

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

<b>In the Matter of</b>	)	
	)	
<b>Amendment of the Commission’s Space Station Licensing Rules and Policies</b>	)	<b>IB Docket No. 02-34</b>
	)	
<b>2000 Biennial Regulatory Review – Streamlining and Other Revisions of Part 25 of the Commission’s Rules</b>	)	<b>IB Docket No. 00-248</b>
	)	

**REPLY TO OPPOSITION**

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. (collectively, the “Petitioners”) hereby reply to the Opposition of Intelsat LLC (“Intelsat”)<sup>1</sup> to the Petition for Reconsideration filed by the Petitioners<sup>2</sup> in this proceeding. As is demonstrated herein, Intelsat stands alone against virtually the entire satellite industry in its defense of the Commission’s requirement that satellite licensees suffer a multi-million dollar forfeiture upon a violation of certain license conditions, and post a performance bond to guarantee that payment. Yet Intelsat fails to adduce any argument or evidence that would suffice to uphold that requirement at this agency or on appeal.

**I. THE COMMISSION LACKS AUTHORITY TO IMPOSE THE BOND.**

Intelsat claims that the Commission may impose payment obligations on its licensees whenever it deems such payments “necessary” under Section 4(i) of the Communications

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<sup>1</sup> Opposition of Intelsat LLC, IB Dkt No. 02-34 (Nov. 6, 2003) (the “Opposition”).

<sup>2</sup> 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. (the “Petition”).

Act to further the “public interest” under Section 309(a). Opposition at 3 (quoting 47 U.S.C. §§ 154(i), 309(a)). This novel interpretation of the Act would, if correct, provide *carte blanche* to the FCC to impose payment obligations more or less at will, and would render superfluous the specific payment provisions contained elsewhere in the Act. The plain terms of the Communications and Administrative Procedure Acts, and an abundance of precedent, demonstrate that this expansive interpretation is unsupportable.

**A. This Payment Requires Statutory Authorization.**

1. *This Forfeiture is a “Sanction.”*

Intelsat claims that the bond requirement is not a penalty but a permissible measure to ensure that “only those applicants with the financial wherewithal to construct their proposed systems” receive licenses. Opposition at 5. This ignores the point. By its terms, the bond is forfeited (and a multi-million dollar payment *automatically* is made) if the licensee does not comply with the license milestone schedule imposed by the Commission. If the Commission’s only interest were in an applicant’s financial qualifications, it could impose a bond as an optional alternative to other methods of demonstrating the availability of sufficient assets to construct and launch a satellite system.<sup>3</sup> But to require forfeiture of the bonded amount upon non-compliance with license conditions (no matter the reason for those conditions or for the subsequent forfeiture) plainly is a sanction.

Intelsat’s suggestion that this \$5 to \$7 million forfeiture is not penal in nature because the Commission would use the threat of that forfeiture to facilitate compliance with the terms of a license is similarly ill-founded. Indeed, “fail[ure] to comply” with “the terms and

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<sup>3</sup> See, e.g., former Section 22.917 of the Commission’s rules (applicant seeking to be considered in a cellular comparative renewal proceeding can demonstrate financial qualifications by showing available assets to cover construction costs, submitting an irrevocable letter of credit, placing money in escrow, or posting a bond).

conditions of any license” or “any rule” of the FCC is the precise act that gives rise to the “Penal Provisions” and “Forfeitures” under Title V of the Act. 47 U.S.C. § 503(b)(1). Nor can Intelsat seriously maintain that the threatened forfeiture is not penal because its threat is intended to induce before-the-fact compliance, rather than after-the-fact retribution. Punishment typically is threatened or inflicted in order to induce “reformation or prevention.”<sup>4</sup> Courts are clear that “a sanction is a penalty even if only *one* of its various objectives is to punish wrongful conduct.”<sup>5</sup>

The cases relied on by Intelsat are not to the contrary. For example, in *L.P. Steuart & Brothers v. Bowles*, the Supreme Court reviewed a decision by the Office of Price Administration to suspend L.P. Steuart’s right to receive wholesale fuel oil because the company had violated fuel rationing regulations. The Supreme Court upheld that suspension, concluding that it was not a penalty but was instead an administrative measure designed to “protect the distribution system and the interests of conservation” by eliminating a “wasteful” retail distributor and “reallot[ing] fuel oil into more reliable channels of distribution.”<sup>6</sup>

