

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Report to Congress Regarding) IB Docket No. 04-158
the ORBIT Act)

COMMENTS OF MOBILE SATELLITE VENTURES SUBSIDIARY LLC

Bruce D. Jacobs
David S. Konczal
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Lon C. Levin
Vice President
**MOBILE SATELLITE VENTURES
SUBSIDIARY LLC**
10802 Park Ridge Boulevard
Reston, Virginia 20191
(703) 390-2700

Dated: May 7, 2004

Summary

The Commission's Report to Congress on the ORBIT Act should reflect two overriding themes: (i) Inmarsat has chosen to ignore explicit requirements of the ORBIT Act, leaving the Commission with no option other than to prohibit Inmarsat from providing service in the United States; and (ii) Inmarsat continues to engage in anticompetitive acts to maintain and increase its dominant share of the MSS market.

Inmarsat has chosen to ignore the unambiguous requirements of the ORBIT Act. The ORBIT Act requires Inmarsat to conduct a public equity offering and to have its shares listed on a major stock exchange. Inmarsat has done neither. As courts and the Commission have repeatedly recognized, the Commission has no option other than to enforce the unambiguous requirements established by Congress, as expressed in the statute. Inmarsat's last-minute request for an extension of its deadline for conducting a public equity offering is baseless. Because Inmarsat has not satisfied the clear requirements of the ORBIT Act, the Commission must prohibit Inmarsat from providing service in the United States, including services that would be provided on Inmarsat-4 satellites. At this point, Inmarsat has no one to blame for its failure to comply with the ORBIT Act other than itself, not market conditions or MSV. Inmarsat chose to flout U.S. law and it must be held to account.

In addition to its decision to ignore U.S. law, Inmarsat continues to frustrate the ability of other MSS operators to compete. First, Inmarsat continues to hinder competing L-band MSS operators such as MSV from gaining access to sufficient L-band spectrum. Second, Inmarsat has refused to make available on reasonable terms the intellectual property that would enable owners of user equipment that uses Inmarsat-standard protocols to buy their service from MSV and would thus foster competition among MSS suppliers. Third, Inmarsat has continued to unreasonably oppose MSV in its efforts to develop a more spectrum efficient and valuable

satellite service through deployment of ancillary terrestrial facilities in the L-band to provide improved coverage. Fourth, Inmarsat appears to have entered into restrictive distribution agreements that foreclose opportunities for competitors. Fifth, Inmarsat is leveraging its dominant position in the maritime MSS market to gain further market share in other MSS markets. Sixth, Inmarsat has used its influence with the International Maritime Organization to further bolster its share of the maritime MSS market.

Table of Contents

Summary	i
Background	1
Discussion	7
I. Inmarsat Has Ignored the Unambiguous Requirements of the ORBIT Act	7
A. Inmarsat Has Not Complied with the Terms of the ORBIT Act	7
1. Inmarsat Has Not Conducted a “Public Offering”	7
2. Inmarsat Does Not Have “Shares” Listed on an Exchange	8
3. The Commission Cannot Rewrite the ORBIT Act	9
B. Although Not Relevant, Inmarsat Has Not Complied with the Spirit of the ORBIT Act Either	13
C. Inmarsat Has Provided No Justification for an Extension of Its Deadline for Conducting a Public Equity Offering	15
II. Despite the Goal of the ORBIT Act for a Competitive Global MSS Market, Inmarsat Maintains Its Dominant Position	16
A. Inmarsat Still Has a Dominant Position in the MSS Market	16
B. Inmarsat Engages in Anticompetitive Acts to Maintain or Extend Its Dominant Market Position	17
1. Inmarsat Refuses to Provide U.S. and Other Competing MSS Systems Stable Access to Sufficient Spectrum.....	17
2. Inmarsat Has Refused to Make Its Intellectual Property Available on Reasonable Terms	20
3. Inmarsat Has Used the Commission’s Regulatory Process to Hinder the Development of Its Competitors.....	21
4. Inmarsat’s Restrictive Distribution Agreements Foreclose Opportunities for Competitors	23
5. Inmarsat Leverages Its Dominant Position in the Maritime MSS Market to Gain Further Market Share in Other MSS Markets	24

6.	Inmarsat’s Influence with the International Maritime Organization Has Further Bolstered Its Share of the Maritime MSS Market	25
Conclusion		26

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Report to Congress Regarding) IB Docket No. 04-158
the ORBIT Act)

COMMENTS OF MOBILE SATELLITE VENTURES SUBSIDIARY LLC

Mobile Satellite Ventures Subsidiary LLC (“MSV”) hereby submits these comments in connection with the Commission’s Report to Congress on the Open-Market Reorganization for the Betterment of International Telecommunications Act (the “ORBIT Act”).¹ As discussed herein, Inmarsat Ventures plc (“Inmarsat”) has failed to comply with the unambiguous requirements of the ORBIT Act and continues to compete unfairly in the MSS market.

Background

MSV. MSV is the successor to Motient Services Inc. (formerly known as AMSC Subsidiary Corporation), the entity authorized by the Commission in 1989 to construct, launch, and operate a United States mobile satellite service (“MSS”) system in the L-band.² MSV’s licensed satellite (AMSC-1) was launched in 1995, and MSV began offering service in 1996. MSV is also the successor to TMI Communications and Company, Limited Partnership (“TMI”) with respect to TMI’s provision of L-band MSS in the United States and TMI’s L-band mobile earth terminal authorizations granted by the Commission.³ Today, MSV offers a full range of

¹“Report to Congress Regarding the ORBIT Act,” *Public Notice*, Report No. SPB-206, DA 04-1087 (April 23, 2004).

² *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *aff’d sub nom. Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993) (“*Licensing Order*”).

³ *See Motient Services Inc., TMI Communications and Company, LP, and Mobile Satellite Ventures Subsidiary LLC, Order and Authorization*, 16 FCC Rcd 20469 (Nov. 21, 2001).

land, maritime, and aeronautical MSS, including voice and data, throughout the contiguous United States, Alaska, Hawaii, the Virgin Islands, and coastal areas up to 200 miles offshore.

Inmarsat. Inmarsat was established in 1979 as a legal monopoly owned largely by foreign government post, telephone, and telegraph (“PTT”) administrations. Taking full advantage of its monopoly position, Inmarsat built a fleet of satellites to provide global service, primarily to large, oceangoing vessels. Inmarsat has since expanded to land mobile and aeronautical services and currently operates nine in-orbit second and third generation satellites in the L-band.⁴ Inmarsat is also currently constructing three fourth-generation satellites.⁵ As a result of its early monopoly and its ties to foreign governments, Inmarsat has a dominant share of the MSS market. While new entrants such as Iridium, Globalstar, ICO, and TMI have all gone through bankruptcy, Inmarsat in 2003 had gross revenues of \$504.5 million and made \$201 million in profits.⁶

ORBIT Act. In March 2000, Congress passed the ORBIT Act, the goal of which is “to promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment by fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat.” ORBIT Act, § 2. In passing the ORBIT Act, Congress recognized that Inmarsat, as a former intergovernmental organization (“IGO”), enjoyed certain competitive advantages over private companies such as MSV. Thus, the ORBIT Act requires the Commission, in considering whether to allow Inmarsat to provide services in the United States, to determine whether Inmarsat has privatized “in a

⁴ See Comments of Inmarsat Ventures plc, IB Docket No. 01-185 (Oct. 19, 2001), at 3.

