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

In the matter of	)	
	)	
Stratos Global Corporation, Transferor	)	WC Docket No. 07-73
	)	DA 07-2257
Robert M. Franklin, Transferee	)	
	)	FCC File Nos.:
Consolidated Application for Consent to	)	ITC-T/C-20070405-00136
Transfer Control	)	ITC-T/C-20070405-00133
	)	ITC-T/C-20070405-00135
	)	SES-T/C-20070404-00440 through -00443
	)	0002961737 and
	)	ISP-PDR-20070405-00006

OPPOSITION OF INMARSAT FINANCE III LIMITED

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OPPOSITION OF INMARSAT FINANCE III LIMITED

Inmarsat Finance III Limited ("Inmarsat Finance")[1] opposes the Petitions to Deny of Iridium Satellite, LLC ("Iridium") and Vizada Services LLC ("Vizada"), and the objections raised in the Comments of Telenor Satellite Services, Inc. ("TSS") (collectively, the "Opponents"), regarding the applications of Stratos Global Corp. ("Stratos Global") and Robert M. Franklin, Trustee, in these proceedings (the "Applications"). Stratos Global and Mr. Franklin seek Commission consent to transfer control of Stratos Global's FCC-authorized subsidiaries (collectively with Stratos Global, "Stratos") from the current shareholders of Stratos Global to an irrevocable trust of which Mr. Franklin is Trustee (the "Trust").

I. INTRODUCTION AND SUMMARY

Although Inmarsat is not an applicant, the three Opponents, who either compete with Inmarsat (Iridium), or have business relationships with Inmarsat (Vizada and TSS),

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[1] Inmarsat Finance is a wholly-owned subsidiary of Inmarsat plc ("Inmarsat").

consume approximately fifty pages of pleadings in challenging Inmarsat's involvement as a financier of this transaction. Inmarsat therefore is compelled to respond on the record.

Iridium operates the Iridium satellite network and provides mobile satellite services ("MSS") in competition with Inmarsat. Iridium essentially expresses concern about the potential for Inmarsat to distribute services the same way that Iridium does, and thereby compete more efficiently and effectively with Iridium.

Vizada and TSS compete with Stratos in the distribution of Inmarsat services directly to end users, and indirectly to various service providers who, in turn, serve end users. Considered together, Vizada and TSS are one of the two largest distributors of Inmarsat services, with Stratos being the other. At the essence, these entities are concerned that the combination of the two steps in this transaction (first, the Trust acquiring control of Stratos; second, Inmarsat possibly exercising its option to acquire control of Stratos after April 2009)[2] will result in them no longer fully enjoying the inefficient distribution structure that is a legacy of Inmarsat's former status as an intergovernmental organization ("IGO"). Thus, Vizada and TSS seek to block Inmarsat from having an option to streamline its distribution structure in the future.

Today, Vizada operates the Inmarsat distribution business previously run by France Telecom (a former Inmarsat Signatory). The Commission has recently approved the application of Telenor and Inceptum to transfer control of TSS to Inceptum. TSS originally was a distributor of Inmarsat services (and an Inmarsat signatory) in its own right, and it subsequently

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[2] In the event that Inmarsat Global's contractual restrictions were amended before April 2009, Inmarsat potentially could exercise its option at such earlier time.

acquired the Inmarsat distribution business of COMSAT, another former Inmarsat Signatory. Inceptum and Vizada are both controlled by Apax Partners S.A., a French private equity firm.[3]

Thus, in considering the pleadings filed by Vizada and TSS, it is important not only to address the competition-related allegations that they make, but also to consider their arguments against the background under which their Signatory predecessors developed their business of distributing Inmarsat services, and United States policy to eliminate these remaining vestiges of Inmarsat's IGO legacy.

As an initial matter, the arguments the Opponents make about "real party in interest" and "*de facto* control" are simply unavailing. In asserting that the Applications fail to identify Inmarsat Finance as the "real party in interest," the Opponents ignore that the Applications identify the roles of all relevant parties. In fact, Inmarsat Finance's role is prominently identified on *the second page* of the narrative to the Applications.

In speculating that Inmarsat Finance will somehow have *de facto* control over Stratos, the Opponents ignore the express terms of the Trust. The use of a trust to own and control Stratos has been chosen entirely for business reasons, and not to avoid application of any Commission regulations or policies.[4] In any event, use of a trust, in which a trustee (Mr. Franklin) has control over a Commission licensee (Stratos), to the exclusion of the trust grantor

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[3] Public Notice, *Authorizations Granted; Telenor ASA, Transferor, and Inceptum 1, AS, Transferee, Consolidated Application for Consent to Transfer of Control and Petition for Declaratory Ruling*, IB Docket No. 06-225, DA 07-2163 (rel. May 23, 2007) ("*Telenor/Inceptum Order*"); VIZADA Services, LLC, File No. SES-AMD-20060804-01315 (filed Aug. 4, 2006).

[4] *Cf.* Iridium Petition at 2.

and beneficiary (CIP Canada)[5] and its parent's lender (Inmarsat Finance), is fully consistent with Commission precedent and policy. None of the Opponents even attempts to explain why the irrevocable Trust does not, under Commission precedent, provide the Trustee with control of Stratos, to the exclusion of Inmarsat (and its subsidiaries).

Because the Trust effectively serves as a "firewall" between CIP and Inmarsat, on the one hand, and Stratos, on the other hand, Vizada's and Iridium's allegations about the CIP/Inmarsat relationship are a legal "red herring." Although Inmarsat Finance disagrees with Vizada's and Iridium's mischaracterizations of much of the history of this transaction, Inmarsat Finance will not consume Commission resources with a line-by-line rebuttal of those irrelevant accusations, because they are not probative of anything relevant for purposes of granting the Applications.

