

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

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

2000 Biennial Regulatory Review –
Streamlining and Other Revisions of Part
25 of the Commission's Rules

IB Docket No. 02-34

IB Docket No. 00-248

OPPOSITION OF INTELSAT LLC

Intelsat LLC ("Intelsat"), by its attorneys, hereby submits this opposition to the joint Petition for Reconsideration ("Petition") filed by various parties (collectively, the "Petitioners")¹ to the *First Report and Order* in the above-captioned proceeding.² The Petitioners request that the Federal Communications Commission ("FCC" or "Commission") eliminate the bond requirement for space station licensees, on the basis that the Commission lacks authority under the Communications Act of 1934 ("Communications Act" or "Act") to condition a license upon the posting of a bond. As explained below, the Commission has the authority to require a bond

¹ Petition for Reconsideration and Comments of the Boeing Company, Hughes Network Systems, Inc., Iridium Satellite LLC, Lockheed Martin Corporation, Loral Space & Communications Ltd., Mobile Satellite Ventures, LP, Panamsat Corporation, and SES Americom, Inc. (filed September 26, 2003; correction filed September 29, 2003) ("Petition for Reconsideration").

² *In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, 18 FCC Rcd 10760 (2003) ("*First Report and Order*").

(or escrow) when issuing licenses for scarce spectrum on a first-come, first-served basis in lieu of statutorily prohibited auctions. In that situation, the bond is a necessary measure to deter speculation and thus ensure that the issuance of a license serves the public interest as required under Section 309 of the Act. Furthermore, it is a measure that will not deter legitimate satellite applications. Therefore, Intelsat urges the FCC to deny the Petition and retain the bond requirement.

I. THE COMMISSION HAS LEGAL AUTHORITY TO IMPOSE A BOND REQUIREMENT

The FCC may require a payment – such as a performance bond – even if that payment is not *expressly* authorized by statute. The Commission has the responsibility under Section 309 to ensure that grant of a satellite license would serve the public interest convenience and necessity. Where Congress has prohibited the use of auctions and the Commission in response has adopted a first-come, first-served licensing mechanism, Section 4(i) of the Act permits the FCC to require a bond (or escrow) as the means to deter speculation and ensure that the grant of a license serves the public interest.

Section 309 of the Act authorizes the FCC to grant space station licenses where such grant serves the public interest, convenience and necessity.³ Recently, Congress clarified that the Commission could not use an auction in issuing spectrum used in the provision of international satellite communications services.⁴ Consistent with this statutory mandate, the FCC selected a first-come, first-served licensing method, but also recognized that this licensing method could open the door to speculation in scarce satellite spectrum and thus undercut the public interest.

³ 47 U.S.C. § 309(a).

⁴ Open-Market Reorganization for the Betterment of International Telecommunications Act, § 647, Pub. L. No. 106-180, 114 Stat. 48 (2000) (“ORBIT Act”), *as amended*, Pub. L. No. 107-233, 116 Stat. 1480 (2002).

Under such circumstances, it is reasonable for the Commission to impose an ancillary bond or escrow requirement, pursuant to its authority under Section 4(i) of the Act, to safeguard the public interest.

Section 4(i) of the Communications Act allows the Commission to “perform any and all acts ... and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions.”⁵ Courts have interpreted Section 4(i) to permit the agency “to issue regulations that may be necessary to fulfill [the] primary directives contained elsewhere in the statute.”⁶ Thus, the Commission may issue regulations, including those implementing payment conditions, which are necessary to effectuate its “primary directive” under Section 309 of the Act, *i.e.* to ensure that “the public interest, convenience, and necessity would be served” by the grant of a space station license.⁷

Indeed, the D.C. Circuit has confirmed that Section 4(i) permits the Commission to impose payment obligations not expressly authorized under the Act. In *Mobile Communications Corp. of America v. FCC*,⁸ the Commission required a licensee to pay a discounted auction price for a “finder’s preference” wireless license *not* subject to auction under Section 309(j) of the Act.⁹ Like the Petitioners, the licensee argued on appeal that the requirement was inconsistent with the specificity with which payment provisions were enumerated in the Act. The D.C. Circuit rejected this argument, explaining that the *expressio unius* principle “has little force in

⁵ 47 U.S.C. § 154(i).

⁶ *Iowa Utilities Board v. FCC*, 120 F.3d at 753, 795 (8th Cir. 1997), *rev'd on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁷ 47 U.S.C. § 309(a).

⁸ 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, *Mobile Telecomm. Tech. v. FCC*, 519 U.S. 823 (1996).

