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COMMUNICATIONS SATELLITE COMPETITION AND PRIVATIZATION ACT OF 1998

APRIL 27, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1872]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 1872) to amend the Communications Satellite Act of 1962 to promote competition and privatization in satellite communications, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

59–006

AMENDMENT

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Communications Satellite Competition and Privatization Act of 1998".

SEC. 2. PURPOSE.

It is the purpose of this Act to promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment by fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat.

SEC. 3. REVISION OF COMMUNICATIONS SATELLITE ACT OF 1962.

The Communications Satellite Act of 1962 (47 U.S.C. 101) is amended by adding at the end the following new title:

"TITLE VI—COMMUNICATIONS COMPETITION AND PRIVATIZATION

"Subtitle A—Actions To Ensure Procompetitive Privatization

"SEC. 601. FEDERAL COMMUNICATIONS COMMISSION LICENSING.

"(a) LICENSING FOR SEPARATED ENTITIES.—

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

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

"(b) LICENSING FOR INTELSAT, INMARSAT, AND SUCCESSOR ENTITIES.—

"(1) COMPETITION TEST.—The Commission shall substantially limit, deny, or revoke the authority for any entity subject to United States jurisdiction to use space segment owned, leased, or operated by INTELSAT or Inmarsat or any successor entities to provide non-core services to, from, or within the United States, unless the Commission determines—

"(A) after January 1, 2002, in the case of INTELSAT and its successor entities, that INTELSAT and any successor entities have been privatized in a manner that will not harm competition in the telecommunications markets of the United States; or

"(B) after January 1, 2001, in the case of Inmarsat and its successor entities, that Inmarsat and any successor entities have been privatized in a manner that will not harm competition in the telecommunications markets of the United States.

"(2) CRITERIA FOR COMPETITION TEST.—In making the determination required by paragraph (1), the Commission shall use the licensing criteria in sections 621, 622, and 624, and shall not make such a determination unless the Commission determines that such privatization is consistent with such criteria.

"(3) CLARIFICATION: COMPETITIVE SAFEGUARDS.—In making its licensing decisions under this subsection, the Commission shall consider whether users of non-core services provided by INTELSAT or Inmarsat or successor or separated entities are able to obtain non-core services from providers offering services other than through INTELSAT or Inmarsat or successor or separated entities, at competitive rates, terms, or conditions. Such consideration shall also include whether such licensing decisions would require users to replace equipment at substantial costs prior to the termination of its design life. In making its licensing decisions, the Commission shall also consider whether competitive alternatives in individual markets do not exist because they have been foreclosed due to anticompetitive actions undertaken by or resulting from the INTELSAT or Inmarsat systems. Such licensing decisions shall be made in a manner which facilitates achieving the purposes and goals in this title and shall be subject to notice and comment.

"(c) ADDITIONAL CONSIDERATIONS IN DETERMINATIONS.—In making its determinations and licensing decisions under subsections (a) and (b), the Commission shall take into consideration the United States obligations and commitments for satellite services under the Fourth Protocol to the General Agreement on Trade in Services.

"(d) INDEPENDENT FACILITIES COMPETITION.—Nothing in this section shall be construed as precluding COMSAT from investing in or owning satellites or other facilities independent from INTELSAT and Inmarsat, and successor or separated entities, or from providing services through reselling capacity over the facilities of satellite systems independent from INTELSAT and Inmarsat, and successor or separated entities. This subsection shall not be construed as restricting the types of contracts which can be executed or services which may be provided by COMSAT over the independent satellites or facilities described in this subsection.

"SEC. 602. INTELSAT OR INMARSAT ORBITAL LOCATIONS.

"(a) REQUIRED ACTIONS.—Unless, in a proceeding under section 601(b), the Commission determines that INTELSAT or Inmarsat have been privatized in a manner that will not harm competition, then—

"(1) the President shall oppose, and the Commission shall not assist, any registration for new orbital locations for INTELSAT or Inmarsat—

"(A) with respect to INTELSAT, after January 1, 2002, and

"(B) with respect to Inmarsat, after January 1, 2001, and

"(2) the President and Commission shall, consistent with the deadlines in paragraph (1), take all other necessary measures to preclude procurement, registration, development, or use of new satellites which would provide non-core services.

"(b) EXCEPTION.—

"(1) REPLACEMENT AND PREVIOUSLY CONTRACTED SATELLITES.—Subsection (a) shall not apply to—

"(A) orbital locations for replacement satellites (as described in section 622(2)(B)), and

"(B) orbital locations for satellites that are contracted for as of March 25, 1998, if such satellites do not provide additional services.

"(2) LIMITATION ON EXCEPTION.—Paragraph (1) is available only with respect to satellites designed to provide services solely in the C and Ku, for INTELSAT, and L, for Inmarsat, bands.

"SEC. 603. ADDITIONAL SERVICES AUTHORIZED.

"(a) SERVICES AUTHORIZED DURING CONTINUED PROGRESS.—

"(1) CONTINUED AUTHORIZATION.—The Commission may issue an authorization, license, or permit to, or renew the license or permit of, any provider of services using INTELSAT or Inmarsat space segment, or authorize the use of such space segment, for additional services (including additional applications of existing services) or additional areas of business, subject to the requirements of this section.

"(2) ADDITIONAL SERVICES PERMITTED UNDER NEW CONTRACTS UNLESS PROGRESS FAILS.—If the Commission makes a finding under subsection (b) that conditions required by such subsection have not been attained, the Commission may not, pursuant to paragraph (1), permit such additional services to be provided directly or indirectly under new contracts for the use of INTELSAT or Inmarsat space segment, unless and until the Commission subsequently makes a finding under such subsection that such conditions have been attained.

"(3) PREVENTION OF EVASION.—The Commission shall, by rule, prescribe means reasonably designed to prevent evasions of the limitations contained in paragraph (2) by customers who did not use specific additional services as of

the date of the Commission's most recent finding under subsection (b) that the conditions of such subsection have not been obtained.

"(b) REQUIREMENTS FOR ANNUAL FINDINGS.—

"(1) GENERAL REQUIREMENTS.—The findings required under this subsection shall be made, after notice and comment, on or before January 1 of 1999, 2000, 2001, and 2002. The Commission shall find that the conditions required by this subsection have been attained only if the Commission finds that—

"(A) substantial and material progress has been made during the preceding period at a rate and manner that is probable to result in achieving pro-competitive privatizations in accordance with the requirements of this title; and

"(B) neither INTELSAT nor Inmarsat are hindering competitors' or potential competitors' access to the satellite services marketplace.

"(2) FIRST FINDING.—In making the finding required to be made on or before January 1, 1999, the Commission shall not find that the conditions required by this subsection have been attained unless the Commission finds that—

"(A) COMSAT has submitted to the INTELSAT Board of Governors a resolution calling for the pro-competitive privatization of INTELSAT in accordance with the requirements of this title; and

"(B) the United States has submitted such resolution at the first INTELSAT Assembly of Parties meeting that takes place after such date of enactment.

"(3) SECOND FINDING.—In making the finding required to be made on or before January 1, 2000, the Commission shall not find that the conditions required by this subsection have been attained unless the INTELSAT Assembly of Parties has created a working party to consider and make recommendations for the pro-competitive privatization of INTELSAT consistent with such resolution.

"(4) THIRD FINDING.—In making the finding required to be made on or before January 1, 2001, the Commission shall not find that the conditions required by this subsection have been attained unless the INTELSAT Assembly of Parties has approved a recommendation for the pro-competitive privatization of INTELSAT in accordance with the requirements of this title.

"(5) FOURTH FINDING.—In making the finding required to be made on or before January 1, 2002, the Commission shall not find that the conditions required by this subsection have been attained unless the pro-competitive privatization of INTELSAT in accordance with the requirements of this title has been achieved by such date.

"(6) CRITERIA FOR EVALUATION OF HINDERING ACCESS.—The Commission shall not make a determination under paragraph (1)(B) unless the Commission determines that INTELSAT and Inmarsat are not in any way impairing, delaying, or denying access to national markets or orbital locations.

"(c) EXCEPTION FOR SERVICES UNDER EXISTING CONTRACTS IF PROGRESS NOT MADE.—This section shall not preclude INTELSAT or Inmarsat or any signatory thereof from continuing to provide additional services under an agreement with any third party entered into prior to any finding under subsection (b) that the conditions of such subsection have not been attained.

"Subtitle B—Federal Communications Commission Licensing Criteria: Privatization Criteria

"SEC. 621. GENERAL CRITERIA TO ENSURE A PRO-COMPETITIVE PRIVATIZATION OF INTELSAT AND INMARSAT.

"The President and the Commission shall secure a pro-competitive privatization of INTELSAT and Inmarsat that meets the criteria set forth in this section and sections 622 through 624. In securing such privatizations, the following criteria shall be applied as licensing criteria for purposes of subtitle A:

"(1) DATES FOR PRIVATIZATION.—Privatization shall be obtained in accordance with the criteria of this title of—

"(A) INTELSAT as soon as practicable, but no later than January 1, 2002, and

"(B) Inmarsat as soon as practicable, but no later than January 1, 2001.

"(2) INDEPENDENCE.—The successor entities and separated entities of INTELSAT and Inmarsat resulting from the privatization obtained pursuant to paragraph (1) shall—

"(A) be entities that are national corporations; and

"(B) have ownership and management that is independent of—

"(i) any signatories or former signatories that control access to national telecommunications markets; and

"(ii) any intergovernmental organization remaining after the privatization.

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

"(A) privileged or immune treatment by national governments;

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

"(C) preferential access to orbital locations, including any access to orbital locations that is not subject to the legal or regulatory processes of a national government that applies due diligence requirements intended to prevent the warehousing of orbital locations.

"(4) PREVENTION OF EXPANSION DURING TRANSITION.—During the transition period prior to full privatization, INTELSAT and Inmarsat shall be precluded from expanding into additional services (including additional applications of existing services) or additional areas of business.

"(5) CONVERSION TO STOCK CORPORATIONS.—Any successor entity or separated entity created out of INTELSAT or Inmarsat shall be a national corporation established through the execution of an initial public offering as follows:

"(A) Any successor entities and separated entities shall be incorporated as private corporations subject to the laws of the nation in which incorporated.

"(B) An initial public offering of securities of any successor entity or separated entity shall be conducted no later than—

"(i) January 1, 2001, for the successor entities of INTELSAT; and

"(ii) January 1, 2000, for the successor entities of Inmarsat.

"(C) The shares of any successor entities and separated entities shall be listed for trading on one or more major stock exchanges with transparent and effective securities regulation.

"(D) A majority of the board of directors of any successor entity or separated entity shall not be subject to selection or appointment by, or otherwise serve as representatives of—

"(i) any signatory or former signatory that controls access to national telecommunications markets; or

"(ii) any intergovernmental organization remaining after the privatization.

"(E) Any transactions or other relationships between or among any successor entity, separated entity, INTELSAT, or Inmarsat shall be conducted on an arm's length basis.

"(6) REGULATORY TREATMENT.—Any successor entity or separated entity shall apply through the appropriate national licensing authorities for international frequency assignments and associated orbital registrations for all satellites.

"(7) COMPETITION POLICIES IN DOMICILIARY COUNTRY.—Any successor entity or separated entity shall be incorporated and headquartered in a nation or nations that—

"(A) have effective laws and regulations that secure competition in telecommunications services;

"(B) are signatories of the World Trade Organization Basic Telecommunications Services Agreement; and

"(C) have a schedule of commitments in such Agreement that includes non-discriminatory market access to their satellite markets.

"(8) RETURN OF UNUSED ORBITAL LOCATIONS.—INTELSAT, Inmarsat, and any successor entities and separated entities shall not be permitted to warehouse any orbital location that—

"(A) as of March 25, 1998, did not contain a satellite that was providing commercial services, or, subsequent to such date, ceased to contain a satellite providing commercial services; or

"(B) as of March 25, 1998, was not designated in INTELSAT or Inmarsat operational plans for satellites for which construction contracts had been executed.

Any such orbital location of INTELSAT or Inmarsat and of any successor entities and separated entities shall be returned to the International Telecommunication Union for reallocation.

"(9) APPRAISAL OF ASSETS.—Before any transfer of assets by INTELSAT or Inmarsat to any successor entity or separated entity, such assets shall be independently audited for purposes of appraisal, at both book and fair market value.

"(10) LIMITATION ON INVESTMENT.—Notwithstanding the provisions of this title, COMSAT shall not be authorized by the Commission to invest in a satellite known as K–TV, unless Congress authorizes such investment.

"SEC. 622. SPECIFIC CRITERIA FOR INTELSAT.

"In securing the privatizations required by section 621, the following additional criteria with respect to INTELSAT privatization shall be applied as licensing criteria for purposes of subtitle A:

"(1) NUMBER OF COMPETITORS.—The number of competitors in the markets served by INTELSAT, including the number of competitors created out of INTELSAT, shall be sufficient to create a fully competitive market.

"(2) PREVENTION OF EXPANSION DURING TRANSITION.—

"(A) IN GENERAL.—Pending privatization in accordance with the criteria in this title, INTELSAT shall not expand by receiving additional orbital locations, placing new satellites in existing locations, or procuring new or additional satellites except as permitted by subparagraph (B), and the United States shall oppose such expansion—

"(i) in INTELSAT, including at the Assembly of Parties,

"(ii) in the International Telecommunication Union,

"(iii) through United States instructions to COMSAT,

"(iv) in the Commission, through declining to facilitate the registration of additional orbital locations or the provision of additional services (including additional applications of existing services) or additional areas of business; and

"(v) in other appropriate fora.

"(B) EXCEPTION FOR CERTAIN REPLACEMENT SATELLITES.—The limitations in subparagraph (A) shall not apply to any replacement satellites if—

"(i) such replacement satellite is used solely to provide public-switched network voice telephony or occasional-use television services, or both;

"(ii) such replacement satellite is procured pursuant to a construction contract that was executed on or before March 25, 1998; and

"(iii) construction of such replacement satellite commences on or before the final date for INTELSAT privatization set forth in section 621(1)(A).

"(3) TECHNICAL COORDINATION AMONG SIGNATORIES.—Technical coordination shall not be used to impair competition or competitors, and coordination under Article XIV(d) of the INTELSAT Agreement shall be eliminated.

"SEC. 623. SPECIFIC CRITERIA FOR INTELSAT SEPARATED ENTITIES.

"In securing the privatizations required by section 621, the following additional criteria with respect to any INTELSAT separated entity shall be applied as licensing criteria for purposes of subtitle A:

"(1) DATE FOR PUBLIC OFFERING.—Within one year after any decision to create any separated entity, a public offering of the securities of such entity shall be conducted.

"(2) PRIVILEGES AND IMMUNITIES.—The privileges and immunities of INTELSAT and its signatories shall be waived with respect to any transactions with any separated entity, and any limitations on private causes of action that would otherwise generally be permitted against any separated entity shall be eliminated.

"(3) INTERLOCKING DIRECTORATES OR EMPLOYEES.—None of the officers, directors, or employees of any separated entity shall be individuals who are officers, directors, or employees of INTELSAT.

"(4) SPECTRUM ASSIGNMENTS.—After the initial transfer which may accompany the creation of a separated entity, the portions of the electromagnetic spectrum assigned as of the date of enactment of this title to INTELSAT shall not be transferred between INTELSAT and any separated entity.

"(5) REAFFILIATION PROHIBITED.—Any merger or ownership or management ties or exclusive arrangements between a privatized INTELSAT or any successor entity and any separated entity shall be prohibited until 15 years after the completion of INTELSAT privatization under this title.

"SEC. 624. SPECIFIC CRITERIA FOR INMARSAT.

"In securing the privatizations required by section 621, the following additional criteria with respect to Inmarsat privatization shall be applied as licensing criteria for purposes of subtitle A:

"(1) MULTIPLE SIGNATORIES AND DIRECT ACCESS.—Multiple signatories and direct access to Inmarsat shall be permitted.

"(2) PREVENTION OF EXPANSION DURING TRANSITION.—Pending privatization in accordance with the criteria in this title, Inmarsat should not expand by receiving additional orbital locations, placing new satellites in existing locations, or procuring new or additional satellites, except for specified replacement satellites for which construction contracts have been executed as of March 25, 1998, and the United States shall oppose such expansion—

"(A) in Inmarsat, including at the Council and Assembly of Parties,

"(B) in the International Telecommunication Union,

"(C) through United States instructions to COMSAT,

"(D) in the Commission, through declining to facilitate the registration of additional orbital locations or the provision of additional services (including additional applications of existing services) or additional areas of business, and

"(E) in other appropriate fora.

This paragraph shall not be construed as limiting the maintenance, assistance or improvement of the GMDSS.

"(3) NUMBER OF COMPETITORS.—The number of competitors in the markets served by Inmarsat, including the number of competitors created out of Inmarsat, shall be sufficient to create a fully competitive market.

"(4) REAFFILIATION PROHIBITED.—Any merger or ownership or management ties or exclusive arrangements between Inmarsat or any successor entity or separated entity and ICO shall be prohibited until 15 years after the completion of Inmarsat privatization under this title.

"(5) INTERLOCKING DIRECTORATES OR EMPLOYEES.—None of the officers, directors, or employees of Inmarsat or any successor entity or separated entity shall be individuals who are officers, directors, or employees of ICO.

"(6) SPECTRUM ASSIGNMENTS.—The portions of the electromagnetic spectrum assigned as of the date of enactment of this title to Inmarsat—

"(A) shall, after January 1, 2006, or the date on which the life of the current generation of Inmarsat satellites ends, whichever is later, be made available for assignment to all systems (including the privatized Inmarsat) on a nondiscriminatory basis and in a manner in which continued availability of the GMDSS is provided; and

"(B) shall not be transferred between Inmarsat and ICO.

"(7) PRESERVATION OF THE GMDSS.—The United States shall seek to preserve space segment capacity of the GMDSS.

"SEC. 625. ENCOURAGING MARKET ACCESS AND PRIVATIZATION.

"(a) NTIA DETERMINATION.—

"(1) DETERMINATION REQUIRED.—Within 180 days after the date of enactment of this section, the Secretary of Commerce shall, through the Assistant Secretary for Communications and Information, transmit to the Commission—

"(A) a list of Member countries of INTELSAT and Inmarsat that are not Members of the World Trade Organization and that impose barriers to market access for private satellite systems; and

"(B) a list of Member countries of INTELSAT and Inmarsat that are not Members of the World Trade Organization and that are not supporting procompetitive privatization of INTELSAT and Inmarsat.

"(2) CONSULTATION.—The Secretary's determinations under paragraph (1) shall be made in consultation with the Federal Communications Commission, the Secretary of State, and the United States Trade Representative, and shall take into account the totality of a country's actions in all relevant fora, including the Assemblies of Parties of INTELSAT and Inmarsat.

"(b) IMPOSITION OF COST-BASED SETTLEMENT RATE.—Notwithstanding—

"(1) any higher settlement rate that an overseas carrier charges any United States carrier to originate or terminate international message telephone services, and

"(2) any transition period that would otherwise apply,

the Commission may by rule prohibit United States carriers from paying an amount in excess of a cost-based settlement rate to overseas carriers in countries listed by the Commission pursuant to subsection (a).

"(c) SETTLEMENTS POLICY.—The Commission shall, in exercising its authority to establish settlements rates for United States international common carriers, seek to advance United States policy in favor of cost-based settlements in all relevant fora on international telecommunications policy, including in meetings with parties and signatories of INTELSAT and Inmarsat.

"Subtitle C—Deregulation and Other Statutory Changes

"SEC. 641. DIRECT ACCESS; TREATMENT OF COMSAT AS NONDOMINANT CARRIER.

"The Commission shall take such actions as may be necessary—

"(1) to permit providers or users of telecommunications services to obtain direct access to INTELSAT telecommunications services—

"(A) through purchases of space segment capacity from INTELSAT as of January 1, 2000, if the Commission determines that—

"(i) INTELSAT has adopted a usage charge mechanism that ensures fair compensation to INTELSAT signatories for support costs that such signatories would not otherwise be able to avoid under a direct access regime, such as insurance, administrative, and other operations and maintenance expenditures;

"(ii) the Commission's regulations ensure that no foreign signatory, nor any affiliate thereof, shall be permitted to order space segment directly from INTELSAT in order to provide any service subject to the Commission's jurisdiction;

"(iii) the Commission has in place a means to ensure that carriers will be required to pass through to end-users savings that result from the exercise of such authority;

"(B) through investment in INTELSAT as of January 1, 2002, if the Commission determines that such investment will be attained under procedures that assure fair compensation to INTELSAT signatories for the market value of their investments;

"(2) to permit providers or users of telecommunications services to obtain direct access to Inmarsat telecommunications services—

"(A) through purchases of space segment capacity from Inmarsat as of January 1, 2000, if the Commission determines that—

"(i) Inmarsat has adopted a usage charge mechanism that ensures fair compensation to Inmarsat signatories for support costs that such signatories would not otherwise be able to avoid under a direct access regime, such as insurance, administrative, and other operations and maintenance expenditures;

"(ii) the Commission's regulations ensure that no foreign signatory, nor any affiliate thereof, shall be permitted to order space segment directly from Inmarsat in order to provide any service subject to the Commission's jurisdiction;

"(iii) the Commission has in place a means to ensure that carriers will be required to pass through to end-users savings that result from the exercise of such authority; and

"(B) through investment in Inmarsat as of January 1, 2001, if the Commission determines that such investment will be attained under procedures that assure fair compensation to Inmarsat signatories for the market value of their investments;

"(3) to act on COMSAT's petition to be treated as a nondominant carrier for the purposes of the Commission's regulations according to the provisions of section 10 of the Communications Act of 1934 (47 U.S.C. 160); and

"(4) to eliminate any regulation on the availability of direct access to INTELSAT or Inmarsat or to any successor entities after a pro-competitive privatization is achieved consistent with sections 621, 622 and 624.

"SEC. 642. TERMINATION OF MONOPOLY STATUS.

"(a) RENEGOTIATION OF MONOPOLY CONTRACTS PERMITTED.—The Commission shall, beginning January 1, 2000, permit users or providers of telecommunications services that previously entered into contracts or are under a tariff commitment with COMSAT to have an opportunity, at their discretion, for a reasonable period of time, to renegotiate those contracts or commitments on rates, terms, and conditions or other provisions, notwithstanding any term or volume commitments or early termination charges in any such contracts with COMSAT.

"(b) COMMISSION AUTHORITY TO ORDER RENEGOTIATION.—Nothing in this title shall be construed to limit the authority of the Commission to permit users or providers of telecommunications services that previously entered into contracts or are under a tariff commitment with COMSAT to have an opportunity, at their discretion, to renegotiate those contracts or commitments on rates, terms, and conditions or other provisions, notwithstanding any term or volume commitments or early termination charges in any such contracts with COMSAT.

"(c) PROVISIONS CONTRARY TO PUBLIC POLICY VOID.—Whenever the Commission permits users or providers of telecommunications services to renegotiate contracts or commitments as described in this section, the Commission may provide that any provision of any contract with COMSAT that restricts the ability of such users or providers to modify the existing contracts or enter into new contracts with any other space segment provider (including but not limited to any term or volume commitments or early termination charges) or places such users or providers at a disadvantage in comparison to other users or providers that entered into contracts with COMSAT or other space segment providers shall be null, void, and unenforceable.

"SEC. 643. SIGNATORY ROLE.

"(a) LIMITATIONS ON SIGNATORIES.—

"(1) NATIONAL SECURITY LIMITATIONS.—The Federal Communications Commission, after a public interest determination, in consultation with the Executive Branch, may restrict foreign ownership of a United States signatory if the Commission determines that not to do so would constitute a threat to national security.

"(2) NO SIGNATORIES REQUIRED.—The United States Government shall not require signatories to represent the United States in INTELSAT or Inmarsat or in any successor entities after a pro-competitive privatization is achieved consistent with sections 621, 622 and 624.

"(b) CLARIFICATION OF PRIVILEGES AND IMMUNITIES OF COMSAT.—

"(1) GENERALLY NOT IMMUNIZED.—Notwithstanding any other law or executive agreement, COMSAT shall not be entitled to any privileges or immunities under the laws of the United States or any State on the basis of its status as a signatory of INTELSAT or Inmarsat.

"(2) LIMITED IMMUNITY.—COMSAT and any other company functioning as United States signatory to INTELSAT or Inmarsat shall not be liable for action taken by it in carrying out the specific, written instruction of the United States issued in connection with its relationships and activities with foreign governments, international entities, and the intergovernmental satellite organizations.

"(3) PROVISIONS PROSPECTIVE.—Paragraph (1) shall not apply with respect to liability for any action taken by COMSAT before the date of enactment of the Communications Satellite Competition and Privatization Act of 1998.

"(c) PARITY OF TREATMENT.—Notwithstanding any other law or executive agreement, the Commission shall have the authority to impose similar regulatory fees on the United States signatory which it imposes on other entities providing similar services.

"SEC. 644. ELIMINATION OF PROCUREMENT PREFERENCES.

"Nothing in this title or the Communications Act of 1934 shall be construed to authorize or require any preference, in Federal Government procurement of telecommunications services, for the satellite space segment provided by INTELSAT, Inmarsat, or any successor entity or separated entity.

"SEC. 645. USE OF ITU TECHNICAL COORDINATION.

"The Commission and United States satellite companies shall utilize the International Telecommunication Union procedures for technical coordination with INTELSAT and its successor entities and separated entities, rather than INTELSAT procedures.

"SEC. 646. TERMINATION OF COMMUNICATIONS SATELLITE ACT OF 1962 PROVISIONS.

"Effective on the dates specified, the following provisions of this Act shall cease to be effective:

"(1) Date of enactment of this title: Sections 101 and 102; paragraphs (1), (5) and (6) of section 201(a); section 301; section 303; section 502; and paragraphs (2) and (4) of section 504(a).