Instead, the relevant inquiry here should be the adequacy of the irrevocable Trust, and the independence of the Trustee, neither of which the Opponents effectively contest. Commission review should not involve the relationship between the grantor and beneficiary of the Trust (CIP Canada) and its parent's lender (Inmarsat Finance). Nor should the Commission seriously consider the Opponents' allegations about what "*de facto* control" Inmarsat may try to exert with respect to Stratos, because (i) such control is not possible given the express provisions

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[5] "CIP" refers to, collectively, Communications Investment Partners Limited ("CIP Ltd"), a private limited company organized under the laws of the British Virgin Islands, and its two subsidiaries, CIP UK Holdings Ltd (a private limited company formed under the laws of England and Wales) ("CIP UK") and CIP Canada Investment Inc. (a Canadian corporation) ("CIP Canada"). CIP Canada is wholly-owned by CIP UK, which, in turn, is wholly-owned by CIP Ltd.

of the Trust, and (ii) as sheer speculation, these allegations are not cognizable under Commission precedent.[6]

Even if the Commission were to consider the potential impact of Inmarsat Finance exercising its option to acquire control of Stratos after April 2009, there are no valid competition-related reasons why Inmarsat Finance could not then (or even now) acquire control of one of its distributors after receiving prior Commission consent.[7] Although there is no reason to think Stratos would do so, Iridium fails to explain why, if Stratos stopped distributing Iridium services, consumers would be harmed, and why Iridium could not simply turn to another distributor of its services. None of the Opponents articulates a valid reason why consumers would be harmed if Inmarsat decided to change the way it does business with TSS or Vizada, or had full latitude to decide how to best serve the needs of its end users, and thus could operate in the same manner as all other satellite operators.

Finally, and contrary to Iridium's speculation that the transaction may somehow breach private distribution agreements that Inmarsat Global Limited ("Inmarsat Global") has with TSS and Vizada,[8] the proposed transaction is structured to be fully consistent with those agreements. However, as even Vizada concedes, Iridium's allegations present a question of

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6 *See American Mobile Radio Corporation*, 16 FCC Rcd 21431, 21436, ¶ 11 (2001); *see also William S. Paley*, 1 FCC Rcd 1025, 1026 (1986).

7 Inmarsat Finance would exercise its option to acquire control of Stratos at such time only if it made business sense to do so, such as enabling Inmarsat to distribute its services more efficiently and to compete more effectively with Iridium and other satellite service providers.

8 Iridium, of course, is not a party to any such agreement and has no personal knowledge of Inmarsat Global's contractual obligations with its distributors.

contract interpretation that longstanding Commission policy provides is best addressed by the tribunal specified in those agreements.[9]

For these reasons, and the others detailed below, the Commission should dismiss the objections of the Opponents and promptly grant the Applications.

II. THE APPLICATIONS APPROPRIATELY IDENTIFY ALL RELEVANT ENTITIES AND ESTABLISH THAT THE TRUSTEE WILL HAVE CONTROL

The allegations of the Opponents center around three themes: (i) there is something "inappropriate" with using a trust to own and vote the Stratos shares, (ii) the applicants have failed to adequately identify Inmarsat Finance's interest in this transaction, and (iii) by virtue of its role in this transaction, Inmarsat Finance will, notwithstanding the role of Mr. Franklin as Trustee, somehow "control" Stratos. To make these unfounded claims, the Opponents ignore relevant law, and misconstrue the law on which they do rely. They also fail to acknowledge that the Applications both (i) clearly and prominently identify the roles of all relevant parties, including Inmarsat Finance, and (ii) address the competitive considerations regarding Inmarsat's role and CIP's role in this transaction.

First, the establishment of a trust to acquire control of a Commission licensee is far from a novel proposition or a structuring mechanism of limited applicability, as Iridium claims.[10] Rather, using a trust is wholly consistent with Commission precedent. The Commission recognizes a trust as a form of business entity that is just as legitimate as any

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[9] Vizada Petition at ii. *See MCI Telecomms. Corp.*, 16 FCC Rcd 21608, 21624, ¶ 30 (1999) ("[W]e will not adjudicate private contractual matters where an alternative forum exists to resolve the issue and the contractual dispute does not bear on the public interest."); *Verestar, Inc.*, 19 FCC Rcd 22750, 22756, ¶ 16 (2004) (granting the proposed transfer of control, reasoning that such grant would not prejudice pending litigation between the transferee and the opposing party regarding the contractual right to the licenses at issue).

[10] *See* Iridium Petition at 6-13 (providing a lengthy and misinformed argument that trusts are accepted by the Commission only in certain limited, extraordinary circumstances).

corporate entity that may acquire a Commission licensee.[11] Indeed, the Commission has recognized a trust as a permissible way by which a trust beneficiary can enjoy the benefit of a Commission license, even when holding the licensee outright would violate Commission rules.[12] The Commission has further explained: "In many cases, trusts are established for personal and economic reasons unrelated to any Commission rule . . . . Such trusts should be facilitated to the extent possible."[13] Contrary to what Iridium argues,[14] the Commission's *Tender Offer Policy Statement* provides relevant guidance for ensuring that control rests with a trustee,[15] and that policy statement in no way alters Commission policy to allow the use of trusts for purposes that are wholly unrelated to Commission rules and regulations.

In the transaction before the Commission, there are legitimate business reasons unrelated to any Commission rule or policy for establishing a trust to control Stratos, and to ensure that neither CIP nor Inmarsat controls Stratos during the term of the Trust.[16] The Applications explain that the reason for this trust structure is to ensure that the proposed transaction complies with Inmarsat Global's private contractual restrictions that prevent it from owning or controlling Stratos or any other distributor of Inmarsat services prior to April 2009.[17]

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[11] *See, e.g., Twentieth Holdings Corporation*, 4 FCC Rcd 4052, 4052-4053, ¶ 5 (1989) ("Trusts, like any other legal entity, may hold broadcast licenses.").

