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SEP - 6 2007

Federal Communications Commission
Office of the Secretary

September 6, 2007

BY HAND

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **REDACTED - FOR PUBLIC INSPECTION**

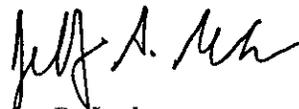
Ex Parte Presentation, In the Matter of Stratos Global Corporation and Robert M. Franklin, Trustee, WC Docket No. 07-73; DA 07-2257

Dear Ms. Dortch:

Pursuant to the procedures set forth in the Protective Order issued in this proceeding (DA 07-3344, rel. Jul. 20, 2007), attached is a redacted, public version of the Ex Parte Presentation of Stratos Global Corporation, Robert M. Franklin, CIP Canada Investment Inc. and Inmarsat Finance III Limited. The Ex Parte Presentation includes responses to arguments raised in this proceeding regarding "Confidential Information," as defined in the Protective Order.

Under separate cover, an unredacted, confidential version of the attached Ex Parte Presentation also is being submitted.

Sincerely,



John P. Janka
Jeffrey A. Marks
Stephanie A. Roy

Enclosures

cc: David Strickland (two copies by hand)
Tricia Poeletta, Counsel for CIP Canada Investment Inc. (by hand)

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September 6, 2007

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Secretary
Federal Communications Commission
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Re: Ex Parte Presentation

**In the Matter of Stratos Global Corporation and Robert M. Franklin, Trustee
WC Docket No. 07-73, DA 07-2257**

Dear Ms. Dortch:

This letter is being submitted on behalf of Stratos Global Corporation (“Stratos”), the Trustee Robert M. Franklin (“Trustee”), CIP Canada Investment Inc. (“CIP Canada”), and Inmarsat Finance III Limited (“Inmarsat Finance”) to provide a response to certain arguments raised by Iridium Satellite LLC (“Iridium”), Vizada Services LLC (“Vizada”) and Telenor Satellite Services, Inc. (“Telenor”) in their July 31, 2007 Replies (Iridium, Vizada and Telenor are referred to collectively as “Petitioners”).

The Transaction Structure is Consistent with Commission Precedent and Policy

Contrary to Petitioners’ contentions,¹ Commission rules allow trusts to hold authorizations and control licensees.² Commission policy is to allow parties to use business forms (including trusts) that best meet their commercial needs.³ In this case, the parties chose a

¹ See Iridium Reply at 12-16.

² *Twentieth Holdings Corp.*, 4 FCC Rcd 4052, 4052, ¶ 5 (1989) (“*Twentieth Holdings*”) (“Trusts, like any other legal entity, may hold broadcast licenses.”). Commission rules expressly allow Trusts to hold licenses under 47 C.F.R. § 25.103 (satellite communications - communications common carrier defined to include trusts); 47 C.F.R. § 1.2105(a)(ii)(A) (competitive bidding rules); 47 C.F.R. § 5.5 (experimental licenses – person defined to include trusts); 47 C.F.R. § 22.99 (public mobile services – telecommunications common carrier defined to include trusts); 47 C.F.R. § 90.7 (private land mobile radio services – person defined to include trusts). See also *Clifford Stanton Heinz Trust*, 11 FCC Rcd 5354, 5355-56, 5359, ¶¶ 6-10, 26 (1996) (granting application of trust for a cellular license); *LEO One Corp.*, 13 FCC Rcd 2801, 2808-09, ¶¶ 15-17 (1998) (granting satellite system application where controlling party was a trust).

³ *Corporate Ownership Reporting & Disclosure by Broadcast Licensees*, 97 FCC 2d 997, 1023, ¶ 53 (1984) (“*Attribution Policy Statement*”) (“[T]rusts . . . established for personal and

(Continued...)

trust structure to ensure compliance with private contractual obligations, and not to avoid application of any Commission rules or policies.⁴

As discussed below in greater detail, the Trust Agreement adheres to Commission policy and precedent to ensure the Trustee, Mr. Franklin, retains control over Stratos.⁵ Mr. Franklin is independent of both CIP and Inmarsat, and has no prior relationship with either entity. The Trust Agreement provides Mr. Franklin with sole voting power over 100% of the Stratos shares. The Trust Agreement provides that the Trust is irrevocable. These conditions alone are adequate under a “control” analysis.⁶