⁵ See *Inmarsat ex parte*, IB Docket No. 01-185 (Nov. 27, 2002), at 1.

⁶ See *Inmarsat 2003 Annual Report* (available at http://www.inmarsatventures.com/pdfs/Inmarsat_Group_Ltd_2003_Results.pdf).

manner that will harm competition in the telecommunications markets of the United States.” 47 U.S.C. § 761(b)(1)(A)(ii).

The ORBIT Act provides clearly-defined criteria that Inmarsat is required to meet fully in order for the Commission to determine that Inmarsat has privatized in a manner that will not harm competition. 47 U.S.C. §§ 763, 763c. Central to these criteria is the requirement that Inmarsat conduct an “initial public offering” (“IPO”) that “substantially dilute[s] the aggregate ownership of [Inmarsat]” by its former signatories. 47 U.S.C. § 763(2). In addition, the ORBIT Act requires that Inmarsat have “shares” that are “listed for trading on one or more major stock exchanges with transparent and effective securities regulation.” 47 U.S.C. § 763(5)(B).

The ORBIT Act originally specified a deadline of October 2000 for Inmarsat’s public offering but included a provision allowing the Commission to extend this deadline until December 31, 2001. ORBIT Act, § 621(5)(A)(ii). In October 2000, the Commission granted Inmarsat a six-month extension of its public offering deadline to July 1, 2001.⁷ In doing so, the Commission found that Inmarsat had demonstrated diligence in preparing for an IPO, but that a brief extension was justified to enable Inmarsat to complete additional steps to conduct an IPO.⁸ In June 2001, the Commission granted Inmarsat a second extension of its public offering deadline to December 31, 2001, the latest date possible under the ORBIT Act at that time.⁹ The Commission again found that Inmarsat had taken the necessary steps to prepare for an IPO, but it

⁷ *In the Matter of Inmarsat Ventures Ltd, Request for Extension of Time Under Section 621(5) of the ORBIT Act, Memorandum Opinion and Order*, FCC 00-356, 15 FCC Rcd 19740 (released October 3, 2000).

⁸ *Id.* ¶¶ 8-12.

⁹ *In the Matter of Inmarsat Ventures Ltd., Request for Extension of Time Under Section 621(5) of the ORBIT Act, Memorandum Opinion and Order*, FCC 01-193, 16 FCC Rcd 13494 (released June 28, 2001).

was reasonable for Inmarsat to delay the IPO based on the advice of its financial advisor due to poor market conditions.¹⁰

Despite Inmarsat's failure to conduct a public offering or to have shares listed on a major stock exchange, the Commission in October 2001 authorized Inmarsat to provide MSS in the United States.¹¹ These authorizations were conditioned on Inmarsat conducting a public offering that meets the deadline specified in the ORBIT Act and that otherwise meets the requirements of the ORBIT Act. *Inmarsat Entry Order* ¶¶ 110-111.

In November 2001, Congress amended the ORBIT Act to afford Inmarsat a one-year extension of its public offering deadline (until December 31, 2002) and granted the Commission the authority to extend this deadline to no later than June 30, 2003.¹² In December 2002, the International Bureau granted Inmarsat a third extension of its public offering deadline to June 30, 2003.¹³ The International Bureau again found that Inmarsat had exercised continued diligence in preparing for an IPO, but that market conditions made a successful IPO unlikely.¹⁴ In June 2003, Congress again amended the ORBIT Act to afford Inmarsat a one-year extension of its public offering deadline (until June 30, 2004) and granted the Commission the authority to extend this deadline to no later than December 31, 2004.¹⁵

¹⁰ *Id.* ¶¶ 18-19.

¹¹ *Comsat Corporation, Memorandum Opinion, Order and Authorization*, FCC 01-272, 2001 FCC LEXIS 5317 (October 9, 2001) ("*Inmarsat Entry Order*").

¹² Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 628, 115 Stat. 748, 804 (2001).

¹³ *In the Matter of Inmarsat Ventures Ltd., Request for Extension of Time Under Section 621(5) of the ORBIT Act, Memorandum Opinion and Order*, DA 02-3489, 2002 FCC LEXIS 6675 (Int'l Bur., December 19, 2002).

¹⁴ *Id.* ¶¶ 9-10.

¹⁵ ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003).

Inmarsat's February 2004 ORBIT Act Filing. On February 10, 2004, Inmarsat filed a letter with the Commission arguing that it has now satisfied its remaining ORBIT Act obligations.¹⁶ Regarding the requirement that Inmarsat conduct a “public offering” that “substantially dilutes” its ownership by former signatories, Inmarsat explains that it instead conducted a private equity offering. *Inmarsat Letter* at 2-3. As a result of this private placement, two private equity funds now each hold 26.14 percent of Inmarsat’s shares. *Id.* at 2-3. Certain members of Inmarsat management team own an additional 4.75 percent of Inmarsat’s shares. *Id.* at 3. The remaining 43 percent of Inmarsat’s shares are still owned by former signatories. *Id.* Among these former signatories, Telenor Satellite Services AS (“Telenor”) (15.10%), COMSAT Investments, Inc. (“COMSAT”) (14.10%), and KDDI Corporation (“KDDI”) (7.62%) hold the most significant interests. *Id.* 3 n.10. Pursuant to a shareholders agreement, these three signatories have certain rights with respect to the governance of Inmarsat, including the right to appoint half of Inmarsat’s non-executive directors. *Offering Memorandum* at 115. Regarding the requirement that Inmarsat have its “shares” listed for trading on a major stock exchange, Inmarsat explains that instead it has listed nonconvertible debt securities on the Luxembourg Stock Exchange. *Id.* at 8-9.

The Commission placed Inmarsat’s letter on *Public Notice* on March 5, 2004. *See* Report No. SAT-00197. MSV and SES Americom, Inc. (“SES”) each opposed Inmarsat’s request.¹⁷ Both MSV and SES explained that Inmarsat has not complied with two unambiguous requirements of the ORBIT Act: the requirements to conduct a public equity offering and to

¹⁶ Letter from Alan Auckenthaler, Vice President and General Counsel, Inmarsat Inc., to Ms. Marlene H. Dortch, FCC, File No. SAT-MS-20040210-00027 (February 10, 2004) (“*Inmarsat Letter*”) and Attachment B (“*Offering Memorandum*”).