[12] *Corporate Ownership and Disclosure by Broadcast Licensees*, 97 FCC 2d 997, 1023, ¶ 53 (1984).

[13] *Id.*

[14] Iridium Petition at 6-9.

[15] *Tender Offer and Proxy Contests*, 59 Rad. Reg. 2d (P&F) 1536, 1578-81, ¶¶ 62-65 (1986); Application Narrative at 6-7.

[16] *See* Iridium Petition at 17 (claiming concern that the trust in this case is being used to circumvent Commission rules or policies).

[17] Application Narrative at 2.

Apart from those contractual restrictions, there is no Commission policy or competition-related reason why Inmarsat (or CIP) could not directly own Stratos today. Iridium's allegation that the use of a trust to acquire control of Stratos somehow contravenes Commission policy[18] therefore is meritless.

Second, Iridium's and Vizada's claim that the "real party in interest" is not reflected in the Applications[19] is similarly without basis. The roles of *all* relevant parties, including Inmarsat Finance, are prominently disclosed in the narrative of the Applications.[20] Because the Trust will own, and the Trustee will vote, the Stratos shares, the assertion that the Applications are somehow defective because Inmarsat Finance should be listed as the recipient of control is simply wrong.

Third, while Vizada goes to great lengths to question CIP's relationship with Inmarsat Finance,[21] that entire line of argument is a classic "red herring" that does not warrant a line-by-line rebuttal.[22] Vizada misses the mark entirely by failing to discuss the terms of the Trust Agreement, which is the relevant document that will govern control of Stratos.[23] Significantly, neither Vizada, TSS, nor Iridium effectively disputes that the terms of the Trust are adequate to provide the independent Trustee with control over Stratos. In fact, and as described

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18 Iridium Petition at 6-13.

19 *Id.* at 2; Vizada Petition at 3-21.

20 Application Narrative at 2-8.

21 Vizada Petition at 2-3, 7-16.

22 For the record, however, Inmarsat Finance disagrees with Vizada's mischaracterization throughout its Petition of Inmarsat Finance's relationship with CIP and much of the history of this transaction.

23 *See BBC License Subsidiary (WLUK)*, 10 FCC Rcd 7926, 7932, ¶ 38 (1995) (in determining governance of a Commission licensee "we are guided largely by documents, as amended, which establish the relationship between the sole voting stockholder" and the nonvoting stockholder).

in the Applications, the Trust Agreement is consistent with Commission precedent for establishing an independent trust that is free from the control of the beneficiary and grantor (CIP Canada) and its parent's lender (Inmarsat Finance).[24]

A review of the Trust Agreement demonstrates that CIP Canada, the beneficiary, has no ability to control, influence or remove[25] the Trustee, and has no ability to control or influence the operations of Stratos. It is axiomatic that if CIP Canada cannot influence or control the Trust or Stratos, then *no entity*, including Inmarsat Finance, can control or influence the Trust by virtue of any relationship it may have with CIP.[26] Thus, even if true, the Opponent's allegations that Inmarsat Finance will be able to influence CIP would not be legally probative of anything relevant, particularly control by the Trust (and the Trustee's independence).

For these and similar reasons, it is specious for Vizada to assert that the Inmarsat Finance/CIP UK loan and the option "undermine" the independence of Stratos while Stratos is controlled by the Trust, and "ensure" that Inmarsat will control Stratos.[27] In contrast, the facts are quite clear:

- Inmarsat Finance's enforcement powers as a creditor of CIP UK are, until April 2009 (when Inmarsat Finance may exercise its option), limited to the right to accelerate the CIP UK loan and, upon foreclosure, to sell the shares of CIP UK and CIP Canada to a third party. During that time, Inmarsat Finance has no security interest in the Stratos shares or any Stratos assets. Realistically speaking, prior to exercising the option neither Inmarsat Finance nor Inmarsat has the power to force Stratos to do *anything* to ensure repayment of Inmarsat Finance's loan to CIP UK.

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[24] Application Narrative at 6-7.

[25] The Trustee may be replaced only in very limited circumstances that are not within CIP's discretion. Trust Agreement, Section 7(h).

[26] *Cf.* Vizada Petition at 12 (speculating that the CIP UK loan agreement "probably" has covenants that somehow allow Inmarsat to control Stratos' operations).

[27] Vizada Petition at 9-16.

- Inmarsat Finance is lending to CIP UK knowing that Inmarsat Finance may never receive regulatory approval to own Stratos, and that there may be valid reasons not to exercise the call option, but rather to allow CIP or a third party to acquire control of Stratos, subject to receiving prior Commission consent. In fact, Inmarsat Finance has the right to sell its option to a third party.

- CIP does not have a "put" right, and thus cannot force Inmarsat to "take" Stratos if Stratos does not perform as expected.

Moreover, there is nothing to support Vizada's allegations that the Inmarsat Finance loan to CIP UK and the option are not "arm's length."[28] Vizada complains both that the interest rate on the Inmarsat Finance loan to CIP UK is too low,[29] and that the option price is too low.[30] In its rush to condemn every aspect of the transaction, Vizada ignores the plain economic fact that the "below-prime interest rate" is effectively additional consideration from Inmarsat Finance to CIP UK for granting the option. Contrary to Vizada's musings, the interest rate while the option exists is "market" for a convertible loan, and the rate afterward is market for a non-convertible loan with the risk-reward profile that is expected to exist at such time. Looking at the economics of the entire transaction resolves any objective concerns about both the interest rate and the option price.