"(2) On the effective date of the Commission's order that establishes direct access to INTELSAT space segment: Paragraphs (1), (3) through (5), and (8) through (10) of section 201(c); and section 304.

"(3) On the effective date of the Commission's order that establishes direct access to Inmarsat space segment: Subsections (a) through (d) of section 503.

"(4) On the effective date of a Commission order determining under section 601(b)(2) that Inmarsat privatization is consistent with criteria in sections 621 and 624: Section 504(b).

"(5) On the effective date of a Commission order determining under section 601(b)(2) that INTELSAT privatization is consistent with criteria in sections 621 and 622: Paragraphs (2) and (4) of section 201(a); section 201(c)(2); subsection (a) of section 403; and section 404 .

"SEC. 647. REPORTS TO THE CONGRESS.

"(a) ANNUAL REPORTS.—The President and the Commission shall report to the Congress within 90 calendar days of the enactment of this title, and not less than annually thereafter, on the progress made to achieve the objectives and carry out the purposes and provisions of this title. Such reports shall be made available immediately to the public.

"(b) CONTENTS OF REPORTS.—The reports submitted pursuant to subsection (a) shall include the following:

"(1) Progress with respect to each objective since the most recent preceding report.

"(2) Views of the Parties with respect to privatization.

"(3) Views of industry and consumers on privatization.

"SEC. 648. CONSULTATION WITH CONGRESS.

"The President's designees and the Commission shall consult with the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate prior to each meeting of the INTELSAT or Inmarsat Assembly of Parties, the INTELSAT Board of Governors, the Inmarsat Council, or appropriate working group meetings.

"SEC. 649. SATELLITE AUCTIONS.

"Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services. The President shall oppose in the International Telecommunication Union and in other bilateral and multilateral fora any assignment by competitive bidding of orbital locations or spectrum used for the provision of such services.

"Subtitle D—Negotiations To Pursue Privatization

"SEC. 661. METHODS TO PURSUE PRIVATIZATION.

"The President shall secure the pro-competitive privatizations required by this title in a manner that meets the criteria in subtitle B.

"Subtitle E—Definitions

"SEC. 681. DEFINITIONS.

"(a) IN GENERAL.—As used in this title:

"(1) INTELSAT.—The term 'INTELSAT' means the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT).

"(2) INMARSAT.—The term 'Inmarsat' means the International Mobile Satellite Organization established pursuant to the Convention on the International Maritime Organization.

"(3) SIGNATORIES.—The term 'signatories'—

"(A) in the case of INTELSAT, or INTELSAT successors or separated entities, means a Party, or the telecommunications entity designated by a Party, that has signed the Operating Agreement and for which such Agreement has entered into force or to which such Agreement has been provisionally applied;

"(B) in the case of Inmarsat, or Inmarsat successors or separated entities, means either a Party to, or an entity that has been designated by a Party to sign, the Operating Agreement.

"(4) PARTY.—The term 'Party'—

"(A) in the case of INTELSAT, means a nation for which the INTELSAT agreement has entered into force or been provisionally applied; and

"(B) in the case of Inmarsat, means a nation for which the Inmarsat convention has entered into force.

"(5) COMMISSION.—The term 'Commission' means the Federal Communications Commission.

"(6) INTERNATIONAL TELECOMMUNICATION UNION.—The term 'International Telecommunication Union' means the intergovernmental organization that is a specialized agency of the United Nations in which member countries cooperate for the development of telecommunications, including adoption of international regulations governing terrestrial and space uses of the frequency spectrum as well as use of the geostationary satellite orbit.

"(7) SUCCESSOR ENTITY.—The term 'successor entity'—

"(A) means any privatized entity created from the privatization of INTELSAT or Inmarsat or from the assets of INTELSAT or Inmarsat, but

"(B) does not include any entity that is a separated entity.

"(8) SEPARATED ENTITY.—The term 'separated entity' means a privatized entity to whom a portion of the assets owned by INTELSAT or Inmarsat are transferred prior to full privatization of INTELSAT or Inmarsat, including in particular the entity whose structure was under discussion by INTELSAT as of March 25, 1998, but excluding ICO.

"(9) ORBITAL LOCATION.—The term 'orbital location' means the location for placement of a satellite on the geostationary orbital arc as defined in the International Telecommunication Union Radio Regulations.

"(10) SPACE SEGMENT.—The term 'space segment' means the satellites, and the tracking, telemetry, command, control, monitoring and related facilities and equipment used to support the operation of satellites owned or leased by INTELSAT, Inmarsat, or a separated entity or successor entity.

"(11) NON-CORE.—The term 'non-core services' means, with respect to INTELSAT provision, services other than public-switched network voice telephony and occasional-use television, and with respect to Inmarsat provision, services other than global maritime distress and safety services or other existing maritime or aeronautical services for which there are not alternative providers.

"(12) ADDITIONAL SERVICES.—The term 'additional services' means Internet services, high-speed data, interactive services, non-maritime or non-aeronautical mobile services, Direct to Home (DTH) or Direct Broadcast Satellite (DBS) video services, or Ka-band services.

"(13) INTELSAT AGREEMENT.—The term 'INTELSAT Agreement' means the Agreement Relating to the International Telecommunications Satellite Organization ('INTELSAT'), including all its annexes (TIAS 7532, 23 UST 3813).

"(14) HEADQUARTERS AGREEMENT.—The term 'Headquarters Agreement' means the International Telecommunication Satellite Organization Headquarters Agreement (November 24, 1976) (TIAS8542, 28 UST 2248).

"(15) OPERATING AGREEMENT.—The term 'Operating Agreement' means—

"(A) in the case of INTELSAT, the agreement, including its annex but excluding all titles of articles, opened for signature at Washington on August 20, 1971, by Governments or telecommunications entities designated by Governments in accordance with the provisions of the Agreement, and

"(B) in the case of Inmarsat, the Operating Agreement on the International Maritime Satellite Organization, including its annexes.

"(16) INMARSAT CONVENTION.—The term 'Inmarsat Convention' means the Convention on the International Maritime Satellite Organization (Inmarsat) (TIAS 9605, 31 UST 1).

"(17) NATIONAL CORPORATION.—The term 'national corporation' means a corporation the ownership of which is held through publicly traded securities, and that is incorporated under, and subject to, the laws of a national, state, or territorial government.

"(18) COMSAT.—The term 'COMSAT' means the corporation established pursuant to title III of the Communications Satellite Act of 1962 (47 U.S.C. 731 et seq.)

"(19) ICO.—The term 'ICO' means the company known, as of the date of enactment of this title, as ICO Global Communications, Inc.

"(20) REPLACEMENT SATELLITES.—The term 'replacement satellite' means a satellite that replaces a satellites that fails prior to the end of the duration of contracts for services provided over such satellite and that takes the place of a satellite designated for the provision of public-switched network and occasional-use television services under contracts executed prior to March 25, 1998 (but not including K–TV or similar satellites). A satellite is only considered a replacement satellite to the extent such contracts are equal to or less than the design life of the satellite.

"(21) GMDSS.—The term 'global maritime distress and safety services' or 'GMDSS' means the automated ship-to-shore distress alerting system which uses satellite and advanced terrestrial systems for international distress communications and promoting maritime safety in general. The GMDSS permits the worldwide alerting of vessels, coordinated search and rescue operations, and dissemination of maritime safety information.

"(b) COMMON TERMINOLOGY.—Except as otherwise provided in subsection (a), terms used in this title that are defined in section 3 of the Communications Act of 1934 have the meanings provided in such section.".

PURPOSE AND SUMMARY

The fundamental purposes of the bill are to encourage privatization of the intergovernmental satellite organizations (IGOs) that dominate international satellite communications and to promote a robustly competitive satellite communications marketplace. The bill seeks to eliminate the provision of commercial satellite communications by intergovernmental organizations. The bill also seeks to ensure that the privatized entities be independent of the IGO "signatories." By privatizing INTELSAT and Inmarsat as outlined in H.R. 1872, the unfair advantages now enjoyed by these organizations would be eliminated, in favor of a level playing field for all competitors. This in turn would bring consumers lower prices, higher service quality, improved efficiency, innovative new products, and more choice.

H.R. 1872 promotes the privatization of INTELSAT and Inmarsat by using the incentive of access to the U.S. marketplace if the IGOs privatize in an expeditious and pro-competitive manner. The bill is also designed to eliminate any unfair advantages of IGOs or their spin-offs or successors over their competitors gained through their intergovernmental status. Pro-competitive privatizations are sought by requiring the Federal Communications Commission (FCC or the Commission) to determine that the IGOs and their privatized "successor" or "separated" follow-ons have been privatized in a manner that would not harm competition in the U.S., prior to authorizing the provision of advanced services in the U.S. market.

The primary incentive in the bill for INTELSAT and Inmarsat to privatize is to limit their access to the U.S. market if they do not privatize in a pro-competitive manner by a date certain. In order to provide these organizations with a reasonable transition period in which to accomplish a full privatization, the bill provides INTELSAT until January 1, 2002, and Inmarsat until January 1, 2001. If privatization does not occur by the dates provided, the bill requires the FCC to limit, deny or revoke authority for the IGO's provision of "non-core services" to the U.S. market. Furthermore, the bill prohibits separated entities from being authorized to provide services in the U.S. if they are not structured in a pro-competitive manner.

Another key part of the bill is the possibility of restrictions on additional services during the pendency of privatization. This lever provides that INTELSAT and Inmarsat cannot provide additional services under new contracts unless the FCC annually determines that: (1) Substantial and material progress is being made towards privatization; and (2) INTELSAT and Inmarsat are not hindering competitors' access to foreign markets.

The bill explicitly eliminates COMSAT's monopoly for the provision of IGO services in the U.S. by permitting other service providers to directly access IGOs satellites as of January 1, 2000. The bill also allows COMSAT's customers a one-time opportunity to renegotiate their contracts with the previous monopoly provider after January 1, 2000.

Lastly, the bill includes a number of additional deregulatory measures designed to ensure that all U.S. satellite service providers can compete as efficiently as possible within the U.S. satellite marketplace. The bill also prohibits the FCC from auctioning orbital slots or spectrum assignments for global satellite systems and requires the Administration to oppose such spectrum auctions in international fora.

BACKGROUND AND NEED FOR LEGISLATION

I. BACKGROUND

In 1962, Congress passed the Communications Satellite Act (the 1962 Act), creating a new organization, the Communications Satellite Corporation (COMSAT), with the specific charter of forming a consortium to operate an international commercial satellite communications system. As a result, COMSAT, and subsequently, the International Telecommunications Satellite Organization (INTELSAT) were established with the assistance of a partnership of nations in Europe, North America, and developing areas of the world. In 1973, INTELSAT was converted into an international treaty organization. At the time of the 1962 Act's passage, it was believed that individual companies were not capable, in those early days of satellite technology, of bearing the financial risk of constructing and operating a global satellite communications system.

Today, INTELSAT is a global communications satellite cooperative with 142 member countries which provides space segment for international telecommunications. It currently operates 20–26 satellites. It is the dominant provider of international "fixed" satellite services (e.g., transoceanic telephone calls, video feeds) and is seeking to expand into a wide array of advanced services.

In 1978, Congress amended the 1962 Act to add a new title V which provided for U.S. participation in a new intergovernmental entity. In 1979, a similar organization to INTELSAT—the International Maritime Satellite Organization (Inmarsat)—came into existence when 26 member nations signed the Inmarsat Convention and Operating Agreement. Inmarsat developed out of the perceived need for a global maritime communications satellite system that would provide distress, safety and communications services to all seafaring nations in a single cooperative, cost-sharing entity. Inmarsat began providing commercial service in 1982. Today, Inmarsat has 82 member countries and operates eight satellites.

INTELSAT and Inmarsat are controlled by "Parties" and "signatories." The Parties, which are the national government members of the INTELSAT and Inmarsat agreements, have ultimate control. The signatories are the owners and operators of the systems. They distribute INTELSAT and Inmarsat services in their own country. The majority of signatories are government-owned or controlled telecommunications monopolies in their own country.

For example, France Telecom, which is the dominant provider of telecommunications services in France is the French signatory to INTELSAT and Inmarsat. The signatories are designated by the member countries to own [1] their shares in the IGOs, with ownership based on an individual member country's use of the system. Accordingly, the U.S., the largest user in both systems, currently controls an 18 percent ownership in INTELSAT and a 23 percent ownership in Inmarsat.

COMSAT, the U.S. signatory to INTELSAT and Inmarsat, has the sole right of access to INTELSAT and Inmarsat in the United States. Any private company wishing to use INTELSAT's or Inmarsat's satellites to or from the U.S. must purchase satellite capacity through COMSAT. In this regime, COMSAT buys INTELSAT and Inmarsat capacity and resells it to U.S.-based customers, which include broadcast, private network and long-distance customers (e.g., MCI, AT&T, WorldCom and Sprint which use approximately 80 percent of COMSAT's private line and switched-voice services).

II. THE PRIVATE SATELLITE INDUSTRY

In the early to mid 1980's, a number of applicants filed petitions with the FCC for permission to launch and operate private satellite systems that would carry international traffic in competition with INTELSAT. In response to this private sector interest in competing with INTELSAT, the Reagan Administration developed the Separate System Policy. This policy for the first time permitted satellite systems "separate" from INTELSAT to compete with the organization, but limited their activities to certain business applications (e.g., television signal carriage for broadcasters and private-line circuits). The provision of these limited, business-oriented services was considered by the Reagan Administration not to pose significant economic harm to INTELSAT, and, thus, was not inconsistent with U.S. obligations under the Agreements. In response to President Reagan's policy, the FCC licensed a number of separate systems, but in order to protect INTELSAT from significant economic harm, prevented the separate systems from interconnecting with public switched networks (referred to as the "PSN restriction"). The PSN restriction thus prevented separate systems from entering the lucrative, high-volume telephony or public data markets.

Since the first private satellite launch in 1988, the private satellite industry has grown slowly. The industry contends that this slow pace of growth is due to INTELSAT's continued market dominance and anti-competitive practices. Today, only three separate satellite systems survive from the original eight applicants. PanAmSat, which was recently purchased by Hughes Communications, Inc., operates 5 predominantly international satellites. Orion Network Systems, which was recently purchased by Loral, currently operates one satellite and is planning the launch of a second satellite in late 1998–1999. Columbia Communications currently leases capacity on National Aeronautical and Space Administration (NASA) satellites and soon will add to its capacity by receiving an

[1] Ownership in INTELSAT or Inmarsat may not be an entirely appropriate term as the signatories ownership share is allocated by usage rather than investment and varies over time.

old, inclined orbit satellite from INTELSAT to resolve their dispute over a particular orbital location.

The provision requiring that INTELSAT be protected from significant economic harm is no longer enforced by the Parties. Therefore, the PSN restriction has been eased by several Administrations and the FCC over time to permit separate systems to compete for all segments of satellite communications services in the United States. But because market opportunities were limited for separate systems until recently, these systems' current customer bases comprise customers for those permitted services. For instance, PanAmSat predominantly provides video services.

III. THE EXPECTED SATELLITE FUTURE

While the international satellite market has yet to reach its potential, the future of international satellite services looks promising. Experts predict that more than 1,700 satellites will be launched in the next decade, an increase of almost 10 times the 200 or so commercial satellites now in orbit worldwide. Furthermore, it is estimated that revenue from satellite services will more than triple from $9 billion today to $29 billion within the next two to three years.[2]

This potential growth can be traced to four main reasons: (1) demand for services has increased; (2) the world's domestic telecommunications monopolies are privatizing and being subject to competition; (3) the innovation and development of non-geostationary systems; and (4) the cost of satellite construction, launch and operation and that of related equipment has dropped dramatically. Existing and new satellite providers are planning ahead to meet the needs of consumers worldwide. From hand-held wireless communications to Internet access to advanced direct-to-home video services, satellite providers are planning to compete for customers" communications needs. In many instances, satellite providers are planning to serve markets that today do not exist. It is estimated that over half of the world's population have never placed a phone call. Many fewer have ever used the Internet. These populations represent new markets that are often unserved by traditional networks because of the high-cost of ubiquitous service with traditional landline technology. Companies preparing to enter the wireless telephone marketplace include such players as: Iridium, Globalstar, ICO Global Communications (the spin-off of Inmarsat), and MCHI/Ellipso. Companies preparing to enter the satellite data marketplace include: Teledesic, Motorola's Celestri, Loral's Cyberstar and Hughes" Spaceway.

The cost of producing a satellite system has decreased, in part, because of improvements in technology. Advances in battery power and digital compression techniques coupled with improvements in mass production capabilities and launch facilities have made the prospects for launching new satellite ventures less risky. Thus, as technology has made producing satellites more cost-efficient, the

[2] See Shine, Eric, "The Satellite Blast Off," Business Week (January 27, 1997), citing Bear, Sterns & Co. analyst; See generally, Cook, William J., "1997: A Space Odyssey," U.S. News & World Report; Crossman, MB, "Fixed and Mobile Satellite Services—Industry Report," Rauscher, Pierce Refsnes, Inc. (April 11, 1997); and Anselm, Joseph, "Launchers See Nothing But Blue Skies Ahead," Aviation Week and Space Technology (April 7, 1997).

ability of satellites to compete directly with traditional land-line networks has increased.

American firms represent a commanding presence in the growth of satellite services. American ingenuity and the entrepreneurial spirit are combining to meet the demand for satellite services. In many instances, American telecommunications providers are using their expertise and success gained in American domestic market to develop opportunities in overseas satellite markets. This has led to a high demand for American manufacturers and providers of satellite products and services. Correspondingly, the growth in demand in satellite services is producing high-wage employment for American workers.

IV. BARRIERS TO COMPETITIVE SATELLITE MARKETS

While the global satellite marketplace is expected to grow, there are significant barriers in many markets that hamper competition. These impediments are the outgrowth of the structure and operations of the IGOs, INTELSAT and Inmarsat, and the relationship of these IGOs with their Member nations. Furthermore, INTELSAT and Inmarsat have the advantage of an unmatched fleet of international satellites in key orbital locations, financed at preferential rates available to IGOs that can more easily raise capital.

The Committee believes that INTELSAT and Inmarsat enjoy a substantial market advantage that harms the development of competition: the inherent incentive is for signatories to favor INTELSAT, Inmarsat and any non-independent spin-off over private satellite providers because the signatories own INTELSAT and Inmarsat. For example, in order to compete in a particular market, a private satellite provider may be required to provide confidential marketing and business data to the licensing authority, which may be the same entity as the signatory, or own the signatory. Thus, a private competitor may be forced to provide confidential data to a competitor. Since the regulatory agency or ministry responsible for telecommunications policy in IGO Member countries often owns the signatory, the agency or ministry with licensing authority has a disincentive to permit a private satellite provider to enter that country's market and compete against the signatory. The majority of signatories to the IGOs are government- owned operators whose regulatory bodies have a financial interest in limiting competition.

The Committee believes that INTELSAT and Inmarsat and their signatories have used their market dominance and governmental status to keep emerging U.S. competitors from expanding into overseas markets for satellite services. This point was clearly made in the September 30, 1997, hearing on H.R. 1872. For example, in that hearing, Mr. Kenneth Gross, President of Columbia Communications, described how the Department of Defense, through MCI, tried to use Columbia to provide services to an Air Force Base in the Azores, Portugal. The foreign signatory, Marconi, declared that no other provider than INTELSAT could be used for this service. As a signatory, Marconi has a direct financial interest in INTELSAT maximizing its revenues, since it receives a return from the usage of INTELSAT's satellites. Mr. Gross concluded that, due

to such conflicts of interest between the operators and regulators, "the result is higher prices to the end user, higher prices to the Defense Department, and to the U.S. Government." [3]

The international treaty structure of both INTELSAT and Inmarsat provide these organizations the opportunity to file for orbital slots and spectrum allocations through the host governments, which pass the applications directly to the International Telecommunication Union (ITU) without the review process that private companies are subjected to. For example, the FCC processes INTELSAT's applications as a formality, forwarding them to the ITU automatically. INTELSAT is headquartered in the U.S., thus the FCC acts as the regulatory body through which INTELSAT applies to the ITU. Inmarsat is headquartered in the United Kingdom, and the U.K. regulatory body performs the same function.

In addition, there is an incentive to provide INTELSAT and Inmarsat orbital locations and spectrum because the Parties' representatives at the ITU often have an ownership stake, through their government-owned signatories in INTELSAT and Inmarsat. The Committee believes that this favorable treatment in the ITU has resulted in many of the limited supply of well-placed geostationary orbital locations in generally-used frequencies being allocated to INTELSAT and Inmarsat. The Committee notes that INTELSAT and Inmarsat currently have a disproportionate number of orbital locations relative to competitors. Many of these orbital slots apparently are not planned for use in the near future, but have presumably been obtained because INTELSAT and Inmarsat are aware of other competitors' interest in the similar locations.

INTELSAT and Inmarsat also benefit from certain privileges and immunities, providing them with advantages that private satellite providers consider barriers to market entry. The privileges and immunities include: diplomatic status, tax exemption, antitrust immunity, government subsidies, and freedom from the regulatory process.

V. FAILED RESTRUCTURING EFFORTS

INTELSAT and Inmarsat have been considering privatization, termed "restructuring" by the IGOs, for several years. In fact, in 1991, Inmarsat voted to create the affiliate ICO Global Communications. INTELSAT started to consider privatization in 1995 with the formation of the INTELSAT 2000 Working Party. The IGOs recognize that in order to extend their dominance in core services to advanced services, they must reform their current multilayered structures. However, given the predominant government control of the organizations, and the fact that in most IGO countries the government still provides commercial telecommunications services, privatization discussions have been proceeding at a slower pace than the U.S. feels is appropriate.

INTELSAT and Inmarsat have been exploring options to enter the "new" satellite markets (e.g., global mobile wireless telephone and data service, broadband data) to compete against the newly

[3] Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, the Communications Satellite Competition and Privatization Act of 1997; September 30, 1997; page 59; Serial No. 105–61.

formed satellite providers, while still maintaining their current market dominance. To date, both INTELSAT and Inmarsat have taken steps to spin off affiliates to enter new growth markets. On March 31, 1998, INTELSAT agreed to spin off certain assets, including five satellites and several additional orbital locations, to a new corporation to be known as "New Skies Satellites, N.V." (New Skies). Inmarsat is currently considering a plan to privatize its operations. Inmarsat Parties and signatories have expressed an interest in the new Inmarsat providing a mobile broadband data service. Details of the Inmarsat privatization plan are to be finalized later in 1998. Under H.R. 1872, the Committee expects that any U.S. acceptance of the plan will require that direct access to the new Inmarsat by competitors to the signatories be permitted, that Inmarsat's privileges and immunities not be extended to the new Inmarsat or former signatories, and that such privatization otherwise be consistent with this title.

The Committee is especially troubled by INTELSAT's New Skies, N.V. proposal. This spin-off will be harmful to private satellite competitors because it will obtain satellites from INTELSAT at below market rates and INTELSAT and its Member nations will own 100 percent of New Skies. The Administration objected in December 1996 when INTELSAT announced that it was procuring a satellite to provide direct broadcast satellite services (known as "K–TV") on the principle that an IGO should not expand into a market that the private sector is capable of serving. Under the 1962 Act, the FCC must authorize COMSAT's investment in IGO satellites, prior to any investment. INTELSAT procured the satellite, despite U.S. government opposition. Now this specific satellite is to be transferred below market value to New Skies to compete against private satellite providers. The IGO is, therefore, buying satellites with its advantageous ability to raise capital from its largely monopoly signatories and transferring these satellites to New Skies, an affiliate to be wholly-owned by INTELSAT and its signatories. Thus, these satellites provide New Skies with an unfair market advantage.

Also troubling under this proposal is that New Skies will have transferred to it two Ka-band orbital locations currently registered to INTELSAT which do not contain satellites. The Committee intends to ensure a pro-competitive spin off of INTELSAT. As currently structured, New Skies is not pro-competitive and would not be permitted to provide services to the U.S. marketplace under H.R. 1872. The possible denial of U.S. market access may persuade New Skies' and INTELSAT's management to amend New Skies' ownership, management, and operations over time. Until it is structured in a pro-competitive manner, the FCC should prevent INTELSAT from transferring licenses or orbital locations to New Skies.

These IGO spin-offs neither decrease the market control of the remaining organizations nor promote the competitive nature of the international satellite marketplace. Many in private industry view the proposals by INTELSAT and Inmarsat for limited reform as insufficient, particularly since the same national telecommunications providers that own the IGOs own the spin-off/new entity.

Thus, IGO restructuring and privatization without guidelines or leverage from the U.S. has not produced a fully pro-competitive re-

sult and is, therefore, not in the public interest. The Committee believes without sufficient guidance and incentives, the IGOs will not adopt a pro-competitive restructuring, and is moving H.R. 1872 to resolve this problem so that privatization of the IGOs will promote competition in the domestic and global satellite services marketplace.

VI. THE COMMITTEE APPROACH

H.R. 1872 is based on simple principles: reliance on the private sector and non-discriminatory competition; the government should not provide commercial services that the private sector can provide; and competitors should compete on a level playing field.

The bill provides a firm time-line and road-map for the privatization of INTELSAT and Inmarsat. If these organizations fail to move towards a pro-competitive privatization, then they would be prevented from offering additional services in the U.S. marketplace. In addition, if they do not privatize in a pro-competitive manner by dates certain, these organizations would be prevented from offering non-core services in the U.S. marketplace—a broader category than "additional services." The bill would also prevent any new spin-offs of these organizations from serving the U.S. market unless they are organized in a pro-competitive manner. Thus, whether access to the U.S. market is ever limited is completely within the IGOs' and their signatories' control.

The Committee believes that the only significant leverage the U.S. government has over INTELSAT or Inmarsat is the ability to limit access to the world's richest and most developed satellite market—the United States—if they do not move forward toward a pro-competitive restructuring.

