106]

In the spirit of this letter, in mid-February these two subcommittees began a series of three hearings chaired respectively by Representative Dan Mica (D.-Florida) and Representative Don Bonker (D.-Washington) in which officials from NTIA, the Department of State and, later, the FCC were invited to present their views on introducing competition to INTELSAT. Executive Branch officials maintained their position, in the face of significant reservations expressed by subcommittee members, that separate system applicants deserved an opportunity to provide services in addition to INTELSAT and that these services could be different from INTELSAT services—a "goldplated intercom," according to Undersecretary of State Schneider—and therefore would not cause significant economic harm to INTELSAT. FCC Chairman Fowler told those subcommittees in an April hearing that while the FCC did not feel bound by the Presidential Determination, they would give it considerable weight. He further testified that there was no need for legislation to protect INTELSAT because the President had determined in accordance with his existing statutory authority that alternative satellite systems were in the national interest. After close questioning, Chairman Fowler stated that the FCC

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[104]INTELSAT Document MS-14-3 at p. 12 (April 8, 1984).

[105]The addition of the White Paper to CC Docket No. 84-1299 was placed on public notice, Report No. I-4032, on February 11, 1985.

[106]*See* supra n. 100.

would only issue a final operating license to separate systems after the State Department indicated that the U.S. had fulfilled its coordination obligation to INTELSAT under the Agreement. He stated that the FCC shared Congress' concern "that we not do anything to jeopardize the viability of INTELSAT." Chairman Fowler declined to answer the question of how the FCC would respond to a negative finding or recommendation by the INTELSAT Assembly pursuant to the Article XIV(d) coordination process.

The FCC Common Carrier Bureau Chief, Albert Halprin, who accompanied Chairman Fowler to the hearings, stated that the FCC staff was quite concerned about the problem of enforcing the service restrictions. Mr. Halprin also noted that INTELSAT offered its INTELSAT Business Service (IBS) with similar interconnection restrictions, relying upon its Signatories to self-enforce.[107]

Panels of telecommunications experts were also invited by the subcommittees to testify. In the February hearing, Philip Trezise and Burt Rein presented the conclusion of their independent studies that U.S. experience in other industries, such as aviation, should demonstrate the wisdom of reaching international agreements as a prerequisite to opening or deregulating markets. They predicted that it would ultimately prove harmful to U.S. interests, for the U.S. to unilaterally decide to approve systems separate from INTELSAT and then to attempt to negotiate landing rights for those systems. At the second hearing, on March 6th, Ambassador Washburn, former NTIA Administrator Henry Geller, former Senator Harrison Schmitt and Wilson Dizard of the Georgetown Center for Foreign Studies testified that they felt that legislation to protect INTELSAT's viability should there be separate systems—an idea

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[107]*See "Fowler Tells House Subcommitees He Sees No Need for Legislation to Protect INTELSAT, That FCC Will Give Heavy Weight to President's Decision, But Consider Foreign Comments,"* 51 TELECOM. REP. 31-32 (April 1, 1985). Mr. Halprin's comments on the INTELSAT IBS service ignore the basic distinctions between reliance by INTELSAT on an intrasystem interconnection restriction (i.e. within the INTELSAT system itself) and reliance on an interconnection restriction applicable to separate systems. *See* Comments of Abbott Washburn before the FCC in CC Docket No. 84-1299, April 1, 1985, in which he states: "INTELSAT possesses a limited ability to monitor compliance with its IBS interconnection restriction because all traffic is intrasystem. INTELSAT would have no way to monitor traffic carried over private systems, however, nor would it be appropriate for INTELSAT to do so. . . . INTELSAT primarily relies upon the good faith and honesty of its membership to comply with the restrictions. While relying on the good faith of its members to enforce such a restriction is acceptable for INTELSAT, separate systems present an entirely different situation. First, in the case of INTELSAT, any traffic through IBS would be intrasystem and therefore the revenue impact would be limited. Moreover, as owners of INTELSAT, the foreign Post Telephone and Telegraph Administrations (PTTs) have little incentive to 'cheat'. In contrast, any traffic diverted by separate systems will be away from the INTELSAT system. As a result, the separate systems and their customers would clearly not have the same financial incentives to minimize diversion. 'Cheating' for customers of separate systems is a 'positive sum' game with potentially high stakes." 51 TELECOM. REP. 27-28 (April 1, 1985).

for which these witnesses had little support—should contain certain provisions: (i) a tight definition of services to be permitted on separate systems; (ii) flexible route pricing for INTELSAT; (iii) direct access to INTELSAT; (iv) continuing oversight to insure that INTELSAT is not sustaining significant economic harm; and (v) enhancement of the facilities planning process of the FCC.

Ambassador Washburn, however, stated that even with these provisions, the Administration's policy on separate systems was particularly weak because it was based on the premise that INTELSAT would not be harmed economically so long as separate systems offered customized services not connected with the public-switched network. Ambassador Washburn stated that the safety net for INTELSAT "is made of cheesecloth."[108]

The House Energy and Commerce Subcommittee on Telecommunications also held hearings to discuss separate satellite systems. Chairman Fowler testified in favor of a policy permitting separate services. In addressing subcommittee concerns about leaky PBX's, Chairman Fowler noted that leaks on any major scale could be readily detected so that diversion should not be a significant problem. NTIA Administrator Markey also testified on this subject and indicated that growth in international traffic should alleviate any diversion problems that arose. Subcommittee members, notably Representative Swift, expressed their concern about INTELSAT's ability to price its services flexibly in order to meet the proposed new competition and expressed concern about the foreign policy implications of proceeding with the proposed new systems. Representative Swift also expressed his concern about the speed with which the FCC proceedings were advancing and indicated that he, among others, was nervous about proceeding too swiftly to open up international telecommunications systems in a way which could not be repaired, should it later prove necessary to do so.[109]

Chairman Fowler further assured the House Telecommunications Subcommittee that the FCC proceeding to implement the Administration's decision on separate systems would allow the public a fair opportunity to comment on the Administration's eventual decision. Representative Swift summarized his views about INTELSAT by stating that if it "isn't broken, it shouldn't be fixed." When Representative Swift questioned Chairman Fowler about the alarming speed of the FCC's proceeding, Chairman Fowler responded that "it's been two years since those applications were filed, and it'll be another year or eighteen months before any final authorizations. I don't think there is any rush."[110]

In mid-March, hearings were held by the House Appropriations Subcommittee to consider the FCC budget. The issue of separate international satellite

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[108]51 TELECOM. REP. 20 (March 11, 1985).

