

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

In the Matter of

Inmarsat Group Holdings Limited

Petition for Declaratory Ruling Pursuant to
Section 621(5)(F) of the Open-Market
Reorganization for the Betterment of International
Telecommunications Act, as amended

IB Docket No. 04-439

OPPOSITION OF MOBILE SATELLITE VENTURES SUBSIDIARY LLC

Bruce D. Jacobs
David S. Konczal
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1128
(202) 663-8000

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

Dated: January 21, 2005

TABLE OF CONTENTS

BACKGROUND AND STANDARD OF REVIEW	2
DISCUSSION	7
I. Inmarsat Has Not Shown That Its Signatories No Longer Have “Effective Control” or That the Company Now Operates Independently of Them	7
II. Inmarsat Has Not Demonstrated that the Financial Interests of Either Apax or Permira Are Sufficient to Eliminate the De Facto Control Position of the Signatories.....	11
A. Articles of Association.....	11
B. Appointment of Board of Directors	13
C. Shareholders Agreement.....	13
CONCLUSION	15

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Mobile Satellite Ventures Subsidiary LLC (“MSV”) hereby submits this Opposition to the Petition for Declaratory Ruling (“Petition”) filed by Inmarsat Group Holdings Limited (“Inmarsat”)¹ asking the Commission to rule that Inmarsat has complied with Section 621(5)(F) of the Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT Act”),² as amended in October 2004 (the “October 2004 Amendment”).³

As discussed herein, the Commission should dismiss Inmarsat’s Petition or, at the very least, seek substantial, additional information from Inmarsat, and provide a further notice period for public comment. Inmarsat has not met its burden of demonstrating compliance with the strict statutory requirements of the ORBIT Act. To the contrary, the record demonstrates that former signatories still retain “effective control” over Inmarsat at this time, and that Inmarsat has not otherwise demonstrated the level of independence from the former signatories required by the Act. MSV hopes that Inmarsat will continue to evolve away from its heritage relationship with

¹ Inmarsat Group Holdings Limited, Request for Declaratory Ruling, IB Docket No. 04-439 (November 15, 2004) (“*Inmarsat Petition*”).

² Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000) (“ORBIT Act”).

³ S.2896, Pub. L. No. 108-371, 118 Stat. 1752 (2004) (“*October 2004 Amendment*”).

its signatories, for that will help create a more competitive MSS market for the public. But Inmarsat has not completed that transition, and hence the ORBIT Act leaves the Commission no choice but to deny the Petition here.

BACKGROUND AND STANDARD OF REVIEW

MSV is the successor to 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.⁴ 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.⁵ Today, MSV offers a full range of land, maritime, and aeronautical MSS, including voice and data, throughout the contiguous U.S., Alaska, Hawaii, the Virgin Islands, and coastal areas up to 200 miles offshore.

Inmarsat was established in 1976 as a legal monopoly owned largely by foreign government post, telephone, and telegraph (“PTT”) administrations.⁶ Relying on its protected monopoly status, Inmarsat built a fleet of satellites to provide global maritime service, primarily to large, oceangoing vessels. Inmarsat has since leveraged that status to expand into land mobile and aeronautical services. Inmarsat currently operates a fleet of nine in-orbit second and third

⁴ *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).

⁵ *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).

⁶ 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.

generation satellites in the L-band.⁷ Inmarsat is also currently constructing three fourth-generation satellites.⁸

As a result of its ties to and investment from PTTs – its former signatories - Inmarsat developed a dominant share of the MSS market; as a result of its continuing ties to its former Signatories, Inmarsat has maintained that dominant position.⁹ Throughout its history, Inmarsat has engaged in anticompetitive acts and practices designed to frustrate the ability of other MSS operators to compete and to enhance its own already dominant position. That behavior has not changed with Inmarsat’s “privatization.”¹⁰

In March 2000, Congress passed the ORBIT Act, the goal of which was intended “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 an intergovernmental satellite organization, enjoyed competitive advantages over private competitors. Thus, the ORBIT Act requires the Commission, in considering whether to allow Inmarsat to provide services in the

⁷ See Comments of Inmarsat Ventures plc, IB Docket No. 01-185 (Oct. 19, 2001), at 3.