In order to ensure compliance with contractual obligations, the parties adopted certain separations between the Trustee and the Stratos board, on the one hand, and CIP and Inmarsat, on the other. In particular, the Trust Agreement precludes CIP or Inmarsat from communicating with the Trustee regarding the operation and management of Stratos.⁷ The Trust Agreement also prohibits communications between Stratos directors and CIP or Inmarsat.⁸ These prohibitions on communications go beyond the Commission’s general requirements for ensuring that a trustee remains independent and in control.⁹ The provision in the Trust, which allows any Stratos board member who is also an officer (*e.g.*, the CEO) to communicate with Inmarsat regarding “commercial matters in the ordinary course of business,”¹⁰ does not provide Inmarsat (or CIP) with control over the operation or management of the company.¹¹ In any

economic reasons unrelated to any Commission Rule . . . should be facilitated to the extent possible.”).

⁴ Even if that were not the case, Commission policy allows parties to use trusts to avoid the consequences of Commission ownership limits or other policies that would apply if they owned the licensee directly. *Id.* at 1024, ¶ 56.

⁵ *Corporate Telecom Services, Inc. v. FCC*, 55 F.3d 672, 675-77 (D.C. Cir 1995) (Commission analysis of adequacy of trust must be related to the rule or policy at issue).

⁶ See *infra* pp. 3-7 (“The Trust Retains Ultimate Control” and “Inmarsat Finance Does Not Have De Facto Control Of Stratos”); see also *FTC Communications, Inc.*, 75 FCC 2d 15, 19-20, 26-27, ¶¶ 11, 30 (1979) (“*FTC*”).

⁷ Trust Agreement at §10(c).

⁸ Trust Agreement at § 4(b).

⁹ See *infra* pp. 3-7 (“The Trust Retains Ultimate Control” and “Inmarsat Finance Does Not Have De Facto Control Of Stratos”); see also *FTC*, 75 FCC 2d at 19-20, 26-27, ¶¶ 11, 30.

¹⁰ Trust Agreement at § 4(b).

¹¹ Notably, this is not a case where the beneficiary needs to avoid “attribution” of its interest for purposes of the Commission’s media ownership restrictions. See *Attribution Policy Statement* at ¶¶ 53-54. Nor is this a case where the applicant seeks Special Temporary Authority (“STA”) to

(Continued...)

event, this “ordinary course” exception is limited to the regular communications between a satellite operator and major distributor about commercial matters that Inmarsat and Stratos have had for more than a decade.

The Trust Agreement obligates the Trustee to comply with all rules, regulations and policies of the Commission,¹² and provides that Commission consent will be obtained before transferring control over Stratos to Inmarsat Finance, CIP, or any third party.¹³ *Thus, the terms of the Trust Agreement ensure that the Commission will have the opportunity to approve in advance any future transfer of control of Stratos from the Trustee to Inmarsat Finance, CIP, or a third party.*

Finally, there is no limit on the ability of Stratos to invest in existing lines of business that compete with Inmarsat, or even to pursue entirely new lines of business. There is simply no obligation on Stratos to operate “in the ordinary course.” Rather, Stratos management and the Stratos directors have a fiduciary duty to conduct business in the best interests of the company, and need to take into account that Inmarsat Finance ultimately may not exercise its option to acquire control of Stratos. If Inmarsat Finance does not exercise the option, control of Stratos will be acquired by CIP or a third party.

The Trustee Retains Ultimate Control

Commission precedent recognizes that there are different levels of “control” within a corporation.¹⁴ A single shareholder has ultimate control by virtue of its voting power

transfer control to a trust while the Commission reviews the “long form” application. *See, e.g., Tender Offers and Proxy Contests*, 59 Rad. Reg. 2d (P&F) 1536, ¶¶ 8, 60, 76 (1986) (“*Tender Offer Policy Statement*”) (approving use of trusts on an STA basis, but preventing offeror from exerting “influence,” as well as control, over operation or management of licensee while “long form” application is pending). Outside of that STA context, Commission precedent is clear that “influence” is not precluded unless it rises to a level of dominance that constitutes “control.” *News Int’l, Plc.*, 97 FCC 2d 349, 355, ¶ 16 (1984) (“*News Int’l*”); *American Mobile Radio Services Corp.*, 16 FCC Rcd 21431, 21436, ¶ 10 (2001) (“*AMRC*”); *see also Lockheed Martin Corp. Regulus, LLC*, 14 FCC Rcd 15816, 15830-31, 15833, ¶ 27, ¶ 32 (1999) (“*Lockheed Martin*”).