[109]*See* 51 TELECOM. REP. 24-25 (Apr. 8, 1985).

[110]*NTIA, State Officials Assure House Panel Reagan Administration Won't Slack on Promises to Prevent Harm to INTELSAT; Fowler Vows FCC Proceeding Will Allow Full Public Comment,* 51 TELECOM. REP. 24-25 (Apr. 8, 1985).

systems was raised by Representative Bob Carr (D.-Michigan). Representative Carr strongly criticized the FCC for not raising in its inquiry on separate systems the matter of excess capacity which would result from failure of North Atlantic traffic to meet FCC forecasts. He also expressed his opinion that the Rulemaking Proceeding should follow the FCC Notice of Inquiry. Chairman Fowler, however, defended the inquiry as comprehensive. He further stated that in his view competition was healthy and compatible with the role of INTELSAT.[111]

Throughout the period of these hearings, members of Congress also continued to express their views individually. Energy and Commerce Committee Chairman Dingell submitted a letter to the FCC Chairman suggesting that the FCC Notice of Inquiry and Proposed Rulemaking be clarified to indicate in detail exactly how the Presidential Determination would be implemented. The letter asked, "Has the Commission, in fact, adopted the broad Executive Branch recommendation as its proposed rule? If not, does the Commission intend to propose a rule setting forth its own policy formulation, and will the public be afforded an opportunity to comment on the resolution of important policy issues embodied in the Commission's proposal?"[112]

Also, in February, Senator Goldwater wrote to Chairman Fowler to encourage the FCC to accelerate its administrative decision-making on separate systems because of the uncertainty in the marketplace that might be caused by further delays. The Senator added that the issues involved had already "undergone unprecedented scrutiny."[113]

Chairman Wirth of the House Telecommunications Subcommittee voiced his concern over the FCC's Notice of Inquiry and Proposed Rulemaking. The Congressman characterized the Notice as "unclear" and stated that it ignored recommendations of the President and the Executive Branch and started *de novo*. He further stated that the FCC should neither be in the position of making foreign policy nor of interpreting what amounted to American treaty obligations. He stated, "Moreover, since it is the State Department that must coordinate the proposed alternative systems with INTELSAT, any excesses on the part of the FCC will not become U.S. policy." He added that, to the extent that the areas of responsibility between the State and Commerce Departments continued to cause problems, the Telecommunications Subcommittee would be forced to legislate an appropriate delineation.[114]

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[111]*See House Panel Hears of FCC Fee Project, Asks About International Satellite Competition* 51 TELECOM. REP. 25-26 (Apr. 8, 1985).

[112]51 TELECOM. REP. 24 (Feb. 25, 1985).

[113]*Id.*

[114]*See Wirth Says FCC Notices on Separate Systems 'Unclear,' Suggests 'De Novo' Review.* 51 TELECOM. REP. 21-22 (March 11, 1985).

Congress Moves Towards Legislation

As a result of these several events, the growing Congressional interest in the subject was translated into legislative action.

First, proposed legislation was adopted in the House of Representatives which would require the U.S. Secretary of State to take certain actions in connection with the establishment of separate systems. The full text of such action is set forth in the *Congressional Record* on May 9, 1985, commencing at page H3053. Two points in the legislation are particularly worth noting: (i) there was a requirement that the U.S. actively support an amendment to Article V(d) of the INTELSAT Agreement to give INTELSAT pricing flexibility to vary its charges on a per-route basis so as to be able to compete with separate systems; and (ii) before the U.S. could proceed to establish a separate system which had received an unfavorable finding from the Assembly of Parties under Article XIV(d), the President of the United States would have to determine that it was in the U.S. national interest nevertheless to proceed, and the Secretary of State would have to send a detailed report, including a plan to minimize adverse impacts on INTELSAT, after which there would be a 60-day waiting period during which the Congress would have an opportunity to take action.[115]

Second, the Appropriations Committee of the House of Representatives adopted report language to a 1985 supplemental appropriations bill which directed the FCC to take certain actions.[116] One noteworthy provision precluded the FCC from issuing a construction permit or final authorization for a separate system until the Article XIV(d) process had been completed.[117]

Neither of the above House actions constituted final legislative action. The proposed legislation, the State Department Authorization Bill which was adopted by the House of Representatives, had to be addressed by the Senate. The second item had to be acted upon by the full House of Representatives and addressed by the Senate. Once passed by the Senate, differences between the House and Senate versions of both items had to be worked out in House/Senate conferences.

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[115]State Department Authorization Bill (HR 2068) Section 123, CONG. REC. H3053 (May 9, 1985). *See* subparagraphs 123(c) Amendments of INTELSAT Agreement and 123(d) Congressional Consultation. *See also* INTELSAT document BG-63-40, June 5, 1985.

[116]*See* House of Representatives Report 99-142, at p. 27.

[117]*Supplemental Appropriations Bill, 1985, Report of the Committee on Appropriations, House of Representatives* 99th Cong., 1st Sess., Rept. 99-142, May 22, 1985, at 27.

FCC Proceeds with Docket 84-1299 on Separate Systems and Reaches a Decision

On April 1, 1985, numerous parties filed comments in the FCC separate systems docket 84-1299. A majority of the comments favored Commission authorization of alternative systems along the general lines recommended by the Executive Branch. A minority of the comments opposed separate systems, arguing that INTELSAT would have to raise rates to countries on thin traffic routes to compete with alternative systems. A number of parties also expressed concern about the enforceability of the Administration's interconnection restriction.