⁸ Inmarsat Finance plc, Form F-4 Registration Statement -- Exchange Offer for 10 3/8% Senior Discount Notes due 2012 (November 30, 2004) at p. 94; Inmarsat Finance II plc, Amendment No. 1 to Form F-4 Registration Statement -- Exchange Offer for 10 3/8% Senior Discount Notes due 2012 (December 17, 2004) at p. 94 (“*Inmarsat December 2004 SEC Form F-4*”).

⁹ See Inmarsat Finance plc, Form F-4 Registration Statement -- Exchange Offer for 7 5/8% Senior Notes due 2012 (May 25, 2004) at 2 (“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.”); *id.* (“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.”); Credit Suisse First Boston, Global Leveraged Finance Research (June 10, 2004), at 11 (concluding that Inmarsat has a 75% share of the maritime and land mobile MSS market).

¹⁰ If control of Inmarsat had shifted from its former signatories to other investors, then one would expect to see a “new” Inmarsat that had changed its anti-competitive ways. The ORBIT Act is premised on the idea that a fully privatized Inmarsat will lack the means and incentives to engage in the anti-competitive activities that have characterized Inmarsat since its intergovernmental days.

United States, to determine whether Inmarsat has privatized “in a manner that will harm competition in the telecommunications markets of the United States.” *Id.* § 601(b)(1)(A)(ii).

A key component of this privatization was to be the full separation of Inmarsat from the influence and control of its former signatories. The Act recognized that until the signatories no longer had a material financial interest in the company, they would have a continued incentive to discriminate in favor of Inmarsat, and against new competing MSS companies, by interfering with competitive MSS entry in other countries and otherwise leveraging their dominant market powers. The *ORBIT Act* specified that the separation of the signatories from Inmarsat would be accomplished in part through an initial public offering to eliminate the control by the signatories, but Congress recognized that an IPO could not be viewed in isolation. The Act required the Commission to evaluate Inmarsat’s privatization claims more broadly, “tak[ing] into account the purposes and intent, privatization criteria, and other provisions of [the Act], as well as market conditions.” *ORBIT Act*. §621(2); 47 U.S.C. §763(2). In short, the Act required independence from former signatories -- not privatization per se -- and Inmarsat was given the burden of demonstrating that independence on a complete record.

In October 2004, Congress granted Inmarsat partial relief from certain of the requirements of the *ORBIT Act*, by permitting Inmarsat to forgo an equity IPO, but only if it could certify that it has satisfied the following three requirements:

- (1) The majority of Inmarsat’s financial interests must no longer held or, controlled directly or indirectly, by signatories or former signatories. *ORBIT Act* § 621(5)(F)(i)(I); *id.* § 621(5)(G).
- (2) Former signatories that retain financial interests in Inmarsat must not possess, together or individually, effective control of Inmarsat. *Id.* § 621(5)(F)(i)(II).
- (3) No intergovernmental organization (“IGO”) can have more than a minimal ownership interest in Inmarsat. *Id.* § 621(5)(F)(i)(III).

To verify these certifications, the *October 2004 Amendment* requires Inmarsat to provide supporting information to the Commission. ORBIT Act § 621(5)(F)(ii). To the extent Inmarsat does not comply with these requirements, then Inmarsat still has the option of conducting an equity IPO by June 30, 2005. *Id.* § 621(5)(A)(ii).

Significantly, however, these criteria are not the sum and substance of the Commission's analysis. In relaxing the technical obligation to conduct an equity private offering, Congress retained the requirement that there be "substantial dilution," thereby leaving in place the duty of the Commission to evaluate the independence of Inmarsat from the former signatories under the broader criteria of the Act. Congress has recognized that a formalistic legal separation, by itself, does not necessarily make Inmarsat a private commercial entity independent of its former signatories and meeting the pro-competitive objectives of the ORBIT Act. *See* ORBIT Act §621(2). This remains true whether Inmarsat purports to achieve this independence by an IPO or otherwise. Thus, the "no effective control" test in Section 621(5)(F)(i)(II) of the October 2004 Amendment demands a broad review consistent with the "independence" requirement of Section 621(2). Inmarsat may choose to avoid a public offering under the former, but in doing so it does not escape the obligation to demonstrate that the goals of the ORBIT Act have been met through sufficient changes to render the company truly independent of its former signatories.¹¹