¹⁷ Opposition of Mobile Satellite Ventures Subsidiary LLC, File No. SAT-MS-20040210-00027 (April 5, 2004) (“*MSV Opposition*”); Comments of SES Americom, Inc., File No. SAT-MS-20040210-00027 (April 5, 2004) (“*SES Comments*”).

have shares listed on an exchange. *MSV Opposition* at 6-12; *SES Comments* at 10-15. MSV noted that the terms of the ORBIT Act are clear on their face and the Commission does not have the discretion to deviate from those terms. *MSV Opposition* at 10-12. SES further explained that Inmarsat has not met the ORBIT Act's goals of substantially diluting Inmarsat's ownership by former signatories and subjecting Inmarsat to transparent and effective securities regulations. *SES Comments* at 15-20. MSV also provided evidence of the extent to which Inmarsat has acted and continues to act in an anticompetitive manner. *MSV Opposition* at 4-5. Inmarsat, Deere & Company ("Deere"), Stratos Mobile Networks, Inc. ("Stratos"), and Telenor filed responses to MSV and SES on April 20, 2004.¹⁸ MSV and SES filed replies on April 30, 2004.¹⁹

Report to Congress on the ORBIT Act. The ORBIT Act requires the Commission to submit a Report to Congress on June 15th of every year. 47 U.S.C. § 765e. The Report must include a discussion of the progress achieved with respect to each objective of the ORBIT Act, the views of the satellite industry and consumers on privatization, and the impact privatization has had on U.S. industry and jobs and the U.S. satellite industry's access to the global marketplace. 47 U.S.C. § 765e(b). In the above-captioned proceeding, the Commission is seeking comment in connection with its Report to Congress on the ORBIT Act due June 15, 2004.

¹⁸ Consolidated Response of Inmarsat Ventures Limited, File No. SAT-MS-20040210-00027 (April 20, 2004) ("*Inmarsat Response*"); Reply Comments of Deere & Company, File No. SAT-MS-20040210-00027 (April 20, 2004) ("*Deere Response*"); Reply Comments of Stratos Mobile Networks, Inc., File No. SAT-MS-20040210-00027 (April 20, 2004) ("*Stratos Response*"); Reply Comments of Telenor Satellite Services, Inc., File No. SAT-MS-20040210-00027 (April 20, 2004) ("*Telenor Response*").

¹⁹ Response of Mobile Satellite Ventures Subsidiary LLC, File No. SAT-MS-20040210-00027 (April 5, 2004) ("*MSV Response*"); Reply of SES Americom, Inc., File No. SAT-MS-20040210-00027 (April 5, 2004) ("*SES Reply*").

Discussion

I. INMARSAT HAS IGNORED THE UNAMBIGUOUS REQUIREMENTS OF THE ORBIT ACT

A. Inmarsat Has Not Complied with the Terms of the ORBIT Act

1. Inmarsat Has Not Conducted a “Public Offering”

The ORBIT Act requires Inmarsat to conduct a “public offering” that has the effect of substantially diluting its aggregate “ownership” by former signatories. 47 U.S.C. § 763(2). Inmarsat has not complied with this requirement. First, the ORBIT Act clearly mandates that Inmarsat conduct a *public* offering to achieve substantial dilution. Instead, Inmarsat conducted a *private* offering. *Inmarsat Letter* at 2-3. Second, Inmarsat has conducted a quasi-public offering of *debt* pursuant to Rule 144A under the Securities Act of 1933 (*id.* at 8-9),²⁰ not a public offering of *equity* as required by the ORBIT Act. The ORBIT Act requires Inmarsat’s public offering to substantially dilute its “ownership” by former signatories. 47 U.S.C. § 763(2). A debt offering does not accomplish this objective because a debt interest is not an ownership interest.²¹ A debt offering has no dilutive impact on the ownership of Inmarsat by former signatories.²²

²⁰ Rule 144A effectively limits potential purchasers to qualified institutional buyers with assets in excess of \$100 million.

²¹ *Black’s Law Dictionary* 1375 (6th ed. 1990) (defining a “debt” as “a sum of money due by certain and express agreement. A specific sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment”); *The American Heritage Dictionary of the English Language* 468 (4th ed. 2000) (defining “debt” as “Something owed, such as money, goods, or services”); *see also DCR PCS, Inc. Order*, 15 FCC Rcd 5297 (March 13, 2000) (“It is well established that ‘the Commission does not consider debt interests in determining compliance with the statutory ownership benchmark.’” (citing *Fox Television Stations, Inc.*, 10 FCC Rcd. 8452, 8483, ¶ 77 (1995) (citing *Wilner & Scheiner*, 103 FCC 2d 511, 519 (1985))).

²² Moreover, there is no ambiguity in Section 621(5)(B) of the ORBIT Act that Inmarsat must have “shares,” not debt, listed on an exchange. 47 U.S.C. § 763(5)(B).

Inmarsat has argued that because one section of the ORBIT Act (Section 621(5)(A)) refers broadly to “securities,” Inmarsat is free to ignore Section 621(2) of the Act, which specifically requires Inmarsat to conduct a public offering of equity to dilute its then-current ownership.²³ Congress was clear in Section 621(2) that Inmarsat must have a public offering of equity. “It is a commonplace of statutory construction that the specific governs the general.”²⁴ In the case of the ORBIT Act, the specific requirement of Section 621(2) that Inmarsat’s public offering dilute its “ownership” governs the general requirement of Section 621(5)(A) for a public offering of “securities.”²⁵

2. Inmarsat Does Not Have “Shares” Listed on an Exchange

The ORBIT Act unambiguously requires Inmarsat to have its “shares” listed for trading on a major stock exchange. 47 U.S.C. § 763(5)(B). Inmarsat has failed to comply with this requirement. Inmarsat has acknowledged, it will have only debt, and not “shares,” listed on an exchange. *Inmarsat Letter* at 8-9. A debt interest is not a “share.” Inmarsat admits as much, stating that its debt securities “technically may not be ‘shares.’” *Inmarsat Letter* at 9. A “share” represents an ownership interest in a business entity.²⁶ A debt interest is not an ownership interest. *See supra* note 36.

²³ 47 U.S.C. § 763(2) (“Such offering shall substantially dilute the aggregate ownership of [Inmarsat] by such signatories or former signatories.” (emphasis added)).

²⁴ *Morales v. Trans World Airlines*, 504 US 374, 384-385 (1992) (citing, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 US 437, 445 (1987)); *see also Varsity Corp. v. Charles Howe*, 516 U.S. 489, 511 (1996) (“This Court has understood the present canon (‘the specific governs the general’) as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.”).

²⁵ It is irrelevant that Inmarsat’s quasi-public Rule 144A debt offering may be related to its private equity offering. *Inmarsat Response* at 20-21. Nowhere does the ORBIT Act identify a private equity offering as an acceptable alternative to the public equity offering that is mandated.

²⁶ Rev. Model Bus. Corp. Act, § 1.40 (1984) (defining a “share” as “the unit into which proprietary interests in a corporation are divided”); *Black’s Law Dictionary* 1375 (6th ed. 1990)

3. The Commission Cannot Rewrite the ORBIT Act

Courts and the Commission have repeatedly recognized the fundamental concepts of administrative law that an administrative agency cannot rewrite a statute²⁷ and must give effect to the unambiguous intent of Congress as expressed in the text of a statute.²⁸ Inmarsat is asking the Commission to ignore the plain meaning of the ORBIT Act. But there is no ambiguity in the text of the ORBIT Act. To dilute its “ownership” by former signatories, Congress required Inmarsat to conduct a public equity offering. 47 U.S.C. § 763(2). Instead, Inmarsat has conducted a private offering of equity and a quasi-public Rule 144A offering of debt. Moreover, Congress required Inmarsat to have “shares” listed on a major stock exchange. Instead, Inmarsat will have debt listed on a stock exchange. 47 U.S.C. § 763(5)(B). The Commission cannot

(defining a “share” as “a unit of stock representing ownership in a corporation”); *The American Heritage Dictionary of the English Language* 1600 (4th ed. 2000) (defining a “share” as “Any of the equal parts into which the capital stock of a corporation or company is divided”).