⁹ *Mobile Communications Corp.*, 77 F.3d at 1404-1405.

the administrative setting,” where courts will “defer to an agency’s interpretation of a statute unless Congress has ‘directly spoken to the precise question at issue.’”¹⁰ The court further explained that the payment condition was “necessary in the execution of [the Commission’s] functions” under Section 4(i) “so long as the Commission properly found it necessary to ‘ensure the achievement of the Commission’s statutory responsibility’ [under Section 309(a)] to grant a license only where the grant would serve the public interest, convenience, and necessity.”¹¹ Furthermore, the court noted that substantial deference was accorded to the Commission’s judgment regarding how the public interest is best served.¹²

As in *Mobile Communications Corp.*, imposition of the bond requirement here is necessary to give effect to the FCC’s mandate under Section 309 to ensure that the grant of a space station license will serve the public interest. In the *First Report and Order*, the Commission determined that a bond requirement would expedite the provision of services to the public by ensuring that licensees are committed to construction of satellite systems and by deterring speculative applications.¹³ Furthermore, by ensuring that only qualified, committed applicants receive a space station license, the bond requirement assists in preserving the integrity of the agency’s licensing scheme.

¹⁰ *Id.* at 1404-1405 (quoting *Texas Rural Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991)). See also *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 443-44 (5th Cir. 1999) (discussing the “limited usefulness of the *expressio unius* doctrine in the administrative context”).

¹¹ *Mobile Communications Corp.*, 77 F.3d at 1406.

¹² *Id.*

¹³ *First Report and Order*, 18 FCC Rcd at 10825-26.

The bond requirement is not an impermissible “forfeiture”.¹⁴ The bond requirement, on its face, does not fall under the forfeiture provisions of the Act.¹⁵ In fact, the bond serves an entirely different function from forfeitures, which are primarily intended to “punish” wrongdoers.¹⁶ Under Section 309, “[the Commission’s] function is to determine whether to grant a privilege to act as a trustee of a scarce public resource, not to assess a penalty for past misconduct.”¹⁷ The bond requirement is designed to further this determination by ensuring that the Commission will license only those applicants with the financial wherewithal to construct their proposed systems, in order to facilitate the optimal use of scarce orbital locations and spectrum. Thus, at most, the bond requirement amounts to a remedial “administrative sanction ... reasonably related to the purpose of the enabling statute” for which no express statutory authority is required.¹⁸ The fact that a bond requirement may adversely affect some licensees in practice does not transform the purpose of the regulation from remedial to punitive.¹⁹ Nor does

¹⁴ See Petition for Reconsideration at 3-5.

¹⁵ 47 U.S.C. §§ 501-504.

¹⁶ See, e.g., *FCC v. Summa Corp.*, 447 F.Supp. 923, 927 (D.Nev. 1978).

¹⁷ *RKO General, Inc.*, 78 F.C.C.2d 1, 116, n.477 (1980).

¹⁸ See *Gold Kist, Inc. v. U.S. Dept. of Agric.*, 741 F.2d 344, 348 (11th Cir. 1984) (“the statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty but ... an agency has broad administrative powers to impose administrative sanctions that are not penalties as long as the sanctions are reasonably related to the purpose of the enabling statute”); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 372 (D.C. Cir. 1961) (test is whether the sanction is “relevant or germane” to the statutory purpose, or, “or the contrary, was designed to punish”).

¹⁹ *Copper Plumbing & Heating Co.*, 290 F.2d at 372 (“If the regulation is designed to implement congressional purposes it does not become a penalty merely because it adversely affects some parties”); see also *Teleprompter Cable Systems, Inc.*, 52 F.C.C.2d 1263, 1271 (1975), *rev’d on other grounds*, *Teleprompter Cable Systems, Inc. v. FCC*, 543 F.2d 1379 (D.C. Cir. 1976) (Commission action not “penal” in nature where the action may have a “punishing” effect, but “punishment, per se, is not [the FCC’s aim],” but rather “to frame a remedy that will ensure the integrity of existing rules”).

the presence of express penal provisions in Sections 501-504 preclude the Commission from imposing such sanctions.²⁰

II. THE BOND REQUIREMENT IS NECESSARY TO DETER SPECULATION

The agency has explained that certain aspects of the new first-come, first-served licensing process *increase* the likelihood of speculation – for example, the elimination of the rule against trafficking in “bare” licenses.²¹ Indeed, the bond requirement directly replaces another prior measure against speculative applications—the Commission’s financial qualifications requirement.²²

Intelsat agrees with the Petitioners that the Commission’s other safeguards (limits on the number of applications, strict milestone enforcement, “black marks” for failure to implement, the “hard look” at licenses, and restrictions on the transferability of “queue” positions)²³ may significantly deter legitimate satellite operators from making speculative filings. Those measures, however, provide little incentive to “mere” speculators who have no intention of implementing a proposed system. Without a significant financial deterrent such as a bond requirement, any entity or individual could speculate in licenses by risking an approximate \$100,000 filing fee plus application preparation costs—a relatively small cost given the potential returns. Even limited occurrences of such speculation could significantly impact the

