



EUROPEAN UNION
DELEGATION OF THE EUROPEAN COMMISSION

44.2(103)
Special

REPLY COMMENTS TO THE FCC'S FURTHER NOTICE OF PROPOSED RULE-MAKING 97-252 BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

1. The Delegation of the European Commission presents its compliments to the Department of State and has the honour to refer to the Further Notice of Proposed Rule-Making FCC 97-252 (hereafter Further NPRM) adopted by the Federal Communications Commission (FCC) on July 16, 1997 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 Services in the United States.
2. The European Community and its Member States welcome the opportunity to comment granted by the FCC. We highly appreciate that the FCC issued this Further NPRM as it shows the FCC's willingness to fulfil its commitments to revise its proposed rules of 1996 governing the possibility for non-U.S.-licensed space stations to provide domestic and international satellite services in the United States, as a result of the World Trade Organisation (WTO) Agreement on Basic Telecommunications Services.
3. The European Community and its Member States invite the FCC to provide further clarification as to **the compatibility of its proposed rules with the GATS multilateral trading system.**
4. The European Community and its Member States consider that it is essential at this stage to avoid taking any action that may jeopardise the effective implementation by WTO Member countries of their commitments undertaken under the WTO/GATS Agreement on Basic Telecommunications Services. **In this context, the European Community and its Member States have concerns with the potential negative impact that the rules proposed in this Further NPRM could have on the implementation by the other WTO Members of their commitments.**
5. **The European Community and its Member States support the FCC's proposal in the Further NPRM 97-252 not to apply the Effective Competitive Opportunities (ECO-Sat) analysis** for evaluating requests by WTO Member satellite systems to provide covered services within the United States, or between the United States and other WTO member countries, in light of the new competitive environment. We have however the following two **general concerns** with the FCC's proposed approach, which were already expressed in our comments to NPRM 97-142 of 4 June 1997 in the matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market:

a) the Further NPRM proposes to maintain broad and unclear **public interest factors** such as law enforcement, foreign policy, and trade concerns in determining whether to grant or deny authorisations to provide satellite services. The European Community and its Member States have strong concerns on the compatibility of such public interest concepts with the GATS/WTO principles of objectivity, non-discrimination and transparency, as well as the U.S. MFN and market access obligations. We believe that the U.S. endorsement of the WTO Agreement on

Basic Telecommunications Services clearly indicates that WTO Members already satisfy the public interest objectives contained in the Notice, which thus cannot be applied to WTO Members;

b) the second major concern of the European Community and its Member States is the use of such a broad and unclear concept as a “very high risk to competition” in the US satellite market as a justification for refusing a licence. Such an approach would erect additional burdens for foreign companies wishing to enter the U.S. satellite market, which would be subject to challenges by their competitors based on unclear conditions and criteria. The European Community and its Member States have concerns about the compatibility of such broad and vague competition policy objectives with the GATS Agreement.

6. The European Community and its Member States in addition wish to express the following **specific comments** regarding the FCC's Further Notice of Proposed Rule-Making 97-252:

Retention of the ECO-Sat Test for services exempt from most-favoured-nation obligations (Further NPRM, paragraphs 20-22)

7. At the very end of the GATS Negotiations on Basic Telecommunications Services, the U.S. tabled an exemption from the most-favoured-nation (MFN) obligations for the one-way satellite transmission of DTH (direct-to-home) and DBS (digital broadcasting) television services, and of digital audio (DARS) services. At the time, the European Community and its Member States expressed concerns about the U.S. MFN-exemption, and reserved their rights within the WTO framework to challenge it.¹ These concerns remain valid.
8. The Further NPRM FCC 97-252 asserts in paragraph 20 that *“The United States took this [MFN-] exemption because the commitments made by other WTO members, including many of its major trading partners, do not provide for market access for DTH-FSS, DBS, or DARS. This created a potential market access imbalance between the United States and its largest trading partners [...]. The United States resolved this imbalance by taking an exemption from most-favoured-nation obligations of the GATS for these services.”* As a result, the FCC proposes to **apply the ECO-Sat test to all requests for access by non-U.S. satellite systems for the delivery of these services.**
9. The European Community and its Member States take note of the above mentioned justification put forward by the United States to justify the MFN-exemption. However, we do not share this analysis on the following grounds:
 - a) In 1993 as a result of the Uruguay Round Negotiations the U.S. undertook **commitments under the GATS on “radio and television services”, “radio and television transmission services” and “other audiovisual services”**. These commitments did not exclude any particular technology;
 - b) **Furthermore, in the context of negotiations on specific services areas, such as those on Basic Telecommunications, WTO Members cannot take MFN-exemptions on**

¹ See the declaration made by the European Communities and their Member States at the Meeting of the Group on Basic Telecommunications on 15 February 1997.

services which do not fall under the scope of these negotiations. The European Community and its Member States hold the view that the one-way satellite transmission of DTH and DBS television services and of digital audio services do not fall under the scope of the 1997 Agreement on Basic Telecommunications. We note that the U.S. also shared the view that one-way DTH, DBS and digital audio services do not fall under the scope of the Basic Telecommunications Agreement, as clearly stated on the cover page of its February 1997 Offer.² "... these services [DTH, DBS and digital audio services] are considered basic telecommunications in the United States but are not part of these negotiations" (emphasis added).