¹¹ MSV submits that the addition of Section 621(5)(F)(i)(II) does not supplant Section 621(2), which is retained in the statute in full. Thus, insofar as Inmarsat privatizes through means other than a public offering, the Commission still must separately decide if it meets the "independence" requirements of Subsection 621(2). Alternatively, the Commission must interpret the "no effective control" element of Subsection 621(5)(F)(i)(II) as itself incorporating a requirement that, if Inmarsat chooses to privatize by means other than a public offering, the result is the full "independence" from the signatories that the ORBIT Act contemplates and requires. The October 2004 Amendment is an accommodation to market conditions affecting the ability to conduct a timely IPO. It most certainly is not an erosion of the underlying purpose, goals, and requirements of the Act itself.

Pursuant to the *October 2004 Amendment*, Inmarsat filed a Petition for Declaratory Ruling on November 15, 2004, certifying that it has satisfied the three requirements of the *October 2004 Amendment*. See *Inmarsat Petition*.¹² That certification, however, is inadequate, because the evidence that is available suggests that its former signatories have *de facto* control of the company and because Inmarsat has failed in its duty to supply critical information to the Commission that is essential to resolving the issue of *de facto* control. The Commission, for its part, when faced with a company that has a dominant market position and a legacy of conducting itself as a favored monopoly, must apply the law strictly and give particular scrutiny to such company's showing that it has privatized in a pro-competitive manner. The express terms and underlying purpose of the ORBIT Act require no less.

MSV is fully prepared to compete with Inmarsat in the United States once that company has fully and adequately separated itself from its former signatories. We hope that this day is approaching, and that the initial steps toward privatization taken by Inmarsat are a harbinger of more complete independence in the future. When that day comes, Congress's goal of a competitive MSS marketplace -- in the United States and elsewhere around the world -- will be much closer to reality. However, the Petition here fails to demonstrate that Inmarsat has achieved the degree of separation from its former signatories required by the ORBIT Act. Until Inmarsat can satisfy the Act's mandate -- fully, completely, and through a detailed record showing -- the Commission has no choice but to deny Inmarsat the benefits it seeks in this country.

¹² On December 21, 2004, the Commission placed Inmarsat's Petition on *Public Notice*. See *Public Notice*, DA 04-4011 (December 21, 2004). Although the Notice specified January 20, 2005 as the comment deadline, that date is Inauguration Day which is a holiday under the Commission's rules. 47 C.F.R. § 1.4(e). These comments are thus timely filed on the next business day. 47 C.F.R. § 1.4(j).

For these reasons, the Commission either should deny Inmarsat's request for a declaratory ruling or, at a minimum, investigate further and in detail the totality of the relationship between Inmarsat and its former signatories.

DISCUSSION

I. INMARSAT HAS NOT SHOWN THAT ITS SIGNATORIES NO LONGER HAVE "EFFECTIVE CONTROL" OR THAT THE COMPANY NOW OPERATES INDEPENDENTLY OF THEM

In order to justify failing to conduct an equity public offering, Inmarsat has the burden of demonstrating that its former signatories "do not possess, together or individually, effective control of Inmarsat." ORBIT Act § 621(5)(F)(i)(II). The term "effective control" is not defined in the ORBIT Act, but, under well-established Commission precedents, control can take two forms: *de jure* and *de facto*. *De jure* control exists when a shareholder owns more than 50 percent of the voting shares of an entity.¹³ *De facto* control exists when an entity that lacks a voting majority is nonetheless in actual control of a company.

The Commission determines whether an individual or group has *de facto* control on a case-by-case basis, taking into account the totality of the facts and circumstances and the relationships among the parties.¹⁴ It is possible, for example, that parties having nominal control of a company do not have *de facto* control because of other factors, such as the company's economic or operational reliance on another entity.¹⁵ Accordingly, it is impossible to evaluate

¹³ See, e.g., *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, DA 04-3610 (International Bureau, November 17, 2004) ("*November 2004 Foreign Ownership Guidelines*"), at 20.

¹⁴ See, e.g., Stephen F. Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 296-97 (1991).