¹² Trust Agreement at § 11(h).

¹³ Trust Agreement at §§ 5(b), 5(c), 5(e), 9(a), 9(b).

¹⁴ *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 442 (D.C. Cir. 1985) (“There may be varying degrees of working control exercised at different levels of the corporation. Corporate officers or station managers may exercise substantial day-to-day working control; yet FCC approval would not be required before a corporation was allowed to replace such personnel.”).

and therefore its ability to elect the board of directors.¹⁵ Thus, a Trustee who votes all of the voting stock of a company has control through the power to select the board of directors. The board of directors the shareholder elects will make major corporate decisions, establish policies, and select officers and managers. Those officers and managers in turn will have authority over day-to-day operational matters, subject to oversight by the board and the ultimate control of the shareholder to replace the board. Thus, the Commission allows a shareholder to rely on directors and management in the first instance, while still retaining ultimate control, because the shareholder retains the power to replace them.¹⁶ The narrative to the Application and the Public Notice describe the intention of the Trustee to do just that, while retaining ultimate control.¹⁷

Inmarsat Finance Does Not Have *De Facto* Control of Stratos

Petitioners suggest that Inmarsat Finance's option to acquire control of Stratos, the absence of a prohibition on its communications with Stratos management, its involvement in structuring the transaction, and its loan to CIP, provide Inmarsat Finance with such "influence" over Stratos that Inmarsat Finance will have *de facto* control of Stratos.¹⁸ This argument is not supported by the facts or the law.

As an initial matter, "influence" and "control" are two very different things under Commission precedent, and an entity may have substantial "influence" without having *de facto* control. Influence does not constitute control unless it rises to the level where someone "is able to 'determine' the licensee's policies and operation, or 'dominate' corporate affairs."¹⁹

The Commission assesses allegations of control in cases involving satellite companies with reference to the six-prong test under *Intermountain Microwave*.²⁰ That test

¹⁵ See *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8513, ¶ 151 (1995) ("*Fox I*").

¹⁶ *SW Texas Public Broadcasting Council*, 85 FCC 2d 713, 715-16 (1981) (licensee "is permitted to delegate operational duties and responsibilities, as may any broadcaster or corporate entity"; what matters is whether the licensee can revoke its delegation at its discretion).

¹⁷ Thus, Vizada is mistaken when he suggests that there is a contradiction between (i) Stratos and Inmarsat Finance, who state that Mr. Franklin will control Stratos and (ii) Mr. Franklin and CIP, who explain that while Mr. Franklin will control Stratos as its shareholder, he does not intend to personally manage the company, as he intends to leave day-to-day operational matters to the board and Stratos management, subject to his oversight. See *Vizada Reply* at 2.

¹⁸ See *Telenor Reply* at 3-9; *Vizada Reply* at 7-20.

¹⁹ *AMRC*, 16 FCC Rcd at 21436, ¶ 10; see also *Lockheed Martin*, 14 FCC Rcd at 15830-31, 15833, ¶¶ 27, 32; *News Int'l*, 97 FCC 2d at 355, ¶ 16.

²⁰ *Intermountain Microwave*, 12 FCC 2d 559, 560 (1963); *Volunteers in Technical Assistance*, 12 FCC Rcd 13995, 13999, ¶ 13 (1997).

examines whether a third party has control over the following elements of the licensee's business:

- the right to use facilities and equipment
- management of daily operations
- deciding and carrying out policy decisions, including preparing FCC applications
- employing, supervising, and dismissing personnel
- paying financing obligations, including expenses arising out of operations
- extracting monies or profits from the licensee's operations

In analyzing allegations of *de facto* control, the Commission does not speculate about how or why people or entities may act in the future.²¹ Specifically, the Commission does not assume or infer that companies and individuals will act in a manner inconsistent with their representations to the Commission, or will be controlled in a manner different from the contractual terms presented to the Commission.²² Rather, the Commission examines existing contractual and legal documents, and ascertainable facts, and then determines (i) whether rights that exist (as a matter of contract or law) provide a mechanism by which someone can exercise control, and (ii) whether parties have already acted in a manner where one party had usurped or abdicated control.²³ No such rights exist and there is no record evidence that any such actions have occurred here.