The Committee believes that the possibility of lost revenue is necessary to convince the INTELSAT and Inmarsat leadership to adopt pro-competitive privatization. Faced with a choice between losing access to the U.S. market or reorganizing as a private company with no unfair advantages, the Committee believes that these organizations will privatize consistent with The Committee policy principles. If that is not the case, the Committee fully supports limiting these organizations' ability to serve the U.S. market. For too long the U.S. consumer has been exploited by INTELSAT and Inmarsat through paying prices higher than necessary.[4] The Committee expects that any excess demand created if INTELSAT and Inmarsat are limited in serving the U.S. market can be met by competitive satellite providers already in existence and those due to become operational shortly. In addition, the bill provides adequate safeguards to prevent U.S. consumers from being harmed, should the IGOs' market access be limited.

During the Committee's deliberation, the Committee considered efforts to remove the market access restrictions and replace them with a modified international settlement policy. The Committee soundly rejected this argument. In particular, an amendment offered at Full Committee to replace the threat of market access limi-

[4] The hearing record contains data showing that INTELSAT, Inmarsat and COMSAT implore huge mark-ups on satellite services. See Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, the Communications Satellite Competition and Privatization Act of 1997; September 30, 1997; Serial No. 105–61.

tations with the imposition of a lower settlement rate on all foreign carriers whose governments opposed privatization or denied market access to private satellite service providers was rejected by an 37–8 vote. The Committee found that settlement rates were an inadequate substitute to the market access incentives that would render the bill ineffective. Nor would the imposition of lower settlement rates address the underlying principle of ending the provision of commercial services by an IGO. The Committee firmly believes that no effective alternative to the market access restrictions has been identified that would produce a pro-competitive privatization.

The legislation also prevents the IGOs from expanding with new orbital locations and new satellites for non-core services or additional services. The Committee is concerned that the IGOs already have a number of anti-competitive advantages in the satellite communications marketplace to the detriment of consumers and competitors, as described in this report. Orbital locations are scarce resources, particularly in the geostationary orbit. To permit the IGOs to grow in terms of orbital locations, numbers of operational satellites and in provision of additional, non-core services would seriously frustrate competition, to the detriment of the commercial industry and consumers. The restrictions in this section are essential to prevent further entrenchment of the IGOs in the commercial marketplace as well as to provide incentives to expedite privatization.

It is not necessary for intergovernmental treaty organizations to provide commercial international satellite services in competition with private companies. Furthermore, the existence of such organizations distorts the marketplace and frustrates the development of a fully competitive private market. There is substantial evidence that the IGOs have used their dominant position in the marketplace and their governmental privileges and immunities to stifle competition. The current structure not only harms the commercial satellite industry, but also results in increased costs to users of these services, including the U.S. government. Increased competition as a result of privatization, moreover, promises substantial consumer benefits estimated at $6.9 billion. U.S. consumers alone are estimated to reap a savings of $1.4 billion. This is in addition to the $1.5 billion consumers in the U.S. are estimated to receive from direct access. These figures reflect a 31 percent savings for consumers over what they would pay under the present regime operated by IGOs.[5]

The Committee's intent is to promote competition and remove government from commercial service provision, rather than to punish the IGOs or their signatory, COMSAT. H.R. 1872 is designed to encourage a competitive restructuring of INTELSAT and Inmarsat and to strengthen all U.S. satellite service providers, including COMSAT, by the introduction of non-discriminatory competition. The Committee notes that it included a deregulatory subtitle to eliminate regulations, once competition is permitted, that have posed significant costs for COMSAT, out of a desire to see

[5] See "Analysis of the Privatization of the Intergovernmental Satellite Organizations Proposed by H.R. 1872," by the Satellite Users' Coalition, dated March 1998, page 22.

COMSAT compete vigorously with other competitors, on a level playing field.

The Committee has found that although privatization or competition may seem threatening or even punitive to incumbents, the end results are instead beneficial to both the incumbent provider and society at large. As past experience demonstrates, competition in the telecommunications market leads to an expansion in the market's size. Likewise, eliminating out-dated regulatory burdens enables all entities to compete more effectively. An example is the impact on AT&T's long-distance services of the 1984 divestiture. Since 1984, AT&T has continually lost market-share to competitors. Its overall market share for long-distance services has decreased from over 90 percent to about 50 percent. However, even as its market share has decreased, AT&T's long-distance minutes and revenues have grown, as the competitive provision of long-distance services resulted in an overall increase in long-distance calling. In other words, competition grew the entire market, so that while AT&T had a smaller slice, the overall pie was much larger. AT&T has enjoyed record growth in earning and net revenues. Thus, while the Committee moves forward H.R. 1872 to promote competition, it expects the bill will also positively impact COMSAT's revenues in the long-term. The Committee also takes note of these facts in evaluating COMSAT's claims of declining shares of some telecommunications markets while actual minutes of use have increased.

The Committee has also examined the U.S. domestic market with respect to satellite services. Over 85 nations permit competition for access to INTELSAT services, known as direct access. This includes direct access for space segment capacity. At least 14 nations permit investment direct access. The United States is behind other nations in this aspect of permitting competition in its domestic telecommunications market. Consumers pay the price for this. The Commissions' answers to questions for the record in the Committee's hearing on this legislation, for example, indicate that COMSAT marks up INTELSAT's rates by an average of 68 percent. COMSAT marks up Inmarsat rates for military uses by as much as 86 percent.[6] These figures, as well as a private study, indicate that substantial savings may result from direct access. Moreover, competition generally leads to lower prices. Investment direct access has the added advantage of diversifying ownership of the IGOs. Thus, the Committee finds that direct access is in the public interest. Further, the Committee finds that both direct access for space segment capacity and investment direct access are in the public interest and that such interest will be served by adopting all forms of direct access as soon as possible. The Committee finds that the Commission currently has the authority to permit direct access under current statutes. The Committee also finds that the Commission has the authority to create a form of virtual direct access in the case of Inmarsat until Inmarsat permits direct access. The Committee expects the President to successfully negotiate to achieve adoption of direct access by Inmarsat.

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[6] Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, the Communications Satellite Competition and Privatization Act of 1997; September 30, 1997; page 156; Serial No. 105–61.

VII. THE NEED FOR FRESH LOOK

"Fresh look" is a policy used by the FCC in the past to permit customers to renegotiate their contracts with a carrier with market power once new competition enters the marketplace. Under H.R. 1872, COMSAT's customers would be permitted, on a one-time basis, to take a fresh look at their existing contracts. The fresh look period authorized in the bill would begin after January 1, 2000, when the Committee intends new competitors will be permitted to compete with COMSAT for INTELSAT and Inmarsat access. The Committee expects the Commission to provide a single negotiation period of reasonable duration for customers to review and possibly renegotiate or be released from their COMSAT contracts.

The Committee believes that the United States should not maintain a monopoly for access to INTELSAT and Inmarsat services. H.R. 1872, therefore, includes provisions to end COMSAT's monopoly for INTELSAT and Inmarsat services by implementing direct access. The Committee believes that fresh look is a necessary complement to direct access. The Committee's goal of introducing competition to the U.S. market for IGO services would not be fully achieved if consumers could not take advantage of competitive alternatives, due to being locked into long-term contracts with COMSAT. Thus, direct access and fresh look are complementary policy tools to promote competition.

The Committee is aware that the Commission has implemented fresh look in at least four instances in the past: (1) allocation of Radio Band, 6 FCC Rcd 4582 (1991) (fresh look required in the context of air-to-ground radio telephone service as a condition of grant of title III license); (2) competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677 (1992) (fresh look required for AT&T customers of tariff 12 packages that included 800 service bundled with interexchange service to terminate inbound 800 service without liability within 90 days of the time 800 numbers became portable); (3) expanded interconnection with local telephone company facilities, 7 FCC Rcd 7369 (1992) (fresh look approved for new competitive opportunities under special access expanded interconnection, permitting special access customers to terminate certain long-term local exchange carriers' special access arrangements if those customers wished to obtain the benefits of new, more competitive alternatives); and (4) implementation of local competition provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (permitting renegotiation of contracts to implement reciprocal compensation requirement between wireless carriers).

The Committee takes note of how the application of fresh look in the past has improved competition in the related services. For example, during the 800 number portability fresh look period, consumers were provided the opportunity to renegotiate long-term contracts with AT&T. The companies that used fresh look to their advantage include, but are not limited to: Avis, Inc., Boise Cascade Corp., James River Corp., Courtaulds Coatings, Inc., Unisys Corp., Unum Life Insurance Co., Cargill, Inc., Ceridian Corp., Kimberly Quality Care, Federal Reserve Bank of Chicago, Bear, Sterns & Company, Inc., Blue Cross and Blue Shield, Diebold Group, Inc., The Guardian Life Insurance Company of America, Random House,

Inc., Outrigger Hotels, America West Airlines, Equifax, First Financial Management, ITT Community Development of Palm Coast, National Data, National Westminster Bank, Morris Air, Ceridan Corp., Kemper Financial Services and CSX.[7] In many instances, AT&T retained its existing customers by improving service, reliability and price commitments. In other instances, customers switched to new providers. While it is true that the former monopoly or dominant carrier, once fresh look is implemented, will have to compete to retain customers, it is unlikely that fresh look will result in a sizable migration of customers to new providers. This is true due to both the long-standing relationship between COMSAT and its customers, and the ubiquity of INTELSAT and Inmarsat satellite coverage, which will continue to give those organizations a considerable advantage for many years to come.

COMSAT has used its monopoly for INTELSAT and Inmarsat services to enter into long-term contracts with its consumers. It is evident that INTELSAT and Inmarsat have market power with respect to certain satellite services, whether it is for primary communications or back-up communications. As the monopoly distributor of their services in the U.S., COMSAT enjoys the benefits of this market power. It is not in the public interest for consumers to be tied in contracts entered into in a monopoly environment when new providers enter the market, for example through the direct access provisions of the bill. COMSAT should not assume that because of its current monopoly, Congress would never impose economic regulation to eliminate that monopoly or otherwise promote competition through such policy tools as fresh look. Congress reserved the right to alter the existing relationship between COMSAT and INTELSAT and Inmarsat in the 1962 Satellite Act. In this instance, the Committee is exercising this right to promote competition to the benefit of American satellite service customers.

The Committee believes that the fresh look provision contained in H.R. 1872, as reported by the Committee, is an important policy tool for effectuating competition. The Committee includes fresh look in H.R. 1872 because it believes that fresh look should be included in any type of international satellite reform legislation.

VIII. SAFEGUARDS FOR CERTAIN INMARSAT SERVICES

H.R. 1872, as reported by the Committee, contains a number of modifications to clarify the Committee's intent that the provisions designed to encourage the privatization of Inmarsat will not adversely impact the provision of maritime safety services. Nor is H.R. 1872 intended to force users who rely on Inmarsat maritime and aeronautical service to immediately stop using Inmarsat for the provision of safety-related maritime or aeronautical services. Accordingly, the FCC is to consider in licensing decisions under new section 601 whether users of non-core services provided by Inmarsat are able to obtain such services from providers other than

[7] See: Gareiss, Robin, "The Fight is On For '800' Users," Communications Week, April 19, 1993; Wallace, Bob, "Winds of Change Sweeping Over Cooped-up 800 World; Carriers Wage War of Numbers on Defections," Network World, May 3, 1993; Gareiss, Robin, "Carriers Count Spoils of '800' Portability, Communications Week, May 3, 1993; Burch, Bill, "MCI Claims to be the Big Winner Under Fresh Look," Network World, August 2, 1993; Wallace, Bob, "Users Ready for a Fresh Look," Network World, July 12, 1993; Communications Daily, "AT&T Claims $140 Million; MCI Says it Has $170 Million in New 800 Business Under Fresh Look," April 29, 1993.

Inmarsat at competitive rates, terms, and conditions, or whether costs to replace equipment incompatible with the new competitors' systems are exorbitant.

While the Committee believes that private satellite systems will soon be offering competitive alternatives to all of the COMSAT-provided Inmarsat services, the bill ensures that Inmarsat's maritime and aeronautical services, and in particular the Global Maritime Distress Satellite System (GMDSS), will continue to be available to current and future users. In particular, the bill as reported includes specific provisions: (1) regarding Inmarsat replacement satellites (new section 602(b)); (2) providing that the Commission may authorize COMSAT to provide additional services, using Inmarsat facilities as long as continued progress is made toward privatization of Inmarsat (new section 603(a)); (3) providing even if progress is not being made, COMSAT will be able to continue to provide additional services under contracts in existence on the date a finding of no progress is made (new section 603(c)); and (4) providing that the United States must take steps necessary to preserve the GMDSS (new sections 624(2) and 624(7)). These provisions provide the necessary assurances that the bill will not harm Inmarsat users.

Inmarsat appears to be moving forward on its own a plan for privatization. Given the current provisions in the Satellite Act, including title VI, the Committee finds that implementation in the United States of the plan being considered currently by Inmarsat, or agreement by the U.S. to such plan, as well as the creation of a new intergovernmental organization, would require legislation amending the Satellite Act. The Committee also finds that provisional application or agreement regarding an Inmarsat privatization plan similar to that currently being discussed would also require such legislation. INTELSAT recently decided to transfer a portion of its assets to a new affiliate, but has made no progress toward pro-competitive privatization. This spin-off apparently may also require legislative authorization.

IX. SAFEGUARDS FOR CERTAIN INTELSAT SERVICES

H.R. 1872 contains provisions to help ensure that INTELSAT users will not be harmed by the transition to a privatized and competitive market. These provisions are described in the section-by-section analysis of new section 601 in general and new section 601(b)(3) in particular, but are parallel to the safeguards provided for Inmarsat users.

X. CONSTITUTIONALITY OF H.R. 1872

During consideration of H.R. 1872 by the Committee, several Members asked whether certain provisions of the bill raised constitutional questions. Specifically, several Members asked whether the bill's provisions relating to permitting COMSAT's customers to renegotiate their contracts (section 642) and possible restrictions on COMSAT's distribution of IGO services (through sections 601 and 603) would constitute impermissible takings; whether the bill would encroach on the Executive's foreign affairs authority; and whether the bill was tantamount to a bill of attainder. The Committee analyzed these and other constitutional issues, and con-

cludes that the bill does not contain any unconstitutional provisions.

In conducting this analysis, the Committee examined the following constitutional concerns: (1) takings; (2) bill of attainder; (3) the President's foreign affairs authority; (4) free speech clause of the First Amendment; and (5) due process/impairment of contracts. The Committee was assisted in this analysis by the American Law Division of the Congressional Research Service (CRS).

A. Takings

Under the Fifth Amendment to the Constitution, private property cannot be taken by the government for public use, without just compensation. Under judicial precedent interpreting the Fifth Amendment, there are basically two separate takings doctrines—"per se takings" and "economic regulation takings". H.R. 1872 would not raise per se takings issues, due to the lack of any tangible or real property involved. The Supreme Court rarely finds a takings due to economic regulation. In fact, to find a takings due to statutory economic regulation, the Supreme Court has required first that there be a substantive due process violation in the statute. Since the Court has not found a substantive due process violation in an economic regulation statute for over half a century, takings in that realm are equally unlikely.

New section 601(a) would prospectively require the Commission to prevent separated entities from entering and providing service in the U.S. market if they were not structured in a pro-competitive manner. COMSAT may continue to own a portion of the INTELSAT affiliate New Skies, a "separated entity" under the bill. The Court has often stated that "those who do business in a heavily regulated field cannot complain when the legislative scheme is altered from time to time." See, e.g., *Concrete Pipe & Products, Inc.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 643 (1993).

There is no property right in the possibility of future business expansion. Nothing in takings law guarantees an owner the continued use of its property in the most profitable manner. Thus even if one were to contend that space segment were property, Section 601(a)(1) does not appropriate such space segment.

New section 601(b) would require the Commission to restrict access for INTELSAT and Inmarsat to serve the U.S. for non-core services if they did not privatize pro-competitively in accordance with the legislation. A takings claim here is unfounded. When establishing telecommunications policy, the Committee and the Commission have routinely stated that licenses are not private property. The Commission is currently authorized to limit, deny, or revoke licenses in many circumstances for legitimate purposes. The fact that this may cause an financial impact on COMSAT is irrelevant under a constitutional analysis.

If such an argument were persuasive, the Commission would be without the right to revoke licenses in the public interest because doing so would most certainly raise a takings complaint from the aggrieved party. CRS has analyzed this issue and has found no case where a taking claim was upheld solely on the basis of a government-induced reduction in the value of an investment other than in land. And, as discussed earlier, the Court has been ex-

tremely reluctant to find takings based on economic regulation, particularly when that regulation merely adjusts the regulatory scheme in a heavily regulated area and does not significantly benefit the government.

New section 603 would prevent INTELSAT and Inmarsat from offering additional services under new contracts if the FCC finds in its annual privatization review that these organizations have not made substantial and material progress towards privatization or are hindering new competitors from entering foreign markets. There is no property right in the possibility of future business expansion, even if the government entity in question encouraged the belief at one time that such expansion would be allowed.

New section 641 would allow U.S. providers of telecommunications services to directly access INTELSAT and Inmarsat rather than being forced to go through COMSAT. The Committee notes that Congress reserved the right to repeal, alter, or amend the provisions of the Act of 1962. *See,* section 301 of the 1962 Act, 47 U.S.C. 732 (1962). Of course, Congress could do so with or without a specific reservation, but the fact that it included this express reservation provides COMSAT notice that reliance on the status quo or an expectation that Congress would never reform the satellite regulatory regime through economic regulation would be unwarranted.

New section 642 would require the Commission to permit users of telecommunications services a one-time opportunity to take a "fresh look" and, at their choice, renegotiate their contracts with COMSAT. The Supreme Court has repeatedly rejected takings claims based on Federal frustration of contracts between private parties. [8]

A concern was raised during the Subcommittee markup that portions of the bill may violate the Tucker Act or subject the U.S. Government to liabilities under the Tucker Act, 28 U.S.C. §1491. The Tucker Act is a jurisdictional statute, providing the Court of Federal Claims with jurisdiction over private causes of actions. It does not provide affirmative, substantive protections against certain government actions. The function of the Tucker Act is to waive the sovereign immunity of the United States to certain types of money claims, and vest jurisdiction over such claims in the U.S. Court of Federal Claims. In other words, the Tucker Act merely permits a suit for restitution if there is a valid claim against the U.S. The Tucker Act by itself creates no substantive right of action. In this instance, the Committee has found no liability under or violations of the takings clause and, thus, the Tucker Act is not applicable, nor violated by H.R. 1872.

B. Bill of attainder

Article I, section 9, clause 3 of the Constitution prohibits bills of attainder. The bill authorizes, or in some cases directs, that the FCC take action COMSAT may consider harmful to its interests, such as in new sections 601, 603 and section 642. However, a bill of attainder is not merely legislation that a company believes is

[8] *Concrete Pipe; Connolly; Omnia Commercial Co.* v. *United States, 261 U.S. 502 (1923). In the lower courts, see Chang* v. *United States,* 859 F.2d 893 (Fed. Cir. 1988).

harmful to its interests, but is a legislative determination of guilt and punishment. Because the Committee's goal is economic regulation that promotes competition and privatization in the satellite market, not to punish any particular entity, it believes that H.R. 1872 is not a bill of attainder.

In any bill of attainder case there must be present two elements—the requisite specificity and the intent to punish—but the existence of the former element without the latter is insufficient to establish an existence of a bill of attainder. In *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 468-84 (1977), the Supreme Court, in upholding legislation to assert Federal Government control over President Nixon's Presidential papers, "denied that the clause limited the power of Congress to burden some persons or groups while not so treating all other plausible individuals or groups. Even the law's specificity in referring to the former President by name and applying only to him did not condemn the act, because he 'constituted a legitimate class of one' on whom Congress could 'fairly and rationally' focus." Because COMSAT currently has a monopoly to distribute IGO services in the U.S., COMSAT is "a legitimate class of one" for purposes of economic regulation and the required element of specificity for a bill of attainder is not met.

Notwithstanding that the first prong of the bill of attainder test is inapplicable in this case, the Committee analyzed whether the second prong is applicable. The Committee concluded that the second prong of the test—the intent to punish—is equally inapplicable. The Court used a three-pronged analysis to reject the Nixon case: (1) the law imposed no punishment traditionally judged to be prohibited by the clause; (2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further non-punitive legislative purposes; and (3) the law had no legislative record evincing a congressional intent to punish.

As the Supreme Court has ruled, "only the clearest proof will suffice to establish the unconstitutionality of a statute" on the basis that it "was so punitive either in purpose or effect as to constitute a penal statute rather than a regulatory one." *Hudson* v. *United States,* 118 S.Ct. 488,493 (1997).

As has been stated in Part VI: The Committee Approach, supra, the Committee has no intent to punish COMSAT. The Committee seeks to stop the expansion of government provision of commercial services and have all service providers compete on a non-discriminatory basis. The Committee removes regulatory burdens from COMSAT that would hinder its operations in a competitive market. The Committee has the regulatory, not punitive, motive to promote competition in the domestic and global satellite services market.

In sum, the purpose of the proposed legislation, as expressed throughout the course of the Committee's deliberation of H.R. 1872, to promote competition in telecommunications markets and a procompetitive privatization of the IGOs, is clearly non-punitive. The Committee believes and concludes that H.R. 1872 does not constitute a bill of attainder.

C. First amendment

The First Amendment provides that Congress shall make no law abridging the freedom of speech. Opponents of the bill could suggest that new sections 601 and 603 of the Satellite Act, as proposed to added by H.R. 1872, could be ruled unconstitutional as an infringement on COMSAT's First Amendment rights. Specifically, they might raise questions whether new sections 601(b) and 603, requiring the Commission to prevent INTELSAT and Inmarsat (and consequently COMSAT) from providing non-core services or additional services, respectively, if certain conditions are not met, would prevent COMSAT from offering certain communications and information services, including Internet content. Under this analysis, they might argue that new section 601(a)'s requirements that the Commission prevent separated entities from providing services in the U.S. unless certain conditions are met could constitute impermissible restraints on speech.

However, in potentially precluding providers from providing additional media, H.R. 1872 is comparable to antitrust laws that prevent combinations by media owners in restraint of trade. In addition to general antitrust laws, such as the Sherman Act, 15 U.S.C. § 1, the FCC has various rules embodying such restrictions, including the daily newspaper cross-ownership rule, 47 C.F.R. § 73.3555(d). The Supreme Court has upheld, against First Amendment challenges, both the application of the Sherman Act to the news media, and prior versions of the cross-ownership rule.

Two caveats apply to the general rule that government may apply business restrictions on the provision of media services: government cannot create a special tax on media products and even content-neutral restrictions may be subject to an intermediate level of scrutiny by the courts. The government is given significant leeway in enacting such restrictions. In *Turner Broadcasting System, Inc.* v. *Federal Communications Commission,* 512 U.S. 664 (1994), the Supreme Court found that a content-neutral regulation will be sustained if it promotes a substantial governmental interest that would be achieved less effectively absent the regulation. In other words, the regulation need not be the least restrictive one the government could have chosen, but it may not burden substantially more speech than is necessary to further the government's legitimate interests. The Committee concludes that this legislation does indeed promote such a substantial government interest.

Further, it appears that any speech restriction that would result from prohibiting some providers of services from providing, or COMSAT from investing in, additional services, such as the Internet, would constitute, at most, a content-neutral incidental speech restriction. As such, it would be constitutional if it promotes a substantial governmental interest that would be less effective absent the regulation. The purpose of the bill is to promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment. The Committee finds this to be a substantial governmental interest.

The Committee believes and concludes that H.R. 1872 does not interfere with COMSAT's First Amendment rights. CRS' analysis of these issues is consistent with this finding. The Committee fur-

ther believes that the provisions of new sections 601 and 603 are necessary to promote a competitive satellite marketplace, both globally and domestically. The impact of the bill would be substantially less effective absent such provisions. Thus, the Committee finds that any concerns raised on possibly interfering with COMSAT's First Amendment rights are without merit.

D. Foreign Authority

The Committee analyzed whether H.R. 1872 would encroach on the President's foreign affairs prerogatives by establishing instructions for positions in international negotiations. For example, new section 661 requires the President to secure a pro-competitive privatization of INTELSAT and Inmarsat based upon the criteria outlined in subtitle B of the bill. Further, new section 621 requires the President to secure a pro-competitive privatization of INTELSAT and Inmarsat consistent with the criteria outlined in new sections 622 to 624. New sections 602, 648, and 649 might also raise similar questions. The Committee has reviewed these concerns and found that they do not encroach on Executive authority. This position is echoed by CRS's legal analysis.[9]

While it can be debated whether the Congress or the President has the authority to take the lead in foreign affairs, it is clear that the Congress and the Executive Branch share authority over establishment of foreign policy. As a general proposition, Congress and the President share power to act interrelatedly in this international/national arena. The President has the responsibility, under the Constitution, to determine the form and manner in which the United States will maintain relations with foreign nations. Only if there is some exclusivity conferred on the President by the Constitution or if there is some denial to Congress by the Constitution of the authority to legislate requirements in this area would there be a problem of validity.

The Committee notes that the current statute already provides direction to, and obligations on, the President. For instance, section 201(a)(1) of the 1962 Act requires the President to aid the development and continuation of a commercial communications satellite system. Clearly the past does not support any proposition of presidential exclusivity in respect to INTELSAT or Inmarsat. Indeed the former organization emerged within the confines of the 1962 Act, and the latter was established pursuant to the International Maritime Satellite Act. The Committee strongly believes guiding the President on IGO policy is consistent with Congressional authority provided under the Constitution and with the precedence established in the 1962 Act.