²⁰ *L.P. Steuart & Bro., Inc. v. Bowles*, 322 U.S. 398, 406-407 (1944) (provision of express criminal and civil sanctions in statute do not subtract from agency power to impose other sanctions in order to protect public against inequitable, unfair, and inefficient distribution of scarce resources); *Copper Plumbing & Heating Co.*, 290 F.2d at 372 (“Though [the statutes at issue] provide for civil and criminal penalties the teaching of *Steuart & Bro.* is that this does not negat[e] the authority of an enforcement agency to use ... additional means for accomplishing the congressional purpose”).

²¹ *First Report and Order*, 18 FCC Rcd at 10841.

²² *Id.* at 10825.

²³ Petition for Reconsideration at 7-9.

Commission's goal of expediting service to the public, given the scarcity and value of orbital resources. Therefore, the bond requirement must be retained in order to prevent such "mere" speculators from impeding the prompt provision of services.

III. THE BOND REQUIREMENT WILL NOT DETER LEGITIMATE SATELLITE APPLICATIONS

The bond requirement will not impose significant and unnecessary costs on satellite operators. As Intelsat has explained, a \$5 million bond amounts to a mere 2 percent of the cost of constructing, insuring, and launching a geostationary satellite.²⁴ Given the Commission's objective of licensing only those applicants who are fully committed to constructing and launching a proposed system, an initial bond that amounts to 2 percent of system costs is not unduly burdensome.

Furthermore, a \$5 million amount is reasonable when compared to the price paid by entities that recently purchased the assets and on-going businesses of satellite licensees. For example, Intelsat recently agreed to acquire five U.S. satellite licenses and one non-U.S. satellite license, four operational satellites and related business from Loral for \$1.1 billion. In 2001, SES acquired twenty-five satellite licenses and additional other related licenses and business from GE Americom for an aggregate \$5 billion.

As Intelsat has explained, current industry rates for such bonds are 1 to 2 percent per annum. Thus, a reasonable estimate of the *maximum* annual cost per bond for a licensee with good credit is \$50,000 to \$100,000—a relatively small expenditure comparable to the application filing fee and other preparation costs.²⁵ Moreover, the carrying cost for the bond will decrease each year as milestones are met and the bond amount is reduced. Insofar as surety companies

²⁴ Comments of Intelsat LLC at 4 (Sept. 26, 2003).

²⁵ Reply Comments of Intelsat LLC at 2-3 (Oct. 27, 2003).

may require collateral from less-qualified licensees, these additional costs reflect “the financial community[’s determination of] whether the licensee is likely to construct and launch its satellite system,” consistent with the Commission’s goal of ensuring that licensees are committed, making financial qualifications “a market-driven rather than a regulatory determination.”²⁶ To the extent that there are concerns about the need to pay both carrying costs for the bond and post collateral, the escrow alternative would be available to eliminate the need to pay annual bond costs. Indeed, the FCC could permit licensees the flexibility to post the \$5 million amount in any combination of bond or escrow.

Finally, the Commission has considered the risks posed by a bond requirement to legitimate applicants, and has included appropriate safeguards in the *Order*. The *Order* provides for a reduction of the bond each time an applicant meets a milestone, so the risk is progressively reduced for a licensee that demonstrates its commitment by proceeding to construct and implement its proposed system. In addition, the bond is not payable if a licensee can show that it missed a milestone because of circumstances beyond its control that warrant a milestone extension.²⁷ Finally, the Commission has considered the potential impact of the bond requirement on operators proposing to provide public safety services, and explained that it will consider requests for complete or partial waivers of the bond requirement.²⁸

²⁶ *First Report and Order*, 18 FCC Rcd at 10825.

²⁷ *Id.* at 10826.

²⁸ *Id.* at 10825.

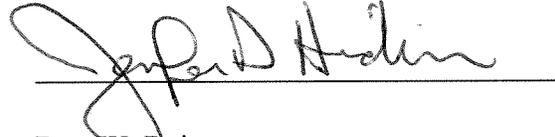
IV. CONCLUSION

For the foregoing reasons, Intelsat urges the Commission to deny the Petition, and to retain the performance bond requirement for satellite licensees.

Respectfully submitted,

INTELSAT LLC

By:

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Bert W. Rein

Carl R. Frank

Jennifer D. Hindin

Chin Kyung Yoo

of

WILEY REIN & FIELDING LLP

1776 K Street, N.W.

Washington, DC 20006-2304

202.719.7000

Its Attorneys

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