During proceedings at the FCC, 51 letters from 41 countries protesting the U.S. action were received at the State Department. Despite this, the State Department maintained that certain INTELSAT member nations had adopted a "wait and see" attitude.[118]

In June 1985, reply comments were filed in the Commission's separate systems proceeding. COMSAT stated emphatically that the White House determination on separate satellite systems was at most a starting point and that a series of explicitly detailed rules should be adopted in the event that separate systems were authorized. COMSAT also argued that all interested parties should have an opportunity to comment on the specific rules or guidelines adopted by the Commission.[119] According to a paper submitted to the Sixty-third meeting of INTELSAT's Board of Governors in June 1985,[120] INTELSAT Executive Organ staff analyzed the comments filed in the separate systems proceeding and found the comments which supported the separate systems to be "largely self-serving, factually inaccurate or logically flawed." The INTELSAT analysis stated that "perhaps the most compelling deficiency of the present FCC proceeding is its failure to suggest how proposed changes in the current system in which large international users support the public-switched networks and earth station systems" should be negotiated, either with the sovereigns directly participating in a new system, or with other sovereigns whose cost of supporting the INTELSAT system would be affected. In addition, INTELSAT noted that ninety letters concerning the separate satellite issue had been written to the Commission by Signatories.

Claiming that a "limited injection of satellite facilities competition into international telecommunications should bring to the world some of the dynamism that characterizes the U.S. domestic data processing/telecommunications sector," the FCC on July 25, 1985, authorized three of six pending applications for private international communications satellite systems, citing the Commu-

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[118]51 TELECOM. REP. 26 (April 8, 1985).

[119]Reply Comments of Communications Satellite Corporation before the FCC in CC Docket 84-1299, June 5, 1985.

[120]INTELSAT document BG-63-35, May 31, 1985.

nications Act of 1934 public interest standard.[121] The Commission stated that the U.S. public would be served by alternative systems that could provide "currently unavailable service, technological innovation and service development, improve network efficiencies, reduce user costs, create new business and trade opportunities and contribute to greater cultural exchange." The Commission also concluded that application of the Executive Branch service restrictions to separate systems would provide reasonable assurances that INTELSAT would not suffer significant economic harm. To enforce limitations protecting INTELSAT, the FCC[122] determined that:

> - all separate systems would be restricted to the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks, except for emergency restoration service;
> - the "no-interconnection" and the "sale or long-term lease" restrictions would apply to all levels of resellers and users of separate system facilities, as well as to separate system operators; and
> - licensees would be required to enforce the restrictions though contractual and other means, at risk of license loss or other appropriate sanctions, and resellers would be required to enforce these restrictions on their customers as well.

The FCC also established more detailed guidelines, consistent with the Presidential Determination, for the operation of separate satellite systems, including determinations that:

> - there was no need to establish a specific minimum unit of space segment capacity which a separate system may provide, so long as the capacity was provided on a sale or long-term lease basis;
> - the minimum lease period for a "long-term lease" of capacity would be one year;
> - separate system operators would be prohibited from operating as

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[121] *See*, FCC NEWS, July 25, 1985 "Commission Supports Presidential Determination that Alternative International Satellite Systems are in the National Interest (CC Docket 84-1299)." *See also* 50 TELECOM. REP. 5 (July 20, 1985). The Report and Order was not released until September 3, 1985, FCC 85-399.

[122] Although the item was adopted by the Commission at an open meeting on July 25th by a majority vote, Commissioners Henry Rivera and James Quello withheld their votes pending acceptable editorial revisions concerning enforcement of the service restrictions to be applied to the proposed systems. Attached to the order released on September 3 were separate statements issued by Commissioner Rivera and Commissioner Quello. Commissioner Rivera restated his concern that enforceability of the proposed restrictions is critical if significant economic harm to INTELSAT is to be avoided and stated that he is satisfied with the enforcement provisions which are now significantly revised and strengthened. Commissioner Quello similarly expressed concern about the adequacy of the restrictions, but expressed his willingness to concur in the decision because of the strengthened enforcement provisions.

> common carriers but they could provide space segment capacity to common carriers and enhanced service providers who could resell such capacity for communications services not interconnected with any public-switched message network;
> - there was no basis to establish a "sunset" date for the Executive Branch service restrictions; and
> - applicants could not begin construction until they had demonstrated certain financial qualifications by showing: 1) the estimated costs of proposed construction and launch and any other initial expenses for the proposed stations; 2) the estimated operating expenses for one year after launch; and 3) the applicant's current financial ability to meet the costs of construction and launch and operating expenses for one year after launch.

Because applicants would have to undergo the INTELSAT coordination process, the status of the application, pending this process, would be uncertain and the applicant would be unlikely to receive financial backing until this process was completed. A two-stage approach to determining financial qualifications was thus adopted. In *stage 1*, the FCC would issue a conditional construction permit if the applicant met specific minimal financial qualifications. The applicant would have to show: 1) estimated costs of expenses for one year after launch; 2) estimated operating sources of funding the system for one year—including identities of financiers and letters of financial interests. This conditional construction permit would *not* allow the applicant to begin construction but would set forth approved technical parameters for technical coordination with INTELSAT. (Para. 235) The FCC would issue an order permitting construction only after *stage 2* requirements were met. The applicant would have to show its current financial ability to meet the costs of construction and launch, along with operating expenses for one year after launch. This would include submitting: (1) a balance sheet verified by an affidavit which demonstrated applicant's financial ability for the most recent fiscal year, (2) documentation of any financial commitments reflected in the balance sheet, and (3) an exhibit demonstrating applicant's ability to meet *stage 2* requirements. Newly established entities having no balance sheet would have to submit an exhibit indicating estimated anticipated income plus other information requested by the FCC—established lines of credit, etc.