10. In addition, the U.S. MFN-exemption might **negatively impact the economic viability of non-U.S.-licensed satellite systems**, since satellite systems normally provide both telecommunications (voice, data, video), and DTH-DBS transmission services ('mixed' systems). Over the past years, the trend toward bundling video programming with telecommunications and information services has even accelerated. The question thus arises how the FCC would evaluate applications from non-U.S.-licensed satellite systems to provide both basic telecommunications and DTH-DBS services.

11. The scope and economic impact of the U.S. MFN-exemption depend on the **precise definition** of DTH and DBS television services, and of digital audio services. We invite the FCC to provide a precise **definition** of "one-way satellite transmission of DTH and DBS television services and of digital audio services", notably with respect to the coverage of the transmission of programmes to cable network head-ends, between operators (contribution links), and the future generation of interactive services via satellite.

12. Thus, the European Community and its Member States **request the FCC to reconsider its proposal** contained in paragraph 21 of the Further NPRM 97-252, and **not to apply the ECO-Sat test to requests for access by WTO-Members satellite systems for the delivery of one-way satellite transmission of DTH and DBS television services and of digital audio services, in the light of the WTO/GATS Agreement.**

13. Furthermore, we note with great concern the FCC's intention possibly, in the future, to adopt more restrictive rules and policies for granting authorisations to provide Direct-to-Home (DTH) and Direct Broadcast Satellite (DBS) services. As stated in paragraph 22 of the Further NPRM, "*In light of certain comments received in response to the initial DISCO II Notice, we wish to clarify that the specific foreign ownership and public interest rules that will be applied to DTH-FSS and DBS services will be addressed in separate Commission proceedings*". The European Community and its Member States strongly recommend that, in light of its comprehensive commitments on audio-visual services at the end of the Uruguay Round, the United States should not impose new, more burdensome, conditions for the grant of authorisations to provide DTH-FSS and DBS services.

Retention of the ECO-Sat Test for Non-WTO-Member markets served by WTO-Member Satellites (Further NPRM, paragraphs 25-28)

² Communication from the United States: Conditional Offer (Revision), S GBT/W/1/Add.2 Rev.1 of 12 February 1997.

14. The FCC requests comments, in paragraph 28, on whether it should apply an ECO-Sat test to the non-WTO route markets in cases where the applicant that seeks to provide service between the United States and a non-WTO member country **uses a satellite licensed by a WTO member country**. The Community and its Member States are of the opinion that the application of the ECO-Sat test to non-WTO route markets in case of satellites licensed by a WTO Member would violate the U.S. national treatment commitments undertaken under the GATS Agreement on Basic Telecommunications Services in the GATS framework, and is thus not permissible. We therefore give our **full support to the alternative solution presented by the FCC** in paragraph 27, namely that: *"... we could give WTO satellites the **same flexibility as we now give U.S. satellites** [via the DISCO I Order]. This would mean that we would not apply an ECO-Sat test in cases involving WTO-member satellites, **regardless of the route market**"* (emphasis added). Given its GATS commitments on national treatment, the U.S. shall accord to WTO-Member-licensed satellites and to the services they provide treatment no less favourable than that it accords to its own, U.S.-licensed satellites and to their services. As a consequence, **the treatment of U.S. licensed and WTO-Member-licensed satellite systems must be harmonised, regardless of the route market they serve.**

Bilateral Agreements (Further NPRM, paragraphs 29-30)

15. The FCC mentions in paragraph 29 its intention of pursuing its *"overriding goal of enhancing competition in all satellite services by opening global markets"* by entering in the future into bilateral agreements for the provision of satellite services with other countries. As an example of such agreements, the FCC cites the recently completed bilateral U.S.-Mexico Agreement on the provision of DTH-FSS and DBS services.³ The FCC proposes, on the basis of the U.S. MFN-exemption on DTH, DBS and digital audio services, **not to apply the ECO-Sat test to applications by non-U.S. satellites** (for the provision of DTH, DBS and digital audio services) **if the applications are covered by a bilateral satellite services agreement**. Regarding this FCC proposal, the Community and its Member States repeat their comments made under the point **'Retention of the ECO-Sat Test for services exempt from most-favoured-nation obligations'** above.

Possibility to deny licenses to the future affiliates of Intergovernmental Satellite Organisations (IGOs) on the ground of a "very high risk to competition" in the U.S. satellite market (Further NPRM, paragraphs 34-36)

16. **The European Community and its Member States welcome and strongly support the FCC's proposal in paragraph 35 "not to apply the ECO-Sat test to applications to use satellites of IGO affiliates if the affiliates are companies of WTO Member countries"** -- i.e. incorporated and engaged in substantive business operations in a WTO Member country's territory. In this respect, we recommend the U.S. to take note of the GATS definition of a "juridical person of another Member" (Art. XXVIII(m)).

³ Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 26, 1996. As well as the related Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States of November 8, 1996.