As a practical matter, Inmarsat has a strong interest in ensuring that it does not assert *de facto* control over Stratos, even if it could. Inmarsat has a business interest in the Trust maintaining control, in order to ensure that the actual implementation of this transaction remains consistent with Inmarsat Global's contractual obligations. In addition, having committed to finance significant sums to support this transaction, and needing *further* Commission consent should Inmarsat Finance decide to exercise its option to acquire control of Stratos, it would be

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[28] *Id.* at 9-13.

[29] *Id.* at 9.

[30] *Id.* at 13-16.

foolish for Inmarsat to engage in any actions that could be construed as a premature, unauthorized transfer of control, even if it could (which it cannot). In the end, however, the transaction documents bear out the undeniable fact that the independent Trustee is experienced, and is fully vested with the power to vote the Stratos shares entirely free from the influence (or control) of either CIP or Inmarsat.

Fourth, contrary to what the Opponents imply,[31] the applicants anticipated the possibility that the Commission might review the potential impact of Inmarsat Finance's (or CIP's) future control of Stratos, and therefore explained *in the Applications* why those events would pose no conceivable competitive issues.[32] The Commission need not reach the issue of the competitive impact of Inmarsat Finance's possible future exercise of its option to acquire control over Stratos (something which cannot occur for nearly two years, and which may never occur), because further Commission consent must be obtained before Inmarsat Finance could acquire control of Stratos.[33] Indeed, Commission precedent clearly establishes that options to acquire stock are not considered a cognizable interest for ownership or control purposes until they actually are exercised.[34] Should the Commission decide to review Inmarsat's potential, future exercise of its option to obtain control of Stratos, however, a careful analysis of the Opponents' competition arguments demonstrates that they are devoid of factual, economic, and legal support.

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[31] *Id.* at ii, 3-21; Iridium Petition at 2, 5.

[32] Application Narrative at 14-15.

[33] *See, e.g., American Mobile Radio Corp.*, 16 FCC Rcd at 21435-21436, ¶ 10.

[34] *Id.*

III. THE TRANSACTION POSES NO THREAT TO COMPETITION OR TO CONSUMERS

There is no merit to the arguments of the Opponents that this transaction poses a threat of competitive harm. As an initial matter, and as Vizada acknowledges,[35] Vizada's and TSS's current distribution relationships with Inmarsat are governed by contracts that provide most-favored-nations protections against the "discrimination" in favor of Stratos that the Opponents speculate might occur. Inmarsat and Stratos have reaffirmed these non-discrimination principles in a letter agreement that Stratos is submitting into the record today.[36] While Vizada suggests that Inmarsat may be able to "favor Stratos in ways not contemplated" when those agreements were negotiated,[37] Vizada does not explain what types of such "favoritism" might occur, or why it would harm consumers. Iridium, on the other hand, complains that Stratos may favor Inmarsat services over Iridium services, but does not assert that this transaction will prevent Iridium from getting its services to market.[38]

Significantly, the Opponents do not dispute that the satellite communications industry is highly competitive. Iridium states that "the satellite market is a fast-paced, evolving industry. Consumers' and others' needs are constantly expanding and more advanced technologies are being developed and deployed every day to meet those needs."[39] Likewise, when seeking Commission consent to a change in control of TSS, TSS' former and current parent companies represented that "the markets in which [TSS] compete[s] are characterized by

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35 Vizada Petition at 26.

36 *See* Stratos Global and Inmarsat plc Letter Agreement (March 19, 2007).

37 Vizada Petition at 26-27.

38 Iridium Petition at 16.

39 *Id.*

robust competition."[40] The pleadings filed by Vizada, TSS, and Iridium do nothing to suggest that the proposed transaction will in any way diminish this competition. To the contrary, even if Inmarsat Finance were, in the future and when contractually permitted to do so, to exercise the call option, obtain Commission consent, and then acquire control of Stratos, competition actually would be enhanced through the realization of well-recognized efficiency benefits upon the vertical integration of Inmarsat with one of its distributors.

Moreover, Vizada and Iridium resort to bald speculation about the potential effects of the Trust's acquiring Stratos,[41] offer no factual basis for their arguments, and never link their arguments to actual anticompetitive effects. In fact, the Vizada and Iridium petitions are so speculative that they contradict each other on key points. Vizada conjectures that, while the Trust is in existence, "Stratos' share of the mobile satellite services distribution increases during the time when the trust is in place."[42] Iridium, by contrast, argues that "Stratos not only will be unlikely to 'expand' its business as it contends, but its business likely will recede."[43] Vizada sounds the alarm that it may lose its Inmarsat business and thus will be looking for another satellite provider to distribute, while Iridium expresses concern that Stratos may direct more marketing efforts to Inmarsat services than to Iridium services (thus providing opportunities for other Iridium distributors to step in and fill the gap).[44] Even if these allegations

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40 Telenor ASA, Transferor, and Inceptum 1, AS, Transferee, Consolidated Application for Consent to Transfer of Control and Petition for Declaratory Ruling, IB Docket No. 06-225, at 12 (filed Nov. 29, 2006).

41 Iridium Petition at 14-17; Vizada Petition at 25-31.

42 Vizada Petition at 26.

43 Iridium Petition at 16.

44 Vizada Petition at 26-27; Iridium Petition at 16.

were not counter-factual, their sheer speculative nature is reason enough to summarily disregard them.

Assuming, for the sake of argument, that the Opponents' speculation were fully credited, the scenarios that they envision would not conceivably involve harm to competition or consumers. Under basic principles of U.S. competition law, the Opponents' theories simply present no legitimate challenge to this transaction, because: "The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"[45] For their own business reasons, the Opponents may wish to avoid any changes to the inefficient distribution structure that is Inmarsat's former-IGO legacy. As Inmarsat Finance details in Section IV of this pleading, the restrictions in that structure hamper Inmarsat's ability to provide service on the same terms and conditions on which Iridium and *all other satellite operators* compete today. But that in no way suggests that this transaction could harm *consumers* of satellite services. Needless to say, *consumers* are the people whom the Commission is charged with protecting.