¹⁵ See *Heitmeyer v. FCC*, 95 F. 2d 91, 99 (1937) ("It is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of finances."); *KIST Corp.*, FCC 84R-74 (Review Board, Oct. 19, 1984) ("[I]t has long been recognized that financial dominance is a strong determinant of *de facto* control. . . . And, financial leverage remains a trustworthy clue in the

whether former signatories have *de facto* control of Inmarsat without knowing the full extent of the ownership and commercial relationships between Inmarsat and its former signatories.

In the present context a determination of “no effective control” must incorporate an evaluation of whether the non-IPO privatization creates a company that is independent of the former signatories consistent with the underlying goals of the Act. Section 621(5)(F), informed by Section 621(2), places this burden directly on Inmarsat.

Any analysis of the control of Inmarsat at present needs to start with how it was controlled historically. When Inmarsat was an intergovernmental organization, its signatories had absolute, unquestioned control. The signatories exercised their control in many ways: (1) through their voting power within Inmarsat; (2) through their role as the exclusive distributors of Inmarsat’s services, and (3) through their relationships with the governments that determined whether, and on what terms, Inmarsat would be granted access to particular countries. Unless these means of control have been eliminated as a result of privatization, Inmarsat’s former signatories may simply have substituted *de facto* control for *de jure* control. It appears that this is, in fact, the case.

At present, Inmarsat’s signatories have retained a substantial portion of the rights that enabled them to exercise control when Inmarsat was an IGO. Although Inmarsat has taken on two minority shareholders, Apax and Permira, each of which has a 25.87 percent interest, Inmarsat’s former signatories continue to have, collectively, the largest interest by far in the

Commission’s search for *de facto* control, irrespective of legal title.”); *see also* 47 C.F.R. § 1.2110(c)(2)(ii) (explaining that control can arise through stock ownership, occupancy of director, contractual or other business relations, or combinations of these and other factors); 47 C.F.R. § 1.2110(c)(5)(ix) (explaining that affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern).

organization. They possess 42.54% of Inmarsat's equity and votes,¹⁶ which is not far below the 50% needed to exercise *de jure* control, and well within the range possible to exercise *de facto* control.¹⁷

This 42.54% interest would be considered significant under the Commission's practice, general corporate law, and other precedents. Inmarsat's own *Articles of Association* ("Articles") define "control" as a voting interest in excess of 30%. See *Articles* § 39.9.2. The Commission considers an equity or debt interest in excess of 33% to be "attributable," meaning that this level of interest allows for a significant degree of influence over a licensee. 47 C.F.R. §

¹⁶ Even this percentage may be understated because it does not reflect the indirect ownership of Inmarsat's financial interests by former signatories, which Inmarsat is required by the ORBIT Act to disclose. See ORBIT Act § 621(5)(G) (requiring a majority of Inmarsat's direct and indirect ownership interests to be held by non-former signatories). The Commission cannot verify the extent to which Inmarsat's voting, equity, and debt interests are held by former signatories unless and until Inmarsat discloses the extent to which: (i) former signatories hold direct or indirect interests in the two private equity funds investing in Inmarsat; (ii) former signatories directly or indirectly hold interests in Inmarsat's publicly-traded bonds and in the institutional entities that have loaned money to Inmarsat (this information can be obtained by conducting an ownership survey; see MCI Communications Corporation, Declaratory Ruling and Order, 9 FCC Rcd 3960, ¶¶19, 61 (July 25, 1994)); and (iii) the current and previous Inmarsat directors, officers, employees, and the employee trust holding financial interests in Inmarsat are affiliated with former signatories. The burden of production of evidence in this proceeding is on Inmarsat. See ORBIT Act § 621(5)(F)(ii); see also *Knology, Inc. v. Georgia Power Company*, 18 FCC Rcd 24615, ¶ 164 (2003) (citing *Nat'l Comm. Assoc., Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) to justify the allocation of the burden of production to the party with easier access to relevant information).