The Commission said that, consistent with the Executive Branch restrictions, it would not issue a license permitting any separate system applicant to begin operating its proposed system until it had been informed by the Department of State that the United States had fulfilled its INTELSAT Agreement obligations.[123]

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[123]Applicants must meet the financial requirements no later than 60 days after the FCC receives the State Department's letter stating that the U.S. has fulfilled its obligations under the INTELSAT charter and may proceed with final authorization. However, the order states that the FCC will permit otherwise qualified applicants to begin construction prior to receipt of the State Department's letter if the applicant can satisfy the second state requirements prior to that time. (¶ 235) Licenses permitting launch or

Authorizations would be conditioned upon one or more foreign entities having authorized use of the proposed system and having entered into consultation with the United States under Article XIV(d) of the INTELSAT Agreement. (Para. 36) This would be a precondition not to granting a conditional construction permit or construction permit, but, rather, only to issuing the final license permitting launch and operation. (Note that the order rejected International Relay Inc.'s proposal that the FCC require applicants to have operating agreements as a precondition for licensing. (Para. 128)) Licenses permitting launch or operation would not be issued until the Department of State informed the FCC that the U.S. had fulfilled its international obligations. (Para. 36) As a condition in the authorization orders, operators would be required to file with the FCC any operating agreements they entered into with foreign entities. The FCC would reconsider the authorization of systems entering agreements with satellite procurement restrictions. (Para. 215)

The FCC reached its own conclusions regarding restrictions to be applied to the proposed systems. As was the case with the Executive Branch determination, separate systems would be prohibited from interconnecting with public-switched networks. Message Telephone Service (MTS) is a switched service and separate systems could not connect with any MTS switched network, whether provided by AT&T or any non-dominant carrier or new entrant such as MCI, GTE Sprint, and SBS. Telex, TWX telegraph and teletext services are also switched, and interconnection with international relay carrier networks to access those services was banned as was interconnection with carrier switched networks providing facsimile or low/high speed switched data services and videoconferencing and associated audio. (Para. 114) These restrictions prohibiting interconnection were intended to be applied to communications which originated in a foreign country and terminated in the United States, as well as those communications which originated in the United States and terminated in a foreign country. Foreign entities were expected to enforce such restrictions.

In its order, the FCC addressed, among other provisions, the enforcement of these restrictions by requiring the following:

> - Separate system operators must place the "no interconnection" restriction in all lease agreements for space segment capacity and all sales contracts for purchase of transponders, (Para. 133).
> - All operating agreements with foreign authorities must contain language requiring both parties to take necessary measures to enforce the "no interconnection" restriction, (Para. 133).
> - Users interconnecting separate system facilities to a PBX or similar equipment must configure such equipment by either hardware design or software features to block on-demand connections with public-switched message networks. Each user also must file with the FCC,

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operation will not be issued until the State Department letter is received. Once either the condition permit or order permitting construction is issued, the applicant bears all risk and liabilities in commencing construction pending final issuance of launch authority and license to begin operation. (¶ 236).

prior to actual use of separate system facilities, a written sworn certification by a corporate official:

> (1) stating that it understands the "no-interconnection" restriction placed on all levels of use of separate system facilities and is aware of the sanctions for non-compliance; (2) giving assurances that it will comply with the restriction; (3) indicating that all concerned employees will be continually advised of the restrictions and that it will enforce strict compliance by its employees; (4) describing the technical measures to be employed to prevent "on-demand" interconnection with the public switched-message network; and (5) attesting that these technical measures will not be changed or overridden for any reason.

Users violating these provisions would be subject to criminal sanctions under Title 18 of the U.S. Code, (Para. 134).
- Users seeking to resell capacity on a common carrier basis must first obtain from the FCC authorizations under Section 214 of the Communications Act, which will be conditioned on compliance with the restrictions, and will require carrier tariffs to impose the restrictions on customer use of the facilities and services offered. Carrier violators will lose their Section 214 authority, and users violating tariff restrictions will be subject to loss of service, (Para. 134).
- Under the Communications Act, parties believing carriers are violating the restrictions may file complaints with the FCC under Section 208; complaints regarding non-carrier violations may be filed under Section 4(i) and 402.
- The FCC will also use civil and criminal remedies available under Title 5 of the Communications Act, including monetary fines and seizure of property for willing and knowing violators, (Para. 137).

The Commission granted conditional authorizations to International Satellite, Inc., PanAmerican Satellite Corporation and RCA American Communications, Inc. Based on a preliminary finding of failure to meet technical standards, the Commission deferred action on the applications of Orion Satellite Corporation and Cygnus Satellite Corporation, giving them 45 days to file documents addressing Commission concerns about their technical submissions.[124] The Commission indicated that Orion and Cygnus would be dismissed at that time if they failed to resolve these concerns.

Action on a sixth application, filed by FINANSAT,[125] was to be taken at a

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[124]The Orion application was granted on September 5, 1985. Memorandum Opinion Order and Authorization in the Matter of the Application of Orion Satellite Corporation. File No. CSS-83-002-P, 6871, released September 6, 1985.

[125]On May 17, 1985, Financial Satellite Corporation (FINANSAT) filed an application with the FCC for authorization to construct, launch and operate a new international satellite system. FINANSAT was the sixth such applicant to request such authorization. FINANSAT proposed to provide on a non-common carrier basis customized point-to-point data communications services using two in-orbit C-band satellites and one ground spare. FINANSAT requested an Atlantic orbital slot at 47

subsequent date.

Congress Enacts Legislation

The State Department Authorization Bill (H.R.2068) was approved by the U.S. Senate on July 31, 1985, and by the U.S. House of Representatives on August 1, 1985. It was signed into law by President Reagan on August 16, 1985, as Public Law No. 99-93. The Authorization Bill contained an amendment affecting INTELSAT which adopted the major provisions of the House legislation. In addition, the Bill recognized and endorsed the Presidential policy on limited international satellite systems apart from INTELSAT and stated:[126]

> Sec. 146.INTELSAT.
>
> (a) Policy.—The Congress declares that it is the policy of the United States—
>
> (1) as a party to the International Telecommunications Satellite Organization (hereafter in this section referred to as INTELSAT), to foster and support the global commercial communications satellite system owned and operated by INTELSAT;
>
> (2) to make available to consumers a variety of communications satellite services utilizing the space segment facilities of INTELSAT and any additional such facilities which are found to be in the national interest and which—
>
> (A) are technically compatible with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment, and
>
> (B) avoid significant economic harm to the global system of INTELSAT; and
>
> (3) to authorize use and operation of any additional space segment facilities only if the obligations of the United States under article XIV(d) of the INTELSAT Agreement have been met.