It is important to reiterate that this transaction does not alter the status quo. Stratos will remain independent of Inmarsat control unless and until Inmarsat Finance is contractually entitled to exercise its call option and does so, and the Commission consents to such a further change in control.[46]

In considering the Opponents' arguments, Inmarsat Finance urges the Commission to consider the incentives that the Opponents have to try to block this transaction, and how those incentives are inconsistent with the interests of consumers in having a more

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[45] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[46] Trust Agreement, Section 6.

efficient means of accessing Inmarsat services.[47] The possible future exercise of its option to acquire Stratos is one part of Inmarsat's broader efforts to reconfigure the distribution of its services to provide additional and more efficient paths to market. Inmarsat has publicly indicated that it intends, after the expiration of its current distribution agreements in April 2009, to improve the efficiency by which it distributes its services by (i) pursuing some larger customers for whom direct distribution is more efficient, and (ii) reducing the distinction between its distribution partners and its service providers (who currently must buy from distribution partners), but (iii) still using multiple third parties to distribute its services for the foreseeable future. The net result of these changes (including the possible exercise of its option after April 2009) will be a more efficient, more entrepreneurial, and more innovative channel to market—for the ultimate benefit of consumers. The current, inefficient distribution channel that favors, among others, Vizada and TSS, is an artifact of Inmarsat's IGO legacy.

Thus, it is no surprise that Vizada and TSS, as the operators of the MSS businesses once owned by the former Signatories Telenor and France Telecom, challenge this transaction in the hope of continuing to enjoy their non-market-based, legacy position. And if Iridium *truly believed* that the proposed transaction would harm *Inmarsat's* distributors, Iridium would not object. That it does shows what Iridium really fears: potential vertical integration (post-April 2009) by Inmarsat would enable Inmarsat to compete more effectively against Iridium, which has already chosen to integrate vertically.

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[47] *See* B. Espen Eckbo, "The Anticompetitive Significance of Merger Revisited," paper for The Market for Corporate Control Regulation and Corporate Governance Issues, Univ. of Lille 2 (March 22, 2007), p. 14 ("[I]t is important to keep in mind that, while preventing efficient mergers harms consumers, the rivals of the merging firms benefit as they avoid having to face competition from an increasingly efficient merged firm.").

A. Vertical Transactions Are Presumptively Pro-Competitive

Inmarsat and Stratos simply are not competitors. Inmarsat owns and operates spacecraft, and wholesales its capacity to third parties such as Stratos and other distributors. Those distributors resell Inmarsat capacity, and the capacity of other satellite operators, to their customers. Thus, the possible acquisition by Inmarsat Finance of any Inmarsat distributor would be a "vertical," not a "horizontal," merger (of course, the transaction before the Commission is *not* an acquisition by Inmarsat Finance).

Unlike horizontal mergers, vertical mergers do not remove a competitor from the market. Rather, vertical mergers present the ability to provide goods and services more efficiently to the consumer by streamlining the process by which those goods and services get to market. Thus, as a general rule, vertical transactions are part of competition and not a danger to it. For this reason, antitrust officials have cautioned that "the enforcement agencies need to exercise caution in taking actions against vertical transactions to avoid chilling efficiency-enhancing mergers that pose little risk of harm to competition."[48]

At the simplest level, vertical mergers can be viewed as efficiency-enhancing transactions, cutting sales and distribution costs, facilitating the flow of information between levels of the industry, and creating economies of scale in management, among other things.[49] Vertical integration is ubiquitous even in markets seen as highly competitive. As leading economists explain:

> Because many vertical mergers create vertical integration efficiencies between purchasers and sellers, many if not most vertical mergers are either

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[48] Steven Sunshine, "Vertical Merger Enforcement Policy," Address before the American Bar Association, April 5, 1995 *("Vertical Merger Enforcement Policy"*). Mr. Sunshine was Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice.

[49] Bork, THE ANTITRUST PARADOX 227 (1993).

> procompetitive or competitively neutral. Potential efficiency benefits involve improved coordination in pricing, production, and design that can reduce costs and improve product quality.[50]

The Commission itself has recognized that vertical mergers present two inherent efficiencies that can be gained only through a merger. First, vertical mergers can lead to elimination of transaction costs as the integrated firm more efficiently distributes its goods and services. Second, vertical mergers can lead to the elimination of double marginalization as the merged firm can better maximize profits without the margin currently being realized at both levels of the distribution chain.[51] These are precisely the kind of efficiencies that Inmarsat would expect to achieve, should Inmarsat decide to exercise its option with CIP Ltd to acquire control of Stratos after April 2009.

B. Opponents Have Not Identified Any Valid Anticompetitive Concerns

Just as important, the Opponents have not presented any credible evidence that consumers could be harmed by the proposed transaction. Ignoring the presumptively pro-competitive nature of vertical transactions, Vizada and Iridium focus on several speculative scenarios.[52] As explained below, none of the types of "foreclosure" that potentially could injure competition exists here.[53]

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50 Riordan and Salop, 63 *Antitrust Law Journal* 513, 519 (1995).

51 *See, e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18387-18388, ¶¶ 190-192 (2005); *see also Vertical Merger Enforcement Policy*.