Congress has a number of delegated powers, including most formidably, the authority to regulate commerce among the States and with foreign nations. To Congress falls the legislative responsibility to enact laws establishing national policy, and, unless Congress invades some constitutional prerogative of the President, he is obligated to carry out that policy, not only in domestic affairs but in the context of international affairs as well. If Congress establishes

[9] Memorandum to House Committee on Commerce from American Law Division, Congressional Research Service, entitled "Presidential and Congressional Interaction Issue;" dated April 15, 1998.

a policy inconsistent with our obligations to other nations or to international bodies, it is the responsibility of the President to so notify those entities. It is not a constitutional issue if the statute, instead of leaving unexpressed the obligation, specifies that he is to carry out his international responsibilities to effectuate the policy thus statutorily set. Thus, even if the Administration were to object to the role provided the President in H.R. 1872, this would not, in the Committee's view raise Constitutional questions.

E. Due Process/Impairment of Contracts

The Committee analyzed whether H.R. 1872 would interfere with private contracts of COMSAT or others, and thus violate the Constitution's due process requirements. The Fifth Amendment to the Constitution states that no person shall be deprived of life, liberty, or property, without due process of law. The issues raised regarding the bill's impact on contracts and the due process clause seem to be two-fold: (1) the bill could prevent COMSAT from executing its obligations and contracts made with INTELSAT and Inmarsat; and (2) COMSAT's current contracts would be explicitly subject to a one-time renegotiation under the bill's "fresh look" provisions. The Committee reviewed these concerns and believes that they do not raise constitutional problems. The Committee also consulted with and reviewed the work of CRS on this specific issue.[10] CRS's analysis supports the Committee's conclusion that there is no impermissible interference with contracts or due process problems with the legislation.

CRS notes that "as a general rule, congressional legislation that interferes with private contracts is scrutinized under the lenient rational-basis review accorded economic regulations, whether the legislation operates retroactively or not." In passing the 1962 Act, Congress intended that the Act could be modified and expressly retained the authority to "repeal, alter or amend" it. Thus, it is clear that COMSAT and other companies cannot with any validity claim a property right in any current arrangement under the Act. *Bowen* v. *Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) supports this very conclusion.

The Supreme Court ruled in *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947) "So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise, the paramount powers of Congress could be nullified by prophetic discernment." In addition, in *FHA* v. *The Darlington, Inc.,* 358 U.S. 84, 91 (1958) the Court declared, "those that do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." COMSAT today is regulated as a dominant common carrier under title II of the Communications Act of 1934 in certain respects.

The Supreme Court has noted that economic regulation, that is, "a law adjusting the burdens and benefits of economic life," enjoys

[10] Memorandum to the House Committee on Commerce from American Law Division, Congressional Research Service, entitled "Congressional Interference with Existing Contacts"; dated April 14, 1998.

before the courts a presumption of constitutionality, unless the legislature acts in an arbitrary and irrational way. *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976). Laws upsetting expectations under contracts may have a retroactive effect, but this fact does not alter the analysis. See *PBGC* v. *R. A. Gray & Co.,* 467 U.S. at 729.

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. Id.

In addition, the Supreme Court stated in *Usery* that "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S., 15–16. See also *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 637 (1993).

A portion of COMSAT's current contracts are with agencies of the Federal government, such as the Department of Defense, that could be impacted by the implementation of this legislation, including new sections 601, 603, and 642. If the requirements of the legislation for a pro-competitive privatization are not met, it is possible that COMSAT would be unable to perform all of its obligations under contracts with such Federal agencies. But this fact would not give rise to any liability on the part of COMSAT or the United States. COMSAT would presumably have a defense of impossibility of performance. Moreover, no liability could be passed through to the Government because of the sovereign acts doctrine. That is, the Government as sovereign and the Government as contractor constitute two separate roles. If the Government acts as sovereign, in its legislative or executive capacity, to make impossible the performance of its obligations, it cannot be held responsible in its capacity as a contractor. See *Horowitz* v. *United States,* 267 U.S. 458 (1925).

Thus, the government acting in its capacity as sovereign with the intention of creating a competitive satellite marketplace, both domestically and globally, would not incur liability or cause constitutional problems due to the bill's potential impact on COMSAT's contracts with Federal agencies. It, thus, would appear that no constitutional issue would be raised by any provision that would limit the exercise of pre-existing contract rights of COMSAT or other entities, either in terms of agreements with telecommunications companies, INTELSAT or Inmarsat, or with governmental agencies. The Committee, therefore, finds that there is no valid legal concern with respect to contractual interference or due process.

HEARINGS

The Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on H.R. 1872, the Communications Satellite Competition and Privatization Act of 1997, on September 30,

1997. The Subcommittee received testimony from: Ms. Regina M. Keeney, International Bureau Chief, Federal Communications Commission; Mr. Jack A. Gleason, Associate Administrator for International Affairs, National Telecommunications and Information Administration, Department of Commerce; Mr. Warren Y. Zeger, General Counsel, COMSAT Corporation; Mr. Frederick A. Landman, President and CEO, PanAmSat Corporation; Mr. Kenneth Gross, President and COO, Columbia Communications Corporation; and Mr. Gerald B. Helman, Vice President, Mobile Communications Holdings, Inc./ELLIPSO.

COMMITTEE CONSIDERATION

The Subcommittee on Telecommunications, Trade, and Consumer Protection met in open markup sessions on March 4, 1998, and March 18, 1998 to consider H.R. 1872, the Communications Satellite Competition and Privatization Act of 1998. On March 18, 1998, the Subcommittee approved H.R. 1872 for Full Committee consideration, amended, by a voice vote.

ROLLCALL VOTES

Clause 2(l)(2)(B) of Rule XI of the Rules of the House requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. A motion by Mr. Bliley to order H.R. 1872 reported to the House, amended, was agreed to by a voice vote, a quorum being present. The following are the recorded votes on amendments to H.R. 1872, including the names of those Members voting for and against, and the voice votes taken on amendments offered to H.R. 1872.

COMMITTEE ON COMMERCE -- 105TH CONGRESS
ROLL CALL VOTE #49

BILL: H.R. 1872, Communications Satellite Competition and Privatization Act of 1998

AMENDMENT: Amendment to the Bliley Amendment in the Nature of a Substitute by Mr. Wynn re: (1) changes the definition of core services; (2) eliminates provisions permitting renegotiation of contracts once COMSAT's monopoly is removed; (3) strikes restrictions on additional and non-core services if privatization is not achieved and instead imposes cost-based settlement rates on all nations denying market access or opposing privatization of INTELSAT and Inmarsat.

DISPOSITION: NOT AGREED TO, by a roll call vote of 8 yeas to 37 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley		X		Mr. Dingell	X		
Mr. Tauzin	X			Mr. Waxman		X	
Mr. Oxley		X		Mr. Markey		X	
Mr. Bilirakis		X		Mr. Hall	X		
Mr. Schaefer		X		Mr. Boucher			
Mr. Barton	X			Mr. Manton		X	
Mr. Hastert		X		Mr. Towns		X	
Mr. Upton		X		Mr. Pallone		X	
Mr. Stearns		X		Mr. Brown	X		
Mr. Paxon				Mr. Gordon		X	
Mr. Gillmor		X		Ms. Furse	X		
Mr. Klug		X		Mr. Deutsch		X	
Mr. Greenwood		X		Mr. Rush	X		
Mr. Crapo		X		Ms. Eshoo		X	
Mr. Cox				Mr. Klink			
Mr. Deal		X		Mr. Stupak		X	
Mr. Largent		X		Mr. Engel		X	
Mr. Burr		X		Mr. Sawyer		X	
Mr. Bilbray		X		Mr. Wynn	X		
Mr. Whitfield		X		Mr. Green			
Mr. Ganske		X		Ms. McCarthy		X	
Mr. Norwood		X		Mr. Strickland		X	
Mr. White		X		Ms. DeGette		X	
Mr. Coburn							
Mr. Lazio		X					
Mrs. Cubin		X					
Mr. Rogan		X					
Mr. Shimkus		X					

3/25/98

COMMITTEE ON COMMERCE -- 105TH CONGRESS
ROLL CALL VOTE #50

BILL: H.R. 1872, Communications Satellite Competition and Privatization Act of 1998

AMENDMENT: Amendment to the Bliley Amendment in the Nature of a Substitute by Mr. Tauzin re: eliminates provisions permitting renegotiation of contracts once COMSAT's monopoly is removed.

DISPOSITION: NOT AGREED TO, by a roll call vote of 20 yeas to 23 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley		X		Mr. Dingell	X		
Mr. Tauzin	X			Mr. Waxman			
Mr. Oxley	X			Mr. Markey		X	
Mr. Bilirakis	X			Mr. Hall	X		
Mr. Schaefer	X			Mr. Boucher			
Mr. Barton		X		Mr. Manton			
Mr. Hastert		X		Mr. Towns	X		
Mr. Upton	X			Mr. Pallone		X	
Mr. Stearns	X			Mr. Brown	X		
Mr. Paxon				Mr. Gordon		X	
Mr. Gillmor		X		Ms. Furse	X		
Mr. Klug				Mr. Deutsch		X	
Mr. Greenwood		X		Mr. Rush	X		
Mr. Crapo	X			Ms. Eshoo		X	
Mr. Cox				Mr. Klink	X		
Mr. Deal		X		Mr. Stupak		X	
Mr. Largent	X			Mr. Engel			
Mr. Burr		X		Mr. Sawyer	X		
Mr. Bilbray		X		Mr. Wynn	X		
Mr. Whitfield		X		Mr. Green		X	
Mr. Ganske		X		Ms. McCarthy		X	
Mr. Norwood		X		Mr. Strickland	X		
Mr. White		X		Ms. DeGette		X	
Mr. Coburn							
Mr. Lazio	X						
Mrs. Cubin	X						
Mr. Rogan		X					
Mr. Shimkus		X					

3/25/98

COMMITTEE ON COMMERCE – 105TH CONGRESS
VOICE VOTES
3/25/98

BILL: H.R. 1872, Communications Satellite Competition and Privatization Act of 1998

AMENDMENT: Amendment in the Nature of a Substitute by Mr. Bliley.

DISPOSITION: AGREED TO, amended, by a voice vote.

AMENDMENT: Amendment to the Bliley Amendment in the Nature of a Substitute by Mr. Stearns re: changes the date governing replacement satellites and unused orbital slots from "May 12, 1997" to "March 25, 1998," and prevents COMSAT from investing in an INTELSAT satellite known as K-TV without Congressional approval.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment to the Bliley Amendment in the Nature of a Substitute by Mr. Tauzin re: applies the application of the additional service restriction to new contracts for new customers

DISPOSITION: NOT AGREED TO by a voice vote.

MOTION: Motion by Mr. Bliley to order H.R. 1872 reported to the House, amended.

DISPOSITION: AGREED TO by a voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

Pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee finds that H.R. 1872, the Communications Satellite Competition and Privatization Act of 1998, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 23, 1998.

Hon. TOM BLILEY,
Chairman, House of Representatives,
Committee on Commerce, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1872, the Communications Satellite Competition and Privatization Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kathleen Gramp (for federal costs) and Patrice Gordon and Jean Wooster (for the private-sector impact).

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 1872—Communications Satellite Competition and Privatization Act of 1998

Summary: H.R. 1872 would amend existing law regarding the federal regulation of international satellite communications sys-

tems and their relationship to the U.S. market. Two treaty-based entities—the International Telecommunications Satellite Organization (INTELSAT) and the International Mobile Satellite Organization (Inmarsat)—currently provide most satellite-based communications services worldwide. A private company, COMSAT, serves as the U.S. signatory to both organizations and, under current law, has the exclusive right to market their services. This bill would allow customers to purchase services directly from INTELSAT and Inmarsat and to renegotiate contracts with COMSAT under certain terms and conditions. If the privatization of INTELSAT and Inmarsat occurs in a manner inconsistent with the criteria and deadlines in the bill, the Federal Communications Commission (FCC) would be required to limit the types of services and facilities that these entities can provide in the U.S. market. The bill also would modify COMSAT's rights and status as signatory, and would make the company subject to the FCC's regulatory fees. The FCC and the Department of Commerce (DOC) would have to issue various reports, findings, and determinations to implement these provisions, but the bill would eliminate certain administrative tasks after certain reforms take effect.

CBO estimates that implementing this bill would have no significant budgetary effects over the 1999–2003 period, but could result in lower costs to federal agencies for international telecommunications services in future years. The legislation would not affect direct spending or receipts; therefore, pay-as-you-go-procedures would not apply. H.R. 1872 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would impose no costs on state, local, or tribal governments. H.R. 1872 would impose new private-sector mandates as defined by UMRA. CBO estimates that the cost of those mandates would not exceed the statutory threshold established in UMRA ($100 million in one year, adjusted annually for inflation).

Estimated cost to the Federal Government: H.R. 1872 would affect discretionary spending on regulatory activities and purchases of international telecommunications services. CBO estimates that the administrative costs associated with implementing this bill would have no significant effect on net spending by the FCC and DOC. We estimate that the FCC would spend a few million dollars over the five-year period to prepare the determinations and reports required by the bill, assuming appropriation of the necessary amounts. Because the commission is authorized under current law to collect fees from the telecommunications industry sufficient to offset the cost of its regulatory and applications activities, CBO assumes that these additional costs would be offset by an increase in collections credited to annual appropriations for the FCC. Likewise, we assume that any reduction in spending resulting from the repeal of existing statutory tasks would be offset by a reduction in receipts. Hence, we estimate that the net effect of this additional workload on the FCC's discretionary spending would be negligible. In addition, we estimate that DOC would spend less than $100,000 in 1999 to prepare reports on access to markets in INTELSAT and Inmarsat-member nations.

The bill also would require COMSAT to pay regulatory fees. By itself, that requirement would not change the amount of receipts

collected by the FCC because the agency's receipts are based on the amounts appropriated. However, having COMSAT pay regulatory fees would increase the number of companies liable for the fee, which would reduce the amount that must be paid by other companies. According to the FCC, COMSAT's payments would total about $650,000 per year.

H.R. 1872 could result in lower prices in the future for international telecommunications services purchased by the federal government, but CBO estimates that such savings are unlikely to be significant during the 1999–2003 period. According to COMSAT, the company's direct sales to the federal government totaled about $50 million in 1997, most of which involved sales to the Department of Defense and the Federal Aviation Administration. Provisions in this bill allowing agencies to purchase services directly from INTELSAT or Inmarsat after January 1, 2000, may result in savings relative to current law. Given the time that would be needed to resolve various technical and contractual issues related to direct access, CBO expects that such savings, if they occur, would not be significant during the next five years. Provisions allowing agencies to renegotiate existing contracts with COMSAT are unlikely to yield significant savings because most government contracts do not involve long-term volumetric commitments. The cost of services purchased from other providers, such as AT&T, MCI, and Sprint, could decline if those companies reduce their costs as a result of this legislation, but CBO cannot estimate the magnitude or timing of such savings.

CBO also expects that federal agencies would be unlikely to incur significant costs if the privatization of INTELSAT and Inmarsat were to trigger the restrictions in the bill on the types of services those entities can provide in the U.S. market. Finally, it is possible that enacting H.R. 1872 would result in litigation regarding the rights and status of COMSAT. CBO has no basis for predicting the likelihood or potential costs of such litigation.

Pay-as-you-go considerations: None.

Estimated impact on State, local, and tribal governments: H.R. 1872 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector

H.R. 1872 would impose new private-sector mandates, as defined by UMRA, on COMSAT (a private firm, created by federal statute) and on owners of earth stations who buy services from INTELSAT and Inmarsat. (An earth station consists of an antenna and associated electrical equipment that transmit and receive radio signals). CBO estimates that the direct costs of complying with private-sector mandates in the bill in each of the years 2000 through 2004 would be below the statutory threshold established in UMRA ($100 million in 1996, adjusted annually for inflation). In addition to the costs of mandates, the bill would affect the future business potential of COMSAT in a variety of other ways. Those effects depend on whether INTELSAT and Inmarsat meet the criteria for privatization included in the bill. CBO has not attempted to estimate the magnitude of those effects.

Mandates in the bill

H.R. 1872 would impose three specific mandates on the private sector. The most costly is contained in section 642. That section would direct the FCC, beginning January 1, 2000, to require COMSAT to allow its customers to renegotiate their service contracts or terminate them without liability.

Estimating the cost of section 642

Section 642 would allow firms that have contracted with COMSAT for telecommunications services to take a "fresh look" at those contracts. COMSAT's status as the sole U.S. supplier of access to INTELSAT and Inmarsat services would be eliminated by section 641. Thus, the fresh look provision would allow COMSAT's current customers to take advantage of a new, more competitive market by negotiating more favorable terms with COMSAT or by terminating their contracts without liability if they can obtain better terms directly from INTELSAT and Inmarsat (or their successors) or from other satellite service providers. CBO estimates that the direct cost to COMSAT of the fresh look provision would be less than $100 million annually between 2000 through 2004 (the first five years that the mandate would be effective.)

That estimate is based on information provided separately by COMSAT, its major customers, and the FCC. The estimated costs represent the difference between COMSAT's current expected net income from long-term contracts or tariff commitments, and its estimated net income after contracts have been renegotiated. CBO expects, consistent with assumptions made by COMSAT and its customers, that in general contracts would be renegotiated at lower prices rather than being entirely broken. Further, CBO assumes that the costs attributable to H.R. 1872 would be solely those related to long-term contracts that otherwise could not be renegotiated until they expire. After existing contracts expire any reduced revenues to COMSAT from negotiations for follow-on contracts would be attributable to new market conditions rather than the fresh look mandate in the bill.

Other mandates

The other private-sector mandates pose minimal costs. If the privatization criteria for INTELSAT and Inmarsat are not met, section 601(b)(1) would direct the FCC to limit, deny, or revoke the license of any entity (primary earth stations) to use a space segment owned, leased or operated by INTELSAT or Inmarsat to provide so-called noncore services. The bill defines such services, with respect to INTELSAT, as "services other than public-switched network voice telephone and occasional-use television" and, with respect to Inmarsat, as "services other than global maritime distress and safety services or other existing maritime or aeronautical services for which there are not alternative providers."

On the one hand, if INTELSAT and Inmarsat are privatized in a manner specified by the bill, no private-sector mandate would be created. On the other hand, if privatization does not occur, the FCC would have to take into account the prospect of harm to the buyers of satellite services before making its licensing decision. CBO assumes that, if competitive alternatives did not exist, the FCC

would not deny earth stations access to INTELSAT or Inmarsat satellites. Either way, the cost of this provision would be negligible. The third mandate would be created by section 643(c), which would impose regulatory fees on COMSAT. Those fees are estimated to be about $650,000 annually.

Estimate prepared by: Federal costs: Kathleen Gramp; Impact on the private sector: Patrice Gordon and Jean Wooster.

Estimate approved by: Robert A Sunshine, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

SECTION 1. SHORT TITLE

Section 1 designates the short title of the bill as the "Communications Satellite Competition and Privatization Act of 1998."

SECTION 2. PURPOSE

Section 2 designates that the purpose of the Act is to promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment by fully privatizing the intergovernmental satellite organizations (IGOs)—INTELSAT and Inmarsat.

The Committee finds that private businesses in a competitive market, rather than intergovernmental organizations providing satellite communications services, best serves the interests of consumers, workers, and businesses. The Committee finds that it is in the public interest for private companies rather than intergovernmental organizations to provide satellite services. The Committee also finds that the current IGOs (i.e., INTELSAT and Inmarsat) as well as their signatories, impair competition, raise barriers to mar-

ket access for competitors and potential competitors, impede innovation, and raise costs for consumers. The Committee finds that the signatories to the INTELSAT and Inmarsat agreements, many of which are government-owned or controlled, impede competition and grant unfair advantage to the IGOs. The primary purpose of new title VI is to end the role of intergovernmental organizations in providing commercial satellite communications services and to ensure that when such organizations are privatized, the privatized entities are independent of their current signatories or owners which control access to national markets and are otherwise organized in a manner that maximizes competition.

SECTION 3. REVISION OF COMMUNICATIONS SATELLITE ACT OF 1962

Section 3 creates a new Title VI with "Subtitle A," "Subtitle B", "Subtitle C," "Subtitle D," and "Subtitle E" to the Communications Satellite Act of 1962 (the 1962 Act or Satellite Act).

TITLE VI—COMMUNICATIONS COMPETITION AND PRIVATIZATION

Subtitle A—Actions to Ensure Procompetitive Privatization

Section 601—Federal Communications Commission licensing

New section 601(a) establishes a competition test which prohibits the Federal Communications Commission (FCC or the Commission), with respect to any separated entity, from: (1) issuing a license or construction permit; (2) renewing a license or permit; (3) permitting the assignment of a license or permit; or (4) authorizing the use by any entity subject to U.S. jurisdiction of any space segment owned or operated by a separated entity unless the Commission determines that such issuance, renewal, assignment, or use will not harm competition in the U.S. The Commission is required to deny or revoke authority to use space segment (i.e., satellite capacity) owned or operated by the separated entity to, from, or within the U.S. if it cannot make such a determination.

This subsection is specifically intended to apply to, but is not limited in its application to, the planned INTELSAT spin-off currently known as "INC" or "New Skies Satellites, N.V."

New section 601(a)(2) requires the Commission to use the licensing criteria created in new sections 621 and 623, as added by this title, when making a determination pursuant to paragraph 601(a)(1). The Commission is precluded from making such a determination unless the privatization of any separated entity occurs in a manner that is consistent with all of the criteria in new sections 621 and 623. The Committee's intent is to ensure that an anticompetitive restructuring does not occur and if it does, such separated entity will be denied access to the U.S. market until such time as it is structured in a pro-competitive manner, as defined by the criteria in new sections 621 and 623. Spin-offs of IGOs like INTELSAT and Inmarsat may have one or more special advantages or otherwise be harmful to competition. Such advantages include, but are not limited to, favorable market access due to their former intergovernmental status, possible broad signatory ownership, favorably obtained orbital locations, possible preexisting con-

tracts obtained by the IGOs, possible transfer of assets at book value rather than market value, and discriminatory relationships with any remaining IGO. The Committee finds that an IGO spin-off is a unique entity, including by virtue of its parent's intergovernmental status or relationship with remaining IGOs, and that any of these types of advantages create a high risk to competition. The Committee concludes that privatization in a manner consistent with pro-competitive criteria in this title is in the public interest.

New section 601(b)(1) establishes a competition test which requires the Commission to substantially limit, deny, or revoke the authorization of any entity subject to U.S. jurisdiction to use any space segment owned, leased, or operated by INTELSAT or Inmarsat or any successor entities thereof to provide non-core services unless the Commission determines that INTELSAT and its successor entities (after January 1, 2002) or Inmarsat and its successor entities (after January 1, 2001), have been privatized in a manner that will not harm competition in the U.S. Using access to the U.S. market as an incentive is the single best means to promote pro-competitive privatizations of the IGOs or otherwise influence IGO or former IGO behavior.

New section 601(b)(1) requires the Commission to take action necessary to enforce these provisions. The Commission is to use its authority to prevent the IGOs from offering non-core services in the U.S. market if the IGOs do not privatize in a pro-competitive manner by the dates provided. This section does not in any way limit the authority of the Commission to otherwise limit, deny, or revoke access to the U.S. market for INTELSAT, Inmarsat or their successor entities either before or after the dates for privatization with respect to core or non-core services.

New section 601(b)(2) requires the Commission to use the licensing criteria created in new sections 621, 622, and 624, as added by this bill, when making a determination pursuant to new section 601(b)(1). The Committee finds that privatization in a manner consistent with pro-competitive criteria in this legislation is in the public interest. The Commission is prohibited from making such a determination unless the privatization of INTELSAT, Inmarsat, or any successor entity is consistent with all of such criteria. The Committee's intent is to ensure that any privatization or restructuring promotes competition and if a privatization consistent with this title does not occur, then INTELSAT, Inmarsat or a successor entity's access to the U.S. market for non-core services be substantially limited, denied, or revoked until such time as the entity is restructured in a pro-competitive manner as defined by the criteria in new sections 621, 622 and 623.

The Committee finds that any special advantages retained by privatized IGOs will pose a high risk to competition. Such advantages include, but are not limited to, favorable market access due to their former intergovernmental status, possible broad signatory ownership, favorably obtained orbital locations, possible preexisting contracts obtained by an IGO, possible transfer of assets at book value rather than market value, and possible discriminatory relationships with the remaining IGOs. Other special advantages which would pose a high risk to competition include continued discriminatory relationships between a successor entity and a remain-

ing IGO, collusive behavior or cross subsidization between a successor entity and a remaining IGO, any direct or indirect benefit from privileges and immunities, ownership that is not independent of signatories which control access to national markets or the current IGOs, the lack of arm's length relationship between the successor entity and remaining IGO, (including separate officers, directors, employees, resources, marketing efforts and accounting systems), no recourse to IGO assets including for credit or capital, and fair market valuing for permissible business transactions between the IGO and its successor entity that is verifiable by an independent audit and consistent with normal commercial practice. An IGO registering or coordinating spectrum or orbital locations for successors would also constitute an anti-competitive advantage.

New section 601(b)(3) clarifies some of the factors the Commission is to consider in making the licensing determinations pursuant to new section 601(b). The Commission shall consider whether users of non-core services are able to obtain similar services from an alternative to INTELSAT, Inmarsat, or successor entities: (1) whether such an alternative offers services at competitive rates, terms, or conditions; (2) whether the users, such as airlines or maritime users, will have to replace equipment at substantial costs prior to the termination of its design life; and (3) whether competitive alternatives do not exist because they have been foreclosed or hindered due to anti-competitive actions undertaken by or resulting from the INTELSAT or Inmarsat systems. This section also notes that such licensing decisions shall be made in a manner which facilitates achieving the purposes and goals in this title. New paragraph (b)(3) is designed to clarify rather than modify the language in new paragraph (b)(1).

