

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

Amendment of the Commission's Space
Station Licensing Rules and Policies

IB Docket No. 02-34

2000 Biennial Regulatory Review –
Streamlining and Other Revisions of Part
25 of the Commission's Rules Governing
the Licensing of, and Spectrum Usage by,
Satellite Network Earth Stations and Space
Stations

IB Docket No. 00-248

REPLY COMMENTS OF INTELSAT LLC

Intelsat LLC ("Intelsat") is pleased to submit the following Reply Comments in response to comments filed by other interested parties on June 3, 2002 with respect to the above-captioned *Notice of Proposed Rulemaking*¹ ("Notice"). In its comments, Intelsat recommended that the Commission adopt a modified First-Come, First-Served ("Modified FCFS") process that would, *inter alia*, apply only to applications for new licenses in certain established service bands and require applicants to submit evidence of a \$10 million bond at the time of filing an application. Unlike the FCFS proposal in the *Notice*, Intelsat's Modified FCFS approach would provide the twin benefits of speed and efficiency while preventing an influx of speculative applications. In this reply, Intelsat explains that, contrary to the assertions of Hughes Networks Systems, Inc.,

¹ See *Amendment of the Commission's Space Station Licensing Rules and Policies; 2000 Biennial Regulatory Review – Streamlining and Other Provisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations*, FCC 02-45, 17 FCC Rcd 3847 (2002) (Notice of Proposed Rulemaking and First Report and Order) ("Notice").

Hughes Communications, Inc., and Hughes Communications Galaxy, Inc. (collectively “Hughes”), a FCFS approach fully comports with, and is not precluded by, the hearing requirement in *Ashbacker Radio Corp. v. FCC*.² Furthermore, Intelsat agrees with those commenters that urge the FCC to ensure that applicants have the capability to construct and operate their systems prior to issuing a license and suggests that the bond proposal in its Modified FCFS approach may fulfill this objective better than the FCC's current financial qualification requirements.

In its comments, Intelsat also concurred with the Satellite Industry Association’s (“SIA”) position that processing round reform would be preferable to the First-Come, First-Served procedure proposed in the *Notice*, which would fail to deter adequately the filing of purely speculative applications. If the Commission does preserve processing rounds, Intelsat urges the agency to reduce the delays caused by both applicant sharing negotiations and, should those negotiations fail, the FCC’s subsequent consideration of sharing and priority issues. Intelsat agrees with those commenters that support limiting applicant sharing negotiations to 60 days and that oppose the selection criteria and mandatory sharing mechanism the Commission proposed in order to facilitate post-negotiation licensing. Although selection criteria are clearly necessary, Intelsat believes that the particular criteria proposed in the *Notice*, especially the new entrant preference rejected by all commenters except Pegasus, lack a valid policy rationale and will not expedite the Commission’s decisionmaking process. In summary, Intelsat urges the FCC to adopt Intelsat’s proposed Modified FCFS procedure, or in the alternative, processing round reform that includes both a limit on applicant sharing negotiations and meaningful selection criteria.

² 326 U.S. 327 (1945).

Intelsat also supports, without reiterating herein, SIA's other streamlining proposals, including granting flexibility to satellite operators that hold licenses for satellites at multiple orbital positions; simplifying the process for requests for Special Temporary Authority ("STA"); and streamlining technical information requirements.³

I. FIRST-COME, FIRST-SERVED FULLY SATISFIES ASHBACKER REQUIREMENTS

In its comments, Hughes claims that a FCFS process would be inconsistent with the *Ashbacker* requirement that the Commission hold a comparative hearing before deciding among mutually exclusive license applications.⁴ In fact, FCFS fully satisfies the *Ashbacker* rights of later-filing applicants because the Commission would establish the date and time of filing as the sole relevant comparative criterion to resolve otherwise mutually exclusive applications. The Communications Act only requires a comparative hearing when "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding" that the public interest, convenience, and necessity would be served by the grant of the application.⁵ If the Commission employs the time of filing as the predominant comparative public interest criterion, it is most unlikely that any material questions of fact would remain that would necessitate a comparative hearing. Thus, a FCFS procedure satisfies *Ashbacker* by relying on the date and time of filing as the comparative criterion to determine that grant of an earlier-filed application serves the public interest.