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degrees West Longitude (W.L.) and one Pacific orbital slot at 178 degrees W.L. These orbital locations would allow full interconnectivity between the regions covered by each satellite, from a central point in the United States. The Atlantic satellite would provide coverage to the continental United States, Canada, Western Europe, and the southast portion of South America, while the Pacific satellite would provide coverage to the Far East, Australia, Mexico and the western portion of the United States. Each satellite would carry 24 transponders which would be offered for sale or long-term lease to selected customers such as large financial institutions. On June 6, 1985, the FCC ruled that until further notice no further applications for separate satellite systems would be accepted. Memorandum Opinion and Order in the Matter of Processing of Pending Applications for Space Stations to Provide International Communications Service (FCC 85-296) (Released June 6, 1985).

[126]Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, §146, 99 Stat. 405, 425-26 (1985).

(b) Preconditions for INTELSAT Consultation.—Before consultation with INTELSAT for purposes of coordination of any separate international telecommunications satellite system under article XIV(d) of the INTELSAT Agreement, the Secretary of State shall—

(1) in coordination with the Secretary of Commerce, ensure that any proposed separate international satellite telecommunications system comply with the Executive Branch conditions established pursuant to the Presidential Determination No. 85-2; and

(2) ensure that one or more foreign authorities have authorized the use of such system consistent with such conditions.

(c) Amendment of INTELSAT Agreement.—

(1) The Secretary of State shall consult with the United States signatory to INTELSAT and the Secretary of Commerce regarding the appropriate scope and character of a modification to article V(d) of the INTELSAT Agreement which would permit INTELSAT to establish cost-based rates for individual traffic routes, as exceptional circumstances warrant, paying particular attention to the need for avoiding significant economic harm to the global system of INTELSAT as well as United States national and foreign policy interests.

(2)(A) To ensure that rates established by INTELSAT for such routes are cost-based, the Secretary of State, in consultation with the Secretary of Commerce and the Chairman of the Federal Communications Commission, shall instruct the United States signatory to INTELSAT to ensure that sufficient documentation, including documentation regarding revenues and costs, is provided by INTELSAT so as to verify that such rates are in fact cost-based.

(B) To the maximum extent possible, such documentation will be made available to interested parties on a timely basis.

(3) Pursuant to the consultation under paragraph (1) and taking the steps prescribed in paragraph (2) to provide documentation, the United States shall support an appropriate modification to article V(d) of the INTELSAT Agreement to accomplish the purpose described in paragraph (1).

(d) Congressional Consultation.—In the event that, after United States consultation with INTELSAT for the purposes of coordination under article XIV(d) of the INTELSAT Agreement for the establishment of a separate international telecommunications satellite system, and the President determines to pursue the establishment of a separate system, the Secretary of State, after consultation with the Secretary of Commerce, shall submit to the Congress a detailed report which shall set forth—

(1) the foreign policy reasons for the President's determination, and

(2) a plan for minimizing any negative effects of the President's action on INTELSAT and on United States foreign policy interests.

(e) Notification to Federal Communications Commission.—In the

event the Secretary of State submits a report under subsection (d), the Secretary, 60 calendar days after the receipt by the Congress of such report, shall notify the Federal Communications Commission as to whether the United States obligations under article XIV(d) of the INTELSAT Agreement have been met.

(f) Implementation.—In implementing the provisions of this section, the Secretary of State shall act in accordance with Executive Order 12046.

(g) Definition.—For purposes of this section, the term "separate international telecommunications satellite system" or "separate system" means a system of one or more telecommunications satellites separate from the INTELSAT space segment which is established to provide international telecommunications services between points within the United States and points outside the United States, except that such term shall not include any satellite or system of satellites established—

(1) primarily for domestic telecommunications purposes and which incidentally provides services on an ancillary basis to points outside the jurisdiction of the United States but within the western hemisphere, or

(2) solely for unique governmental purposes.

The 1985 Supplemental Appropriations Bill (H.R.2577) was passed by the U.S. House of Representatives on July 31, 1985, and by the Senate on August 1. President Reagan signed it into law on August 15, 1985, as Public Law No. 99-88. Of course, to the extent that the Appropriations Bill language and report are inconsistent with the above-described State Department Authorization Bill (H.R. 2068), then the Authorization Bill, which has the full status of law, governs. The Supplemental Appropriations Bill for the fiscal year ending September 30, 1985, includes a Conference Report and a Statement of Managers of H.R. 2577. These Statements resulted from an effort by the House and Senate Conferees to reconcile differences between the Report language approved by the House and the Senate. It must be noted that the Senate Report language was generally less definitive than the House and contradicted the House version by instructing the FCC to issue construction permits immediately.

The Conference Report and Statement of Managers is as follows:[127]

International Telecommunications
Satellite Service

The House and Senate reports were not in agreement regarding the issue of international telecommunications satellite service. Since both bodies acted, but prior to the completion of the Conference, the FCC acted on the pending applications. (Three Commissioners voted

[127]Conference Report including the Statement of Managers on the Bill H.R. 2577 making supplemental appropriations for the Fiscal Year ending September 30, 1985, H.R. REP. No. 99-236, 99th Cong., 1st Sess. 16 (July 2, 1985).

in favor, and two withheld their vote.) Some members of Congress are disturbed by this. The conferees strongly believe that the following agreed-upon language provides essential guidance to the Commission and the Executive Branch. It should be followed.

Regarding the provision of international telecommunications satellite service, the conferees strongly believe that the Executive Branch or the FCC, in any action, shall endeavor to avoid significant economic harm to INTELSAT.