New section 601(b)(3) is intended in part to address the questions raised by some parties regarding the potential impact of new section 601(b) on certain users. Some expressed a concern about the possibility that certain users might be required to switch from IGO services when there are not yet competitive alternatives available. The Committee addressed this concern by providing that the Commission is to consider in making its licensing decision under new section 601(b) whether users of non-core services are able to obtain such services other than through the IGOs at competitive rates, terms, and conditions. At the same time, the Committee does not wish to provide any incentive to the IGOs or their signatories to preclude market entry by U.S. satellite service providers in overseas markets, thus preventing competitive alternatives from developing. Some expressed a concern that some signatories, aware that the Commission might consider whether alternatives were available to users, might make it more difficult for such alternatives to develop. Thus the Committee provides that in making its licensing decisions the Commission shall consider whether competitive alternatives in individual markets do not exist because of actions taken by or resulting from the INTELSAT or Inmarsat systems. Under this subsection, the Commission may publish notice of a potential limitation or revocation of licenses prior to the privatization dates in new section 601, in order to provide an opportunity to users to avoid high costs of replacing equipment or transitioning from one system to another. This subsection makes clear, however, that the

decisions shall be made in a manner which facilitates the pro-competitive privatization of INTELSAT and Inmarsat as outlined in this title. Thus the Commission must implement new subsection (b)(3) in a manner which is best suited to result in the pro-competitive privatization of the IGOs as soon as practicable but no later than January 1, 2001, for Inmarsat and January 1, 2002, for INTELSAT and in a manner consistent with the criteria in subtitle B.

The Committee notes that nothing in H.R. 1872 is intended to jeopardize the ability of the U.S. government to contract for satellite services as necessary to protect our national security. The Committee expects that the Commission will implement section 601(b)(3), and all other provisions of the bill, in a manner which takes into account U.S. national security interests. The Committee expects particular deference be given to the national security related needs of our intelligence agencies and the Department of Defense, and other similar agencies.

The Committee's intent is that while the Commission is to apply sufficient pressure on the IGOs and their successors to privatize in a pro-competitive manner as defined in the legislation, in doing so, it should consider the impact on users as prescribed in the bill. The objective is to reduce the burden on users if IGOs are denied access to the U.S. market. The Committee recognizes that certain signatories or the IGOs may erect or maintain formal or informal barriers to competitors, with the effect of making it difficult for providers other than the IGOs to offer competitive services to those markets. Thus the Commission is required to consider whether competitive alternatives do not exist because they have been foreclosed or hindered due to anti-competitive actions undertaken by or resulting from the INTELSAT or Inmarsat systems.

This legislation is consistent with the World Trade Organization (WTO) obligations of the United States. However, to clarify that this is the case, new section 601(c)(3) explicitly states that the Commission shall take into consideration the United States obligations and commitments for satellite services under the Fourth Protocol to the WTO's Services Agreement, which covers basic telecommunications, as it implements new subsections (a) and (b). New subsection (c) is not designed in any way to reduce the pro-competitive requirements or criteria in this title. It is intended to clarify that the Commission shall take notice of the WTO obligations of the U.S. as it implements this title. The Committee anticipates that the Commission will, in doing so, receive input from relevant Executive branch agencies.

New section 601(d) expressly states that this legislation does not preclude COMSAT from investing in or owning satellite or other facilities independent from INTELSAT, Inmarsat or successor or separated entities, or from reselling the services or facilities of such independent systems. This provision clarifies the Committee's intent that this legislation not preclude COMSAT from providing services through facilities independent from the IGOs. Thus, the legislation permits COMSAT to provide services in advanced, high-growth areas, including additional and non-core services, regardless of the outcome of the annual privatization determinations

under new subsection 601(b)(1) or new section 603, provided that COMSAT does so through independent facilities.

The Committee's goal is to motivate and provide incentives for the IGOs to privatize in a pro-competitive manner as soon as possible. Essentially, the Committee has used the possibility of continued access to the lucrative U.S. telecommunications market to encourage the IGOs to privatize. New section 601 therefore provides deadlines and specific competition criteria. If these requirements are not met, the IGOs access to the U.S. market will be restricted for non-core services.

Section 602—INTELSAT or Inmarsat orbital locations

New section 602 requires the President, unless the FCC determines that the IGOs have been privatized in a manner that will not harm competition pursuant to new section 601(c), to oppose, and prohibits the FCC from in any way assisting, any registration for new orbital locations for INTELSAT after January 1, 2002, and for Inmarsat, after January 1, 2001. The President and the FCC also must take all measures necessary to preclude procurement, registration, development, or use of new satellites which would provide non-core services. COMSAT is required under the 1962 Act to obtain authorization by the FCC for investment in new INTELSAT or Inmarsat satellites.

A limited exception is provided in that this restriction does not apply to orbital locations for replacement satellites pursuant to new section 622(2)(B) and orbital locations for satellites that are contracted for as of March 25, 1998, if such satellites do not provide additional services. Additional services are defined as Internet services, high-speed data, interactive services, non-maritime or non-aeronautical mobile services, DTH or DBS video services, or Ka-band services. Such services should be provided by the private sector rather than IGOs. This exception in new subsection (b) is not intended to provide an avenue for expansion for the IGOs, through acquisition of new orbital locations or expanding the use of existing locations. New subsection (b)(2) provides that this exception only applies to satellites which provide services in the C, Ku, and L bands.

Section 603—Additional services authorized

New section 603(a)(1) provides that the Commission may, subject to conditions in new section 603, authorize the use of INTELSAT or Inmarsat space segment for certain advanced services defined as additional services. New section 603(a)(2) provides that if the Commission does not find that the requirements of its annual review process as required in new section 603(b) have been fully met, including that substantial and material progress has been made toward a pro-competitive privatization and that the IGOs are not hindering competitors market access, then the Commission may not permit COMSAT or other providers of IGO services to offer additional services under new contracts. Under new subsection 603(a)(2), the prohibition on additional services under new contracts would last until the Commission makes a finding that progress towards a pro-competitive privatization is being made.

Under new section 603(a)(2), if progress is not found, the Commission is required to preclude the authorization, license, permit or renewal thereof for the use of IGO space segment for additional services provided directly or indirectly under new contracts. By including both the direct and indirect provision of additional services, the Committee intends to preclude evasion of this section, including through resale to new users by existing users. New subsection 603(a)(3) requires the Commission to establish rules to prevent evasion of the limitations in this section by users who did not use specific additional services as of the date of the Commission's most recent finding under new subsection (b) that the conditions of such subsection have not been met. Thus users who are utilizing one type of additional service cannot evade this section by purchasing another type of additional service following a negative finding. The intent of this subsection is to avoid a potential termination of the services a user is currently utilizing, if a negative finding is made, but to preclude COMSAT or other providers of IGO services from offering additional services under new contracts, if the requirements of new section 603 are not met. New section 603 in no way limits the authority of the Commission to limit additional services or other services of IGOs or separated or successor entities if it decides to do so in the public interest, to promote a pro-competitive privatization or otherwise.

New section 603(b) requires the FCC to annually review whether progress is being made by the IGOs towards a pro-competitive privatization and provides the dates by which these annual findings must occur. New section 603(b)(1) contains the primary criteria to be used in such findings. New section 603(b)(1)(A) sets out the first of these: that substantial and material progress has been made during the preceding period at a rate and manner that is probable to result in achieving a pro-competitive privatization in accordance with this title. Thus, the Commission would be required to find that the requirements of the section were not met if at the time of a finding: (1) the rate of privatization was not moving at a pace that would result in privatization of INTELSAT by January 1, 2002 and Inmarsat by January 1, 2001, or (2) that even if it were, it is not probable that such privatizations would occur in a manner consistent with all the requirements of this title. Moreover, progress must be substantial and material, that is, not merely statements of intent to privatize, in order for the Commission to make a positive finding.

New section 603(b)(1)(B) sets out the second primary criterion for a positive annual finding: that neither INTELSAT or Inmarsat are hindering competitors' or potential competitors' access to the satellite services market place. Thus, if the Commission finds that the IGOs, either on their own or working with their signatory owners, are hindering access to the satellite services market, then it must find that the conditions in this section have not been met.

New sections 603(b)(2)–(5) contain several specific conditions which, at a minimum, must be met in order for the Commission to make a positive annual finding. However, these minimum requirements alone are not sufficient for the Commission to make a positive finding. Both new sections 603(b)(1)(A) and (B) must also be met prior to a positive finding. The principle criteria that must

guide the Commission's analysis are those in new section 603(b)(1). The references to a pro-competitive privatization in new sections 603(b)(2)–(5) refer to that described in the requirements of this title. For example, if the resolution described in new section 603(b)(2) is not consistent with and does not include the pro-competitive criteria in subtitle B, then the requirements of this section have not been met. The same applies with respect to the new sections 603(b)(3)–(5).

New section 603(b)(6) defines the criterion of not hindering access and requires that the Commission not make a finding under new paragraph (1)(B) unless the Commission determines that the INTELSAT or Inmarsat are not in any way impairing, delaying or denying access to national markets or orbital locations for other satellite service providers. The Committee finds that the IGOs and their signatories have impaired market access and that the IGOs have warehoused orbital slots, impaired competition throughout the satellite coordination process, and otherwise created barriers to competition. This section therefore requires the Commission to make a negative finding under paragraph (1)(B) if it determines that the INTELSAT or Inmarsat systems are in any way impairing or delaying access to national markets or orbital locations.

New section 603(c) grandfathers users under existing contracts, so that COMSAT or any other IGO Signatory may continue to provide additional services to any third party under a contract that predates a negative finding. This section is designed to avoid requiring the breach of existing contracts for IGO services by parties that have relied on such contracts in business planning. It is not intended to permit evasion of new subsection (b) through resale or other devices.

Subtitle B—Federal Communications Commission Licensing Criteria: Privatization Criteria

Section 621—General criteria to ensure a pro-competitive privatization of INTELSAT and Inmarsat

New section 621 provides the Commission with the general criteria it must use in its determination of whether the licensing of the use of, or provision of service by, any of the privatized entities will harm competition in the U.S. market. In addition to the ten general criteria in new section 621, other provisions in subtitle B provide criteria specific to the privatization of INTELSAT, INTELSAT's separated entity, and Inmarsat. New section 621 directs the President and the Commission to secure pro-competitive privatizations of INTELSAT and Inmarsat in accordance with the criteria set out in subtitle B.

New section 621(1) provides deadlines for the two organizations to obtain such a privatization. For INTELSAT, the deadline is as soon as practicable, but no later than January 1, 2002, for Inmarsat it is as soon as practicable, but no later than January 1, 2001. The Committee believes that these dates are fully achievable for each organization, since they have been studying the issues associated with privatization for over four years.

New section 621(2) sets out the key objective for privatizations of the IGOs, which is that their successor entities and separated

entities be independent corporations. Currently, the IGOs are not corporations, incorporated in any one country and subject to that country's laws, but instead are treaty-based intergovernmental organizations, immune from many national governments' laws and regulations. In effect, the IGOs, providers of commercial services, have much of the legal status of a government entity. The intent of new section 621(2) is to ensure that the privatized entities do not operate with such privileged and immune treatment, but are subject to the same laws and regulations as other competitors. Accordingly, new section 621(2) requires that privatized entities be national corporations and have ownership and management that is independent of the IGOs and the signatories.

Specifically, new section 621(2)(B)(I) provides that the privatized entities must have ownership and management that is independent of any signatories or former signatories that control access to national telecommunications markets, and ownership and management independent of any IGO remaining after the privatization. This is intended in part to remove the conflict of interest inherent when, as is often the case with the IGOs owners, the operators, or signatories, are owned by the same agency empowered to make interconnection arrangements or licensing decisions on additional market entry. In some cases, the IGO signatories are themselves the government licensing agency. If the privatized entities are owned by operators who can ensure new competitors are kept out of their national markets or raise barriers or otherwise impair market access, then such a privatization will harm competition.

By "independent," the Committee intends that the IGO privatizations result in entities that operate free from control of the IGOs and the IGO signatories, and that they instead function as normal private corporations, with fiduciary duties to private shareholders, and not to national governments. The Committee does not intend to bar investment in the privatized entities by any particular entity, but the signatories, acting in any collaborative function as they do now through IGO structure, should not control or influence the operations of any privatized entity. The Committee does not intend to provide "veto" power to any one country by the insistence of that country's signatory investing in a privatized entity. Rather, by "independent," the Committee intends to provide some degree of flexibility and discretion to the Administration and the Commission in determining the totality of the privatized entity's independence, and therefore specifically avoids using investment limitations on a percentage basis. However, the Committee intends a minimum of a superabundant external investment, independent from the IGOs, signatories and former signatories, would be necessary to find that a privatized entity is indeed "independent." Likewise, if signatory ownership creates an incentive or potential incentive for signatory favoritism of an IGO successor or separate entity, such structure should not be deemed independent.

Likewise, the Commission should consider when making its determinations under new section 601, the totality of the privatized entities ownership and management structure. The Committee also expects the Commission would look to its precedents and relevant precedents in other bodies of law for determining independence in terms of corporate governance. If the IGOs or market-access con-

trolling signatories have control of the board or in other ways control the operations and decisions of any privatized entities, then such entities would not be "independent" under the meaning of this section. The Committee recognizes that there are many ways to "control" access to markets. Legal control is one means. Control through facilities ownership or influence with authorities are others.

Without the requirements of this section, the successor and separated entities of the IGOs could retain the same unfair market advantage over private competitors that the IGOs themselves have enjoyed. The legislation is concerned only with those signatories and former signatories who control market access. The Committee is determined to open markets to competitive suppliers of telecommunications services, so as to most reliably lower the costs of international communications for the benefit of consumers in the United States and worldwide.

New section 621(3) requires as a pro-competitive criteria that the privatized entities may not operate with IGO privileges and immunities. This section seeks to prevent the IGO successor and separated entities from benefiting from another unfair competitive advantage that the IGOs have enjoyed. The IGOs have a full range of diplomatic and other treaty-based privileges and immunities, such as tax exemptions, immunity from lawsuits, antitrust immunity, and preferential access to orbital locations. These privileges and immunities have permitted the IGOs to warehouse scarce orbital slots, prevented competitors from obtaining orbital locations from which to compete, and have made it difficult, if not impossible, for private competitors to obtain legal redress for anti-competitive abuses that the IGOs may have engaged in.

New section 621(3) provides that preferential treatment of the IGOs not be extended to any privatized entity. This section therefore prohibits extending any preferential treatment the IGOs have enjoyed. In addition, the section specifically includes privileged or immune treatment provided by national governments; privileges or immunities or other competitive advantages IGOs and their signatories enjoy through their intergovernmental agreements by which the IGOs operate; and preferential access to orbital locations including through the non-application of anti-warehousing requirements. By this language, the Committee intends that the privatized entities would be subject to the same requirements as any other competitor in a market, and would not be provided preferential access over its competitors to orbital locations, nor preferential status under a country's domestic law nor any other preferences, direct or indirect, of any kind. Therefore, to be pro-competitively structured, a privatized entity must be treated like any other competitor in each national market. For purposes of a Commission determination under new section 601, the Commission must consider that preferential treatment in other markets may harm competition in the U.S. market.

New section 621(4) requires as one of the ten general criteria for a pro-competitive restructuring that during the transition period prior to full privatization, the IGOs shall not be permitted to expand into additional services, as defined by the bill. This limit on IGO expansion applies to additional applications of existing serv-

ices or additional areas of business. Thus if an IGO attempts to offer an additional service by applying an existing service in a new or advanced manner, that service provision would also be precluded.

New section 621(4) is intended to prevent the IGOs from leveraging their dominant positions in their core services into new and additional services. This is, in part, designed to address the phenomenon that, when dominant telecommunications companies are put on notice that competition is going to be permitted, they commonly seek to expand into new markets, using leverage from their dominant services to foreclose the market opportunities of new entrants. Such leveraging into advanced service sectors would be particularly troubling in this instance since the IGOs were given their monopolies only to facilitate their provision of core services, such as international telephony for INTELSAT and safety of life at sea for Inmarsat.

New section 621(5) provides that any privatized entity shall be a national, public stock corporation whose shares are publicly traded and whose operations are subject to the laws of the nation of incorporation. Therefore, new section 621(5)(B) provides deadlines for initial public offerings of securities of any privatized entity. Those deadlines are no later than January 1, 2001, for the successor entities of INTELSAT and no later than January 1, 2000, for the successor entities of Inmarsat. The Committee notes that the general criteria only address the initial public offering (IPO) of stock in the successor entities. The Committee does not provide any deadline for any subsequent public offerings of stock, but notes that the deadline for a complete privatization, as provided in new section 621(1), is a year following each IPO, respectively for INTELSAT and Inmarsat.

New section 621(5)(C) provides that the shares of the privatized entities be listed on major stock exchanges with transparent and effective securities regulation. This is to ensure that the stock of privatized entities is not protected by interested governments or subject to manipulation, but that its trading is instead subject to regulation that protects against such fraudulent, deceptive or otherwise abusive stock trading practices. The Committee also intends by this new section 621(5)(C) that such privatized entities be subject to the disclosure requirements of major stock exchanges and be subject to the fiduciary duties imposed on boards by nations with such exchanges. This subsection, like all of new section 621, is necessary in part because the Committee finds that IGO successor or separated entities, given the intergovernmental status of their parent entities, are unique organizations, unlike other satellite service providers.

New section 621(5)(D) requires that the board of directors of any privatized entity be independent of the signatories and the remaining IGOs. The section requires that a majority of the board of any successor or separated entity not be selected or appointed by, or otherwise represent any signatory or former signatory that controls access to national markets or any IGO remaining after privatization. By limiting the board selection by signatories that control market access in their countries, the Committee intends to prevent control of the board by signatories that can influence entry deci-

sions in their respective markets. In many countries, the signatories are government-owned or controlled monopolies that control access to their telecommunications markets. In some markets, the signatory is the actual licensing body for that country. The intent of new section 621(5)(D) is thus analogous to that of new section 621(2)(B). As with that section, the Committee does not intend to bar COMSAT's participation in the selection process of future privatized entities' directors, since COMSAT does not control access to the U.S. telecommunications market.

New section 621(5)(E) requires that all transactions between such entities and their former IGOs must be conducted at arm's length, in order to assure independence of the newly privatized entities, to assure fairness to competitors, and to promote transparency and market-based decision making.

New sections 621 (6) and (7) reflect the Committee's intent that IGO successor and separated entities be fully subject to competition regulation and enforcement in the countries in which they are incorporated, headquartered, or doing business, and that such countries have progressive telecommunications regimes. New section 621(6) would therefore require that any privatized entity that is licensed by the FCC must have applied through the appropriate national licensing authorities for use of desired frequencies and orbital location registration. New section 621(7) would consequently prevent FCC licensing of an entity that forum shopped by incorporating in a country that does not have developed regulatory and competition regimes and which have not made WTO market opening commitments with respect to their satellite markets. This paragraph therefore requires that the domiciliary country have effective laws and regulations that secure competition in telecommunications services, and be a signatory of the WTO Services Agreement with a schedule of commitments covering non-discriminatory market access to its satellite services market. This subsection, like all of new section 621, is necessary in part because the Committee finds that IGO successor or separated entities are unique organizations, due to the intergovernmental status of their parent organizations, and therefore unlike other satellite service provides.

New section 621(8) is intended to prevent the IGOs and their successor and separated entities from warehousing orbital locations. Over the years the IGOs have had privileged access to scarce orbital slots, since no national or international authority has overseen their access to slots to assure that they actually need or use the locations for which they apply. Other satellite operators are not so privileged. For instance, although the Commission and much of the rest of the world has established a policy of spacing satellites two degrees in the orbital arc apart from each other, to avoid interference to adjacent satellites, INTELSAT has generally insisted on three degree spacing between its satellites and those of other systems.

Orbital slots are critical to operating a satellite system. Without orbital slots, competitors may not operate satellites nor offer services over their facilities in competition to the IGOs. The Committee, therefore, has provided in new section 621(8) an anti-warehousing cut-off date of March 25, 1998. Under this paragraph, if the IGOs are not using their slots to provide commercial services by that

date, or if they do not have firm operational plans and contractual commitments to do so, or to place a satellite in their reserved slots by that date, they must turn the slots back in to the International Telecommunication Union (ITU) for reallocation to satellite operators who will make use of them. INTELSAT's and Inmarsat's operational plans are adopted in official signatory meetings of the two organizations, by the Board of Governors and Council, respectively. The language requiring the provision of commercial services is intended to prevent the IGOs from warehousing orbital slots in which a satellite is located, but one that is not currently being used to provide services, due perhaps to its inclined orbit. The provision of commercial services would generally require a satellite to be in a non-inclined orbit, for example so that a user's earth station could receive a steady signal.

New section 621(9) requires an appraisal of the satellites and other assets transferred by an IGO to a successor or separated entity prior to such transfer. Under the paragraph, the appraisal must be at both book and fair market value and conducted by an independent third-party. All of the existing assets of the IGOs have been acquired by privileged treaty organizations and are to be transferred to private corporations. It is, therefore, important for government officials and the public to know the market value of the assets that will be conferred by the privatization of the IGOs. A determination can then be made by each national administration as to the most appropriate disposition of the profits from such transfers.

Finally, new section 621(10) provides that COMSAT shall not be authorized by the Commission to invest in K–TV satellites, unless Congress specifically authorizes such investment. U.S. policy is that the INTELSAT should not procure the K–TV satellites. The Committee intends by this paragraph to ensure that U.S. policy is not thwarted by COMSAT's investment in such satellites unless Congress specifically provides authorization.

In December 1996, the U.S. Administration opposed the procurement by INTELSAT of the K–TV satellite, which is designed to provide direct broadcast services, on the theory that IGOs should not expand into commercial services that the private sector can provide. Despite U.S. opposition, INTELSAT voted to procure the K–TV satellite. Under the 1962 Act, COMSAT must obtain Commission authorization prior to investing in IGO satellites. After INTELSAT's decision to procure K–TV, COMSAT petitioned the Commission for investment authorization. The Commission has not granted COMSAT's request. In April 1998, INTELSAT announced that the separated entity New Skies/INC will operate K–TV. INTELSAT wishes to transfer K–TV to New Skies at book value, debt free. Accordingly, new section 621(10) is intended to ensure that, if such transfer is attempted, COMSAT shall not be authorized to invest in K–TV satellites, until such time as the K–TV transfer and operation are consistent with other privatization criteria in the section. The Committee specifically finds at this time that approval of investment in K–TV is not in the public interest and that allocation or transfer of orbital slots for K–TV satellites is not in the public interest.

Section 622—Specific criteria for INTELSAT privatization

In addition to the general privatization criteria that are intended to apply to the privatization of any successor or separated entity of an IGO, new section 622 provides criteria specific to the privatization of INTELSAT. In this section, the Committee highlights two important criteria for that privatization, both of which are intended to foster a competitive international satellite market undistorted by INTELSAT's leveraging of its status as an IGO, ownership structure, and dominant position in core telephone and video services into new service markets.

First, new section 622(1) would require the Commission to determine for purposes of licensing whether the number of competitors created out of INTELSAT's present assets, when added to the number of competitors in markets served by INTELSAT, is sufficient to create a fully competitive market. While the Committee did not feel it necessary to specify a particular number of successor or separated entities to be created out of INTELSAT, it believes that multiple successor entities are more likely to lead to a fully competitive global satellite market, given the current market position and dominance of the IGOs. The Committee finds that the greater the number of competitors created out of INTELSAT, the more likely consumers and new entrants will benefit through the enhancement of competition. The Committee intends that the U.S. seek a privatization involving multiple entities created out of INTELSAT as a key part of its privatization policy, but does not specify the number of such entities which must be created.

The Commission will be required under new section 601(b) to determine whether the licensing of a successor entity due to the privatization of INTELSAT will harm competition in the telecommunications market of the United States. Under new section 622(1), an aspect of this competition determination must include an analysis of whether the number of competitors created out of INTELSAT is sufficient to create a fully competitive market. If the Commission cannot make a determination that the requisite number of competitors are present, the lack of such competitors must be deemed a high risk to competition as would failure to meet any of the other criteria in this title.

The Committee notes that new section 622(1) refers to the market served by INTELSAT. That market is a global market. New section 601(b) requires the Commission to undertake a determination regarding the effect on competition in the U.S. market. The Committee notes that given the inherently global nature of satellite services, the competitiveness of the global market will inevitably impact the competitiveness of the U.S. market for satellite services.

New section 622(2) is intended to limit INTELSAT's expansion pending privatization. While new section 621(4) limits INTELSAT's expansion into new services, this paragraph limits INTELSAT's expansion by preventing its acquisition of additional orbital slots, placing new satellites in existing slots, and procuring additional satellites. Ever since privatization was first discussed, INTELSAT has engaged in a rapid expansion of its satellites and orbital slots. Since this rapid expansion has occurred at a time when the market share for INTELSAT's core telephony services in some markets is decreasing (although the total volume of telephone minutes has not

decreased) due to the transfer of such traffic to fiber optic cables, INTELSAT may use its rapid build-up to use its privileged position and access to orbital slots to create a surplus of satellites or satellite capacity for new commercial services, thus impairing access to these new markets for competitors.

Thus, in new section 622(2), the Committee directs the United States to oppose such INTELSAT expansion in INTELSAT, at the ITU, and in the Commission.

The Committee, however, makes provision in new section 622(2)(B) for INTELSAT's need to replace satellites used for the provision of core telephone and occasional video services, as long as such satellite is procured pursuant to a construction contract executed by March 25, 1998, and its construction commences by January 1, 2002.

New section 622(3), like the previous paragraph, is intended to end INTELSAT's anti-competitive tactics. The paragraph requires as an additional pro-competitive criteria for INTELSAT's privatization that technical coordination between INTELSAT and others shall not be used to impair competition, and that coordination under Article XIV(d) of the INTELSAT Agreement shall be eliminated pursuant to the privatization process. Article XIV(d) currently requires all of INTELSAT's competitors to engage in coordination of their satellites with INTELSAT satellites, in order to avoid technical and economic harm to INTELSAT. By new section 622(3), the Committee intends that the review for economic harm to INTELSAT through the operation of a competitor's satellites be eliminated, thereby confirming a decision already made by INTELSAT, and that continuing technical coordination shall not be used for anti-competitive purposes.