¹⁷ See, e.g., *News Corp., General Motors Corp., and Hughes Electronics Corp.*, 18 FCC Rcd 10573, ¶ 1 (2003) (finding that ownership of a 34% stake in Hughes gave News Corp. "effective control"); *In re Tri-Star Pictures, Inc.*, 634 A.2d 319, 321, 329 (Del. 1993) (finding that Coca-Cola exercised control although it owned directly only 36.8% of common stock); *Kahn v. Tremont Corp.*, 1996 Del. Ch. LEXIS 40, at *22-23 (Del. Ch. Mar. 21, 1996) (owner of 44% of stock held to be controlling shareholder); *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962) (finding control existed by owning 28.3% of stock); *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955) (owner of approximately one-third of outstanding shares has control); *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa. 1940) (control found with 27% of ownership); *Zetlin v. Hanson Holdings, Inc.*, 379 N.E.2d 387 (N.Y. 1979) (sale of 44.4% of stock constitutes sale of control).

25.159(c)(1).¹⁸ Of Inmarsat's equity and debt holders, only former signatories, and neither Apax nor Permira, exceed these thresholds.

Inmarsat also continues to be economically dependent on its former signatories. In fact, it relies on the former signatories for the majority of its revenues. In a December 2004 filing with the Securities and Exchange Commission ("SEC"), Inmarsat explained that Telenor, KDDI, and Stratos are three of its five largest distributors, accounting for 56.3% of its revenues.¹⁹ All of these entities are former signatories and still hold significant voting interests in Inmarsat.

Inmarsat has acknowledged that it relies on these former signatories and that the loss of any of them as a "distributor" of Inmarsat services could adversely affect its revenues, profitability, and liquidity.²⁰ Given these facts, Inmarsat's former signatories are in a position to exercise *de facto* control over Inmarsat.²¹ Inmarsat has not met its burden of demonstrating that the signatories no

¹⁸ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order*, 14 FCC Rcd 12541, ¶ 4 (August 5, 1999) (explaining that an entity holding an attributable interest in a licensee has a "a realistic potential' to influence core operating functions of licensees").

¹⁹ *Inmarsat December 2004 SEC Form F-4* at 13.

²⁰ *Inmarsat December 2004 SEC Form F-4* at 13:

"For the nine-month period ended September 30, 2004, our five largest master distributors in terms of our revenue were Stratos Global, Telenor, Xantic (a joint venture between KPN and Telstra), France Telecom Mobile Satellite Communications and KDDI. Sales to these five distributors represented 27.3%, 23.7%, 18.5%, 13.1% and 5.3%, respectively, of our revenue during the nine-month period ended September 30, 2004. . . . The loss of any of these distributors, or the failure by any of them to market or distribute our services effectively, could cause end users to seek alternative service providers, which could adversely affect our revenues, profitability or liquidity."

²¹ In order to evaluate properly the extent to which Inmarsat's distribution arrangements with its former signatories contribute to giving the former signatories *de facto* control, the Commission needs to know the nature and scope of those distribution arrangements. What already is known strongly suggests that these arrangements, particularly when considered in conjunction with the former signatories' ownership interests in Inmarsat, do vest the former signatories with *de facto* control. Inmarsat's Petition, however, fails the standard of the ORBIT Act because it lacks the information needed to make a final determination on the control issue. Inmarsat has not filed its distribution agreements with the Commission, which it could do with a request for confidential treatment, and it has not even summarized their terms.

longer exercise “effective control,” or that the company is otherwise adequately independent of the signatories to meet the pro-competitive purposes of the ORBIT Act.

II. INMARSAT HAS NOT DEMONSTRATED THAT THE FINANCIAL INTERESTS OF EITHER APAX OR PERMIRA ARE SUFFICIENT TO ELIMINATE THE DE FACTO CONTROL POSITION OF THE SIGNATORIES

In an attempt to counter the reality of the signatories’ legal and financial leverage over the company, Inmarsat points to various provisions in its *Articles* and *Shareholders Agreement* to support its claim that Apax and Permira control its operation. In fact, these documents demonstrate the degree to which Inmarsat is still controlled by its former signatories. Obviously these financial investors have an interest in the economic success of the enterprise, but that does not mean that either investor has taken effective control of Inmarsat from the former signatories, or that the independence required by the Act has been achieved. Inmarsat’s arguments to the contrary elevate form over substance.