However, the European Community and its Member States are highly concerned about the further scrutiny and market entry barriers on the basis of an alleged *"significant risk to competition in the US satellites market"* to which the FCC intends to subject affiliates of IGOs. We are concerned in particular, by the following statements made by the FCC in paragraph 35 *"[...] in the WTO negotiations, the United States preserved its ability to protect competition in the U.S. market, including the possibility of not granting market access to a future privileged IGO affiliate."*, and paragraph 36 of its Further NPRM *"Accordingly, upon appropriate application, we propose to review the affiliate's relationship to its IGO parent to ensure that grant would not pose a significant risk to competition in the U.S. satellite market, and that the affiliate is structured to prevent such practices as collusive behaviour, cross-subsidisation, and denial of market access, and that the affiliate does not benefit directly or indirectly from IGO privileges and immunities. This review could result in denial of license or conditioning access to the U.S. market by the IGO affiliate"* (emphasis added).

17. In this respect, the European Community and its Member States reiterate the reply comments made to the FCC NPRM 97-142 ('Foreign Participation' Order and Notice of Proposed Rule-Making). We wish in particular to stress again the following major concerns, most of which have been addressed also in our Reply comments regarding the FCC's 'Foreign Participation' Order and NPRM:

a) The U.S. intends to deny access to its satellite market to IGO affiliates *"if that could pose a very high risk to competition in satellite services to, from, and within the United States"*. The European Community and its Member States view the latter criteria as too broad and unclear. For the U.S. to keep such a high degree of discretion regarding access to its market -- as suggested by the criteria of *"very high risk to competition"* -- would be against the letter and spirit of the GATS general obligations and disciplines, as well as the U.S. specific market access commitments;

b) IGO affiliates will already be subject to a number of disciplines and pro-competitive safeguards as a result of the commitments undertaken by WTO Members under the Reference Paper. In addition, the restructuring processes of IGOs will be examined under appropriate competition law. As a consequence, IGO affiliates will already be subject to the prohibition of anti-competitive practices, and to safeguards preventing inter alia cross-subsidisation. Therefore, the Community and its Member States consider that some of the 'tests' to which the FCC intends to submit IGO affiliates (*"to ensure that the affiliate is structured to prevent such practices as collusive behaviour, cross-subsidisation, and denial of market access, and that the affiliate does not benefit directly or indirectly from IGO privileges and immunities"*) **could potentially lead to an over-regulation of these affiliates. Thus, we strongly recommend the United States not to create unnecessary burdensome regulations for reviewing applications.** Instead, the United States should rely much more on the fundamentally improved conditions of competition in satellite services that will result from the successful conclusion of the Agreement on Basic Telecommunications Services -- as recognised by the FCC in its Further NPRM (see paragraphs 2, 13, 16, 17, etc.). In our view, **promoting an open and competitive market for satellite services is a far more efficient means of serving the public interest than intense regulatory scrutiny.**

Other Public Interest Considerations: Spectrum Availability and Technical Co-ordination
(Further NPRM, paragraph 38)

18. The European Community and its Member States wish to recall that, according to the Chairman's Note on Market Access Limitations on Spectrum Availability negotiated in the framework of the Agreement on Basic Telecommunications Services, each Member has the right to exercise spectrum / frequency management, provided that this is done in accordance with Article VI and other relevant provisions of the GATS. This implies that Members' measures and decisions regarding allocation, assignment and technical co-ordination are administered in a "reasonable, objective and impartial manner", and do not nullify or impair a country's specific commitments, *i.e.* not act in themselves as a disguised barrier to trade. In addition, the GATS Reference Paper requires such allocation to be carried out "in an objective, timely, transparent and non-discriminatory manner". Any rules adopted by the FCC in this respect should be consistent with these principles.

Compliance with Commission Rules and Policies (Further NPRM. paragraphs 39-46) The FCC proposes in its paragraph 44 to "apply all applicable Commission rules and policies to all non-U.S. satellite systems that are eligible to serve the United States". The European Community and its Member States wish to stress that all these rules and policies shall be consistent with the GATS general obligations and disciplines (such as MFN treatment, *etc.*) as well as with the U.S. specific market access and national treatment commitments.

19. To conclude, on the basis of the above analysis, the European Community and its Member States request the United States to reconsider, where necessary, the proposals contained in its Further NPRM 97-252 to ensure that it is fully consistent with GATS principles. The European Community and its Member States also reaffirm their request to the U.S. to amend the remaining FCC's rules where necessary in order they do not conflict with GATS principles.

20. The European Community and its Member States reserve their rights to challenge under the WTO dispute settlement procedures any rules to be proposed by the FCC that would be inconsistent with the U.S. general GATS obligations and disciplines, or with its specific market access and national treatment commitments.

21. The Delegation of the European Commission would be grateful to receive the views of the Department of State, and requests that this Note Verbale be transmitted to the Federal Communications Commission so that it can be part of the proceedings in this matter and put in the public record.

The Delegation of the European Commission avails itself of the opportunity to renew to the Department of State the assurance of its highest consideration.



Washington, DC
4 September, 1997