Section 623—Specific criteria for INTELSAT separated entities

New section 623 establishes criteria, in addition to the general criteria of new section 621, specific to the privatization of a separated entity of INTELSAT. Under new section 681(a)(8) of subtitle E on definitions, a separated entity of INTELSAT is defined in part as an entity whose structure was under discussion as of March 25, 1998. In early April 1998, INTELSAT adopted a plan to incorporate an affiliate, New Skies Satellites, N.V. The additional criteria in new section 623 will therefore be used by the FCC when it makes its determination, pursuant to new section 601(a), whether New Skies has been privatized in a manner that will not harm competition in the telecommunications markets of the U.S.

Specifically, new section 623 adds the following criteria to a new section 601(a) determination: (1) the INTELSAT separated entity must conduct an IPO within one year after decision to create it—or by April 1, 1999; (2) the INTELSAT separated entity must waive any privileges and immunities for any transaction between INTELSAT and itself; (3) there must be no interlocking directorates between the INTELSAT separated entity and INTELSAT; (4) spectrum is not to be transferred from INTELSAT and the INTELSAT separated entity after its initial creation; and (5) there must be no reaffiliation through ownership, management or exclusive arrangements between the INTELSAT separated entity and

INTELSAT until 15 years after the complete privatization of INTELSAT.

The Committee intends by new section 623 in part to specify the elements that would define the independence of the separated entity from INTELSAT. Accordingly, new section 623(1) gives the separated entity one year to hold a public offering of its stock. Only when private, non-signatory owners hold a preponderance of the separated entities shares can there be any assurance of independence and autonomy from INTELSAT.

New section 623(2) similarly carries forward the policy of new section 621 that a separated entity should in no way partake in the privileges and immunities enjoyed by INTELSAT. New section 621, for example, requires that transactions between INTELSAT and a separated entity be at arm's length. The only effective way to enforce that requirement is to ensure that INTELSAT will not assert its privileges and immunities if such a transaction is challenged in any court of law or before any competent regulatory body. In this provision, the Committee has sought to prevent a separated entity, which must have no privileges and immunities, from hiding behind those of INTELSAT.

The Committee's goal is to ensure the creation of stand-alone, truly independent separated entities. The prohibition in new section 623(3) on interlocking directorates is essential to that goal. Similarly, proscription in new section 623(4) on INTELSAT's continuing transfers of radio spectrum to a separated entity, after the initial transfers at the inception of such an entity, and the 15-year prohibition in new section 623(5) on reaffiliation of a privatized INTELSAT and any successor or separated entity are intended to eliminate any remaining ties between INTELSAT and such entities.

Section 624—Specific criteria for Inmarsat

New section 624 establishes criteria, in addition to the general criteria of new section 621, specific to the privatization of Inmarsat. Thus, the additional criteria in new section 624 would be used when the FCC makes its determination, pursuant to new section 601(b), whether Inmarsat and any successor entities have been privatized in a manner that will not harm competition in the telecommunications markets of the U.S.

Specifically, new section 624 adds the following criteria: (1) multiple signatories and direct access to Inmarsat must be permitted; (2) Inmarsat must be prevented from expanding during the transition to full privatization; (3) there must exist a sufficient number of competitors in the markets served by Inmarsat, including the number of competitors created out of Inmarsat, to create a fully competitive market; (4) there are no ownership, management or exclusive arrangements between Inmarsat or any of its successor or separated entities and ICO for 15 years after Inmarsat's privatization; (5) there are no interlocking directorates or employees between Inmarsat or any of its successor or separated entities and ICO; and (6) Inmarsat spectrum, after January 1, 2006, or end of life of current Inmarsat satellites, whichever is later, must be available for assignment to all satellite systems on a non-discriminatory basis. Thus the spectrum provided to Inmarsat is to be used

for the key purpose for which Inmarsat was created—particularly maritime safety—but is not to be used for a new type of service.

While new sections 603 and 621(4) limit expansion of Inmarsat into new services, new section 624(2) limits Inmarsat's expansion pending privatization through the acquisition of additional orbital slots and new satellites. As is the case with INTELSAT, Inmarsat has engaged in the expansion of its satellites and orbital slots since privatization was first discussed. Since this expansion is occurring at a time when private competitors actively are seeking to enter the market for new services, Inmarsat is using its privileged position and access to orbital slots to create a surplus of satellites for new commercial services, thus impairing access to these new markets for competitors.

New section 624(2) therefore directs the United States to oppose this Inmarsat tactic in the Inmarsat Assembly of Parties and Council, at the ITU and in the Commission. For purposes of the Commission and the Administration carrying out this directive, however, the Committee notes that new section 624(2) specifically provides that it shall not be construed to limit the maintenance, assistance, or improvement of the Global Maritime Distress and Safety Service ("GMDSS"). The Committee intends through both new sections 624(2) and 624(7) that the United States will take all appropriate action to ensure the continued viability of GMDSS, which is currently provided by Inmarsat. To that end, the Committee also expects that the U.S. will actively support measures to enable private competitors to offer GMDSS in the future.

New section 624(3) requires the Commission to consider the number of competitors created out of Inmarsat's present assets, added to the number of competitors in markets served by Inmarsat, when determining whether the use of a successor entity's services will harm competition in the U.S. New section 624(3) is intended to facilitate the creation of a fully competitive market for mobile satellite services. While the Committee did not feel it necessary to specify a particular number of successor or separated entities to be created out of Inmarsat, it is its view that multiple entities are more likely to lead to a fully competitive market and that the U.S. should pursue the multiple subsidiary option.

New section 624(4) specifically prohibits any recombination of Inmarsat or its successor entities with ICO until at least 15 years after Inmarsat is privatized in accordance with the criteria in the bill. The 15 year remerger preclusion helps to prevent ICO from gaining unfair advantages over competitors or potential competitors by utilizing Inmarsat spectrum that was obtained by Inmarsat as an IGO. This provision prevents Inmarsat from evading the intent of the bill through merger or other joining with ICO, which is specifically excluded from the definition of "separated entity." A similar purpose is underlies new section 624(5), which prohibits Inmarsat or its successor entities from sharing directors, officers, or employees with ICO.

The Committee included new section 624(4) and (5) because it is concerned about the emerging U.S. mobile satellite service (MSS) industry's current access to global MSS spectrum. Any re-merger or affiliation of a privatized Inmarsat and ICO would also eliminate any near-term U.S. MSS access to that spectrum. Inmarsat has

been assigned access to, and controls 56 percent of available global MSS spectrum. ICO, with 82 percent of its investment held by Inmarsat signatories or organizations affiliated with an Inmarsat signatory, has been assigned, and controls 19 percent of available global MSS spectrum. The entire U.S. MSS industry currently has access to only 25 percent of such global spectrum.

The Committee therefore has concluded that there should be, in order to protect against competitive harm to the U.S. market, an absolute prohibition against the merger, reaffiliation, additional investment ownership, management ties or any exclusive arrangements between Inmarsat and ICO and/or any Inmarsat successor or separated entity for a period of 15 years. The Committee has concluded that the Commission, with respect to one of the licensing criteria provided in new sections 621 and 624 for Inmarsat or Inmarsat successor or separated entities, shall specifically prohibit entry into the U.S. MSS market or revoke any such authority previously granted should these events occur.

Section 625—Encouraging market access and privatization

New section 625 is intended to provide additional incentives for other nations that participate in the IGOs to support a pro-competitive privatization of the IGOs, but through a means that is consistent with U.S. obligations under the WTO Service Agreement. The Committee has therefore adopted a mechanism to use settlement rates for international message telephony as a means of encouraging both market access for private satellite systems and a pro-competitive privatization of INTELSAT.

The Committee has provided new section 625 as an additional remedy that is targeted at the countries that deny market access to competitive satellite companies and that are opposing a timely and competitive privatization of INTELSAT and Inmarsat. Pursuant to new section 625, all relevant international telecommunications policies of the United States, including settlements policy, will be directed to the legislative objectives of lowering the costs of international telecommunications services for consumers.

New section 625(a) accordingly requires the Secretary of Commerce, through the Assistant Secretary for Communications and Information, to transmit to the Commission a list of non-WTO countries that impose barriers to competitive entry in their satellite market and a list of non-WTO countries that are opposing IGO privatization. The Commission may then impose a cost-based settlement rate on U.S. international common carriers settling their traffic with carriers from those countries, pursuant to new section 625(b). The Committee expects that other U.S. government agencies will take notice of this listing. Nothing in this title precludes the Commission from using settlement rates to encourage WTO member nations to support a pro-competitive privatization, using settlement rates as a lever, if otherwise consistent with U.S. obligations to the WTO. The Committee finds that lowering settlement rates to cost in any event would be in the public interest.

The Committee notes that no specific time-frame for the imposition of cost-based rates on impeding countries is provided in new section 625, other than the 180 days from enactment provided to the Commerce Department and the agencies with which it must

consult to provide a list to the Commission. The Committee thereby intends to provide the Commission with flexibility in the timing and decision to impose cost-based rates on impeding countries.

New section 625(c) requires the Commission, in exercising its authority to establish settlement rates for U.S. international common carriers, to advocate in favor of cost-based settlement rates in all relevant international telecommunications policy fora, including IGO meetings. By this paragraph, the Committee intends to clearly state that it is U.S. policy and in the public interest to establish cost-based settlement rates. The Committee believes that the Commission should exercise the authority it has to set settlement rates for U.S. carriers to advocate in favor of cost-based settlement rates, as opposed to cost-oriented rates or some other less competitive benchmark. The Committee believes that until international settlement rates are reduced to reflect the actual costs of terminating international calls on specific routes, the international market will continue to operate with significant distortive, above-cost subsidies, to the harm of competition and U.S. consumers.

Subtitle C—Deregulation and Other Statutory Changes

Section 641—Direct access; treatment of COMSAT as nondominant carrier

New sections 641(1) and (2) require the Commission to permit competitors to offer services through direct access to the INTELSAT and Inmarsat systems. The Commission is further required to ensure that direct access through the purchases of space segment from INTELSAT or Inmarsat is available by January 1, 2000. The Commission is further required to ensure that direct access through investment directly in INTELSAT or Inmarsat by entities other than the U.S. signatory is permitted, by January 1, 2002, and Inmarsat, by January 1, 2001. This section requires the Commission to take such actions as may be necessary to authorize such direct access.

Currently, INTELSAT offers four types of direct access: Level 1, permitting a customer access to operational, technical and tariff information and permitting a customer to attend INTELSAT meetings; Level 2, permitting a consumer to access INTELSAT tariff and service terms and conditions; Level 3, permitting a consumer direct ordering and financial liability for services; and Level 4, permitting a consumer to directly invest.

Inmarsat does not currently offer direct access to entities other than its signatories. However, the proposed privatization reportedly would terminate Inmarsat's Operating Agreement, including the provisions governing exclusive signatory distribution of Inmarsat service. If the Inmarsat Operating Agreement is terminated, former signatories, including COMSAT for provision of services in the United States, should not be the exclusive distributors of Inmarsat services. The Committee further finds that the U.S. Administration and the Commission should, in the public interest, ensure that any Inmarsat privatization plan includes direct access until full privatization is fully implemented. This statement should not be interpreted in any way as an endorsement of, or support for, the current Inmarsat privatization plans.

Although over 85 nations worldwide now permit Level 3 direct access to INTELSAT—resulting in dramatic savings to consumers—the United States, currently, does not. Currently, over 14 nations permit Level 4 direct access. This provision will help further deregulate the U.S. telecommunications marketplace, while bringing more opportunities and lower prices to consumers. The Committee believes that implementing direct access is of vital interest to the promotion of competition for INTELSAT and Inmarsat services in the United States, as well as in promoting competition for satellite services generally.

New sections 641(1)(A)(i) through (iii) describe the circumstances which the Commission should determine are present when the Commission implements direct access through purchases of space segment capacity from INTELSAT. Likewise, new section 641(2)(A)(i) through (iii) places similar requirements on the Commission before permitting telecommunications carriers to purchase space segment directly from Inmarsat. Specifically, the Commission would be required to determine the following conditions have been met prior to its implementation of direct access through purchases of space segment capacity: (1) INTELSAT and Inmarsat have a mechanism to ensure that signatories are compensated for unavoided support costs; (2) no foreign signatory is permitted to provide INTELSAT or Inmarsat service from the U.S.; and (3) carriers must pass through savings to end-users.

The Committee intends that the Commission, in implementing new subsections 641(1)(A)(i) and 641(2)(A)(i), determine that the U.S. signatory be fairly compensated only for its unavoidable costs which it is required to incur as a signatory and which are in excess of payments from INTELSAT and Inmarsat to the U.S. signatory. Thus, the only costs covered by this section are those unavoidable signatory expenses in excess of all payments to signatories from the IGOs. Such payments include, but are not limited to, the INTELSAT Utilization Charge, or IUC. If such costs are in excess of or not otherwise covered by the IUC or by other payments to INTELSAT or Inmarsat, then this section shall be satisfied if INTELSAT or Inmarsat has in place or creates a mechanism or other methodology or legal regime which permits (or does not preclude) parties, particularly the U.S. party, to adopt means to ensure that such unavoidable, excess signatory costs are covered by payments from other direct access providers or otherwise covered or fairly compensated. In other words, either INTELSAT or Inmarsat providing payments which covers such excess, unavoidable costs themselves, or having a mechanism, methodology or legal regime which permits (or does not preclude) the Commission to establish a mechanism, other methodology, or legal regime to cover such costs, shall constitute the mechanism described in this section. The items cited in this section, namely insurance, administrative, and other operations and maintenance expenditures, are possible examples of what such costs might be. The Committee, however, intends that the Commission, as the expert agency with the ability to determine exactly what such unavoidable costs of serving as the U.S. signatory are, and whether such costs are in excess of payments the U.S. signatory receives from INTELSAT or Inmarsat, make the determinations as to which costs are unavoid-

able signatory expenses. The intent of this section is that a mechanism be in place to fairly compensate the U.S. signatory, currently COMSAT, for its unavoidable excess costs as signatory. The Committee does not intend the Commission to deny or delay or otherwise impair direct access to U.S. consumers due to circumstances effecting foreign signatories. The Committee expects that the Commission will establish, if necessary to have direct access for space segment capacity in place as of January 1, 2000, and investment direct access by January 1, 2002, (for INTELSAT) and January 1, 2001, (for Inmarsat), whatever rules are necessary to comply with this section, including but not limited those necessary for fair compensation of the unavoidable, excess signatory costs described herein. The Committee intends that this section be implemented in a manner so as to ensure that direct access through purchases of space segment capacity from the IGOs is available as of January 1, 2000, and investment direct access by January 1, 2002, for INTELSAT and January 1, 2001, for Inmarsat. Nothing in this section precludes the Commission from establishing direct access earlier with or without the structure described in this section. This section does, however, mandate direct access for space segment capacity as of January 1, 2000, and investment direct access as of January 1, 2002, for INTELSAT as of January 1, 2001, for Inmarsat, pursuant to this section.

The Committee intends that the Commission, in implementing new subsections 641(1)(A)(ii) and 641(2)(A)(ii), does so in a manner consistent with U.S. obligations to the WTO and consults with Executive branch agencies in this regard.

The Committee intends that the Commission, in implementing subsections 641(1)(A)(iii) and 641(2)(A)(iii), should not establish a "means" that imposes any administrative or regulatory burdens on the affected carriers or other burdens which might impair a carrier's ability to respond to the demands of a competitive marketplace. The Committee expects that the Commission can meet this condition, for example, simply by requiring the carriers to annually provide a letter to the Commission verifying that end-users are receiving savings from the implementation of direct access through purchases of space segment capacity from the IGOs. The Committee does not intend for the Commission to implement any form of carrier regulation or reporting requirement that would reinstate or be tantamount to dominant carrier regulation on carriers found to be non-dominant before the Committee's consideration of H.R. 1872 and subsequently relieved of such regulation, or to impose such regulation on carriers that have never been subject to it. The forgoing sentence does not apply to COMSAT in part because COMSAT is a unique entity created by Congress under the Satellite Act and serves a unique role as the U.S. signatory to the IGOs.

The Committee believes that consumers will benefit from direct access and thus any type of extensive "means" beyond the most minimalist mechanism could reduce the competitive benefits of direct access. The Committee believes that the Commission should not impose any "means" that would impair or hinder, in any manner, carriers from taking advantage of direct access. The Committee notes that new subsections 641(1)(A)(iii) and (2)(A)(iii) state that the means be in place, not that the Commission take any spe-

cific action. The Committee also notes that the language does not refer to any specific amount or percentage of savings. Moreover, the Committee finds that competition is the best, most efficient and least burdensome means to ensure that savings are passed on to end users. Thus the Committee intends that this requirement would be met if the Commission finds that competition resulting from direct access will result in savings to consumers over what they might pay in the absence of direct access.[11]

New sections 641(1)(B) and 641(2)(B) require the Commission to ensure that prior to permitting Level 4 direct access to INTELSAT or investment in Inmarsat that such investment will be attained under procedures ensuring that INTELSAT and Inmarsat signatories will receive fair compensation for the market value of their investment.

The Committee intends that none of these conditions should be interpreted in a manner which impairs or prohibits the implementation of direct access. However, the Committee has received information from the Commission which highlight that these conditions could be interpreted to prevent direct access from the IGOs from being implemented by the dates in the bill.[12] The Commission outlined scenarios in which the conditions could not be met and thus direct access would not occur. The Commission also raised serious concerns regarding whether these conditions could be reached prior to the dates outlined in the bill. The Committee intends that this section should be implemented in a manner so that no form of direct access will be impaired or delayed. However, the Committee intends to review these provisions in light of the concerns raised by the Commission and others regarding possible interpretations, in order to make them consistent with the intent of the Committee to end the monopoly provision of IGO services in this country through establishing direct access.

The Committee believes the FCC has the current authority to institute direct access. By including provisions in this bill on direct access the Committee does not intend to imply that there is a need to amend any provision of the 1962 Act to provide for direct access. Furthermore, the Committee does not intend to prevent the Commission from exercising its existing discretion to provide for direct access to INTELSAT or Inmarsat prior to the deadlines outlined in the bill.

New section 641(3) requires the Commission to take action, as appropriate, on COMSAT's petition to be treated as a non-dominant common carrier for purposes of Commission regulatory treatment according to the provisions of section 10 of the Communications Act of 1934. The Committee does not here take a position on whether the petition should be granted.

New section 641(4) requires the Commission to sunset any regulation providing for direct access to INTELSAT or Inmarsat when these organizations fully privatize in a pro-competitive manner pursuant to the provisions of the bill. The Committee believes that

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[11] Letter to the Honorable Tom Bliley, Chairman, House Committee on Commerce from the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated March 24, 1998.

[12] Letter to the Honorable Tom Bliley, Chairman, House Committee on Commerce from the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated March 24, 1998.

it is unnecessary to require direct access once INTELSAT and Inmarsat are fully privatized in accordance with this title.

Section 642—Termination of monopoly status

New section 642 implements a policy doctrine known as "fresh look." Fresh look permits customers, at their own choice, to renegotiate their contracts once a barrier to competition has been eliminated. This gives customers an opportunity to take advantage of the arrival of new competitive providers in a market.

New section 642(a) requires the Commission, beginning on January 1, 2000, to permit users or providers of telecommunications services under previous contracts or commitments with COMSAT, at their discretion, to have a one-time opportunity to renegotiate their contracts or commitments on rates, terms and conditions. Under this section, the Committee expects that users or providers will be given one opportunity for a reasonable time period after January 1, 2000 to renegotiate their contracts or commitments with COMSAT. Users would have the option of renegotiating their contracts during the period delineated as reasonable by the Commission. Some users and providers may opt to wait, for example, until Level 3 direct access providers are fully operational, before electing to exercise their right for fresh look as provided under this section. Users will presumably require some time to examine the options available and engage in contract negotiations. This is why the Committee required the Commission to determine a reasonable negotiation period, rather than just permitting fresh look on a specific date.

New section 642(b) makes clear that existing Commission authority to implement fresh look is not altered or prohibited by new section 642(a). The Committee notes that given COMSAT's unique status as the U.S. signatory to IGOs, fresh look may be in the public interest in other circumstances. In addition to January 1, 2000, the Committee believes that the Commission should permit consumers to renegotiate their contracts or commitments on rates, terms, and conditions with COMSAT without threat of penalty whenever the situation warrants.

The Committee intends to ensure that COMSAT does not use its market power to impose on customers contracts which have the effect of vitiating or impairing the effectiveness of this section. New subsection 642(c) therefore provides that whenever users or providers of telecommunications services are permitted to renegotiate contracts or commitments with COMSAT, the Commission is authorized to declared null, void and unenforceable any provision of a contract that restricts the ability of the customer to modify existing contracts, or enter into contracts with new providers. Such restrictions, should include withdrawal penalties or termination charges.

Section 643—Signatory role

New section 643(a) permits the Commission to restrict foreign ownership of a U.S. signatory if the Commission determines that not doing so would constitute a threat to national security. Any such restriction may be adopted only after a public interest determination by the Commission, which is required to consult with the

President prior to making a determination. This provision must be implemented in a manner consistent with the U.S. obligations under the WTO agreements.

During markup of H.R. 1872, the Committee removed explicit instructions to require the Commission to permit multiple U.S. signatories to INTELSAT and Inmarsat. The removal of this provision should not be viewed as a lack of interest by the Committee to see multiple U.S. signatories to INTELSAT and Inmarsat. The Committee believes INTELSAT and Inmarsat permitting multiple signatories may be beneficial, but that a statutory change is unnecessary to permit it.

New section 643(a)(2) provides that the U.S. is not required to have signatories represent it at INTELSAT or Inmarsat meetings, once the IGOs privatize in a pro-competitive manner pursuant to the provisions of the bill. The Committee believes that it is unnecessary for the U.S. to require a signatory to INTELSAT or Inmarsat once these organizations are fully privatized.

New section 643(b) provides that COMSAT has no privileges and immunities under U.S. law on the basis of its signatory status to INTELSAT or Inmarsat. An exception is provided if COMSAT or any other U.S. signatory takes action pursuant to the specific, written instructions of the U.S. government.

New section 643(c), "Parity of Treatment," provides the Commission, starting on the date of enactment of the bill, with authority to enact regulatory fees on any U.S. signatory to INTELSAT or Inmarsat at the rate similar to the fees imposed on other entities providing similar services. The Committee believes that the Commission currently has the statutory authority to impose such fees but wishes to make explicit here that the Commission does indeed have such authority. This subsection should not be interpreted to imply that the Commission does not currently have the authority to enact such regulatory fees.

Section 644—Elimination of procurement preferences

New section 644 prevents, starting on the date of enactment of the bill, any interpretation that the 1962 Act or Communications Act of 1934 implies or authorizes any preference for the U.S. Government procuring telecommunications services from INTELSAT, Inmarsat or COMSAT over any private provider of services. The Committee finds that in this unique circumstance involving an IGO the public interest would be served by using this provision as a basis for using U.S. government procurement as leverage to promote a pro-competitive privatization of the IGOs in accordance with this title.

Section 645—Use of ITU technical coordination

New section 645 requires the Commission and U.S. satellite companies, starting on the date of enactment of the bill, to use the ITU procedures for technical coordination with regards to INTELSAT, or its successor or separated entities. This is intended to prevent the use of INTELSAT procedures, which have in the past been used to harm competitors by raising barriers to entry, and may continue to inherently benefit INTELSAT or its successor or sepa-

rated entities over private U.S. satellite providers, when coordinating technical interference between systems.

Section 646—Termination of Communications Satellite Act of 1962 provisions

New section 646 repeals certain portions of the 1962 Act that are no longer necessary as provisions of the bill become fully implemented. The bill ties the elimination of certain statutory provisions to the effective dates of certain provisions of the bill. The Committee finds that these provisions would no longer be necessary upon the date to which their repeal is tied to.

New section 646 repeals section 304 of the 1962 Act on the date of direct access. At the Full Committee markup, the Committee amended H.R. 1872 to move the repeal of section 304, including the ten-percent ownership cap on COMSAT in section 304(b)(3), to the effective date of the Commission's order establishing direct access to INTELSAT. Prior to the Subcommittee markup, section 304 was to be repealed on the date of enactment. In Subcommittee, the date of "direct access" (which was defined in the bill as introduced as including both Level 3 and Level 4 direct access) was moved from "as soon as practicable" to a later point and the definition was deleted and the current language regarding direct access was added. Thus, in Full Committee, the repeal of section 304 was made co-synchronous to the date direct access is implemented, which for the purposes of repealing section 304 refers to the date direct access at all levels or forms is fully implemented. This repeal date is important, in part, because absent direct access, a single international services carrier or Regional Bell Operating Company, for example, could purchase COMSAT while COMSAT retains an aspect of its monopoly over access to an IGO and could potentially use COMSAT's market power and bottleneck position as the exclusive U.S. reseller of IGO services in an anti-competitive manner.

Section 647—Reports to Congress

New section 647 requires the Commission to provide a detailed report to Congress within 90 days of enactment of the bill, and not less than annually thereafter, on the status of achieving privatization as required by the bill. The Committee intends that the Commission seek public comment in preparing these reports. The Committee intends that each provision of this title regarding privatization be addressed in the report. The report is required to be made public.

Section 648—Consultation with Congress

New section 648 requires the Administration and the Commission to consult with the House Committee on Commerce and the Senate Committee on Commerce, Science and Transportation prior to each various meeting of INTELSAT and Inmarsat.

Section 649—Satellite auctions

New section 649 prevents the Commission from using competitive bidding procedures (i.e., auctions) to award licenses for spectrum or orbital locations used for providing international satellite services. In addition, it requires the Administration to oppose the

adoption of auctions to award licenses for orbital locations or satellite services in the ITU and other fora.