The various cases cited by Intelsat simply follow the teaching of *L.P. Steuart* that a rule “does not become a penalty merely because it adversely affects some parties.”<sup>7</sup> Consistent with this line of cases the Commission may, for example, grant or withhold licenses (both acts that are within the FCC’s sphere of express delegated authority) based on the licensee’s record of compliance with the Commission’s rules, or other factors.<sup>8</sup> But it is one thing to deny, revoke or suspend a license based on a recipient’s apparent unfitness to receive that benefit; it is quite

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<sup>4</sup> Webster’s Third New International Dictionary of the English Language, Unabridged, at 1843 (1993).

<sup>5</sup> *American Bus Ass’n*, 231 F.3d at 7 (emphasis in original) (citing *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996)).

<sup>6</sup> *L.P. Steuart & Bro. v. Bowles*, 322 U.S. 398, 404-406 (1944).

<sup>7</sup> *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 372 (D.C. Cir. 1961) (quoted in Opposition at 5).

<sup>8</sup> See, e.g., *RKO General, Inc.*, 78 FCC2d 1, 116 n.477 (1980) (quoted in Opposition at 5).

another thing to demand a \$5 to \$7 million payment upon the inability to meet certain license conditions.<sup>9</sup>

Nor can the requirement that \$5 to \$7 million be forfeited upon failure to meet certain license conditions be saved by its characterization as a performance bond. The bond aspect of the requirement is a red herring, and serves only to guarantee that a licensee will pay the forfeiture if and when it becomes due. The notion that a “bond” is allowable where a “forfeiture” is not is senseless. By that logic, the FCC could require *all* licensees to post performance bonds that would automatically be subject to forfeiture without ever having to issue a Notice of Apparent Liability or comply with other due process requirements. Regardless of the mechanics of its imposition, the forfeiture of \$5 to \$7 million upon failure to meet a license milestone is a penalty that cannot be levied absent express statutory authorization.

2. *No “Sanction” May be Imposed Without Explicit Authority.*

It is well settled that “[t]he sanctioning authority of an agency may include a specific sanction, or it may be stated in general terms. In either case, the agency may exceed neither the specific nor general grant of power authorized by Congress.”<sup>10</sup> The plain terms of the Administrative Procedure Act require that “[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and authorized by law.” 5 U.S.C. § 558(b).<sup>11</sup> Indeed, the Commission “literally has no power to act . . . unless and until Congress confers power upon it.”<sup>12</sup>

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<sup>9</sup> *Gold Kist Inc. v. USDA*, 741 F.2d 344 (D.C. Cir. 1985), also cited by Intelsat, reflects this distinction. The D.C. Circuit concluded that the sanctions at issue – fines imposed in response to rule violations – “were penalties, not administrative sanctions,” and determined that “the agency had no authority to impose such a penalty.” *Id.* at 348.

<sup>10</sup> Jacob Stein *et al.*, 5 Administrative Law § 41A.01 (2003).

<sup>11</sup> This is the case whether or not the sanction is characterized as a penalty. *See American Bus Ass’n v. Slater*, 231 F.3d 1, [cite] (D.C. Cir. 2000) (APA plainly “requires statutory authority for all sanctions, not merely those that can be characterized as penal”).

<sup>12</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

Nor can an agency “presume” to hold such authority in the absence of an express statutory provision.<sup>13</sup>

In a variety of contexts, ranging from bus companies,<sup>14</sup> to power producers,<sup>15</sup> to securities dealers,<sup>16</sup> to Indian tribes,<sup>17</sup> to communications companies,<sup>18</sup> courts have upheld the requirement that any agency-imposed “sanction” be explicitly “within the jurisdiction delegated to the agency.” 5 U.S.C. § 558(b).

**B. The Act Provides No Authority for the Multi-Million Dollar Forfeiture and Performance Bond.**

The \$5 to \$7 million forfeiture is a sanction or penalty, and thus must be authorized by statute. Because it is not, the Commission must eliminate this requirement.