52 Vizada Petition at 25-31; Iridium Petition at 16-17.

53 For this reason, none of Vizada's citations is on point. *Denver & Rio Grande Western v. United States*, 387 U.S. 485 (1967) involved a horizontal merger. *United States v. Dairy Farmers of America*, 426 F.3d 850 (6th Cir. 2005) likewise involved a horizontal transaction. *United Nuclear Corp. v. Combustion Eng'g, Inc.*, 302 F. Supp. 539 (E.D. Pa. 1969) was a transaction with horizontal and vertical aspects, but while the court found the horizontal aspects problematic, it ruled that the evidence as to vertical effects was "inconclusive," and

1. There Will Be No Foreclosure of Other Satellite Operators

Iridium argues that vertical integration of Inmarsat's distribution would somehow affect the ability of the services of Iridium and other satellite operators to get distributed to consumers. Specifically, Iridium claims that Stratos will favor Inmarsat services over Iridium services, which, it asserts, will cause competitive harm.[54] There is simply no merit to that argument.

As an initial matter, Stratos has confirmed that it will not alter its current distribution strategy as a result of the proposed transaction.[55] Stratos currently distributes Inmarsat, MSV, Globalstar, and Iridium services, among others. The only thing that is happening as a result of the current transaction is that Stratos' shares are being placed in a trust. Because neither Inmarsat nor CIP will have any control over Stratos (and, indeed, each is prohibited from having any communications with the Trustee regarding the management or operation of Stratos), there is no reason to believe that Stratos' current line of business will change at all.

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that "plaintiff has not carried its burden." The security interests in *MGM v. Transamerica Corp.*, 303 F. Supp. 1344 (S.D.N.Y. 1969), and in *Mr. Frank, Inc. v. Waste Management Inc.*, 591 F. Supp. 859 (N.D. Ill. 1984), also involved horizontal transactions. *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957)—which was decided long before economists, regulators, and courts reached the current consensus described above that vertical transactions are generally pro-competitive—simply stands for the proposition that non-controlling stock acquisitions can, in certain circumstances, raise competitive issues under the antitrust laws. But, as this Opposition demonstrates, those circumstances do not exist here. In any event, the Commission does not consider options to acquire stock as "ownership" until they actually are exercised. *American Mobile Radio Corp.*, 16 FCC Rcd at 21435-21436, ¶ 10.

[54] Iridium Petition at 16.

[55] Application Narrative at 11.

Notwithstanding Iridium's and Vizada's speculation that Stratos will somehow languish or "waste away" while under the Trustee's control,[56] the natural desire will be to facilitate Stratos' continued increase in value over the next two years: the Trustee is an experienced businessman with a reputation in the community to uphold, and Stratos management will be compensated in part through an incentive plan overseen by the Stratos Board of Directors that is explicitly designed to maximize Stratos' revenues and earnings. Thus, there is no basis for the Opponents to assume that neither Stratos management nor the Trustee will fulfill their roles as responsible stewards of the company and its shares, and seek to facilitate the continued growth of Stratos.

Even if the Commission were to assume (for the sake of argument) that Inmarsat Finance could exercise some control over Stratos or that Stratos would have the incentive to favor Inmarsat services over Iridium services, there still would be no foreclosure of other satellite operators. The only theory on which this transaction could adversely affect competition by foreclosing satellite operators would be if Stratos controlled some essential asset without which distribution would be hindered. Iridium makes no such claim, and it could not do so.

First, other satellite operators already have several paths to market. Iridium never once states that it would be unable to get to market after this transaction, or that either Iridium itself or other distributors could not respond to any opportunities created if Stratos were to focus more on the distribution of Inmarsat services. Iridium could not make that claim because satellite operators can and do distribute through multiple distribution channels. For example, MSS operators such as Iridium, MSV, and Globalstar already distribute through other distribution partners such as TSS and Vizada, through service providers, and by selling directly

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[56] Iridium Petition at 15-16; Vizada Petition at 15.

to end users. Iridium does not claim that Stratos is its largest distributor. Because Iridium already possesses other highly-effective distribution avenues, including selling directly to end users, consumers would not be harmed even if the Commission were to posit Stratos favoring Inmarsat services over Iridium, because Iridium would still get to market.

Second, it is undisputed that there are no significant barriers that prevent existing distributors from expanding their business, or even new companies from entering the satellite services distribution business. Dozens of companies currently distribute the services of Iridium, Inmarsat, and other satellite providers, and no one contends that these distributors could not easily start distributing Iridium services or increase their existing distribution of Iridium services. Even if one were to hypothesize that Stratos some day may choose to distribute only Inmarsat, and even if one were assume (counter-factually) that other existing distributors (such as TSS and Vizada) could not provide adequate distribution alternatives, there is no reason Iridium could not appoint new entrants to provide distribution both quickly and easily. The only substantial requirement to beginning distribution of Iridium services is a sales force, and possibly an earth station license, neither of which is a meaningful obstacle to commencing a new distribution business. New distributors need not own their own gateway facilities; they could rely on access to gateway facilities owned by others. Indeed, Iridium already owns its own gateway facilities, on which its distributors rely in order to provide service. Thus, to the extent Iridium needs new distribution channels, it already possesses the means either to distribute itself, or to facilitate the entry of new distributors. In sum, there is no basis to suggest that any foreclosure of other satellite operators would occur, or that consumers will lose access to Iridium (or any other satellite services) because of this transaction.

2. There Will Be No Foreclosure of Inmarsat Distributors

The gist of Vizada's argument is that the proposed transaction will give Inmarsat the incentive to favor Stratos and alter its existing distribution relationships, including its relationship with Vizada.[57] According to Vizada, Inmarsat will have the incentive to provide Stratos more favorable service and terms, which will harm competing distributors and their customers.[58] There are several fundamental flaws with that theory.