²⁷ See, e.g., *Rural Health Care Support Mechanism, Report and Order*, FCC 03-288 (November 17, 2003), ¶ 16 (“The Commission is not authorized to amend the statute to add categories to the definition.”); see also *Indiana Michigan Power Co. v. Dept. of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (rejecting an agency’s interpretation of a statute and noting that the agency’s “treatment of this statute is not an interpretation but a rewrite”); *ASARCO Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978) (stating that the “agency has no authority to rewrite the statute in this fashion”); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1320 (D.C. Cir. 1977) (“Congress has not provided the agency with the type of discretion it evidently desires and contends for in this case. We are bound to effectuate the legislative will and we perceive it to be unambiguous in this context. If the EPA desires an element of flexibility in its operations, the agency must look to the Congress and not to the courts.”); *Lubrizol Corp. v. EPA*, 562 F.2d 807, 820 (D.C. Cir. 1977) (“But for this Court to countenance what, on the record before us, is essentially an amendment by regulation would constitute an unwarranted judicial intrusion upon the legislative sphere wholly at odds with the democratic processes of lawmaking contemplated by the Constitution.”); *March v. USA*, 506 F.2d 1306, 1318 n.56 (D.C. Cir. 1974) (“An administrative agency, like a court, lacks freedom to tailor its interpretation of a statute to its own notions of what is best, and thereby to negate its stated purpose.”).

²⁸ Under Step One of *Chevron*, if Congress has spoken to the precise question at issue, then the unambiguously expressed intent of Congress governs. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Only if the statute is silent or ambiguous will a court proceed to Step Two of *Chevron* to determine whether the agency’s interpretation is based on a permissible reading of the statute. *Id.* at 843.

deem Inmarsat to have complied with these requirements unless it were to ignore the plain meaning of the terms “ownership,” “public offering,” and “shares.” But the Commission does not have this discretion. Congress has “directly spoken” to the requirement that Inmarsat conduct a public offering of equity and “that is the end of the matter;” the Commission “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. If Inmarsat wants to be relieved of the requirement for conducting a public offering of its shares, therefore, it needs to direct its arguments to Congress, not the Commission. Indeed, even Inmarsat itself has recognized that it will need Congressional approval for its attempt to evade these unambiguous requirements of the ORBIT Act.²⁹ Unless and until Congress amends the ORBIT Act, the Commission cannot deem Inmarsat to have complied with its requirements.

Recognizing that it has not complied with the terms of the ORBIT Act, Inmarsat has argued that Section 601(b)(2) of the ORBIT Act does not require strict compliance with its terms and that, instead, it need only privatize “consistent with” the requirements of the ORBIT Act. *Inmarsat Response* at 14-16. The Commission, however, has used the “consistent with” standard to allow Inmarsat only two very minor deviations from the terms of the ORBIT Act.³⁰ First, while the ORBIT Act required Inmarsat to privatize by July 2000, the Commission relied on the

²⁹ “Inmarsat Shakes up Europe,” *Satellite News* (December 15, 2003) (quoting Inmarsat’s vice president as stating, “Our challenge will be to convince the Congress and [the Commission] to consider the sale sufficient to comply with the ORBIT Act”); *Satellite Week* (December 15, 2003) (quoting Inmarsat’s vice president in reference to the private offering as stating “The challenge will be persuading the FCC or Congress this suffices”); “European Equity Firms Makes Successful Offers for Inmarsat,” *Communications Daily* (October 20, 2003) (quoting Inmarsat’s CEO in reference to the private offering as stating “we will have to discuss with your legislature and the FCC as to whether this is acceptable. If they are amenable to recognizing we’ve accomplished the goal of the ORBIT legislation, they will advise us of what is the best way to move forward.”).

³⁰ The Commission did not rely on the “consistent with” language in authorizing Inmarsat to provide service in the United States prior to its public equity offering. Rather, there is a separate statutory provision (Section 601(b)(1)(D) of the ORBIT Act) that authorized the Commission to take that action. *Inmarsat Entry Order* ¶ 37.

“consistent with” standard to allow Inmarsat into the United States market even though it did not complete one step (restructuring of its Board) until after this date. *Inmarsat Entry Order* ¶ 46. Second, while the ORBIT Act forbids Inmarsat’s officers and managers from having ownership interests in former signatories unless those interests are held in a blind trust, the Commission relied on the “consistent with” standard to waive the blind trust requirement for *de minimis* financial interests. *Id.* ¶ 47.

In authorizing Inmarsat to provide service in the United States, however, the Commission clearly stated that the authorizations to use Inmarsat “are subject to limitation or revocation . . . should Inmarsat fail to conduct an IPO *in compliance with* the requirements of Section 621 of the ORBIT Act.” *Inmarsat Entry Order* ¶ 112 (emphasis added). The Commission never stated that anything less than strict compliance with the public equity offering mandated by the ORBIT Act would suffice.³¹

Inmarsat is now asking the Commission to rewrite the core requirements of the ORBIT Act based on the “consistent with” standard. But under no reasonable interpretation of the term “consistent with” can the Commission find that Inmarsat has complied with the ORBIT Act by (i) conducting a private equity offering instead of a public equity offering and (ii) listing debt rather than shares on an exchange. Neither Congress nor the Commission have ever stated or

³¹ Inmarsat has noted that in a previous decision, the International Bureau stated that if Inmarsat does not achieve “substantial dilution” through an “IPO *or other means*,” Inmarsat’s authorizations will be limited or revoked. *Inmarsat Response* at 21 (citing *Inmarsat Ventures plc, Order*, File No. SAT-MS-20020925-00187 (International Bureau, December 17, 2002), at ¶ 11). Inmarsat has claimed that this means that the Commission contemplated substantial dilution occurring in a few different ways. *Id.* The International Bureau’s statement, however, is legally irrelevant because the Bureau was not asked and was not briefed in that proceeding as to whether something other than a public equity offering would satisfy the ORBIT Act. Moreover, the Bureau provided no basis in the text of the ORBIT Act for stating that something other than an IPO would satisfy the requirements of the Act.

implied that the “consistent with” standard could be read so broadly as to eviscerate these core requirements of the ORBIT Act.

Even if the Commission were to find that Inmarsat has privatized “consistent with” the requirements of the ORBIT Act, the “consistent with” standard does not apply to Inmarsat’s provision of “additional services,” which includes services on Inmarsat-4 satellites.³² Section 602(a) of the ORBIT Act clearly states that until Inmarsat is privatized “in accordance with” the requirements of the ORBIT Act, it “shall not be permitted to provide additional services.” 47 U.S.C. § 761a(a).³³ The “consistent with” phrase does not appear in Section 602(a). Thus, whatever the Commission’s interpretation of its discretion with respect to other provisions of the Act, until Inmarsat complies with the specific requirements of the ORBIT Act, the Commission cannot lawfully authorize it to provide services on Inmarsat-4 satellites.³⁴

³² The ORBIT Act defines “additional services” as “non-maritime or non-aeronautical mobile services in the 1.5 and 1.6 GHz band on planned satellites or the 2 GHz band.” 47 U.S.C. § 769(a)(12)(A).