A. Articles of Association

Inmarsat claims that because its *Articles* require a simple majority to decide questions arising at board meetings and because Apax and Permira together hold a majority of Inmarsat’s voting shares, this means that Apax and Permira control Inmarsat. *Inmarsat Petition* at 12. This claim is flawed for three reasons. First, there is no single majority shareholder that controls Inmarsat’s votes. Voting control of Inmarsat is vested in three groups: (i) Apax (25.87%); (ii) Permira (25.87%); and (iii) former signatories (42.54%). Any two of these groups are needed for a voting majority. Inmarsat assumes that Apax and Permira will always act together to form a voting majority, but provides no evidence that this is the case.²² In fact, Inmarsat’s governance

²² In contrast, the *October 2004 Amendment* specifically requires the Commission to assume that former signatories will act together. See ORBIT Act § 621(5)(F)(i)(II) (requiring Inmarsat to certify that former signatories do not have effective control either “together or individually”) (emphasis added).

is structured to provide protections and controls for the minority stockholders when they are acting independently, which protection Apax and Permira secured for themselves as discussed below. The former signatories and one of either Apax or Permira could just as easily form a voting majority. Moreover, as a practical matter, Apax and Permira are unlikely to act in a manner adverse to the interests of the former signatories, considering that the former signatories are Inmarsat's largest customers and account for the majority of Inmarsat's revenues.

Third, despite the general "majority rules" provision, Inmarsat's *Articles* contain a number of "supermajority" voting requirements that require the consent of former signatories for certain basic decisions. These supermajority voting provisions afford former signatories a significant degree of influence over Inmarsat's operations.²³

Among other decisions that require the consent of former signatories is Inmarsat's acquisition or merger with a Land Earth Station Operator ("LESO"), which are the entities that provide Inmarsat's services to end user customers and, for the most part, are themselves former signatories. *See Articles* § 39. Such a transaction must be approved by the directors appointed by shareholders holding 10% or more of Inmarsat's shares, which includes two former signatories. *Id.* Apparently, this provision is intended to protect LESOs from direct competition with Inmarsat and demonstrates the extent to which former signatories still influence Inmarsat's business decisions. Moreover, Inmarsat's *Articles* prevent this restriction from being amended

²³ For example, Inmarsat cannot issue new shares without the approval of (i) holders of 75% of its shares and (ii) the directors appointed by Telenor and Comsat (*i.e.*, the directors appointed by entities holding 10% or more of Inmarsat's shares). *See Articles* § 20.2. Inmarsat cannot abrogate the rights of any share class without the approval of holders of 75% of its shares. *See Articles* § 19.1. Moreover, Inmarsat's *Articles* cannot be amended without the approval of the directors appointed by Telenor and Comsat (*i.e.*, the directors appointed by entities holding 10% or more of the shares). *See Articles* § 53.1; *Shareholders Agreement* § 9.25.

without the consent of its former signatories,²⁴ and its *Shareholders Agreement* requires this provision to be included in the charter documents of any Inmarsat entity that conducts an IPO.²⁵

B. Appointment of Board of Directors

Inmarsat asserts that Apax and Permira control Inmarsat because they control the composition of Inmarsat's board of directors. *Inmarsat Petition* at 10-11. This assertion is wrong for two reasons. First, each entity holding 10% or more of Inmarsat's shares has a right to appoint a director. *See Articles* § 12. As a result, each of Apax, Permira, Telenor, and Comsat has appointed a director to Inmarsat's board. Moreover, at least one of the Telenor or Comsat directors must be present at Inmarsat board meetings in order to constitute a quorum for the directors to transact business. *See Articles* § 39.8. Second, the fact that Apax and Permira can appoint an unlimited number of additional directors beyond those appointed by the 10% shareholders does not mean that they would appoint directors who are unacceptable to the former signatories, who collectively own the largest piece of Inmarsat and are the source of the majority of Inmarsat's revenues. Similarly, of the three Inmarsat directors appointed in addition to the four appointed by the 10% shareholders, all are Inmarsat executives, which makes it particularly unlikely that they will take positions that are adverse to the interests of the former signatories, who are responsible for a majority of Inmarsat's equity and revenues.

C. Shareholders Agreement.

Inmarsat notes that its *Shareholders Agreement* requires the prior written consent of Apax and Permira for certain significant transactions. *See Shareholders Agreement*, Schedule 6. It claims that these approval or veto rights demonstrate that Apax and Permira control the

²⁴ *See Articles* §§ 19.1, 39.9.2 (requiring 75% shareholder approval to amend this provision); *Shareholders Agreement* § 9.25 (requiring approval from directors appointed by Telenor and Comsat).