²¹ *William S. Paley*, 1 FCC Rcd 1025, 1026 (1986) (“Unlike a *de jure* transfer of control, where the mere potential to exercise majority vote requires prior Commission consent . . . a finding that a *de facto* transfer of control has occurred depends largely upon a review of the actual operation of the licensee – *not upon the potential for some hypothetical future exercise of control.*”) (emphasis added); *see also Fox I*, 10 FCC Rcd at 8516, ¶¶ 159-60 (“We have held that a showing of *de facto* control must rely on facts and events that have occurred and not on speculation as to what might occur in the future.”).

²² *News Int'l*, 97 FCC 2d at 356, 358, ¶¶ 17, 21; *Lockheed Martin*, 14 FCC Rcd at 5832, ¶ 30.

²³ *See News Int'l*, 97 FCC 2d at 356, ¶ 17 (“This is not a case where we can review retrospectively the operations of a corporation and the conduct of its principals Rather, we must review prospectively the materials before us and representations as to future conduct [W]e believe it is not appropriate to infer, in the absence of information to the contrary, that [the party asserting that it will be in control] will not faithfully carry out its representations or that it will be controlled and operated in a manner that differs from the agreement under consideration.”); *Manahawkin Comm. Corp.*, 16 FCC Rcd 342, 346, ¶¶ 8, 14 (2001) (“*Manahawkin*”) (“In ascertaining whether a prohibited transfer of control has occurred, we have traditionally looked . . . to see whether a new entity or individual has obtained the right to determine the basic operating policies of the station.”) (distinguishing the case at hand from precedent in which the Commission found an unauthorized transfer of control because the precedent involved a licensee who abdicated control of the station and a third party that assumed

(Continued...)

Inmarsat Finance does not have the right to dominate Stratos with respect to *a single one of the Intermountain Microwave* criteria. It does not have any equity or debt interests in Stratos. It does not have the right to appoint any Stratos director or officer. In fact, while the Trust owns and controls Stratos, Inmarsat Finance has no contractual or other legal rights whatsoever that provide it with negative or positive control over Stratos.

Control over all of the relevant *Intermountain Microwave* activities rests ultimately with the Trustee, who elects the Stratos board. For example, the Stratos board, as controlled by the Trustee, decides who the officers will be. Through those officers, the board (which is controlled by the Trustee), will determine the daily operations, the use of facilities and equipment, and the payment of obligations. Even the Trust beneficiary (CIP) is not entitled to receive any profits from the operation of Stratos unless and until the Stratos board (with whom Inmasat and CIP may not communicate) declares and pays dividends.²⁴ Thus, as long as the Trust owns (and controls) Stratos, neither CIP nor Inmarsat Finance determines when or how Stratos spends money, pays its bills, or allocates its profits.²⁵

Significantly, the terms of the Trust require the Trustee (and not some third party) to maintain *de facto* control, and expressly require the Trustee to comply with all Commission requirements, rules, and policies, including the requirement to seek prior Commission consent to

control); *VisionStar, Inc. and Echostar VisionStar Corp.*, 16 FCC Rcd 19187, 19194-95, ¶¶ 24-26 (2001) (examining the rights conferred by the contracts for the transaction at issue in conjunction with whether the facts indicated a usurpation of control and concluding: “Premature transfer of control requires actions on the part of the transferee in addition to the contractual rights granted here. We do not find that there has been an assumption of control by [the investor] and thus, the rights granted to [the investor] in the Shareholders’ Agreement when taken together with the lack of interference in [licensee’s] business by [the investor] does not indicate an unauthorized transfer of control.”).

²⁴ Stratos has never declared a dividend in its history.

²⁵ Vizada is mistaken when it indicates that Stratos will

Stratos is not and will not become a party to the Facilities Agreement.