³³ See *Loral and Intelsat, Order and Authorization*, DA 04-357 (International Bureau, February 11, 2004), at ¶¶ 58-63, 66 (holding that, although Intelsat was previously found to have privatized “consistent with” the ORBIT Act, Intelsat is prohibited from providing “additional services” pursuant to Section 602(a) until the Commission finds that Intelsat has conducted an IPO that “fully complied” with Section 621 of the ORBIT Act).

³⁴ Inmarsat has contended that the Commission has already authorized Inmarsat to provide “additional services” because it previously found that Inmarsat privatized “consistent with” the ORBIT Act. *Inmarsat Response* at 5 n.10 (citing *Inmarsat Entry Order* ¶ 60). In fact, the Commission stated that Inmarsat could provide “additional services” only “subject to Inmarsat’s conducting an IPO *in compliance with* Section 621” of the ORBIT Act. *Inmarsat Entry Order* ¶ 60 (emphasis added). As discussed herein, because Inmarsat has not conducted a public equity offering, it has not conducted an IPO “in compliance with” Section 621. Moreover, in that proceeding the Commission was not asked to consider an application to provide “additional services” with Inmarsat. The Commission was never briefed on the issue of whether Inmarsat could provide “additional services” prior to full compliance with each of the requirements of the ORBIT Act. The Commission never considered the difference between the “consistent with” standard used in Section 601(b)(2) pertaining to general licensing criteria for “non-core services” and the “in accordance with” standard used in Section 602(a) pertaining to “additional services.” Compare 47 U.S.C. § 761(b)(2) (ORBIT Act Section 601(b)(2)) with 47 U.S.C. § 761a(a) (ORBIT Act Section 602(a)). The “specific” clause of 602(a) pertaining to licensing of

B. Although Not Relevant, Inmarsat Has Not Complied with the Spirit of the ORBIT Act Either

Although it is irrelevant as a legal matter, since Inmarsat has failed to meet the letter of the law,³⁵ Inmarsat has also failed to meet the spirit of the ORBIT Act. While Inmarsat has argued that it has achieved substantial dilution of its ownership by foreign signatories with its private equity offering, it is at least as reasonable to assume that a public equity offering would have required far more substantial reform of Inmarsat's ownership structure and greater dilution of ownership.³⁶ While Inmarsat has claimed that the goal of the ORBIT Act to subject it to transparent and effective securities regulations has been achieved by its debt listing, SES has shown that a public equity offering would have subjected Inmarsat to more meaningful securities regulations than its debt offering. *SES Comments* at 18-20; *SES Reply* at 19-21.

Although Inmarsat has claimed that it was forced to conduct a private rather than a public equity offering because current economic conditions are not supportive of a public equity offering, this is far from certain. *Inmarsat Letter* at 7. Since October 2000, Congress and the

“additional services” governs the general licensing clause in 601(b)(2) pertaining to “non-core” services. *See Morales v. Trans World Airlines*, 504 US 374, 384-385 (1992) (citing, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 US 437, 445 (1987)); *see also Varity Corp. v. Charles Howe*, 516 U.S. 489, 511 (1996) (“This Court has understood the present canon (‘the specific governs the general’) as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.”).

³⁵ It is well established that “when the statute’s language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.” *Lamie v. United States*, 124 S. Ct. 1023, 1030 (2004) (*quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations and citations omitted)). Federal agencies such as the Commission are bound by the same principle.

³⁶ Inmarsat has cited examples of other public equity offerings that resulted in 10-25% of new ownership. *Inmarsat Response* at 32. But Inmarsat has offered no evidence as to why these examples are analogous to its case. Nor has Inmarsat provided evidence from the financial community of the level of dilution that would have been achieved had it conducted a public equity offering, especially in light of the improved market for public equity offerings. *MSV Opposition* at 7-9.

Commission have together granted Inmarsat five separate extensions of its public offering deadline. These extensions were granted solely because of poor economic conditions which arguably precluded Inmarsat at the time from conducting a successful public offering.³⁷ In today's economy, however, this is no longer a valid excuse for Inmarsat's failure to conduct a public equity offering. Economic conditions in general and the market for public equity offerings in particular have improved dramatically since Inmarsat's public offering deadline was extended by Congress in June 2003. Below are some indications of this trend:

- Of the 84 companies that went public in 2003, 53 did so in the last two quarters of 2003. Moreover, 24 companies went public in December 2003 alone.³⁸
- Of those companies that went public, the average stock price has increased by 26%.³⁹
- The NASDAQ Composite Index has increased in value by 21.4% since June 2, 2003.⁴⁰
- The S&P 500 has increased in value by 15.5% since June 2, 2003.⁴¹
- The NASDAQ Telecommunications Index has increased in value by 24.8% since June 2, 2003.⁴²

³⁷ For example, the legislative history of the ORBIT Technical Corrections Act of 2003 reveals that Congress extended Inmarsat's public offering deadline to June 30, 2004 solely because economic conditions at the time were arguably less than optimal for a public offering, not because Congress believed the goals of the ORBIT Act were no longer valid. *See, e.g.*, 149 Cong. Rec. H5343 (daily ed. June 12, 2003) (statement of Rep. Shimkus) ("The legislation is necessary because the ORBIT Act—which was enacted in March 2000—did not anticipate the collapse of the IPO markets I want to emphasize that H.R. 2312 does not reopen the battles over the ORBIT law or challenge its underlying public policy."); 149 Cong. Rec. H5343 (daily ed. June 12, 2003) (statement of Rep. Tauzin) ("Unfortunately, the market conditions have not improved to a point where it would be reasonable to require the IPO.").

³⁸ "Year-End Review of Markets & Finance 2003: IPO Market Ended Year Better Than It Started," *Wall St. J.*, Jan. 2, 2004, available in 2004 WL-WSJ 56916047.

³⁹ *Id.*

⁴⁰ On June 2, 2003, the NASDAQ Composite Index opened at 1612.1. On May 5, 2004, it closed at 1957.26.

⁴¹ On June 2, 2003, the S&P 500 index opened at 971.13. On May 5, 2004, it closed at 1121.53.

⁴² On June 2, 2003, the NASDAQ Telecommunications Index opened at 142.51. On May 5, 2004, it closed at 177.83.

Inmarsat has been a consistently profitable company throughout its existence and is still the dominant provider of MSS in the world today. Given its admitted dominance of all segments of the MSS market, Inmarsat should have little difficulty conducting a successful public equity offering in these improved public equity markets.