²⁵ *Shareholders Agreement* § 15.7.

operations of Inmarsat. However, these types of veto rights are designed for protection of minority investors, and are not indicative of a majority or “control” position.²⁶ The fact that Apax and Permira negotiated for these minority protections, which are exercisable by each of these minority stockholders independently, demonstrates that there is no evidence to support Inmarsat’s assumption that Apax and Permira will always act together to form a voting majority. In fact, these rights are more akin to a recognition that these financial investors need protection given their respective minority ownership positions in the company. Further, the Commission has held that the existence of approval or veto rights by a minority stockholder over “major corporate decisions” such as the ones at issue does not constitute control.²⁷

In addition, former signatories hold veto rights with respect to many decisions including the following: (i) Inmarsat cannot allot any equity securities without the approval of (a) holders of 75% of the shares and (b) the directors appointed by the 10% shareholders (which includes former signatories) (*Shareholders Agreement* §16.3); (ii) the Shareholders Agreement cannot be modified without the approval of holders of 75% of Inmarsat’s shares (*id.* § 9.2); and (iii) Inmarsat cannot enter into contracts with Apax and Permira without the approval of the directors appointed by the 10% shareholders (*id.* § 8.4).

As the Commission has long recognized, *de facto* control is indicated and determined by a combination of factors; here, the cumulative effect of the various elements of power wielded by the former signatories lead to conclusion that they continue to control Inmarsat’s operations. In any event, Inmarsat has completely failed to demonstrate that the presence of these two financial

²⁶ For example, these transactions include (i) any material change in the nature of Inmarsat’s business (*Shareholders Agreement*, Schedule 6, Item 6) and (ii) any merger of Inmarsat (*id.* Item 8).

²⁷ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 447 (¶ 81) (providing that “non voting shareholders may be given a decision making role (through supermajority provisions or similar mechanisms) in major corporate decisions that affect their interest as shareholders without being deemed to be in de facto control”).

investors, standing alone, satisfies the “no effective control” requirement of the Act, especially as informed by the Act’s requirement that the privatization of Inmarsat create full independence of the company from its former signatories. Inmarsat may have made progress down that road, but the Commission is required to make Inmarsat reach the finish line before granting the benefits of new entry into the United States market. The ORBIT Act provides no other option.

CONCLUSION

For the reasons discussed above, MSV urges the Commission to deny Inmarsat’s request for a declaratory ruling or, if it does not deny the request outright, to investigate the totality of the relationship between Inmarsat and its former signatories.

Respectfully submitted,

/s/Bruce D. Jacobs

Bruce D. Jacobs

David S. Konczal

SHAW PITTMAN LLP

2300 N Street, NW

Washington, DC 20037-1128

(202) 663-8000

/s/Lon C. Levin

Randy Segal

Senior Vice President

Lon C. Levin

Vice President

MOBILE SATELLITE VENTURES

SUBSIDIARY LLC

10802 Parkridge Boulevard

Reston, Virginia 20191

(703) 390-2700

January 21, 2005

CERTIFICATE OF SERVICE

I, David S. Konczal, hereby certify that on this 21st day of January 2005, served a true copy of the foregoing "Opposition" by electronic mail (*) or via first class United States mail, postage prepaid, upon the following:

Chairman Michael K. Powell*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Kathleen Q. Abernathy*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Michael J. Copps*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Kevin J. Martin*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Jonathan S. Adelstein*
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Bryan Tramont*
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Sheryl J. Wilkerson*
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jennifer Manner*
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Paul Margie*
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Sam Feder*
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Barry Ohlson*
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Don Abelson*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Thomas Tycz*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Richard Engelman*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Roderick K. Porter*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Steven Spaeth*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

David Strickland*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

JoAnn Lucanik*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

William Bell*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Howard Griboff*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Paul Locke*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Robert Nelson*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Cassandra Thomas*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

John Rogovin*
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

James Ball*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Stephen Duall*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Chip Fleming*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Karl Kensinger*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kathryn Medley*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Sean O'More*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

Neil Dellar*
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

/s/David S. Koneczal
David S. Koneczal