³ Comments of the Satellite Industry Association at 20-22, 37-39 ("SIA Comments")

⁴ Comments of Hughes Network Systems, Inc., Hughes Communications, Inc. and Hughes Communications Galaxy, Inc. at 12 ("Hughes Comments"); *Ashbacker*, 326 U.S. at 333.

⁵ *Hispanic Info. & Telecomms. Network v. FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (quoting 47 U.S.C. § 309(e)).

Hughes also suggests that FCFS is contrary to *Ashbacker* because under FCFS, no satellite application would ever be mutually exclusive to any other satellite application.⁶ However, eliminating such mutual exclusivity is exactly the objective. As recognized in the *Notice*, *Ashbacker* does not preclude the FCC from limiting the filing rights of competing applicants, nor does it eliminate the Commission's authority to determine when applications are mutually exclusive.⁷ FCFS in fact creates "a processing round of one, which would cut off the filing rights of applications filed on any subsequent day."⁸ As Teledesic recognizes, a primary benefit of FCFS is that it gives Commission staff greater freedom to evaluate each application on its own merits by resolving mutual exclusivity in all instances.⁹

II. THE \$10 MILLION BOND PROPOSED BY INTELSAT WOULD IMPROVE UPON CURRENT FINANCIAL QUALIFICATION REQUIREMENTS

Most commenters support retention of financial qualification requirements because such requirements add certainty that an applicant has the capability ultimately to construct and operate its licensed system.¹⁰ As PanAmSat Corporation ("PanAmSat") notes, however, "there have been problems with implementing financial qualifications standards for space station applicants and, because of these problems, the Commission has gone to great lengths recently to waive or

⁶ Hughes Comments at 13.

⁷ *Notice*, ¶ 63.

⁸ *Notice*, ¶ 44. *See also* Comments of Teledesic LLC at 6 ("Teledesic Comments").

⁹ Teledesic Comments at 7. The Supreme Court has held that Section 309 of the Communications Act allows the FCC to deny, without holding a hearing, an application that is inconsistent with a Commission rule adopted to further the public interest. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956). A FCFS rule would also further the public interest by decreasing delays in processing space station applications, expediting service to the public, promoting the efficient use of scarce spectrum and orbital resources, and facilitating the United States administration in meeting its international regulatory deadlines. *Notice* at ¶¶ 12-14, 21-23, 64.

¹⁰ Comments of PanAmSat Corporation at 15-16 ("PanAmSat Comments"); Comments of the Boeing Company at 10-11 ("Boeing Comments"); Hughes Comments at 44-45; Comments of Inmarsat Ventures PLC at 12 ("Inmarsat Comments"); SIA Comments at 34.

refrain from applying its financial qualifications policies.”¹¹ For example, the Commission has waived financial qualification requirements in cases where band segmentation permitted available resources to accommodate all pending applications and allow for future entry.¹² Such waivers are particularly useful in the current environment where financial markets are unlikely to fund fully applicants prior to the receipt of a license. Therefore, Intelsat agrees that the FCC should reexamine its financial qualification criteria.¹³

For example, the bond suggested by Intelsat might be a better “litmus test” for gauging an applicant’s commitment and financial ability to build its proposed system. By submitting the bond, an applicant commits to spend at least \$10 million or 10 percent of the cost of building and launching its satellite system.¹⁴ The bond also has the benefit of reducing the administrative burden on applicants and the Commission associated with proving and evaluating financial qualifications.

Intelsat’s proposed bond is consistent with agency precedent; the FCC has made use of a performance bond in the past as evidence of financial ability to construct a licensed system. In its order granting exclusivity to private paging systems in the 929-930 MHz band, the Commission required applicants for “slow growth” extensions (for the purpose of building out large systems) to obtain a performance bond in the amount of a construction cost estimate for the build-out.¹⁵ As construction of the system proceeded, the FCC allowed the licensee to reduce the

¹¹ PanAmSat Comments at 16; *see also* Teledesic Comments at 41.