Of course, neither CIP Canada (nor Inmasat Finance) has any power to cause Stratos to do anything while the Trust holds the Stratos shares.

any transfer of control.²⁶ There is no record basis to conclude that the Trustee will not fulfill his fiduciary and contractual obligations to do so, but rather will abdicate control to someone else.²⁷ The Commission held in *Lockheed Martin* that six directors of Comsat with alleged ties to Lockheed would not be presumed to breach their fiduciary obligations without a showing of “sufficient particularized facts.”²⁸ Here, no Petitioner has presented even one fact to support an allegation that the Trustee or any Stratos Board member will breach his or her fiduciary or contractual obligations.

No Other Aspect of the Transaction Changes the Control Analysis

Unable to point to any aspect of the Trust that vests control in anyone but the Trustee, the Petitioners resort to contending that extraneous factors somehow result in Inmarsat (rather than the Trustee) having control over Stratos. However, the only aspect involving Stratos they can point to is the absence of any prohibition on Inmarsat management talking to Stratos management. In addition, they highlight certain aspects of the transaction between Inmarsat and CIP (but not with Stratos or the Trust).

I. Communications with Stratos Management

At the outset, the extent to which Stratos management communicates with Inmarsat is within the control of the Stratos board (which is controlled by the Trustee). They have a fiduciary duty to ensure that Stratos is managed independently of Inmarsat. Petitioners nonetheless complain that Inmarsat is not *precluded* from communicating with Stratos management and therefore might seek to use its existing and prospective relationship with Stratos to influence Stratos decisions.²⁹ As noted above, the Commission’s precedents make it clear that “influence” does not mean “control” unless there is the power to dominate the corporate affairs of the licensee. The ability to talk simply does not provide the power to dominate.

Commission precedent allows entities with a financial interest in a licensee to have far greater rights than Inmarsat Finance has in this case. Specifically, Commission precedent would allow Inmarsat Finance, without being deemed to have “control,” to have at

²⁶ Trust Agreement at §§ 2(a), 5(e), 11(h); *Fox I*, 10 FCC Rcd at 8516, ¶ 159 (contractual provisions designed to ensure where control rests are relevant in *de facto* control analysis).

²⁷ See *Lockheed Martin*, 14 FCC Rcd at 15835-36, ¶ 37. Iridium’s assertion that Mr. Franklin is “a figurehead with no power to run Stratos or to second guess Stratos management,” Iridium Reply at 10, is wholly unsupported, and is simply wrong for the reasons provided above.

²⁸ See *Lockheed Martin*, 14 FCC Rcd at 15835-36, ¶ 37.

²⁹ See Vizada Reply at 14-17; Telenor Reply at 7-8.

least one seat on the Stratos board³⁰ and therefore communicate with other Stratos board members, and with Stratos officers and managers. For example, in *Lockheed Martin*, the Commission found no *de facto* control of Comsat even though Lockheed had (i) 3 of 15 board seats, (ii) a 49% equity stake, and (iii) a contractual obligation to acquire the remaining 51% following statutory amendments. The Commission recognized that Lockheed's three appointees to the board would be talking regularly with the other Comsat directors and officers and that those Comsat officials would appreciate that Lockheed was obligated to acquire the remaining 51% of Comsat. However, the Commission concluded that these "circumstances do not constitute actual control. . . ."³¹ Moreover, in *AMRC*, the Commission found no *de facto* control by an entity which had (i) provided 100% of critical funding, (ii) an option to acquire a majority equity stake and *de jure* control, (iii) its CEO as one of three board members of the licensee (who would obviously talk with the other board members and senior management), and (iv) representation among the officers of the licensee.³²

In sharp contrast to those cases, Inmarsat Finance has no Stratos board seats, a prohibition on talking with the Stratos Board, no equity or debt stake in Stratos, and no contractual obligation to acquire Stratos stock. Moreover, the Trustee will ensure that the Stratos Board and management remain independent.³³

³⁰ *AMRC*, 16 FCC Rcd at 21435, ¶ 10 (one of three seats); *Lockheed Martin*, 14 FCC Rcd at 15833, ¶ 33 (three of fifteen seats); *FTC*, 75 FCC 2d at 23, n.19 (one of four seats).

³¹ *Lockheed Martin*, 14 FCC Rcd at 15838, ¶ 40.

³² *AMRC*, 16 FCC Rcd at 21435-36, ¶ 10.