First, under the proposed transaction, neither Inmarsat Finance (nor Inmarsat itself) will have any control over Stratos, nor could it gain control over Stratos before the Commission has an opportunity to review and approve such a change in control. Second, Inmarsat's relationship with other major distributors, such as Vizada and TSS, is governed by existing contracts that are in place through April 2009, and that contain non-discrimination protections, as detailed above. There is simply no basis for concluding that Inmarsat would not honor those contractual obligations for the terms of the relevant agreements. Third, once the existing distribution arrangements terminate, the parties are free to decide mutually how they wish their commercial relationship to proceed. Regardless whether this transaction ever existed, Inmarsat has the ability to revise its distribution structure in April 2009, and, like all other

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[57] Vizada does not contend that it will sell a lower volume of Inmarsat services during the trusteeship. To the contrary, Vizada concedes that during that period, it will be protected by contractual nondiscrimination provisions and the uniform price terms of its current distribution agreement with Inmarsat. Vizada Petition at 29 (acknowledging that Inmarsat will be in a position to alter its relationship with Vizada only "[o]nce the protections of the current distribution agreement expire").

Even if Inmarsat had the ability to reduce Vizada's access to Inmarsat services, in favor of Stratos, consumers would not be injured because they would simply receive service from a different distributor.

[58] Vizada Petition at 29.

satellite operators, will be able to select and pursue the distribution model that is the most efficient way to serve the needs of consumers.

Indeed, once the existing contracts expire, Inmarsat—like any other company—is free to contract with whomever it pleases, with or without this transaction. A fundamental tenet of U.S. competition law is that a business "generally has a right to deal, or refuse to deal, with whomever it likes."[59] Yet the *only* potential effects Vizada has identified are those that could occur regardless of this transaction. There would be no competitive concerns even if Inmarsat altered its distribution absent this transaction, and Vizada has no good explanation for why there should be concerns (assuming *arguendo* that it happens) with this transaction. In fact, one reason Inmarsat would choose to exercise its option and vertically integrate with Stratos' distribution system is that doing so would be the most efficient way to expand the provision of Inmarsat services, particularly in light of the competition that Inmarsat faces from other satellite providers, all of which market both directly and through distributors. Even so, Inmarsat currently intends to continue to use *multiple distributors* for the foreseeable future, as well as potentially sell directly after April 2009.

Finally, even if the Commission were to credit Vizada's speculation and assume that it will lose "equal access" to Inmarsat's services, there is no evidence that *consumers* of satellite services would be harmed. Distributors have other satellite services to sell, some of which they already offer. Thus, from a consumer's perspective, the same satellite products and services will be available regardless whether the Trustee acquires control of Stratos. Even if

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[59] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *see also United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (antitrust law "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

Inmarsat services were to become available through different distribution channels, there is no reason to believe that such an evolution of distribution channels for satellite services would be anything but pro-competitive. As noted above, satellite service offerings are rapidly evolving, the market is highly competitive, and it is in consumers' interests for all satellite operators to have the freedom to develop distribution channels that best position them for the uncertain and changing future. As a matter of competition law, U.S. courts recognize that a shift in distribution share among distributors of a given service does not constitute an injury to competition, or consumers.[60] In fact, the primary focus of antitrust laws, like the Commission's competition policies under the Communications Act, is facilitating *interbrand* competition (*i.e.*, competition among satellite operators and other providers of similar services).[61] Changes in distribution systems in competitive industries, as here, presumptively reflect the imperative of a satellite operator to achieve a distribution mechanism that best enables it to compete with other brands.

For these reasons, neither Vizada, TSS, nor Iridium has raised any plausible theory under which the proposed transaction would harm competition or consumers.

IV. THE POTENTIAL EXERCISE OF INMARSAT FINANCE'S OPTION WOULD ADVANCE IMPORTANT PUBLIC INTEREST GOALS

For the reasons set forth above, Inmarsat Finance will not have control of Stratos unless, in the future, and contingent on receiving further Commission consent, it exercises the

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[60] *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc.*, 129 F.3d 240, 244 (2d Cir. 1997) (It is not "a violation of the antitrust laws, without a showing of an actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor."); *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975) ("[W]e reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor.").

[61] *Leegin Creative Leather Products, Inc.*, __ S. Ct. ___, 2007 U.S. LEXIS 8668 (June 28, 2007).

option to acquire control of Stratos. Thus, the Commission's public interest analysis at this time should not assume that Inmarsat Finance has control, as the Opponents urge. Nevertheless, to the extent that the Commission engages in the balancing of harms and benefits from Inmarsat Finance's involvement in the proposed transaction, such a balancing weighs heavily in favor of approving the transaction. As detailed in the preceding section, there are no cognizable competitive harms from the Trustee owning and voting the Stratos shares, and there would be none if Inmarsat Finance were to exercise its option to acquire control of Stratos after April 2009. With no competitive harms, and a qualified, experienced Trustee, the Commission should not require any greater public interest showing from the applicants than it required of TSS when approving the change in control of TSS.[62] In any event, this transaction actually would advance important public interest goals.

Together, Vizada and TSS are responsible for the distribution of some 40% of all Inmarsat services, and thus serve as the "gatekeepers" to almost half of Inmarsat's global traffic. Even though it has privatized, all of Inmarsat's business must continue to be provided under an anachronistic distribution structure left over from its pre-privatization days, under which a very small number of these types of gatekeepers have the ability to provide Inmarsat services directly to end users. The perpetuation of that structure in 2004 was one of the prices for Inmarsat's privatization—obtaining shareholder consent to the private equity takeover of Inmarsat that substantially diluted the economic interests of Signatories and foreign governments in Inmarsat. In a world where Inmarsat has been fully privatized and competes as an independent, publicly-traded commercial enterprise, more flexibility in the operation of its distribution network surely

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[62] *See Telenor/Inceptum Order* at 1-2 (granting consent to private equity acquisition of TSS transaction based on showing that applicant was qualified and there was no competitive harm, but without any specific public interest showing).

would enhance competitive choices for Inmarsat's MSS offerings, and thus inure to the benefit of consumers.