In addition, with regard to this issue, the conferees agree on the following:

1. Presidential Determination No. 85-2 properly balances the U.S. commitment to INTELSAT with our commitment to develop a competitive international telecommunications marketplace. In addition, the Executive Branch and the FCC shall fully implement and enforce the criteria in that Presidential Determination. Moreover, the FCC shall not award construction permits without adopting appropriate measures and guidelines to enforce the Presidential Determination.

2. The FCC, in considering applications for alternative international satellite systems, shall be neutral and shall not show a predilection or bias to any application.

3. The U.S. should support the continued provision of telephone service by INTELSAT to developing countries at affordable rates.

4. The U.S. should support INTELSAT's ability to compete fully and fairly in all new international telecommunications services, including supporting INTELSAT's ability to price competitively and fairly on services not provided before August 1, 1985.

More specifically, if the President has not found the modification to Article V(d) of the INTELSAT Agreement to be not in the national interest, the U.S. shall support such modification so that INTELSAT may price competitively and fairly, provided that INTELSAT has adopted measures to ensure prices are cost-based and not predatory, including the release of information on revenues, costs, and allocation of such costs.

5. In the event the Secretary of State decides to proceed after an unfavorable consultation pursuant to the INTELSAT Agreement or in the event the President decides to alter the Presidential Determination, a tentative decision along with the rationale for such decision shall be sent to the Congress and a final decision shall not be made until the Congress has had 45 calendar days to review the tentative decision and the accompanying rationale.

Representative Neal Smith (D.-Iowa), Chairman of the Appropriations Subcommittee on State, Commerce, the Judiciary and Related Agencies, and cosponsor of the Conference Report and Statement of Managers, during the House floor consideration of the Conference Report, made the following statement:[128]

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[128]Statement of Chairman Smith during House floor consideration of the Conference Report on Bill H.R. 2577 making supplemental appropriations for the fiscal year ending September 30, 1985, House Cong. Rec. pp. H6906-6907 (July 31, 1985).

I want to comment on a provision in the Statement of the Managers on INTELSAT. The INTELSAT language represents a compromise in the House and Senate reports dealing with that matter. In November of last year, the President determined that the authorization of telecommunications systems separate from INTELSAT was in the national interest so long as our legal obligations were met and, in particular, so long as the systems were sufficiently limited in their operation that they could not cause significant economic harm to INTELSAT's global telecommunications network.

Language was inserted in the Appropriations Committee report on the House side in order to emphasize the Committee's strong concern that the FCC faithfully and effectively enforce the safeguards for INTELSAT specified by the President, and in the Conference Report, there is language to that effect.

Now, last week, just prior to the completion of the Conference Committee work on this issue, the FCC acted to conditionally grant three of the six applications to create private, separate satellite systems. Two Commissioners withheld their votes out of concern that the majority had failed to impose safeguards sufficient to carry out the President's injunction against causing significant economic harm to INTELSAT. The basic purpose of the language in the Statement of the Managers is once again to underscore the fact that the conferees from both the House and Senate strongly believe that "the action by the FCC as well as the Executive Branch, relating to the international telecommunications satellite issue must adhere to the United States' obligation to 'avoid significant economic harm to INTELSAT' ".

As explained in the Executive Branch White Paper released earlier this year to support the President's decision to recommend authorization of separate systems, only with safeguards for preserving INTELSAT, "The United States placed a leading role in the creation of INTELSAT in order to further political, economic, and security objectives (and it) became a centerpiece of overall U.S. space and foreign policy programs."

In order to preclude "unrestricted entry" by private satellite systems, which "could ultimately undermine the economic integrity of this important international enterprise," the White Paper explained, the President specified that the new private systems must be restricted to providing private "customized" services, as distinguished from general, public, "switched" general telecomunications service. "Customized", the White Paper went on to specify, meant "intracorparate networks and television transmission."

However, although the FCC has not yet made clear the precise terms of its decision, under the order that two Commissioners were not prepared to accept last week, it appears it may be permissible to link combinations of corporate networks or to combine numerous corporations in a single network. Such a provision in the President's safeguards would threaten to divert from INTELSAT major portions of the voice and data revenues between highly developed countries; these revenues are essential for the support of INTELSAT's global mission.

In short, under such a provision, the Commission's decision—still

preliminary and tentative—would permit the new systems to engage in skimming.

The Statement of Managers on this bill underscore Congress' concern with any decision that would permit such evasion of the President's purpose and expect that the U.S. support, in practice as well as in its formal statements, support "the continued provision of telephone service [as well as other services] by INTELSAT to developing countries at affordable rates."

Similarly, the managers emphasized, that the United States must support measures necessary to enable INTELSAT to compete "fully and fairly," especially on new telecommunications services, and in regard to any services—old or new—for which competitive challenges to its provision of services appear on this point, the managers' language refers specifically to the importance of modifying Article V(d) of INTELSAT's charter, to enable it to price on a route-by-route basis where necessary to meet competition, as it has never had to do in the past.

I do want to clarify one thing about this latter point. In referring to the need for INTELSAT to have "adopted measures to ensure prices are cost-based and not predatory," the managers of course did not imply any view that INTELSAT's prices are currently not cost-based and fair. As the Executive Branch White Paper observed on this subject, "[W]e believe that concerns about possible predatory pricing (by INTELSAT) are premature. The economic and legal literature provides very little evidence that predatory pricing has ever occurred."

Similarly, the language should not be misconstrued to support any conclusion that any new measures are needed, to ensure that INTELSAT's prices are cost-based.

And in the same vein, in referring to the "release" of information showing the cost basis of INTELSAT's rates, the report does not contemplate any departure from current methods for obtaining such information. The managers are aware that COMSAT, the U.S. signatory to INTELSAT promptly makes available to the FCC all information relating to INTELSAT operations, including services, charges, and costs, and that dissemination within the United States of such information is governed by a memorandum of understanding between the Departments of State and Commerce, the FCC, and COMSAT itself.