Intelsat claims that Sections 4(i) and 309(a) of the Communications Act authorize the \$5 to \$7 million forfeiture as a “necessary” incident to the Commission’s general ability to award licenses pursuant to “the public interest.” Opposition at 3. As the D.C. Circuit made plain

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<sup>13</sup> *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (“Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony”). *See also, e.g., Securities and Exchange Comm’n v. Sloan*, 436 U.S. 103, 117-119 (1978) (refusing to defer to SEC interpretation where action exceeds, and is therefore “inconsistent with,” limited statutory mandate).

<sup>14</sup> *American Bus Ass’n v. Slater*, 231 F.3d at 4-5 (rejecting attempt by Transportation Department to impose supplementary penalties for statutory violations: “[b]y specifying the circumstances under which monetary relief will be available, Congress evinced its intent that damages would be available in no others”).

<sup>15</sup> *Wolverine Power Co. v. FERC*, 963 F.2d 446 (D.C. Cir. 1992) (FERC’s statutory authority to fine licensees, and power to take other actions against non-licensees, does not permit FERC to fine non-licensees: “Congress knew how to draft an enforcement provision applicable to a “licensee”).

<sup>16</sup> *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (statutory authorization permitting SEC to bar individual from associating with a “broker dealer” precludes barring such individual from associating with an “investment advisor”).

<sup>17</sup> *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (“the Secretary’s decision to institute a 50% penalty for Tribes . . . exceeded his limited authority under the [enabling Act]”).

<sup>18</sup> *AT&T Corp. v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003) (express statutory authority to prescribe “verification procedures” precluded any additional authority to require – and penalize a carrier’s failure to obtain – actual customer authorization prior to carrier change).

in *Motion Picture Association of America v. FCC*, however, these general enabling provisions simply “cannot carry the weight” of such a substantive regulation.<sup>19</sup>

It is important to emphasize that Section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a “necessary and proper” clause. Section 4(i)’s authority must be “reasonably ancillary” to other express provisions. And, by its express terms, our exercise of that authority cannot be “inconsistent” with other provisions of the Act.<sup>20</sup>

Likewise, this penalty does not find support in the Commission’s general authority under Section 309(a) to award licenses “in the public interest,” any more than the regulations at issue in *MPAA* were salvageable under the Commission’s general authority pursuant to Section 303(r) to regulate “in the public interest.” *Id.* at 803-806. The FCC “cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue.” *Id.* at 806.

The “public interest” standard of Section 309(a) provides no such substantive authority. Section 309(a) merely specifies the “touchstone” criteria for determining whether or not to award a particular license.<sup>21</sup> This is not a substantive grant of authority to impose forfeiture requirements (or any other regulations) on licensees.<sup>22</sup> Without such authorization, the Commission’s bond requirement cannot be sustained.

Intelsat relies principally on the case of *Mobile Communications Corp. v. FCC*,<sup>23</sup> contending that the decision supports the Commission’s authority to impose the \$5 to \$7 million

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<sup>19</sup> *Motion Picture Ass’n of America Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (“*MPAA*”).

<sup>20</sup> *Id.* (quoting then-Commissioner Powell).

<sup>21</sup> *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 598 (1950).

<sup>22</sup> *Cf., e.g., Building Owners and Managers Ass’n Int’l v. FCC*, 254 F.3d 89, 94-95 (D.C. Cir. 2001) (statutory requirement that FCC “issue regulations to prohibit restrictions that impede viewers from using [over-the-air reception] devices” found to be sufficient basis for OTARD rules) (internal punctuation omitted).

