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

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230
	)	

COMMENTS OF HOME BOX OFFICE

Home Box Office ("HBO"), a Division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits its comments in response to the *Notice of Proposed Rulemaking* ("Notice"), released in the above-captioned proceeding on November 27, 2000.[1/] Through the Notice and its associated Policy Statement,[2/] the Commission seeks to promote the development of secondary spectrum markets. The Commission seeks to frame its policies around three key areas: (1) eliminating unnecessary regulations and administrative requirements; (2) promoting the availability of frequency and technically agile equipment; and (3) promoting more effective functioning of market processes for the exchange of spectrum usage rights.[3/]

1/ *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, FCC 00-402 (Nov. 27, 2000)("NPRM").

2/ *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, Policy Statement*, FCC 00-401 (Dec. 1, 2000) ("Policy Statement").

3/ Policy Statement ¶¶ 26-39.

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Although the Notice was directed mostly towards spectrum under the jurisdiction of the Wireless Telecommunications Bureau, one section of the Notice asked for specific comments with respect to the leasing of satellite capacity, a subject for the International Bureau. HBO will limit its comments to those particular issues.

As detailed below, HBO believes that the Commission's policies and rules regarding secondary markets for satellite licenses have generally been free of any undue regulatory barriers. With the Commission's help, secondary satellite markets have developed according to the dictates of consumers and the marketplace. To the extent the Commission addresses secondary markets for satellite capacity, it should seek to further encourage the development of the market by clarifying any unsettled questions that complicate the process of commercial negotiations.

I. STATEMENT OF INTEREST

HBO is a leading provider of pay television services in the United States, distributing multiple feeds of its HBO and Cinemax services to nearly 37 million subscribers. HBO was the first national television network to use domestic satellites for the distribution of its network services. HBO began satellite distribution of its networks in 1975 at a time when the provisioning of satellite services was heavily regulated on a common carrier basis. Over time, the Commission reduced its regulatory oversight of satellite services. Most notably, in its 1982 *Transponder Sales Decision,*[4/] the Commission permitted satellite capacity arrangements to be conducted on a private, non-common carrier basis, and approximately one year later, HBO

[4/] *Domestic Fixed-Satellite Transponder Sales*, CC Docket No. 82-45, *Memorandum Opinion, Order and Authorization*, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984), *modified Martin Marietta Systems*, 60 RR 2d 799 (1986).

became one of the first satellite users to negotiate a private satellite transaction, with Hughes Communications Galaxy, Inc. Since that time, almost all of the domestic and international satellite capacity that HBO uses has been purchased or leased in private, unregulated transactions.

II. SECONDARY MARKETS FOR SATELLITE CAPACITY

Generally, the Commission has interpreted its rules for the Fixed Satellite Service ("FSS") in a manner that has promoted the development of a secondary market in space station capacity. As noted above, since 1982, the Commission has permitted operators of FSS satellites located in geostationary orbits to lease or sell on a non-common carrier basis any or all of their transponders to third parties.[5/] Further, the Commission has permitted licensees of satellite systems operating on a non-common carrier basis, such as most Big and Little Low-Earth Orbit ("LEO") satellite systems, to offer capacity on their satellites to individual customers on individualized terms, ranging from short-term leases to outright sales with only minor limitations.[6/] Satellite licensees may lease or sell one or all transponders on a satellite to any party they wish, and the leases may be of any duration. Moreover, licensees are not obligated to obtain Commission approval for those leases or even to inform the Commission of the parties to whom they have leased transponders.

The Commission also has a flexible policy with respect to the licensing of satellite earth stations. Transmit earth stations may be licensed to the same party that receives the satellite license or to other parties who wish to obtain access to satellites and have an arrangement with

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[5/] NPRM ¶ 66.

[6/] NPRM ¶ 66.

the satellite licensee to communicate with a particular satellite.[7] Domestic receive-only earth stations have been completely deregulated and may be installed and operated without any FCC authority.

The deregulatory approach to the provisioning and use of satellite capacity taken by the Commission provides licensees and their customers with enormous flexibility. Mutually satisfactory arrangements are developed through commercial negotiations, not dictated or constrained by regulatory mandates. In HBO's experience, these policies have worked well. They provide operators and users with the ability to tailor their individualized transactions to their particular needs. In the case of programming networks such as HBO, this flexibility has allowed for agreements that have included provisions for long-term contracts with guaranteed replacement rights and elaborate backup and restoration capabilities. Because private satellite transactions have been a great success, both from an operator and user perspective, HBO urges the Commission to reaffirm its policies without material change.

III. POTENTIAL MINOR MODIFICATIONS TO COMMISSION POLICY

HBO supports the Commission's approach in the Policy Statement and the Notice. In these documents, the Commission reaffirms its policies promoting secondary spectrum markets for satellite capacity, while announcing a desire to search for "additional actions we could take relating to other licenses and services that would also promote more efficient use of spectrum and facilitate the development of secondary markets."[8]

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[7] NPRM ¶ 67.

[8] NPRM ¶ 63.

HBO would suggest only minor changes or clarifications for the Commission to consider. First, the Commission should more frequently entertain individual requests to waive technical and service rules to accommodate flexible use of satellite spectrum, so long as the requested waiver will not impose constraints on other satellite operators or users. This flexibility will further promote the individualized arrangements that are currently negotiated between operators and users. For example, as technology improves, it may be possible to deploy even smaller satellite earth station antennas or other non-rule compliant techniques that would improve service without causing interference. The Commission should be flexible in accepting such changes on a case-by-case basis, pending any necessary rule modifications.

Second, the FCC could clarify the responsibility of satellite licensees and operators with respect to information content transmitted over their satellite facilities pursuant to privately-negotiated contracts. When satellite capacity transactions were heavily regulated, it was clear that the satellite operators did not have legal responsibility for the content they did not control but that was transmitted over their satellites by third parties.[9/] In the deregulated environment, however, the lack of legal responsibility for content by satellite operators is less clear. HBO believes that it would be helpful for the Commission to clarify that satellite operators who do not contractually exercise control over their customers' content cannot be held responsible for transmitting such content. Such a clarification would not in any way undermine the principle that the satellite capacity customers, who "publish" the information, would continue to be responsible for its content. A Commission clarification, as HBO proposes, would simplify the negotiation of commercial satellite capacity contracts and would provide assurance that

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[9/] *See Humane Society of the United States v. Western Union Int'l, Inc., Memorandum Opinion and Order*, 30 FCC 2d 711, 713 (1971).

responsibility for content lies appropriately with the originator of the content and not the passive transmitter of such information.

IV. CONCLUSION

HBO supports the approach taken by the Commission in the Policy Statement and the NPRM and urges it to reaffirm the flexible satellite regulatory policies that have served the public well for many years, while considering minor modifications that will serve to further promote the development of secondary markets in satellite capacity.

Respectfully submitted

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