In addition, the managers' statement underscores the Congress' recognition of the absolute and fundamental necessity for the safeguards in the President's determination of last November in assuring the avoidance of significant economic harm to INTELSAT. As stated by Under Secretary of State William Schneider in testimony given in April of this year before the Subcommittee on Telecommunications of the Committee on Energy and Commerce, in which he rejected suggestions that the President's determination might only be a short-term protection.

This anxiety has been raised. But the intention is not to allow competitors at any time in the future to go into the public switched networks, but to instead focus on new applications.

The Statement of Managers provides that, should this Executive

> Branch "intention" ever be changed, "a tentative decision along with the rationale for such decision shall be sent to the Congress and a final decision shall not be made until the Congress has had 45 days to review the tentative decision and the accompanying rationale."
>
> Finally, the statement provides in the event there is an unfavorable coordination pursuant to the INTELSAT agreement and the Secretary of State decides to proceed that the Secretary shall provide the Congress with a report outlining the rationale for his decision in order to provide the Congress with a reasonable opportunity to decide whether to allow his recommendation to be implemented.
>
> The Statement of Managers outlines a policy of protecting INTELSAT in its present mission while assuring that any new service not now performed by INTELSAT will be subject to competition and that procedures will not be followed and decisions will not be made which exclude a full opportunity for any applicant, including INTELSAT to bid for such service.

On the other side of the Congress, Senator Hollings made the following statement:[129]

> MR. HOLLINGS. Mr. President, I had no intention of offering a statement on the report language the conferees agreed upon in regard to international telecommunications satellite service, since I believed the language was clear on its face. I still believe the language is clear, however, the House Manager inserted a statement in yesterday's House debate that tries to reinterpret this language. This statement of the House Manager obviously reflects his opinions alone and not those agreed upon in the conference. The various Executive Branch and independent agencies directed to act in the report language shall follow the plain meaning of that language.
>
> More specifically, let me make the following points in response to the House Manager's statement:
>
> First. The managers reached no conclusion that the decision of the FCC last week did not fully enforce the conditions in Presidential Determination 85-2.
>
> Second. The managers did not conclude that INTELSAT does not today have the ability to price flexibly.
>
> Third. The managers only agreed to "support INTELSAT's ability to compete fully and fairly in all new international telecommunications satellite services." The managers did not conclude, as the House Manager asserts, that this support extends to "any service—old or new—for which competitive challenges to its-INTELSAT's—provision of services appear."
>
> Fourth. In conditioning the support of the United States to a modification of article 5(d) of the INTELSAT Agreement, the managers agreed that INTELSAT had to have in place "measures to ensure

[129]Statement of Senator Hollings during Senate floor consideration of Bill H.R. 2577 making supplemental appropriations, Sen. Cong. Rec. pp. S10634-10635 (August 1, 1985).

> prices are cost-based and not predatory, including the release of information on revenues, costs, and the allocation of costs." The managers in no way agreed that INTELSAT already had those measures in place. In fact, if we believed that INTELSAT already had such measures in place, why did we even refer to a INTELSAT having to adopt such measures and release such information? It is clear that the managers believed just the contrary to the House manager's statement. INTELSAT does not now have such measures in place. The type of information INTELSAT releases is not sufficient for the United States to determine that prices are not predatory. The President and the executive branch are to make sure these measures are adopted prior to any support for a modification to Article V(d).
>
> Fifth. The managers believe the current Presidential Determination is properly balanced. There was no determination by the manages that the conditions in this determination are so "absolute and fundamental" that they can never be altered. What the managers agreed to is that prior to any change the President must submit the tentative decision to Congress for 45 days review.
>
> As I stated at the outset, the report language is clear on its face, and the comments of the House Manager are his alone.

The Statement of Managers most notably urged the U.S. Executive Branch or the FCC, in any action, to endeavor to avoid significant economic harm to INTELSAT. It also stated that the criteria in the Presidential Determination should be fully implemented and enforced. Further, it stated that the FCC could not award construction permits to the authorized separate systems applicants without adopting appropriate measures and guidelines to enforce the Presidential Determination. However, once construction permits were issued, no further requirements need be met before actual construction began.

Conclusion

Undoubtedly, even observers from a distance would view with fascination the events chronicled in this article as part of the formulation of national telecommunications and foreign policy. These events are made even more interesting by reason of the fact that, in the pursuit of deregulatory and competitive policies, the Government of the United States is reversing its long-held views with respect to the role and place of INTELSAT in the international scene. The processes and procedures which have led to the conclusions described above are themselves most interesting. One can see the division of authority and responsibility in the field of telecommunications in the structure of the U.S. Government most dramatically in this vignette. Not only is there no focal point in the Executive Branch of U.S. Government for policy formulation in telecommunications—as there is in most other governments among the family of nations—but there is a seemingly independent regulatory agency that is called upon to make a wide range of judgments, including those with sensitive foreign relations implications. One can see the tension between those committed to deregulatory objectives and those concerned with foreign relations and the consequences of tampering with a successful international institution such

as INTELSAT, which has reflected so favorably on U.S. foreign policy leadership since 1964. These differing views have been reflected primarily in Congress and in the actions of the Congress; surprisingly, there has been less of a foreign relations concern to be found among such agencies as the Department of State, the Department of Commerce, and the FCC.

At this writing, the final chapters have not been written on this subject. None of the various applicants has yet announced that it has a foreign correspondent. Although the FCC did not respect this traditional requirement before conditionally granting certain licenses, final FCC authorization for the separate systems to launch and operate would require one or more foreign authorities to authorize use of each system and enter into consultation procedures under Article XIV(d). Article XIV(d) proceedings cannot begin under the INTELSAT Agreement until two Parties commence the process.