C. Inmarsat Has Provided No Justification for an Extension of Its Deadline for Conducting a Public Equity Offering

Inmarsat has brazenly stated that it “has no plans, or ability” to conduct a public equity offering by the June 30, 2004 deadline and has belatedly asked for an extension. *Inmarsat Response* at 38. The ORBIT Act, however, permits the Commission to extend the June 30, 2004 public offering deadline only “in consideration of market conditions and relevant business factors relating to the timing” of the offering. 47 U.S.C. § 763(5)(A)(ii). Unlike in its past extension requests, Inmarsat has not even attempted to provide the Commission with any evidence of current “market conditions” or “business factors” that warrant an extension. To the contrary, the unrebutted evidence demonstrates that economic conditions in general and the market for public equity offerings in particular have improved dramatically since Inmarsat’s last extension request was granted. *MSV Opposition* at 7-9; *see also SES Comments* at 14 n.51. Inmarsat’s decision to flout the requirements of the ORBIT Act is a circumstance of its own making and does not serve as a basis for extending its IPO deadline.⁴³

Inmarsat and Telenor, one of the former foreign signatories that continues to own a substantial portion of Inmarsat, have claimed that it is Inmarsat’s customers who will ultimately be harmed should the Commission find that Inmarsat has failed to comply with the ORBIT Act.

⁴³ The Commission does not afford parties an extension of time to complete acts due to circumstances that were within the party’s control. *See, e.g., Loral SpaceCom Corp., Memorandum Opinion, Order and Authorization*, 18 FCC Rcd 6301, ¶ 9 (Int’l Bur. 2003) (“Milestone extensions are granted only when the delay in implementation is due to circumstances beyond the licensee’s control.”).

Inmarsat Response at 5; *Telenor Response* at 6-7. This is like the man who is accused of killing his parents asking for the mercy of the court because he's an orphan. If Inmarsat and Telenor were truly concerned with the plight of their customers, they would have complied with the unambiguous requirements of the ORBIT Act. At the very least, Inmarsat would have sought a declaratory ruling prior to taking the course it has chosen.⁴⁴

II. DESPITE THE GOAL OF THE ORBIT ACT FOR A COMPETITIVE GLOBAL MSS MARKET, INMARSAT MAINTAINS ITS DOMINANT POSITION

The stated purpose of the ORBIT Act is to “promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment.” ORBIT Act § 2. The Commission has acknowledged that the ORBIT Act “reflects Congress’s concern that the Commission only allow a pro-competitive privatized Inmarsat into the U.S. market.” *Inmarsat Entry Order* ¶ 34. As discussed below, Inmarsat’s privatization has failed to alleviate this concern.

A. Inmarsat Still Has a Dominant Position in the MSS Market

Inmarsat was established as a legal monopoly. Article VIII of the Inmarsat Convention specifically permitted Inmarsat to object to the operation of any new satellite system that Inmarsat claimed would cause it economic harm. Inmarsat Convention Art. VIII. Moreover, Inmarsat was owned largely by governmental entities, was the recipient of enormous government investments, and for over fifteen years was the only MSS system in operation. As a result of this monopoly heritage, Inmarsat developed a dominant position in the MSS market. Statements in

⁴⁴ While Inmarsat has claimed to have a number of United States government customers, these customers should not be impacted should the Commission find that Inmarsat has not complied with the ORBIT Act. The ORBIT Act applies to licenses granted by the Commission to use Inmarsat. United States government users do not need a Commission license and, in fact, have been permitted to use Inmarsat for United States service even prior to its privatization.

Inmarsat's recent *Offering Memorandum* confirm this:

- “We are the leading provider of global mobile satellite communications services.” *Offering Memorandum* at 83.
- “We have a significant market share in each of the primary mobile satellite services sectors in which we compete.” Inmarsat then states that it is number one in market position in each of the three primary MSS sectors (maritime, land, and aeronautical). *Offering Memorandum* at 83.
- “In the maritime sector, we believe we are the leading provider of global mobile satellite services, with 2002 revenues in excess of 30 times those of our nearest competitor.” *Offering Memorandum* at 84.
- “We believe we are also the market leader in the provision of high-speed data services to the maritime and land sectors, with 2002 data revenues of more than 15 times those of our nearest competitor.” *Offering Memorandum* at 84.
- “In each of the past ten years, we have generated EBITDA of over \$250 million and, in each financial year since we became a private company in 1999, our EBITDA margins (EBITDA as a percentage of revenues) have exceeded 63%.” *Offering Memorandum* at 3.
- “We believe that no competitor is likely to introduce global mobile satellite services at data transmission rates comparable to ours in the short- to medium-term in light of the limited availability of suitable spectrum and the cost and lead-time required to replicate our in-orbit and terrestrial infrastructure.” *Offering Memorandum* at 84.

B. Inmarsat Engages in Anticompetitive Acts to Maintain or Extend Its Dominant Market Position

Inmarsat engages in the following practices designed to frustrate the ability of other MSS operators to compete, and to maintain or enhance its already dominant position in the MSS market.

1. Inmarsat Refuses to Provide U.S. and Other Competing MSS Systems Stable Access to Sufficient Spectrum

Throughout its history, Inmarsat has fought efforts by the U.S. government to make L-band MSS spectrum more accessible to new MSS operators such as MSV. First, Inmarsat continually opposed generic spectrum allocations in international forums. Generic allocations

would have facilitated access to L-band spectrum by competing MSS providers. Prior to the 1997 World Radiocommunication Conference (“WRC-97”), the L-band was subdivided into segments allocated on a primary basis for either maritime, aeronautical, or land MSS.⁴⁵ A non-generic MSS allocation facilitates Inmarsat’s access to spectrum because of its monopoly in the maritime and aeronautical MSS markets. A non-generic MSS allocation thus limits the spectrum competing MSS systems can use for their services. By insisting on non-generic MSS allocations, Inmarsat was able to limit the spectrum other MSS systems could access to provide services in competition with Inmarsat. The Commission has now adopted a generic L-band MSS allocation, recognizing that it will provide MSV with “maximum flexibility” in access to spectrum.⁴⁶

Inmarsat has refused to provide competing L-band MSS systems with assured access to sufficient spectrum necessary to operate viable systems. Access to a stable and sufficient supply of spectrum is particularly critical for competing L-band MSS systems. These competing L-band systems need to know with certainty that they will have access to adequate spectrum to meet consumer demands and to develop innovative bandwidth-intensive data services in competition with Inmarsat. Competing MSS providers, however, have never been able to access nearly as much spectrum as Inmarsat, thus providing Inmarsat with a competitive advantage. To this day, Inmarsat controls the lion’s share of L-band spectrum, whether or not it makes use of this spectrum. In addition, rather than consenting to a long-term coordination agreement, Inmarsat has only been willing to consent to year-to-year agreements whereby spectrum assignments

⁴⁵See *Final Acts of the World Radiocommunication Conference (WRC-97)*, Geneva, 1997; *Amendment of Parts 2, 25, and 87 of the Commission’s Rules, Notice of Proposed Rulemaking*, FCC 02-261, ET Docket No. 02-305 (rel. Oct. 7, 2002) (“*Generic L-band MSS Allocation NPRM*”), at ¶ 14.