³³ Indeed, despite Vizada's assertion, Vizada Reply at 19, that the Media Bureau would never allow a person to have the level of "influence" asserted here, the Media Bureau found no *de facto* control by an entity who (before receiving FCC consent) had an opportunity to exert far greater influence by: (i) providing substantially all of the programming to a station, (ii) acquiring ownership of almost all station assets (except FCC licenses), (iii) paying substantially all the purchase price, (iv) acquiring assignable option to acquire FCC licenses, (v) employing almost all station staff, (vi) bearing economic risk of station operations by receiving all revenues and bearing all expenses, and (vii) negotiating acquisition terms. See *Fant Broadcasting*, 19 FCC Rcd 8229 (2004) ("*Fant*") (affirming underlying Media Bureau decision for the reasons provided therein).

The *Edwards* case that Vizada references, Vizada Reply at 18, is readily distinguishable because it turned on *actual conduct* demonstrating that the proposed transferee did not make its own decisions. *Edwards*, 16 FCC Rcd 22236, 22249-50, ¶¶ 23-27 (2001) (finding that the proposed transferee lacked the most basic knowledge of the transaction and had behaved in a manner adverse to a reasonable businessman's interests over the course of the transaction). Moreover, *Edwards* is no longer controlling. Since *Edwards*, the full Commission's decision in *Fant* affirmed the underlying Media Bureau decision that *Edwards* indicated was not yet binding.

2. Existence of the Option with CIP

Contrary to what the Petitioners assert,³⁴ it is not certain that Inmarsat Finance will exercise its option with CIP to acquire control of Stratos after April 2009. In fact, the transaction documents expressly provide for the possibility that CIP or another party may acquire control of Stratos from the Trust.³⁵

Inmarsat Finance's option thus is not a cognizable current ownership interest for purposes of Section 310(d), and is not evidence of control.³⁶ Furthermore, as the Commission has previously found, the amount of the exercise price does not "change the fact that the option may not be exercised."³⁷ Even if the option exercise consideration were relevant, the calculation must include all assumed liabilities. In this case, the option is to acquire control of Stratos indirectly, by acquiring shares of CIP UK (the parent company of CIP Canada). CIP UK's liabilities, including its indebtedness to Inmarsat Finance (which Inmarsat Finance will indirectly assume and which CIP itself no longer will carry as a liability for accounting purposes), thus properly should be taken into account in calculating the "price" of exercising the option.

Moreover, Inmarsat Finance's ability to acquire Stratos is contingent on exercising the option before it expires on December 31, 2010, and on the receipt of Commission and other requisite governmental consents. Significantly, CIP cannot "force" Inmarsat Finance to acquire Stratos if Inmarsat Finance does not decide to exercise its option.³⁸ As such, the existence of the option is "not evidence" of control by Inmarsat Finance.³⁹

³⁴ See Telenor Reply at 9-13; Vizada Reply at 20-21.

³⁵ See, e.g., Trust Agreement at §§ 4(d), 5(a), 5(c), 9(a), 9(b).

³⁶ *Manahawkin*, 16 FCC Rcd at 348, ¶ 12.

³⁷ *Richard R. Zaragoza*, 14 FCC Rcd 1732, 1737, ¶ 20 (1998) (finding that upfront payment of 99.8% of the purchase price does not "change the fact that the option may not be exercised" and rejecting argument that nominal payment at exercise warrants different conclusion) (cited with approval in *Manahawkin*); *GTE Corp.*, 15 FCC Rcd 14032, ¶¶ 62-63 (2000) (where conversion right is contingent, pre-paid nature of option does not render right a current equity interest) (also cited with approval in *Manahawkin*).

³⁸ See *Manahawkin*, 16 FCC Rcd at 348, ¶ 12.