In all likelihood, the separate systems applicants are also in the process of endeavoring to obtain appropriate financial support. As indicated earlier, the applicants will have to satisfy FCC requirements to demonstrate financial capabilities. While these may not themselves be onerous, obtaining adequate financing may not be easy. Satellite communications is still far from a risk-free activity. It can be expected that potential sources of financing will require that potential system operators obtain, at a minimum, launch and initial operating insurance. Prior to recent failures, premiums were running at rates in excess of 20%; with recent claims totalling over $230 million in September 1985 alone, it becomes very doubtful if insurance can be obtained, leaving organizations to self-insure.[130]

While the combined actions of the Congress and the President, following the FCC decision, appear to constitute efforts at balancing the introduction of possible separate systems with the protection of INTELSAT, the reaction of INTELSAT members has yet to be heard. The INTELSAT Governments (Parties) and telecommunications entities (Signatories) have steadfastly opposed any change in the policy embodied in the INTELSAT Agreements which provides for the establishment and operation of a single global communications satellite system. These member Governments and telecommunications authorities have expressed both outright opposition to the authorization of separate international communications satellite systems apart from INTELSAT, and serious reservations about the change in U.S. policy reflected in the November

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[130]*See* Dye, *Insurance Premiums Likely to Soar, Satellite Failures Stagger Communications Industry*, Los Angeles Times, Sept. 17, 1985, p. 1. The article refers to the $149 million in insurance claims as a result of satellites lost due to the destruction on September 11, 1985 of an Ariane launch vehicle with an American domestic satellite and a Eutelsat satellite aboard and the announcement on September 16, 1985 by Hughes Aircraft Co. of the total loss of the Eutelsat satellite as a functioning satellite and insurance claims of some $85 million. The article quotes James Barnett, President of International Technology Underwriters, and a long-time industry expert as saying (p. 21) ". . .the events of the past few days will probably force many of the underwriters out of the business" since $500 million more than collected in premiums has been paid since 1968.

28, 1984 Presidential Determination. They have communicated these reservations both directly to appropriate agencies of the United States Government and through the passage of unanimous resolutions by the Assembly of Parties and the Meeting of Signatories. It is to be expected that these Parties and Signatories will continue to state their views and concerns regarding the impact on INTELSAT of potential separate systems in whatever manner they deem appropriate. Undoubtedly, the question of United States policy will be addressed at the Tenth Meeting of the INTELSAT Assembly of Parties which convenes in Washington on October 7, 1985. Amendment of Article V(d) of the Agreement is also before the Assembly, having been proposed by three nations from the developing world. In addition, the question of developing adequate criteria and procedures under Article XIV(d) will be considered by the Assembly, with proposals from two developing countries along with, in all likelihood, some materials to be submitted by the Board of Governors.

Moreover, the internal U.S. processes have yet to be exhausted with respect to the FCC decision and the Executive Branch implementation of Congressional direction. The latter would appear to be a straightforward proposition, with the Department of State indicating its views with respect to the possible amendment of Article V(d), and at the appropriate time initiating with another Party an Article XIV(d) consultation with the INTELSAT Assembly.

With respect to the former, i.e., petitions for reconsideration of or appeals of the FCC Order, it is too soon and too complex a matter to make any predictions. It should be noted, however, that COMSAT has indicated, in a press release commenting on the July 25 FCC action, that the "Commission actions raise questions of procedure and due process but, more fundamentally, that the Commission may have exceeded its authority under existing legislation by granting interim construction permits without adequately defining and implementing the President's policy determination." In addition, International Relay, Inc. (IRI) has raised some fundamental questions in its reply comments filed at the FCC in the separate satellite systems proceeding. It argued that the FCC lacks jurisdiction under either the Communications Act or the Satellite Act to authorize and license the establishment and operation of separate satellite systems. Accordingly, it stated that, should the FCC conclude that such systems are in the public interest, the proper FCC action would be to request Congressional authorization for such licensing, and hold the pending applications in abeyance in the meantime. Of course, as noted earlier, this was not the course followed by the FCC. IRI also refuted the position of other comments that the President and the FCC have authority to authorize such systems. It stated that, in enacting the Satellite Act, "Congress established a comprehensive plan for U.S. participation in international satellite communications systems and ousted the FCC from any pre-existing independent role in authorizing international satellite systems." Furthermore, IRI stated that "the power given to the President to find that alternative systems are required to serve 'unique governmental needs' or as 'otherwise. . .in the national interest' would not permit authorization of the systems now being proposed." IRI pointed out that the legislative history of the Act makes it clear that "unique governmental

needs" referred to reconnaissance satellites and national security interests, and "otherwise required in the national security interest" applied to governmental uses of a non-sensitive nature, such as meteorological services. Furthermore, IRI stated that the legislative history plainly shows that new satellites established to meet these special purposes would be *government-owned* satellites. Thus, IRI strenuously argued that neither the FCC nor the President has authority to authorize privately-owned international satellite systems to provide service to private users. IRI concluded that the FCC's proposal to license separate satellite systems is flagrantly at odds with the Congressional plan.[131] IRI's legal and legislative analysis was endorsed by Ambassador Washburn in comments filed in Docket 84-1299 on July 11, 1985.[132] It remains to be seen whether these challenges to FCC jurisdiction to decide these matters or to the procedures followed by the FCC are pursued further.

As noted in their article, Professors Cowhey and Aronson foresee other remaining issues.[133]

> In the aftermath of these decisions, aficionados of regulatory policy should watch for several other benchmark policy choices. What rules will govern pricing and access to INTELSAT? How vigorously will the United States support entry by American satellite carriers into other countries? What will these proceedings imply for entry by foreign satellite systems into those countries? Will the United States eventually decide to grant U.S. entry to new foreign common carriers—say, a French satellite system—and if so will it demand strict reciprocity for American carriers? How will new transoceanic telecommunications cables be coordinated with the international satellite system? How much supervision will the FCC exercise over the pricing agreements reached between American carriers and foreign PTTs?

Thus, certain aspects of the issues and events chronicled in this article have yet to be resolved definitively.

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[131]Reply Comments of International Relay, Inc. in CC Docket No. 84-1299, Memorandum Attachment, p. 5 (June 5, 1985).

[132]Additional Comments of Abbott Washburn in CC Docket No. 84-1299, (July 11, 1985).

[133]*See* Cowhey & Aronson, *supra* n. 28, at 35.