Yet these distribution requirements continue to provide the businesses established by former Signatories with special privileges and artificial protection from competition. Specifically, Inmarsat is forced to sell services through an elite club of distributors. In the case of "traditional" Inmarsat services,[63] entry into this "club" of distributors is effectively restricted to businesses that were part of the Inmarsat distribution structure at the time of privatization. This means that distribution rights to services comprising over 90% of Inmarsat's revenues still lie with businesses established by former Signatories. Although Inmarsat technically has the right to appoint additional distributors for its services, this right is severely constrained by the arrangements imposed by the former Signatories.

Thus, Inmarsat's option to acquire and vertically integrate with Stratos in the future provides the potential for the same types of public interest benefits that the Commission recognized when it allowed resellers and end users of Intelsat to contract directly with Intelsat.[64] In that case, the Commission found that allowing end users to directly contract with Intelsat, rather than buying through a distributor, would result in:

> (i) improved responsiveness to customer inquiries on service implementation; (ii) avoidance of mark-up costs charged to third parties; (iii) greater control over service quality, performance costs, connectivity, redundancy, and earth station capabilities; and (iv) more flexibility (than through third parties) in tailoring

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[63] By "traditional," Inmarsat means the types of mobile voice and data services that Inmarsat historically provided before its new generation of spacecraft, and on which hundreds of thousands of end-users have invested significant sums in terminal and network equipment. This term does not include the new generation of "BGAN" land-mobile services, or the forthcoming BGAN aeronautical and maritime services, each of which requires different terminals than the installed base of end-user equipment.

[64] *See Direct Access to the INTELSAT System*, 14 FCC Rcd 15703 (1999).

services in terms of bandwidth, time duration, performance standard, redundancy, and service applications.[65]

As noted above, experience has demonstrated that the current distribution agreements make it virtually impossible for Inmarsat to appoint new full-service distributors. Moreover, the volume discounts in the Inmarsat distribution arrangements reward distributors who have larger collective "sales," even when those increased sales result from mere consolidation, rather than increased production. Thus, the arrangements that TSS and Vizada enjoy occur at the expense of smaller and newer distributors who cannot effectively compete for customers at the same pricing levels. The impact of these contractual restrictions has been exacerbated by the continued consolidation of Inmarsat distributors, and will be further exacerbated if TSS and Vizada come under common control.

Approving this transaction ensures that Stratos will remain independent until April 2009, and afterwards allows Inmarsat the possibility of acquiring control of Stratos, all in an effort to break down the former-IGO-legacy walls that prevent Inmarsat from operating in the same manner as every other satellite company—freely choosing its distributors, deciding when it makes business sense to retain distributors who provide a "value-added" function, and deciding when it makes business sense to sell services directly to consumers. Among other things, this transaction ensures that further consolidation of the Inmarsat distribution network will not occur while the existing distribution arrangements remain in place.

Thus, this transaction not only is in the public interest, but it also advances the goals of the ORBIT Act, which mandate that the Commission ensure that the privatization of

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[65] *Id.* at 15716, ¶ 22.

Inmarsat occurs in a way that fosters competition.[66] In fact, the ORBIT Act expressly contemplates that competition would be enhanced by United States national security, law enforcement and public safety users having direct access to Inmarsat (*i.e.*, without being required to go through a distributor).[67] Thus, approving a transaction in which Stratos would remain an independent entity until at least April 2009, and Inmarsat Finance thereafter (and subject to receiving prior Commission consent) would have the ability to acquire control of Stratos, would facilitate longstanding Unites States competition policy.

The arguments Vizada and TSS make in an effort to perpetuate the current Inmarsat distribution mechanism are flatly inconsistent with U.S. policy.

V. CONCLUSION

The Applications properly and prominently identify the roles of all relevant parties to the Trust's acquisition of Stratos, including Inmarsat Finance. The Trust is fully consistent with Commission precedent and is being employed entirely for business reasons, not to avoid application of any Commission regulations or policies. None of the Opponents has explained why the Trust will not provide the Trustee with control of Stratos, to the exclusion of Inmarsat. The Opponents' speculation about possible future unauthorized transfers of control is both inconsistent with the Trust, and not cognizable under Commission policy in any event.

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[66] Congressional policy in adopting the ORBIT Act is memorialized in the Act itself: "promote a fully competitive global market for satellite communications services for the benefit of consumers and providers of satellite services and equipment by fully privatizing . . . Inmarsat." ORBIT Act, Pub. L. No. 106-180, 15 Stat. 48, § 2 (2000).

[67] *See* 47 U.S.C. § 761(b)(1)(C) ("Such [national security, law enforcement and public safety services] *may be obtained* by the United States *directly from* INTELSAT, *Inmarsat*, or a successor entity, or indirectly through COMSAT, or authorized carriers or distributors of the successor entity.") (emphasis supplied).

Even if the Commission were to consider the impact of Inmarsat exercising its option after April 2009 and ultimately obtaining control (after receiving prior Commission consent), there are no valid reasons (competition-related or otherwise) why Inmarsat could not acquire control of one of its distributors, and provide service to consumers in the same manner as all other satellite operators with whom Inmarsat competes. For these reasons, and the others detailed above, the Commission should dismiss the objections of the Opponents, and promptly grant the Applications.

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July 9, 2007

DECLARATION

I, Diane J. Cornell, hereby declare under penalty of perjury under the laws of the United States of America that the facts contained in the foregoing Opposition about which official notice may not be taken are true and correct to the best of my knowledge, information and belief.

Executed on July 9, 2007.

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CERTIFICATE OF SERVICE

I, Jeffrey A. Marks, hereby certify that on this 9th day of July 2007, I caused to be served a true copy of the foregoing Opposition by U.S. first class mail (unless otherwise indicated) upon the following:

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