<sup>23</sup> *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996).

payment requirement at issue here based upon a finding that such regulations are necessary to “preserv[e] the integrity of the agency’s licensing scheme.” Opposition at 4. As an initial matter, the Supreme Court has, since *Mobile Communications* was decided, explicitly rejected the notion that an agency may avoid the mandate of a generally applicable statute (here, the APA requirement that sanctions be imposed only “within jurisdiction delegated to the agency”)<sup>24</sup> simply by looking to its general authority to “preserve the integrity” of the its licensing scheme.<sup>25</sup>

More importantly, Intelsat is simply incorrect in its reading of *Mobile Communications*, in which the D.C. Circuit upheld a requirement that a licensee pay a “substantially discounted auction price” for a license. *Mobile Communications*, 77 F.3d at 224. The Commission imposed the payment requirement at issue in that case after Congress expressly authorized the Commission to use competitive bidding to assign licenses. *Id.* In upholding the discounted auction payment, the court relied heavily on the fact that (i) Congress had explicitly authorized auction payments for such licenses, and (ii) failure to require a payment under those circumstances could constitute “unjust enrichment” of the licensee. *Id.* at 225-227. Thus, the statute as a whole, and in particular “the nature of Congress’s auction authorization,” provided support for the discounted auction payment that the FCC imposed. *Id.* at 226.

Thus, the holding in *Mobile Communications* turned on Congress’s express endorsement of auction-based licensing for that service. In contrast, nothing in the statute remotely suggests any Congressional support for the payment requirements imposed on satellite licensees by the *Order*. To the contrary, satellite services have been singled out for exemption from auction-based licensing fees under the ORBIT Act, which prohibits the use of competitive

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<sup>24</sup> 5 U.S.C. § 558(b); see also *American Bus Ass’n*, 231 F.3d at 6.

<sup>25</sup> See generally *FCC v. NextWave Personal Comm’s, Inc.*, 537 U.S. 293 (2003).

bidding for “orbital locations or spectrum used for the provision of international or global satellite communications services.” 47 U.S.C. § 765f.

Nor may the payment requirement find support in any of the other provisions of the Act that require payments under certain circumstances. It is neither an application fee authorized under Section 8 (47 U.S.C. § 158), nor a regulatory fee that can be imposed under Section 9 (47 U.S.C. § 159). The various penal provisions of the Act also cannot support the payment requirement because the amount to be paid is outside the range of acceptable penalties, and the forfeiture procedures do not incorporate the protections that are required prior to imposition of a typical penalty. *See* 47 U.S.C. §§ 501-504. Indeed, the existence of such expressly authorized penalties and payments tends to refute the implication that others may legitimately be imposed.<sup>26</sup>

## **II. THE PERFORMANCE BOND IS BAD POLICY.**

The Coalition demonstrated in its Petition that, even if the Commission has authority to impose the bond, it should not. The \$5 to \$7 million forfeiture, and the performance bond guaranteeing that payment, are unnecessary and burdensome. There is simply no evidence to support the Commission’s (and Intelsat’s) notion that the various other procedural mechanisms are insufficient to deter speculation. Moreover, the evidence is uncontroverted that the threat of a \$5 to \$7 million forfeiture will chill some applicants from filing.

Intelsat contends that the *in terrorem* effect of the forfeiture will work perfectly to deter “speculative” applications while allowing “legitimate” ones to go forward. But it ignores the reality that *all* business ventures are speculative to some degree and that all businesses make decisions to continue or not to continue to pursue certain projects for legitimate business reasons.

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<sup>26</sup> *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (“it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it”).

New and innovative satellite service proposals are inherently risky (or “speculative,” as Intelsat would have it) and involve long lead times. The chilling effect of a multi-million dollar forfeiture will particularly deter such applications as they threaten to penalize licensees if in the future their businesses, technology, or market conditions change and, for whatever reason, they decide they cannot continue to construct what they proposed years earlier. The threat of a \$5 to \$7 million forfeiture will introduce a new element of risk to the satellite industry that many investors may conclude is simply unacceptable.

**III. CONCLUSION.**

As Petitioners have demonstrated and Intelsat has not refuted, the Commission’s requirement that space station licensees pay a multi-million dollar forfeiture upon failure to meet certain licensing milestones, and its requirement that they post a performance bond to guarantee that payment, are unauthorized and are bad policy as well. The Commission should reconsider and eliminate these requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William S. Carnell, hereby certify that the attached Reply was served via First Class U.S. Mail, postage prepaid, on this the 19<sup>th</sup> day of November, 2003, on the following:

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