¹² *See, e.g., The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd 16127, 16150-151 (2000) (Report and Order).

¹³ Inmarsat Comments at 12; PanAmSat Comments at 16; SIA Comments at 34.

¹⁴ Comments of Intelsat LLC at 11-12 (“Intelsat Comments”).

¹⁵ *Amendment of the Commission’s Rules to Provide Channel Exclusivity to Qualified Private Paging Systems At 929-930 MHz*, 8 FCC Rcd 8318 (1993) (Report and Order) (“*Private Paging Exclusivity Order*”). The Commission has distinguished such “performance bonds” underwriting construction from “forfeiture bonds” based on Section 503 of the Communications Act. *Id.*, 8 FCC Rcd at 8325-26.

bond amount to reflect costs incurred. The outstanding principal on the bond was payable to the U.S. Treasury if the licensee failed to construct all or part of the proposed system within the extension period.¹⁶

Intelsat's bond proposal is similarly designed to ensure that only applicants with the capability to construct and operate their proposed satellite system receive licenses. The amount of the bond expires unless the licensee defaults on its obligations without having spent at least \$10 million or 10 percent of the cost of building and launching its satellite system. Therefore, if the Commission adopts Intelsat's Modified FCFS approach, the bond would provide greater certainty than that associated with existing financial qualifications without unduly burdening applicants.

III. ANY PROCESSING ROUND REFORM MUST INCLUDE BOTH LIMITS ON NEGOTIATIONS AND MEANINGFUL SELECTION CRITERIA

Intelsat reiterates its belief that its Modified FCFS approach best addresses the problems identified with the current licensing procedure. Nevertheless, Intelsat agrees with commenters that any streamlining via reform of the current processing round procedure should focus on reducing the delays associated with the resolution of mutually exclusive applications.¹⁷ Such reform requires that the Commission (1) limit the amount of time available for sharing negotiations among applicants, and (2) expeditiously determine the distribution of spectrum and orbital locations among applicants if the parties cannot reach a sharing agreement.

¹⁶ The *Private Paging Exclusivity Order* also allowed the licensee the option of placing the estimated amount of construction costs in an escrow account, the balance of which would be payable to the U.S. Treasury if the licensee failed to construct all or part of the proposed system within the slow-growth period. *Private Paging Exclusivity Order*, 8 FCC Rcd at 8326-27.

¹⁷ Hughes Comments at 46-48; Comments of Pegasus Development Corporation at 3-4 ("Pegasus Comments"); Comments of Final Analysis Communication Services, Inc. at 1 ("Final Analysis Comments"); CTIA Comments at 4; SIA Comments at 14-16; PanAmSat Comments at 10-13; Boeing Comments at 3-4; Teledesic Comments at 31-32.

In the *Notice*, the FCC proposes a 60-day limitation on sharing negotiations.¹⁸ Most commenters support this proposal,¹⁹ and Intelsat agrees that the FCC should adopt this time frame should the agency decide to reform the current processing round procedure.

The *Notice* also proposes either to adopt various selection criteria to govern priority among applications, or to impose mandatory sharing via band segmentation.²⁰ Commenters generally oppose both the FCC's proposed selection criteria and the mandatory sharing mechanism.²¹ Hughes asserts that because the proposed criteria are inconsistent with each other and subjective, their use could lead to greater uncertainty.²² SIA notes that the proposed criteria would, in some cases, require the Commission to administer detailed affiliation restrictions, thereby further complicating the licensing process.²³ Pegasus Development Corporation ("Pegasus") suggests that most of the proposed criteria support no sound policy objectives or are susceptible to gaming.²⁴ Finally, Hughes notes that the proposed criteria may in some cases actually discourage innovation, competition, and efficient investment and use of scarce orbital slots and spectrum.²⁵ Intelsat agrees with the above commenters that the proposed criteria lack policy justification and will not facilitate the Commission's decisionmaking process.

¹⁸ *Notice*, ¶ 70.

¹⁹ Hughes Comments at 47; PanAmSat Comments at 10; SIA Comments at 14; CTIA Comments at 4.