The Committee believes that auctions of spectrum or orbital locations could threaten the viability and availability of global and international satellite services, particularly because concurrent or successive spectrum auctions in the numerous countries in which U.S.-owned global satellite service providers seek downlink or service provision licenses could place significant financial burdens on providers of such services. This problem would be compounded by the fact that the multi-year period required for design, construction and launch of global and international satellite systems usually requires service providers to invest substantial resources well before they obtain all needed worldwide licenses and spectrum assignments. The uncertainty created by spectrum auctions could disrupt the availability of capital for such projects, and significantly reduce the available benefits offered by global and international satellite systems.

Subtitle D—Negotiations to Pursue Privatization

Section 661—Methods to pursue privatizations

New section 661 directs the President to secure the privatization of INTELSAT and Inmarsat, and any separated or successor entities, in a manner that meets the criteria set forth in subtitle B (new sections 621-625). The Committee intends that the President will use all means available, including any authority available to the President in addition to that specifically provided in new title VI, to achieve the purposes of this legislation.

Subtitle E—Definitions

Section 681—Definitions

New section 681 adds to the 1962 Act the following new definitions: (1) INTELSAT; (2) Inmarsat; (3) signatories; (4) party; (5) commission; (6) International Telecommunication Union; (7) successor entity; (8) separated entity; (9) orbital location; (10) space segment; (11) non-core; (12) additional services; (13) INTELSAT Agreement; (14) Headquarters Agreement; (15) Operating Agreement; (16) Inmarsat Convention; (17) national corporation; (18) COMSAT; (19) ICO; (20) Replacement Satellites; and (21) Global Mobile Distress and Safety Services.

With respect to new section 681(8), which defines "separated entity," the Committee notes the following: notwithstanding the definitions in this bill, ICO remains subject to FCC entry regulation under the Commission's recent "DISCO II" decision. The Committee recognizes that the Commission's Report and Order [13] defined ICO as an IGO affiliate. The Commission defines an IGO affiliate as an entity created by an IGO, in which IGO and IGO affiliates maintain ownership interests. The "DISCO II" Report and Order establishes a framework for the evaluation of entry into the U.S. market for both IGOs and their affiliates.

[13] In the Matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States—IB Docket 96–111.

This bill does not specifically apply the "DISCO II" term "affiliate" to ICO. The Committee also specifically excludes ICO as a separated entity for purposes of the privatization of Inmarsat. The Committee stresses however, that its exclusion of ICO as a "separated entity" should not be considered as modifying, redefining or changing the Commission's "DISCO II" decision in any way. For purposes of the "DISCO II" Order, the Committee does not intend to effect the Commission's treatment of ICO as an IGO affiliate when considering ICO's applications to provide satellite services in the U.S.

The Committee notes that the definitions of "non-core services" and "additional services" overlap. "Additional services" are specifically identified because they are services that the Committee believes INTELSAT or Inmarsat already are actively seeking to provide or seeking to establish the capability to provide. The Committee expects the Commission to consider substantially similar services to those specifically listed as additional services. "Additional services" are generally a subset of "non-core services." During Full Committee consideration of the bill, the Committee rejected an amendment which would have defined non-core services as those provided over frequencies that COMSAT is not now currently using because such a definition would in the Committee's view have made the bill ineffective. This position was supported by the analysis of the FCC.[14]

New section 681(b) states that, except where defined otherwise in new section 681(a), terms used in the bill have the same meaning as those terms have under section 3 of the Communications Act of 1934 (47 U.S.C. 153).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic):

THE COMMUNICATIONS SATELLITE ACT OF 1962

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TITLE VI—COMMUNICATIONS COMPETITION AND PRIVATIZATION

Subtitle A—Actions To Ensure Procompetitive Privatization

SEC. 601. FEDERAL COMMUNICATIONS COMMISSION LICENSING.

(a) LICENSING FOR SEPARATED ENTITIES.—

(1) COMPETITION TEST.—The Commission may not issue a license or construction permit to any separated entity, or renew or permit the assignment or use of any such license or permit,

[14] Letter to the Honorable Tom Bliley, Chairman, House Committee on Commerce from the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated March 24, 1998.

or authorize the use by any entity subject to United States jurisdiction of any space segment owned, leased, or operated by any separated entity, unless the Commission determines that such issuance, renewal, assignment, or use will not harm competition in the telecommunications market of the United States. If the Commission does not make such a determination, it shall deny or revoke authority to use space segment owned, leased, or operated by the separated entity to provide services to, from, or within the United States.

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

(b) LICENSING FOR INTELSAT, INMARSAT, AND SUCCESSOR ENTITIES.—

(1) COMPETITION TEST.—The Commission shall substantially limit, deny, or revoke the authority for any entity subject to United States jurisdiction to use space segment owned, leased, or operated by INTELSAT or Inmarsat or any successor entities to provide non-core services to, from, or within the United States, unless the Commission determines—

(A) after January 1, 2002, in the case of INTELSAT and its successor entities, that INTELSAT and any successor entities have been privatized in a manner that will not harm competition in the telecommunications markets of the United States; or

(B) after January 1, 2001, in the case of Inmarsat and its successor entities, that Inmarsat and any successor entities have been privatized in a manner that will not harm competition in the telecommunications markets of the United States.

(2) CRITERIA FOR COMPETITION TEST.—In making the determination required by paragraph (1), the Commission shall use the licensing criteria in sections 621, 622, and 624, and shall not make such a determination unless the Commission determines that such privatization is consistent with such criteria.

(3) CLARIFICATION: COMPETITIVE SAFEGUARDS.—In making its licensing decisions under this subsection, the Commission shall consider whether users of non-core services provided by INTELSAT or Inmarsat or successor or separated entities are able to obtain non-core services from providers offering services other than through INTELSAT or Inmarsat or successor or separated entities, at competitive rates, terms, or conditions. Such consideration shall also include whether such licensing decisions would require users to replace equipment at substantial costs prior to the termination of its design life. In making its licensing decisions, the Commission shall also consider whether competitive alternatives in individual markets do not exist because they have been foreclosed due to anticompetitive actions undertaken by or resulting from the INTELSAT or Inmarsat systems. Such licensing decisions shall be made in a manner

which facilitates achieving the purposes and goals in this title and shall be subject to notice and comment.

(c) ADDITIONAL CONSIDERATIONS IN DETERMINATIONS.—In making its determinations and licensing decisions under subsections (a) and (b), the Commission shall take into consideration the United States obligations and commitments for satellite services under the Fourth Protocol to the General Agreement on Trade in Services.

(d) INDEPENDENT FACILITIES COMPETITION.—Nothing in this section shall be construed as precluding COMSAT from investing in or owning satellites or other facilities independent from INTELSAT and Inmarsat, and successor or separated entities, or from providing services through reselling capacity over the facilities of satellite systems independent from INTELSAT and Inmarsat, and successor or separated entities. This subsection shall not be construed as restricting the types of contracts which can be executed or services which may be provided by COMSAT over the independent satellites or facilities described in this subsection.

SEC. 602. INTELSAT OR INMARSAT ORBITAL LOCATIONS.

(a) REQUIRED ACTIONS.—Unless, in a proceeding under section 601(b), the Commission determines that INTELSAT or Inmarsat have been privatized in a manner that will not harm competition, then—

(1) the President shall oppose, and the Commission shall not assist, any registration for new orbital locations for INTELSAT or Inmarsat—

(A) with respect to INTELSAT, after January 1, 2002, and

(B) with respect to Inmarsat, after January 1, 2001, and

(2) the President and Commission shall, consistent with the deadlines in paragraph (1), take all other necessary measures to preclude procurement, registration, development, or use of new satellites which would provide non-core services.

(b) EXCEPTION.—

(1) REPLACEMENT AND PREVIOUSLY CONTRACTED SATELLITES.—Subsection (a) shall not apply to—

(A) orbital locations for replacement satellites (as described in section 622(2)(B)), and

(B) orbital locations for satellites that are contracted for as of March 25, 1998, if such satellites do not provide additional services.

(2) LIMITATION ON EXCEPTION.—Paragraph (1) is available only with respect to satellites designed to provide services solely in the C and Ku, for INTELSAT, and L, for Inmarsat, bands.

SEC. 603. ADDITIONAL SERVICES AUTHORIZED.

(a) SERVICES AUTHORIZED DURING CONTINUED PROGRESS.—

(1) CONTINUED AUTHORIZATION.—The Commission may issue an authorization, license, or permit to, or renew the license or permit of, any provider of services using INTELSAT or Inmarsat space segment, or authorize the use of such space segment, for additional services (including additional applications of existing services) or additional areas of business, subject to the requirements of this section.

(2) ADDITIONAL SERVICES PERMITTED UNDER NEW CONTRACTS UNLESS PROGRESS FAILS.—If the Commission makes a finding under subsection (b) that conditions required by such subsection have not been attained, the Commission may not, pursuant to paragraph (1), permit such additional services to be provided directly or indirectly under new contracts for the use of INTELSAT or Inmarsat space segment, unless and until the Commission subsequently makes a finding under such subsection that such conditions have been attained.

(3) PREVENTION OF EVASION.—The Commission shall, by rule, prescribe means reasonably designed to prevent evasions of the limitations contained in paragraph (2) by customers who did not use specific additional services as of the date of the Commission's most recent finding under subsection (b) that the conditions of such subsection have not been obtained.

(b) REQUIREMENTS FOR ANNUAL FINDINGS.—

(1) GENERAL REQUIREMENTS.—The findings required under this subsection shall be made, after notice and comment, on or before January 1 of 1999, 2000, 2001, and 2002. The Commission shall find that the conditions required by this subsection have been attained only if the Commission finds that—

(A) substantial and material progress has been made during the preceding period at a rate and manner that is probable to result in achieving pro-competitive privatizations in accordance with the requirements of this title; and

(B) neither INTELSAT nor Inmarsat are hindering competitors' or potential competitors' access to the satellite services marketplace.

(2) FIRST FINDING.—In making the finding required to be made on or before January 1, 1999, the Commission shall not find that the conditions required by this subsection have been attained unless the Commission finds that—

(A) COMSAT has submitted to the INTELSAT Board of Governors a resolution calling for the pro-competitive privatization of INTELSAT in accordance with the requirements of this title; and

(B) the United States has submitted such resolution at the first INTELSAT Assembly of Parties meeting that takes place after such date of enactment.

(3) SECOND FINDING.—In making the finding required to be made on or before January 1, 2000, the Commission shall not find that the conditions required by this subsection have been attained unless the INTELSAT Assembly of Parties has created a working party to consider and make recommendations for the pro-competitive privatization of INTELSAT consistent with such resolution.

(4) THIRD FINDING.—In making the finding required to be made on or before January 1, 2001, the Commission shall not find that the conditions required by this subsection have been attained unless the INTELSAT Assembly of Parties has approved a recommendation for the pro-competitive privatization of INTELSAT in accordance with the requirements of this title.

(5) FOURTH FINDING.—In making the finding required to be made on or before January 1, 2002, the Commission shall not find that the conditions required by this subsection have been attained unless the pro-competitive privatization of INTELSAT in accordance with the requirements of this title has been achieved by such date.

(6) CRITERIA FOR EVALUATION OF HINDERING ACCESS.—The Commission shall not make a determination under paragraph (1)(B) unless the Commission determines that INTELSAT and Inmarsat are not in any way impairing, delaying, or denying access to national markets or orbital locations.

(c) EXCEPTION FOR SERVICES UNDER EXISTING CONTRACTS IF PROGRESS NOT MADE.—This section shall not preclude INTELSAT or Inmarsat or any signatory thereof from continuing to provide additional services under an agreement with any third party entered into prior to any finding under subsection (b) that the conditions of such subsection have not been attained.

Subtitle B—Federal Communications Commission Licensing Criteria: Privatization Criteria

SEC. 621. GENERAL CRITERIA TO ENSURE A PRO-COMPETITIVE PRIVATIZATION OF INTELSAT AND INMARSAT.

The President and the Commission shall secure a pro-competitive privatization of INTELSAT and Inmarsat that meets the criteria set forth in this section and sections 622 through 624. In securing such privatizations, the following criteria shall be applied as licensing criteria for purposes of subtitle A:

(1) DATES FOR PRIVATIZATION.—Privatization shall be obtained in accordance with the criteria of this title of—

(A) INTELSAT as soon as practicable, but no later than January 1, 2002, and

(B) Inmarsat as soon as practicable, but no later than January 1, 2001.

(2) INDEPENDENCE.—The successor entities and separated entities of INTELSAT and Inmarsat resulting from the privatization obtained pursuant to paragraph (1) shall—

(A) be entities that are national corporations; and

(B) have ownership and management that is independent of—

(i) any signatories or former signatories that control access to national telecommunications markets; and

(ii) any intergovernmental organization remaining after the privatization.

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

(A) privileged or immune treatment by national governments;

(B) privileges or immunities or other competitive advantages of the type accorded INTELSAT and Inmarsat and

their signatories through the terms and operation of the INTELSAT Agreement and the associated Headquarters Agreement and the Inmarsat Convention; and

(C) preferential access to orbital locations, including any access to orbital locations that is not subject to the legal or regulatory processes of a national government that applies due diligence requirements intended to prevent the warehousing of orbital locations.

(4) PREVENTION OF EXPANSION DURING TRANSITION.—During the transition period prior to full privatization, INTELSAT and Inmarsat shall be precluded from expanding into additional services (including additional applications of existing services) or additional areas of business.

(5) CONVERSION TO STOCK CORPORATIONS.—Any successor entity or separated entity created out of INTELSAT or Inmarsat shall be a national corporation established through the execution of an initial public offering as follows:

(A) Any successor entities and separated entities shall be incorporated as private corporations subject to the laws of the nation in which incorporated.

(B) An initial public offering of securities of any successor entity or separated entity shall be conducted no later than—

(i) January 1, 2001, for the successor entities of INTELSAT; and

(ii) January 1, 2000, for the successor entities of Inmarsat.

(C) The shares of any successor entities and separated entities shall be listed for trading on one or more major stock exchanges with transparent and effective securities regulation.

(D) A majority of the board of directors of any successor entity or separated entity shall not be subject to selection or appointment by, or otherwise serve as representatives of—

(i) any signatory or former signatory that controls access to national telecommunications markets; or

(ii) any intergovernmental organization remaining after the privatization.

(E) Any transactions or other relationships between or among any successor entity, separated entity, INTELSAT, or Inmarsat shall be conducted on an arm's length basis.

(6) REGULATORY TREATMENT.—Any successor entity or separated entity shall apply through the appropriate national licensing authorities for international frequency assignments and associated orbital registrations for all satellites.

(7) COMPETITION POLICIES IN DOMICILIARY COUNTRY.—Any successor entity or separated entity shall be incorporated and headquartered in a nation or nations that—

(A) have effective laws and regulations that secure competition in telecommunications services;

(B) are signatories of the World Trade Organization Basic Telecommunications Services Agreement; and

(C) have a schedule of commitments in such Agreement that includes non-discriminatory market access to their satellite markets.

(8) RETURN OF UNUSED ORBITAL LOCATIONS.—INTELSAT, Inmarsat, and any successor entities and separated entities shall not be permitted to warehouse any orbital location that—

(A) as of March 25, 1998, did not contain a satellite that was providing commercial services, or, subsequent to such date, ceased to contain a satellite providing commercial services; or

(B) as of March 25, 1998, was not designated in INTELSAT or Inmarsat operational plans for satellites for which construction contracts had been executed.

Any such orbital location of INTELSAT or Inmarsat and of any successor entities and separated entities shall be returned to the International Telecommunication Union for reallocation.

(9) APPRAISAL OF ASSETS.—Before any transfer of assets by INTELSAT or Inmarsat to any successor entity or separated entity, such assets shall be independently audited for purposes of appraisal, at both book and fair market value.

(10) LIMITATION ON INVESTMENT.—Notwithstanding the provisions of this title, COMSAT shall not be authorized by the Commission to invest in a satellite known as K–TV, unless Congress authorizes such investment.

SEC. 622. SPECIFIC CRITERIA FOR INTELSAT.

In securing the privatizations required by section 621, the following additional criteria with respect to INTELSAT privatization shall be applied as licensing criteria for purposes of subtitle A:

(1) NUMBER OF COMPETITORS.—The number of competitors in the markets served by INTELSAT, including the number of competitors created out of INTELSAT, shall be sufficient to create a fully competitive market.

(2) PREVENTION OF EXPANSION DURING TRANSITION.—

(A) IN GENERAL.—Pending privatization in accordance with the criteria in this title, INTELSAT shall not expand by receiving additional orbital locations, placing new satellites in existing locations, or procuring new or additional satellites except as permitted by subparagraph (B), and the United States shall oppose such expansion—

(i) in INTELSAT, including at the Assembly of Parties,

(ii) in the International Telecommunication Union,

(iii) through United States instructions to COMSAT,

(iv) in the Commission, through declining to facilitate the registration of additional orbital locations or the provision of additional services (including additional applications of existing services) or additional areas of business; and

(v) in other appropriate fora.

(B) EXCEPTION FOR CERTAIN REPLACEMENT SATELLITES.—The limitations in subparagraph (A) shall not apply to any replacement satellites if—

(i) such replacement satellite is used solely to provide public-switched network voice telephony or occasional-use television services, or both;

(ii) such replacement satellite is procured pursuant to a construction contract that was executed on or before March 25, 1998; and

(iii) construction of such replacement satellite commences on or before the final date for INTELSAT privatization set forth in section 621(1)(A).

(3) TECHNICAL COORDINATION AMONG SIGNATORIES.—Technical coordination shall not be used to impair competition or competitors, and coordination under Article XIV(d) of the INTELSAT Agreement shall be eliminated.

SEC. 623. SPECIFIC CRITERIA FOR INTELSAT SEPARATED ENTITIES.

In securing the privatizations required by section 621, the following additional criteria with respect to any INTELSAT separated entity shall be applied as licensing criteria for purposes of subtitle A:

(1) DATE FOR PUBLIC OFFERING.—Within one year after any decision to create any separated entity, a public offering of the securities of such entity shall be conducted.

(2) PRIVILEGES AND IMMUNITIES.—The privileges and immunities of INTELSAT and its signatories shall be waived with respect to any transactions with any separated entity, and any limitations on private causes of action that would otherwise generally be permitted against any separated entity shall be eliminated.

(3) INTERLOCKING DIRECTORATES OR EMPLOYEES.—None of the officers, directors, or employees of any separated entity shall be individuals who are officers, directors, or employees of INTELSAT.

(4) SPECTRUM ASSIGNMENTS.—After the initial transfer which may accompany the creation of a separated entity, the portions of the electromagnetic spectrum assigned as of the date of enactment of this title to INTELSAT shall not be transferred between INTELSAT and any separated entity.

(5) REAFFILIATION PROHIBITED.—Any merger or ownership or management ties or exclusive arrangements between a privatized INTELSAT or any successor entity and any separated entity shall be prohibited until 15 years after the completion of INTELSAT privatization under this title.

SEC. 624. SPECIFIC CRITERIA FOR INMARSAT.

In securing the privatizations required by section 621, the following additional criteria with respect to Inmarsat privatization shall be applied as licensing criteria for purposes of subtitle A:

(1) MULTIPLE SIGNATORIES AND DIRECT ACCESS.—Multiple signatories and direct access to Inmarsat shall be permitted.

(2) PREVENTION OF EXPANSION DURING TRANSITION.—Pending privatization in accordance with the criteria in this title, Inmarsat should not expand by receiving additional orbital locations, placing new satellites in existing locations, or procuring new or additional satellites, except for specified replacement satellites for which construction contracts have been executed as

of March 25, 1998, and the United States shall oppose such expansion—

(A) in Inmarsat, including at the Council and Assembly of Parties,

(B) in the International Telecommunication Union,

(C) through United States instructions to COMSAT,

(D) in the Commission, through declining to facilitate the registration of additional orbital locations or the provision of additional services (including additional applications of existing services) or additional areas of business, and

(E) in other appropriate fora.

This paragraph shall not be construed as limiting the maintenance, assistance or improvement of the GMDSS.

(3) NUMBER OF COMPETITORS.—The number of competitors in the markets served by Inmarsat, including the number of competitors created out of Inmarsat, shall be sufficient to create a fully competitive market.

(4) REAFFILIATION PROHIBITED.—Any merger or ownership or management ties or exclusive arrangements between Inmarsat or any successor entity or separated entity and ICO shall be prohibited until 15 years after the completion of Inmarsat privatization under this title.

(5) INTERLOCKING DIRECTORATES OR EMPLOYEES.—None of the officers, directors, or employees of Inmarsat or any successor entity or separated entity shall be individuals who are officers, directors, or employees of ICO.

(6) SPECTRUM ASSIGNMENTS.—The portions of the electromagnetic spectrum assigned as of the date of enactment of this title to Inmarsat—

(A) shall, after January 1, 2006, or the date on which the life of the current generation of Inmarsat satellites ends, whichever is later, be made available for assignment to all systems (including the privatized Inmarsat) on a nondiscriminatory basis and in a manner in which continued availability of the GMDSS is provided; and

(B) shall not be transferred between Inmarsat and ICO.

(7) PRESERVATION OF THE GMDSS.—The United States shall seek to preserve space segment capacity of the GMDSS.

SEC. 625. ENCOURAGING MARKET ACCESS AND PRIVATIZATION.

(a) NTIA DETERMINATION.—

(1) DETERMINATION REQUIRED.—Within 180 days after the date of enactment of this section, the Secretary of Commerce shall, through the Assistant Secretary for Communications and Information, transmit to the Commission—

(A) a list of Member countries of INTELSAT and Inmarsat that are not Members of the World Trade Organization and that impose barriers to market access for private satellite systems; and

(B) a list of Member countries of INTELSAT and Inmarsat that are not Members of the World Trade Organization and that are not supporting pro-competitive privatization of INTELSAT and Inmarsat.

(2) CONSULTATION.—The Secretary's determinations under paragraph (1) shall be made in consultation with the Federal

Communications Commission, the Secretary of State, and the United States Trade Representative, and shall take into account the totality of a country's actions in all relevant fora, including the Assemblies of Parties of INTELSAT and Inmarsat.

(b) IMPOSITION OF COST-BASED SETTLEMENT RATE.—Notwithstanding—

(1) any higher settlement rate that an overseas carrier charges any United States carrier to originate or terminate international message telephone services, and

(2) any transition period that would otherwise apply,

the Commission may by rule prohibit United States carriers from paying an amount in excess of a cost-based settlement rate to overseas carriers in countries listed by the Commission pursuant to subsection (a).

(c) SETTLEMENTS POLICY.—The Commission shall, in exercising its authority to establish settlements rates for United States international common carriers, seek to advance United States policy in favor of cost-based settlements in all relevant fora on international telecommunications policy, including in meetings with parties and signatories of INTELSAT and Inmarsat.

Subtitle C—Deregulation and Other Statutory Changes

SEC. 641. DIRECT ACCESS; TREATMENT OF COMSAT AS NONDOMINANT CARRIER.

The Commission shall take such actions as may be necessary—

(1) to permit providers or users of telecommunications services to obtain direct access to INTELSAT telecommunications services—

(A) through purchases of space segment capacity from INTELSAT as of January 1, 2000, if the Commission determines that—

(i) INTELSAT has adopted a usage charge mechanism that ensures fair compensation to INTELSAT signatories for support costs that such signatories would not otherwise be able to avoid under a direct access regime, such as insurance, administrative, and other operations and maintenance expenditures;

(ii) the Commission's regulations ensure that no foreign signatory, nor any affiliate thereof, shall be permitted to order space segment directly from INTELSAT in order to provide any service subject to the Commission's jurisdiction;

(iii) the Commission has in place a means to ensure that carriers will be required to pass through to end-users savings that result from the exercise of such authority;

(B) through investment in INTELSAT as of January 1, 2002, if the Commission determines that such investment will be attained under procedures that assure fair compensation to INTELSAT signatories for the market value of their investments;

(2) to permit providers or users of telecommunications services to obtain direct access to Inmarsat telecommunications services—

(A) through purchases of space segment capacity from Inmarsat as of January 1, 2000, if the Commission determines that—

(i) Inmarsat has adopted a usage charge mechanism that ensures fair compensation to Inmarsat signatories for support costs that such signatories would not otherwise be able to avoid under a direct access regime, such as insurance, administrative, and other operations and maintenance expenditures;

(ii) the Commission's regulations ensure that no foreign signatory, nor any affiliate thereof, shall be permitted to order space segment directly from Inmarsat in order to provide any service subject to the Commission's jurisdiction;

(iii) the Commission has in place a means to ensure that carriers will be required to pass through to end-users savings that result from the exercise of such authority; and

(B) through investment in Inmarsat as of January 1, 2001, if the Commission determines that such investment will be attained under procedures that assure fair compensation to Inmarsat signatories for the market value of their investments;

(3) to act on COMSAT's petition to be treated as a nondominant carrier for the purposes of the Commission's regulations according to the provisions of section 10 of the Communications Act of 1934 (47 U.S.C. 160); and

(4) to eliminate any regulation on the availability of direct access to INTELSAT or Inmarsat or to any successor entities after a pro-competitive privatization is achieved consistent with sections 621, 622 and 624.

SEC. 642. TERMINATION OF MONOPOLY STATUS.

(a) RENEGOTIATION OF MONOPOLY CONTRACTS PERMITTED.—The Commission shall, beginning January 1, 2000, permit users or providers of telecommunications services that previously entered into contracts or are under a tariff commitment with COMSAT to have an opportunity, at their discretion, for a reasonable period of time, to renegotiate those contracts or commitments on rates, terms, and conditions or other provisions, notwithstanding any term or volume commitments or early termination charges in any such contracts with COMSAT.