⁴⁶*Generic L-band MSS Allocation NPRM* at ¶ 18; *Final Acts of the World Radiocommunication Conference (WRC-97)*, Geneva, 1997; *Amendment of Parts 2, 25, and 87 of the Commission’s Rules, Order*, FCC 03-269, ET Docket No. 02-305 (rel. Nov. 4, 2003).

fluctuate annually. These year-to-year agreements fail to provide competing L-band systems with the certainty regarding spectrum access that is necessary to attract investment and to expand customer bases. And, to this day, Inmarsat continues to make unreasonable demands during L-band coordination negotiations to impede competing L-band systems from accessing sufficient spectrum, thus preventing these systems from becoming viable competitors to Inmarsat.

Inmarsat continues to operate antiquated Standard A terminals that use far more spectrum than newer Inmarsat equipment.⁴⁷ These terminals were introduced in 1982 and there have been no new Standard A terminals approved by Inmarsat after 1991.⁴⁸ As Standard A terminals have been superseded by newer, more spectrum-efficient terminals over the past 20 years, the number of Standard A terminals in use has slowly declined. Inmarsat itself has recognized that spare terminals as well as servicing capabilities for Standard A terminals are becoming increasingly scarce. *Id.* Nonetheless, Inmarsat has refused to take expeditious action to replace these spectrum inefficient terminals with newer terminals. Inmarsat has announced plans to retire the Standard A terminals no earlier than December 31, 2007. *Id.* Even if Inmarsat were to comply with this self-imposed timetable, it is inexcusable that it would wait so long to require the use of more efficient equipment. Had Inmarsat acted more responsibly to replace the Standard A terminals, these terminals would have already been replaced with more spectrum-efficient terminals, thus freeing L-band spectrum for competing systems.

⁴⁷Continued operation of Standard A terminals is also a public safety concern because the terminals exceed the Commission's out-of-band emission limits for L-band terminals adopted to protect Global Positioning System ("GPS") receivers from interference. *See Amendment of Parts 2 and 25 to Implement GMPCS MOU, Report and Order*, IB Docket No. 99-67, FCC 02-134 (May 14, 2002), at ¶ 47.

⁴⁸Available at <http://www.inmarsat.org/article.cfm?ArticleID=28>

2. Inmarsat Has Refused to Make Its Intellectual Property Available on Reasonable Terms

Inmarsat user equipment is built based on Inmarsat proprietary protocols that require complimentary software in the gateway earth stations. Inmarsat has refused to make available on reasonable terms the intellectual property necessary to permit new entrants to build and operate earth stations that would allow Inmarsat customers to use competing service providers. Having purchased Inmarsat-compatible equipment for thousands of dollars, end users are understandably reluctant to scrap their investment in order to use a new MSS system. Operators of other MSS systems theoretically could configure their networks to provide service to these users, but only if Inmarsat was willing to share its intellectual property on reasonable terms, which so far it has been unwilling to do. The result would be a more competitive MSS industry with current Inmarsat equipment users no longer being held captive to Inmarsat as their only choice for service.

Not only is requiring Inmarsat to share its intellectual property with other MSS providers good policy, it was mandated by treaty but ignored by Inmarsat. Pursuant to the Inmarsat Convention, Inmarsat was obligated to make available certain technical information to MSV or any other entity under U.S. jurisdiction upon request, on fair and reasonable terms and conditions. *See* Inmarsat Convention at Article 21(7)(b); *see also* Article 3. While MSV made substantial and continuous efforts to obtain this proprietary technical information, Inmarsat never agreed to make this information available on reasonable terms. MSV incorporates by reference its previous submissions to the Commission detailing Inmarsat's unreasonable refusal to license intellectual property to MSV.⁴⁹ While Inmarsat may no longer be obligated by the Inmarsat

⁴⁹ *See* Affidavit of Lon C. Levin, AMSC, attached as Exhibit A to Comments of AMSC Subsidiary Corporation on Applications of Lockheed Martin Corporation/Regulus, LLC, File No. SAT-ISP-19981016-00072 (Nov. 23, 1998).

Convention to license its intellectual property to competing systems, its past refusal to comply with this requirement is responsible in large part for Inmarsat's dominance of the MSS market today. Indeed, had Inmarsat provided MSV with access to certain intellectual property on reasonable terms as required by the Inmarsat Convention, MSV would have been able to use its facilities to provide a competitive service to Inmarsat customers in North America. In its *Offering Memorandum*, Inmarsat bluntly admits the anticompetitive impact of its practices, stating "We believe this relatively large installed base of terminals contributes to stable revenues, particularly in the maritime market, because the cost and time required to switch to a competing system could be substantial." *Offering Memorandum* at 84.

3. Inmarsat Has Used the Commission's Regulatory Process to Hinder the Development of Its Competitors

In February 2003, the Commission authorized L-band MSS providers to operate in-band ancillary terrestrial facilities integrated with their satellite operations to provide service in urban areas where satellite signals are typically blocked by buildings and other obstructions.⁵⁰ The Commission authorized operation of these terrestrial facilities because it will increase spectrum efficiency, enable MSS providers to offer ubiquitous service, and dramatically reduce the cost of MSS equipment and service.⁵¹

⁵⁰See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, Report and Order*, FCC 03-15, IB Docket No. 01-185 (February 10, 2003) ("ATC Order").

⁵¹*Id.* ¶ 1 (noting that ancillary terrestrial operations will enhance the ability of MSS providers "to offer high-quality, affordable mobile services on land, in the air and over the oceans without using any additional spectrum resources beyond spectrum already allocated and authorized by the Commission for MSS in these bands"); *id.* ¶ 32 ("We find that permitting ATC will allow MSS operators the opportunity to take advantage of a number of network, spectrum and economic efficiencies that may help defray the substantial capital costs required to create and operate a satellite system. These efficiencies could, in turn, reduce the marginal cost of serving subscribers and permit MSS operators to serve more customers. By taking advantage of potential integration of services, MSS operators may also obtain economies of scale: larger

Inmarsat, however, has made specious technical arguments before the Commission in opposition to the efforts of MSV and the Canadian L-band MSS provider to operate these terrestrial facilities. Inmarsat has argued that terrestrial facilities operating in the L-band in the United States will cause interference to Inmarsat's services both within and outside of the United States.⁵² In some cases, the Commission saw through Inmarsat's frivolous interference claims. For example, in assessing the potential for interference to Inmarsat terminals from out-of-band emissions from MSV's terrestrial facilities, the Commission concluded that an Inmarsat terminal could experience a noise of increase of 3% and noted "this is in contrast to 600,000% calculated by Inmarsat in its analysis."⁵³ Moreover, while Inmarsat argued that MSV should be limited to 10 base station carriers on any 200 kHz channel to protect Inmarsat from interference,⁵⁴ the Commission authorized MSV to operate 3450 carriers on any 200 kHz channel.⁵⁵

Inmarsat's speculative interference concerns not only delayed Commission approval of terrestrial facilities in the L-band, but also convinced the Commission to adopt unnecessarily stringent limits on MSV's terrestrial operations out of an abundance of caution to protect Inmarsat. For example, the number of base station carriers per 200 kHz channel the Commission authorized L-band operators to deploy is less than the number needed to protect Inmarsat from

customer bases could provide the opportunity to support larger production volumes and, therefore, lower costs for handsets and other equipment.").

⁵²See, e.g., Comments of Inmarsat Ventures plc, IB Docket No. 01-185 (Oct. 19, 2001).