²⁰ *Notice*, ¶ 78.

²¹ Teledesic Comments at 32-33; SIA Comments at 16.

²² Hughes Comments at 38-39; *see also* Teledesic Comments at 31-32. Similarly, SIA states that the preference for applicants that commit to provide service to rural and unserved areas will force the Commission to make subjective determinations about negligible differences in satellite service offerings that could significantly delay the licensing process. SIA Comments at 36.

²³ SIA Comments at 35.

²⁴ Pegasus Comments at 5-6.

²⁵ Hughes Comments at 40-42.

In fact, the only comparative criterion supported by any of the commenters is the new entrant preference. For obvious reasons, Pegasus – which has no orbiting satellites – prefers this approach.²⁶ Intelsat urges the FCC not to adopt such a preference because, as shown below, it would be inconsistent with the public interest.

Past experience demonstrates that a new entrant preference can delay the deployment of service to the public. For example, many recipients of the FCC’s “set-asides” of PCS licenses for “entrepreneurs” have experienced financial difficulties, resulting in bankruptcy filings and payment defaults involving over 200 licenses covering a population of approximately 191 million.²⁷ The agency has found that such set-asides can conflict with the goals of promoting competition and the rapid deployment of new technologies and services.²⁸ A new entrant preference for satellite licenses could similarly increase the number of licensees who lack the financial capability to construct and operate their systems.

A new entrant preference also lacks adequate policy justification. As noted in Intelsat's initial comments, a new entrant preference would contradict the proposed preference for applicants who have made more progress toward providing service.²⁹ In addition, Intelsat agrees with SIA that a new entrant preference would unfairly discriminate against existing satellite operators that do not hold sufficient market share to be considered dominant in any market and that such a preference could encourage speculation and greenmail by new entrants seeking to profit from the transfer of satellite licenses to existing operators.³⁰ Hughes also correctly notes

²⁶ Pegasus Comments at 3-4.

²⁷ Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 15 FCC Rcd 16266, 16270-271 (2000) (Sixth Report and Order and Order on Reconsideration) (“*PCS Order*”).

²⁸ *PCS Order*, 15 FCC Rcd at 16278.

²⁹ Intelsat Comments at 7 n.16.

³⁰ SIA Comments at 35.

that a new entrant preference ignores the experience, capital, and know-how that incumbents possess in launching spacecraft and utilizing spectrum and orbital locations, and therefore disadvantages those parties which may be best situated to actually construct and operate a system.³¹

Finally, a new entrant preference would impose additional administrative burdens on the FCC. The determination of whether an applicant qualifies as a “new entrant” would require the Commission to adopt detailed affiliation restrictions, and closely scrutinize corporate relationships.³² Administration of such a requirement could considerably lengthen the licensing process, as the Commission would not only have to determine the eligibility of each applicant for the preference, but may find itself defending those determinations through protracted appeals. Therefore, Intelsat recommends that the FCC decline to adopt a new entrant preference if it opts to modify its processing round procedure.

In conclusion, a modified processing round procedure that only expedites sharing negotiations fails to address half of the problem. True processing round reform must also include workable comparative criteria that will allow the FCC to license applicants quickly and fairly even if sharing negotiations fail. Intelsat recognizes the inherent difficulty in developing such criteria, and respectfully suggests that this difficulty is another reason why the FCC should adopt the Modified FCFS approach. If the Commission does choose the modified processing round approach, however, Intelsat urges the FCC to develop and adopt workable comparative criteria in order to achieve its goal of expediting service to the public.

³¹ Hughes Comments at 40.

³² SIA Comments at 35; Intelsat Comments at 7 n.16.

IV. CONCLUSION

In view of the foregoing, Intelsat recommends that the FCC adopt Intelsat's proposed Modified FCFS licensing approach. If the Commission chooses to retain and modify the processing round system, Intelsat urges the agency to (1) limit the amount of time available for sharing negotiations among applicants, and (2) adopt comparative criteria that will allow prompt licensing even in the absence of a negotiated sharing agreement among applicants.

Respectfully submitted,

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