(b) COMMISSION AUTHORITY TO ORDER RENEGOTIATION.—Nothing in this title shall be construed to limit the authority of the Commission to permit users or providers of telecommunications services that previously entered into contracts or are under a tariff commitment with COMSAT to have an opportunity, at their discretion, to renegotiate those contracts or commitments on rates, terms, and conditions or other provisions, notwithstanding any term or volume commitments or early termination charges in any such contracts with COMSAT.

(c) PROVISIONS CONTRARY TO PUBLIC POLICY VOID.—Whenever the Commission permits users or providers of telecommunications services to renegotiate contracts or commitments as described in this section, the Commission may provide that any provision of any contract with COMSAT that restricts the ability of such users or providers to modify the existing contracts or enter into new contracts with any other space segment provider (including but not limited to any term or volume commitments or early termination charges) or places such users or providers at a disadvantage in comparison to other users or providers that entered into contracts with COMSAT or other space segment providers shall be null, void, and unenforceable.

SEC. 643. SIGNATORY ROLE.

(a) LIMITATIONS ON SIGNATORIES.—

(1) NATIONAL SECURITY LIMITATIONS.—The Federal Communications Commission, after a public interest determination, in consultation with the Executive Branch, may restrict foreign ownership of a United States signatory if the Commission determines that not to do so would constitute a threat to national security.

(2) NO SIGNATORIES REQUIRED.—The United States Government shall not require signatories to represent the United States in INTELSAT or Inmarsat or in any successor entities after a pro-competitive privatization is achieved consistent with sections 621, 622 and 624.

(b) CLARIFICATION OF PRIVILEGES AND IMMUNITIES OF COMSAT.—

(1) GENERALLY NOT IMMUNIZED.—Notwithstanding any other law or executive agreement, COMSAT shall not be entitled to any privileges or immunities under the laws of the United States or any State on the basis of its status as a signatory of INTELSAT or Inmarsat.

(2) LIMITED IMMUNITY.—COMSAT and any other company functioning as United States signatory to INTELSAT or Inmarsat shall not be liable for action taken by it in carrying out the specific, written instruction of the United States issued in connection with its relationships and activities with foreign governments, international entities, and the intergovernmental satellite organizations.

(3) PROVISIONS PROSPECTIVE.—Paragraph (1) shall not apply with respect to liability for any action taken by COMSAT before the date of enactment of the Communications Satellite Competition and Privatization Act of 1998.

(c) PARITY OF TREATMENT.—Notwithstanding any other law or executive agreement, the Commission shall have the authority to impose similar regulatory fees on the United States signatory which it imposes on other entities providing similar services.

SEC. 644. ELIMINATION OF PROCUREMENT PREFERENCES.

Nothing in this title or the Communications Act of 1934 shall be construed to authorize or require any preference, in Federal Government procurement of telecommunications services, for the satellite space segment provided by INTELSAT, Inmarsat, or any successor entity or separated entity.

SEC. 645. USE OF ITU TECHNICAL COORDINATION.

The Commission and United States satellite companies shall utilize the International Telecommunication Union procedures for technical coordination with INTELSAT and its successor entities and separated entities, rather than INTELSAT procedures.

SEC. 646. TERMINATION OF COMMUNICATIONS SATELLITE ACT OF 1962 PROVISIONS.

Effective on the dates specified, the following provisions of this Act shall cease to be effective:

(1) Date of enactment of this title: Sections 101 and 102; paragraphs (1), (5) and (6) of section 201(a); section 301; section 303; section 502; and paragraphs (2) and (4) of section 504(a).

(2) On the effective date of the Commission's order that establishes direct access to INTELSAT space segment: Paragraphs (1), (3) through (5), and (8) through (10) of section 201(c); and section 304.

(3) On the effective date of the Commission's order that establishes direct access to Inmarsat space segment: Subsections (a) through (d) of section 503.

(4) On the effective date of a Commission order determining under section 601(b)(2) that Inmarsat privatization is consistent with criteria in sections 621 and 624: Section 504(b).

(5) On the effective date of a Commission order determining under section 601(b)(2) that INTELSAT privatization is consistent with criteria in sections 621 and 622: Paragraphs (2) and (4) of section 201(a); section 201(c)(2); subsection (a) of section 403; and section 404 .

SEC. 647. REPORTS TO THE CONGRESS.

(a) ANNUAL REPORTS.—The President and the Commission shall report to the Congress within 90 calendar days of the enactment of this title, and not less than annually thereafter, on the progress made to achieve the objectives and carry out the purposes and provisions of this title. Such reports shall be made available immediately to the public.

(b) CONTENTS OF REPORTS.—The reports submitted pursuant to subsection (a) shall include the following:

(1) Progress with respect to each objective since the most recent preceding report.

(2) Views of the Parties with respect to privatization.

(3) Views of industry and consumers on privatization.

SEC. 648. CONSULTATION WITH CONGRESS.

The President's designees and the Commission shall consult with the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate prior to each meeting of the INTELSAT or Inmarsat Assembly of Parties, the INTELSAT Board of Governors, the Inmarsat Council, or appropriate working group meetings.

SEC. 649. SATELLITE AUCTIONS.

Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services. The President shall oppose in the International Telecommunication Union and in other bilateral

and multilateral fora any assignment by competitive bidding of orbital locations or spectrum used for the provision of such services.

Subtitle D—Negotiations To Pursue Privatization

SEC. 661. METHODS TO PURSUE PRIVATIZATION.

The President shall secure the pro-competitive privatizations required by this title in a manner that meets the criteria in subtitle B.

Subtitle E—Definitions

SEC. 681. DEFINITIONS.

(a) IN GENERAL.—As used in this title:

(1) INTELSAT.—The term "INTELSAT" means the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT).

(2) INMARSAT.—The term "Inmarsat" means the International Mobile Satellite Organization established pursuant to the Convention on the International Maritime Organization.

(3) SIGNATORIES.—The term "signatories"—

(A) in the case of INTELSAT, or INTELSAT successors or separated entities, means a Party, or the telecommunications entity designated by a Party, that has signed the Operating Agreement and for which such Agreement has entered into force or to which such Agreement has been provisionally applied; and

(B) in the case of Inmarsat, or Inmarsat successors or separated entities, means either a Party to, or an entity that has been designated by a Party to sign, the Operating Agreement.

(4) PARTY.—The term "Party"—

(A) in the case of INTELSAT, means a nation for which the INTELSAT agreement has entered into force or been provisionally applied; and

(B) in the case of Inmarsat, means a nation for which the Inmarsat convention has entered into force.

(5) COMMISSION.—The term "Commission" means the Federal Communications Commission.

(6) INTERNATIONAL TELECOMMUNICATION UNION.—The term "International Telecommunication Union" means the intergovernmental organization that is a specialized agency of the United Nations in which member countries cooperate for the development of telecommunications, including adoption of international regulations governing terrestrial and space uses of the frequency spectrum as well as use of the geostationary satellite orbit.

(7) SUCCESSOR ENTITY.—The term "successor entity"—

(A) means any privatized entity created from the privatization of INTELSAT or Inmarsat or from the assets of INTELSAT or Inmarsat, but

(B) does not include any entity that is a separated entity.

(8) SEPARATED ENTITY.—The term "separated entity" means a privatized entity to whom a portion of the assets owned by INTELSAT or Inmarsat are transferred prior to full privatization of INTELSAT or Inmarsat, including in particular the entity whose structure was under discussion by INTELSAT as of March 25, 1998, but excluding ICO.

(9) ORBITAL LOCATION.—The term "orbital location" means the location for placement of a satellite on the geostationary orbital arc as defined in the International Telecommunication Union Radio Regulations.

(10) SPACE SEGMENT.—The term "space segment" means the satellites, and the tracking, telemetry, command, control, monitoring and related facilities and equipment used to support the operation of satellites owned or leased by INTELSAT, Inmarsat, or a separated entity or successor entity.

(11) NON-CORE.—The term "non-core services" means, with respect to INTELSAT provision, services other than public-switched network voice telephony and occasional-use television, and with respect to Inmarsat provision, services other than global maritime distress and safety services or other existing maritime or aeronautical services for which there are not alternative providers.

(12) ADDITIONAL SERVICES.—The term "additional services" means Internet services, high-speed data, interactive services, non-maritime or non-aeronautical mobile services, Direct to Home (DTH) or Direct Broadcast Satellite (DBS) video services, or Ka-band services.

(13) INTELSAT AGREEMENT.—The term "INTELSAT Agreement" means the Agreement Relating to the International Telecommunications Satellite Organization ("INTELSAT"), including all its annexes (TIAS 7532, 23 UST 3813).

(14) HEADQUARTERS AGREEMENT.—The term "Headquarters Agreement" means the International Telecommunication Satellite Organization Headquarters Agreement (November 24, 1976) (TIAS 8542, 28 UST 2248).

(15) OPERATING AGREEMENT.—The term "Operating Agreement" means—

(A) in the case of INTELSAT, the agreement, including its annex but excluding all titles of articles, opened for signature at Washington on August 20, 1971, by Governments or telecommunications entities designated by Governments in accordance with the provisions of the Agreement, and

(B) in the case of Inmarsat, the Operating Agreement on the International Maritime Satellite Organization, including its annexes.

(16) INMARSAT CONVENTION.—The term "Inmarsat Convention" means the Convention on the International Maritime Satellite Organization (Inmarsat) (TIAS 9605, 31 UST 1).

(17) NATIONAL CORPORATION.—The term "national corporation" means a corporation the ownership of which is held

through publicly traded securities, and that is incorporated under, and subject to, the laws of a national, state, or territorial government.

(18) COMSAT.—The term "COMSAT" means the corporation established pursuant to title III of the Communications Satellite Act of 1962 (47 U.S.C. 731 et seq.).

(19) ICO.—The term "ICO" means the company known, as of the date of enactment of this title, as ICO Global Communications, Inc.

(20) REPLACEMENT SATELLITES.—The term "replacement satellite" means a satellite that replaces a satellite that fails prior to the end of the duration of contracts for services provided over such satellite and that takes the place of a satellite designated for the provision of public-switched network and occasional-use television services under contracts executed prior to March 25, 1998 (but not including K–TV or similar satellites). A satellite is only considered a replacement satellite to the extent such contracts are equal to or less than the design life of the satellite.

(21) GMDSS.—The term "global maritime distress and safety services" or "GMDSS" means the automated ship-to-shore distress alerting system which uses satellite and advanced terrestrial systems for international distress communications and promoting maritime safety in general. The GMDSS permits the worldwide alerting of vessels, coordinated search and rescue operations, and dissemination of maritime safety information.

(b) COMMON TERMINOLOGY.—Except as otherwise provided in subsection (a), terms used in this title that are defined in section 3 of the Communications Act of 1934 have the meanings provided in such section.

ADDITIONAL VIEWS OF MR. TAUZIN

While I, along with many of my colleagues support the pro-competitive goals of H.R. 1872, I continue to have strong reservations about the so-called "Fresh Look" provisions of the bill. Because these provisions abrogate private contracts that were negotiated between Comsat and its carrier-customers, I offered an amendment to strike these provisions in the Commerce Committee. Although the committee narrowly rejected my amendment, I continue to oppose them, and hope that the full House of Representatives will vote to strike the "Fresh Look" provisions when it considers H.R. 1872.

In my view, the "Fresh Look" provisions are unconstitutional takings of Comsat's property, and will ultimately subject the U.S. Government—and the taxpayers to substantial claims for damages. As if that's not enough, the "Fresh Look" provisions are unfair, and cannot be justified on the basis of the factual record that has been developed at the Federal Communications Commission and in a Federal court.

BACKGROUND

Several years ago, as a result of both a series of regulatory changes that were designed to increase competition in international telecommunications and the widespread deployment of fiber optic cables, Comsat negotiated long-term contracts with the largest long distance companies to carry international traffic using INTELSAT's facilities. Comsat is the owner of the U.S. share of the INTELSAT's system. These contracts were designed to guarantee a steady stream of traffic in the face of increased competition from other satellite systems and fiber optic cables. In return for long term traffic commitments, Comsat dropped its prices considerably. These contracts (with AT&T, MCI, Worldcom and Sprint) were renegotiated in 1993 and 1994, at a time when competing satellite systems were permitted to, and did bid for this traffic.

THE "FRESH LOOK" PROVISIONS OF H.R. 1872

As reported by the Commerce Committee, H.R. 1872 proposes a new section 642 of the Communications Satellite Act of 1962. Subsection (a) of the proposed new section reads as follows:

> The Commission shall, beginning January 1, 2000, permit users or providers of telecommunications services that previously entered into contracts or are under a tariff commitment with COMSAT to have an opportunity, at their discretion, for a reasonable period of time, to renegotiate those contracts or commitments on rates, terms, and conditions or other provisions, notwithstanding any term or vol-

ume commitments or early termination charges in any such contracts with COMSAT.

The effect of the new section will be to permit Comsat's carrier-customers to walk away from commitments they made in voluntary negotiations. They will have had the benefits of lower prices for that portion of the contract they chose to honor, but Congress will have given them the ability to unilaterally terminate the remaining portion of the contract without penalty. In my view, this policy is wrong, and needs to be stricken from the bill.

1. The "Fresh Look" provisions of H.R. 1872 are unconstitutional takings of Comsat's property, and will create a massive liability for America's taxpayers

The "Fresh Look" provisions take away from Comsat, by name, contract rights for which it bargained. Comsat is a private, investor-owned entity, and contract rights are property. See *Lynch* v. *United States,* 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."). The Government cannot simply take that property, as the "fresh look" provisions would do, without paying for it. See id.; see also *Allied Structural Steel* v. *Spannaus,* 438 U.S. 234, 247 (1978) (government could not "nullify express terms of [a] company's contractual obligations").

The proponents of "Fresh Look" point to cases where companies holding adjudicated unlawful monopolies were required to allow other parties out of contracts that had been used to maintain the monopolies. Indeed, the bill puts the word "monopoly" in the title of the section. But no court has found that Comsat has any monopoly, let alone an unlawful one, and it plainly does not; it has less than a quarter of the satellite telecommunications market. Any attempted congressional adjudication that Comsat has an unlawful monopoly, and deserves to be punished by having its contracts taken away, would usurp the judiciary's function and be an unconstitutional Bill of Attainder. See *United States* v. *Brown,* 381 U.S. 437 (1965); *SBC Communications, Inc.* v. *FCC,* 981 F. Supp. 996 (N.D. Tex. 1997).

Proponents of "Fresh Look" also invoke the doctrine that "federal frustration of contracts between private parties" is permissible, but that doctrine has no application here. The "frustration" doctrine says that if a new general policy (e.g., a safety regulation) incidentally alters private contractual relationships (e.g. a construction contract) the private parties have no claim. See e.g., *Norman* v. *Baltimore & O.R.R.,* 294 U.S. 240, 307–08 (1935). But no case has ever come close to holding or suggesting that the government can simply declare that all signed contracts of a specific, named contractor are open for "renegotiation" without any court determination that the contractor has broken the law. Any such statute would be plainly unconstitutional. See e.g., *Connolly* v. *Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224 (1986) (fact that Congress might incidentally interfere private contracts by regulating their subject matter does *not* mean "that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation").

2. The "Fresh Look" provisions of H.R. 1872 are unfair

Based on the long-term guarantees of traffic resulting from Comsat's carrier-contracts, Comsat itself contracted with Intelsat's for the capacity to handle that traffic. Comsat's contracts with INTELSAT's will remain in force, even if the carrier-contracts that formed the basis for the INTELSAT's contracts are abrogated by Congress. Comsat will continue to be liable for its contractual obligations to INTELSAT's, and will be required to pay $845 million over the life of the contracts. Yet because of the "Fresh Look" provisions of H.R. 1872, the guarantee of traffic will have been eradicated by Congress. This is unfair to Comsat, and as noted above, will result in the U.S. government paying off substantial claims for damages to which Comsat will be entitled.

In addition, these contracts represent 93% of Comsat's INTELSAT's-derived revenues. Placing a significant portion of the company's revenues at risk, while at the same time requiring Comsat to fulfill its obligations pursuant to the Intelsat's contracts, would be ruinous to Comsat.

3. The "Fresh Look" provisions of H.R. 1872 are unjustified on the basis of the record compiled by the FCC and a Federal court

Comsat's carrier-contracts cover international switched-voice traffic. Comsat's share of this market is only 20%. If 80% of this traffic can be—and is—routed over facilities that compete with Comsat's, claims that Comsat has "locked up" traffic are utterly without merit.

Moreover, the record demonstrates that these contracts were entered into voluntarily. Comsat and AT&T jointly petitioned the Federal Communications Commission to find that these contracts were in the public interest. In their joint filing, Comsat and AT&T stated that

> PanAmSat's arguments are likewise without merit. First, PanAmSat asserts that the Agreement inappropriately "locks in" both AT&T and COMSAT. However, to the extent COMSAT and AT&T have assumed mutual commitments, that is not inappropriate; rather it is the nature of long-term arrangements. In any event, the Agreement is non-exclusive, and leaves both parties with substantial flexibility. AT&T is free to place traffic not covered therein on "whatever facilities it should select, consistent only with U.S. law and international obligations," and COMSAT is free to compete for additional AT&T traffic, as well as the traffic of other service carriers.

See, Joint Reply Comments of Comsat and AT&T, In the Matter of Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, CC Docket No. 87–67, at 6 (footnotes omitted).

Moreover, in an antitrust suit involving these contracts, the court stated that

> * * * nothing in the record suggests that Comsat secured any of the contracts by means of any anticompetitive act against [PanAmSat]. On the contrary, the record sug-

> gests that for their own reasons, the common carriers elected to secure long-term deals with Comsat only after considering and rejecting offers from PAS.

Alpha Lyracom Space Communs. v. *COMSAT Corp.,* 968 F. Supp. 876, 894 (S.D.N.Y. 1996) (citations omitted), aff'd, *Alpha Lyracom Space Communs.* v. *COMSAT Corp.,* 113 F.3d 372 (2d Cir. N.Y. 1997).

CONCLUSION

Despite the absence of any facts that would justify Congress imposing a remedy as draconian as "Fresh Look," the Committee narrowly rejected my amendment to strike the provision; therefore, when the House considers H.R. 1872, I intend to support a similar amendment. Congress should not be in the business of voiding contracts voluntarily entered into by private parties.

As I have discussed in these views, the "Fresh Look" provisions constitute a compensable taking which would hold the taxpayers liable for substantial claims for damages. These provisions would leave Comsat liable for paying for the traffic that the contracts guaranteed, even after Congress repealed the guarantee. Finally, there is no factual basis for imposing "Fresh Look." The carrier-contracts are neither exclusive nor anticompetitive. They are voluntary agreements between private parties. Congress should not impair the ability of either party to rely upon the commitments made by the other to fulfill their obligations under these contracts.

ADDITIONAL VIEWS

We support the pro-competitive, deregulatory goals embodied in H.R. 1872, and we were pleased to support the legislation as it moved through the Commerce Committee. We are deeply concerned, however, about several provisions that were included in the bill when the "Dingell amendment" was accepted during consideration of the bill by the Subcommittee on Telecommunications, Trade and Consumer Protection.

The "Dingell amendment," which addresses the terms and conditions under which direct access to intergovernmental satellite organization facilities may be granted, contains two provisions—641(1)(A)(iii) and 641(2)(A)(iii)—which are decidedly at odds with the pro-competitive, deregulatory thrust of H.R. 1872. These provisions, which would direct the Federal Communications Commission ("FCC" or "Commission") to involve itself in the pricing decisions of carriers which are considered by the FCC to be non-dominant,[1] are unnecessary, intrusive, and contrary to the direction that the FCC should be headed with respect to regulation of the telecommunications market. We find it ironic that these ill-advised, regulatory provisions were included in a section of the bill titled "Deregulation and Other Statutory Changes."

The parties most likely to take advantage of direct access are carriers competing in the international long-distance market. This market is highly competitive, and market forces will provide participants in this market with discipline as they establish their prices. Should these parties obtain direct access, competition will compel them to "flow-through" any cost-savings to their end customers; carriers which fail to do so will inevitably lost market share. Thus, we do not believe there is any compelling rationale for the Commission to involve itself in the area of international long-distance pricing, except to the extent that Commission involvement is necessary to ensure that U.S. carriers are not forced to pay inflated settlements rates to foreign monopolies.[2]

Legislation that is intended to deregulate the satellite market is an inappropriate vehicle to reregulate the long-distance market, even in the unlikely event that such reregulation was necessary. Accordingly, we strongly urge that these provisions of the "Dingell amendment" be stripped from the bill at some point in the legislative process, and barring that, we urge the Commission to employ the forbearance authority granted it under Section 10 of the Communications Act (47 U.S.C. 160) to refrain from applying the requirements of 641(1)(A)(iii) and 641(2)(A)(iii). Given the many re-

[1] The FCC found in its AT&T Non-Dominance Order that no carrier is dominant in the provision of international services. See In the matter of motion of AT&T Corp. to be Declared Non-Dominant for International Service, FCC 96–209, released May 14, 1996.

[2] See In the Matter of International Settlement Rates, FCC IB 96–261, released August 18, 1997.

sponsibilities facing the Commission, and its limited resources, it would be an inappropriate use of resources for the FCC to spend any time implementing these unnecessary and counterproductive provisions.

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DISSENTING VIEWS

On its face H.R. 1872 aims at a worthwhile objective. All agree that more competition is better, whether it is in the satellite industry, the long distance business, local telephone networks or cable TV. We have no argument with this worthy goal. The crux of the problem with this bill is that it will not achieve what it sets out to do. In fact, it will accomplish precisely the opposite. Less competition and higher prices are the unfortunate, but inevitable outcomes of H.R. 1872.

Where does this well-intentioned bill jump the track? We can point to one simple, but false premise underlying this bill that is responsible for all the infirmities that naturally flow from it. H.R. 1872 starts with the assumption that COMSAT is a monopoly, and, as such, is deserving of all evils that may be bestowed upon it.

The simple truth is that COMSAT is not a monopoly. Yes, it is true that the Government granted COMSAT an exclusive franchise to provide satellite services using INSTELSAT and Inmarsat facilities. But, that is not where the story ends. Today scores of satellite systems compete head to head with INTELSAT and Inmarsat. COMSAT is not the only game in town by a long shot.

In 1984, President Reagan issued an executive order that put an end to COMSAT's monopoly by authorizing competition in the satellite market. Today COMSAT faces more than 20 highly effective competitors that have combined investments in satellites totaling over $14 billion. In the past four years alone, Wall Street has tripled the value of these competitors' stocks, and their owners now enjoy a combined market value of more than $40 billion. Clearly, investors believe these companies are not shackled on the sidelines, unable to compete against an entrenched monopolist.

If you choose not to believe the investors, then look at COMSAT's share of the market. These numbers positively refute any lingering doubt that the days of COMSAT's monopoly status have long since passed. Since 1988, COMSAT's market share for voice traffic has plummeted from 70% to 21%. Its share of the video market has dropped precipitously since 1993 from 80% to 42%. If COMSAT is a monopoly, it certainly isn't a very good one.

This is not to say that the satellite industry should not compete on an even playing field in the international marketplace. if INTELSAT and Inmarsat have any competitive advantages, whether it be in obtaining orbital slots or exclusive access to foreign markets, the correct approach should be to put pressure on the international community to eliminate those advantages. Unfortunately, H.R. 1872 takes the opposite approach and places the burden on COMSAT to correct the ills of the rest of the world, and punishes COMSAT if it doesn't succeed. The fallacy with that approach is that COMSAT has no control over the actions of 141 foreign countries. Hence, the goal of the bill is doomed from the start.

Worse, if COMSAT is punished for its inability to bring home the gold, the goal of stimulating more competition is compromised even further. By the terms of this bill, COMSAT would be restricted from providing "non-core" services, which are defined as just about everything COMSAT provides today to remain a viable competitor in the market. The curtailment of services dictated by this bill would turn the clock back 30 years to a time when COMSAT was mainly in the business of carrying international telephone calls. Most of the so-called "core" services COMSAT would be permitted to offer have since migrated from satellites to fiber optic cable.

As a result, COMSAT would be turned into a dinosaur overnight. While it is easy to see how this would benefit COMSAT's competitors, we are at a loss to understand how it would increase competition. To the contrary, the effect would be to remove a competitor from the marketplace. Less competition inevitably leads to higher prices, precisely the opposite goal of the bill.

If this weren't bad enough, COMSAT would have a legitimate claim for damages against the U.S. Government. The punitive service restrictions contained in this bill are tantamount to the Government imposing capital punishment on COMSAT for a crime committed by somebody else. Through no fault of its own, COMSAT's investment in satellites would be rendered virtually worthless.

Based on specific instructions from the Government, and in reliance on a reasonable expectation of an investment return, COMSAT's shareholders have staked billions of dollars on assets orbiting the sky solely for the purpose of generating revenues now and into the future. When the service restrictions contained in this bill kick in, and they surely will, those stranded assets will be looking for a home, And, of course, U.S. taxpayers will be forced to take them in. The resulting taxpayer liability could run well into the billions of dollars.

A more extensive discussion of the Government "takings" claim is contained in the "Additional Views of Mr. Tauzin," Chairman of the Subcommittee on Telecommunications, Trade, and Consumer Protection, included with this report. While that discussion focuses on taxpayer liability stemming from the bill's "fresh look" provisions, which permit the abrogation of private contracts, the arguments contained there are equally relevant to the imposition of service restrictions addressed in these views. An attempt to remove the punitive "fresh look" provisions was narrowly defeated by a 20–23 vote of the Committee.

The punitive measures on COMSAT, its customers, and the U.S. taxpayers should be eliminated from H.R. 1872. The punishment should be redirected where it belongs: on foreign countries that impede progress toward privatization. The notion that this Committee would put the financial viability of a U.S. company at risk based solely on the actions of a group of foreign countries is simply beyond comprehension. But that is precisely what H.R. 1872, as reported, would accomplish.

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