⁵³ATC Order ¶ 157 ("Based on our analysis of out-of-band interference from ATC base stations to Inmarsat MET receivers, and taking all of the above factors into account, we conclude that an Inmarsat MET could experience a noise increase of approximately 3%. This is in contrast to 600,000% calculated by Inmarsat in its analysis.").

⁵⁴See, e.g., Inmarsat *ex parte*, IB Docket No. 01-185 (June 10, 2002), at 9.

⁵⁵ATC Order ¶¶ 132-147, Appendix C2 § 2.1.

any potential for harmful interference⁵⁶ and less than the number needed for L-band operators to provide the ubiquitous service envisioned by the Commission in authorizing L-band terrestrial operations.

Inmarsat's arguments are not motivated by genuine concerns regarding interference. Inmarsat knows that if MSV is unable to secure sufficient flexibility for its terrestrial component and is unable to deploy a replacement system, Inmarsat would benefit by being in a position to take over the spectrum that MSV now uses.

4. Inmarsat's Restrictive Distribution Agreements Foreclose Opportunities for Competitors

Inmarsat sells its services through twenty-six "master distributors," including "some of the largest incumbent communications companies in the world," such as Telenor, KPN, Telstra, and France Telecom. *Offering Memorandum* at 2, 93. Some of Inmarsat's master distributors, such as Telenor (15.1%), COMSAT (14.1%), and KDDI (7.62%), also own stock in Inmarsat. *Inmarsat Letter* at 3 n.10. Inmarsat's use of restrictive distribution agreements raises competitive concerns. Indeed, in 1998, the European Commission issued an administrative letter stating that, while it did not consider Inmarsat's distribution agreements then in effect to violate Article 81 of the Treaty of Rome, it might re-examine the issue if Inmarsat failed to carry out a public share offering within three years. *Offering Memorandum* at 112. Because Inmarsat failed to carry out a public share offering within three years, the European Commission may re-examine Inmarsat's distribution agreements at any time. *Id.*

Moreover, although MSV does not have access to Inmarsat's distribution agreements, it understands that a number of these agreements are exclusive in nature. These agreements, by

⁵⁶The Commission's decision to restrict an L-band MSS operator to 3450 base station carriers on any one 200 kHz channel limits the potential for noise increase to Inmarsat to a mere 1.4%.

their nature, foreclose opportunities for competitors. Moreover, several large telecommunications companies continue to hold substantial equity stakes in Inmarsat, which give those companies an economic incentive to favor Inmarsat over competing providers of mobile satellite services.

5. Inmarsat Leverages Its Dominant Position in the Maritime MSS Market to Gain Further Market Share in Other MSS Markets

Inmarsat has stated publicly that its business strategy is to “continue to leverage our leading position in the maritime sector by cooperating with our master distributors to encourage existing enterprise-level users to take up additional services.” *Offering Memorandum* at 3, 85. The Commission is more than familiar with the detrimental impact leveraging of market power has on consumers and competition.⁵⁷ Moreover, this type of activity may well violate both U.S. antitrust⁵⁸ and EC competition laws.⁵⁹

⁵⁷ See, e.g., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, ¶ 145 (November 26, 1997) (“[W]e are concerned that a foreign carrier with market power in an input market on the foreign and of a U.S. international route has the ability to exercise, or leverage, that market power into the U.S. market to the detriment of competition and consumers.”).

⁵⁸ See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 883 (2004) (leveraging may violate Section 2 of the Sherman Act where there is a dangerous probability that the defendant will monopolize a second market).

⁵⁹ Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, [1992] 4 CMLR 16, upheld on appeal, Case 53/92P *Hilti AG V Commission* [1994] ECR-I667, [1994] CMLR 614; OJ [1992] L/72/1, [1992] 4 CMLR 551, upheld on appeal to the Court of First Instance, Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR-II-755, [1997] 4 CMLR 726, and on appeal to the European Court of Justice, Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECR I-5951, [1997] 4 CMLR 662; *Centre-Belge d’Etudes de Marche-Telemarketing v. CLT & IPB*, [1985] ECR 3261.

6. Inmarsat's Influence with the International Maritime Organization Has Further Bolstered Its Share of the Maritime MSS Market

Inmarsat has stated that “[o]ur market-leading position in the maritime sector is underpinned by our role as the *sole provider* of satellite services required for the operation of the Global Maritime Distress and Safety System, or GMDSS, and by maritime sector regulations that require all cargo vessels over 300 gross tons and all passenger vessels, irrespective of size, which travel in international waters to carry distress and safety terminals that use our services.” *Offering Memorandum* at 2, 84 (emphasis added). Inmarsat is the only MSS provider that participates in the International Maritime Organization (“IMO”), which establishes the technical standards and requirements for the GMDSS system.⁶⁰ Inmarsat has explained that “[w]e are currently recognized by the IMO as the *sole provider* of the satellite communication services required for GMDSS.” *Offering Memorandum* at 88 (emphasis added). Although the membership requirements were modified in 1999, it is likely that Inmarsat or its surrogates would hinder efforts by its competitors to become a part of the GMDSS process, or to become a competing provider of GMDSS services. Because current GMDSS requirements are written in such a way that only Inmarsat’s service offerings can satisfy them, MSV and other competitors are effectively foreclosed from competing for much maritime business that they could obtain otherwise.

⁶⁰ As the Commission explained in the *Inmarsat Entry Order*, the International Mobile Satellite Organization (“IMSO”) is the residual IGO formed after the privatization of Inmarsat. *Inmarsat Entry Order* ¶ 9. IMSO’s responsibility is to ensure Inmarsat’s continued provision of certain public services, principally GMDSS. *Id.* ¶ 9. The Commission has explained that “this is done through a contractual relationship between IMSO and both Inmarsat Ventures, Ltd., and Inmarsat Ltd.” *Id.* Moreover, the Commission has explained that the IMSO holds a “special share” in Inmarsat. *Id.* ¶ 43. The IMSO has concluded an “agreement of cooperation” with the IMO. See “Inter-Governmental Organizations Which Have Concluded Agreements of Cooperation with IMO” (available at <http://www.imo.org/home.asp>).

Conclusion

MSV requests that the Commission act consistently with the views expressed herein.

Respectfully submitted,

/s/Bruce D. Jacobs

Bruce D. Jacobs

David S. Konczal

SHAW PITTMAN LLP

2300 N Street, N.W.

Washington, D.C. 20037

(202) 663-8000

/s/Lon C. Levin

Lon C. Levin

Vice President

MOBILE SATELLITE VENTURES

SUBSIDIARY LLC

10802 Park Ridge Boulevard

Reston, Virginia 20191

(703) 390-2700

Dated: May 7, 2004

CERTIFICATE OF SERVICE

I, David S. Konczal of the law firm of Shaw Pittman LLP, hereby certify that on this 7th day of May 2004, served a true copy of the foregoing "Comments" by hand delivery upon the following:

Andrea Kelly*
Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Marilyn Simon*
Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Qualex International
Portals II
Room CY-B402
445 12th Street, SW
Washington, DC 20554

/s/David S. Konczal
David S. Konczal

*By hand delivery and electronic mail