³⁹ See *id.*

3. Inmarsat Finance's Loan to CIP UK

Iridium erroneously asserts that Inmarsat has a debt interest in *Stratos* that should be considered equity.⁴⁰ Critically, the Inmarsat Finance loan is to CIP UK, not Stratos. Accordingly, the loan to CIP UK is simply not relevant to *de facto* control of Stratos.⁴¹

But even if that loan were relevant, Commission precedent is clear that a large financial investment does not by itself convey control.⁴² Under Commission precedent, it is highly relevant that a transaction, as here, specifically has been restricted to prevent the exercise of control.⁴³ The Commission “can [not] find improper *de facto* control” absent “extrinsic evidence that a financier’s leverage has manifested itself in the actual operations of a licensee.”⁴⁴

Under the terms of this transaction, the Stratos board (which the Trustee controls) retains full authority over the finances and operations of Stratos. [REDACTED]

[REDACTED]⁴⁵ Significantly, neither CIP nor Inmarsat Finance may determine when, whether, how much, and on what terms Stratos may seek to raise additional capital while the Trust owns and controls Stratos.

Moreover, the terms of Inmarsat Finance’s loan to CIP UK are consistent with commercial debt instruments, including, among other things, the limitations on how the funds Inmarsat Finance provides can be used (limited to acquiring Stratos shares), the ability of CIP to

⁴⁰ Iridium Petition at 7 n.15.

⁴¹ The Facilities Agreement therefore does not, as Vizada asserts, “vitiating the purported insulation of the trust.” Vizada Reply at 8. Moreover, Vizada misreads the Option Agreement when it asserts that a certain covenant allows CIP to control Stratos while the Trust is in existence. *Id.* at 12, n.24. That covenant expressly applies at a future time—only *after* the Commission has approved the transfer of the Stratos shares from the Trust to CIP UK, as a possible element in the second stage of this transaction. Option Agreement at § 7.4.5. Nor is it relevant to the Trustee’s control of Stratos whether Inmarsat Finance has appropriate contractual remedies against CIP if CIP does not honor its contractual obligations to Inmarsat Finance. *Cf.* Vizada Reply at 11 n.21.

⁴² *Fox I*, 10 FCC Rcd at 8515-16, ¶ 158-60 (99% of financing did not provide control).

⁴³ *Id.* at 8516, ¶ 159.

⁴⁴ *Id.* at 8516, ¶ 160.

⁴⁵ [REDACTED]

fund its acquisition costs with proceeds of the loan, deferral of loan repayments in the early years of the loan, and requirements that available excess cash be applied to the loan balance.⁴⁶ CIP UK retains the ability and the right to repay the loan over its ten-year term if Inmarsat Finance does not exercise its option and acquire control over Stratos before December 2010. In fact, the parties anticipate that, after the Trust terminates, free cash flow from Stratos would provide CIP the means to satisfy its debt service obligations to Inmarsat Finance. Alternatively, CIP could either (i) refinance the debt with a new loan from a third party; or (ii) sell Stratos and repay the loan with the proceeds from the sale.

Petitioners' focus on CIP's capital structure and their suggestion that Inmarsat Finance's loan to CIP should be recharacterized as "equity" for purposes of examining *de facto* control⁴⁷ suffer from a fundamental flaw. Even if Inmarsat were deemed (*arguendo*) to have "control" of CIP, this would be irrelevant to "control" of Stratos because CIP itself does not have control of Stratos.⁴⁸

Finally, CIP's obligation to pass through to Inmarsat Finance certain financial information regarding Stratos, such as quarterly and annual balance sheets and statements of operations and cash flow, is a standard term in a commercial loan agreement.⁴⁹ Moreover, that information will be publicly available to all, because Stratos will continue to be subject to securities reporting obligations of the SEC and the Toronto Stock Exchange by virtue of its existing public bonds. Even if the Trustee were providing this information only to CIP (or Inmarsat Finance), doing so would be permissible under Commission trust precedent.⁵⁰ This obligation of CIP to Inmarsat Finance has no bearing on the Trustee's control of Stratos.

⁴⁶ Cf. Iridium Reply at 8. [REDACTED]

⁴⁷ See Iridium Reply at 7, n.15; see also Vizada Reply at 12, n.25.

⁴⁸ Moreover, the Commission has found that supplying virtually all of the capital for an investment is not enough to convey "control" for Section 310(d) purposes. *Fox I*, 10 FCC Rcd at 8515-16 (99% of financing did not provide control). As noted below, the parties have provided full transparency into the source of capital for this transaction. See *infra* page 13 ("The Applications Provide All Relevant Information").

⁴⁹ Cf. Vizada Reply at 8-9.

⁵⁰ *Tender Offer Policy Statement*, at ¶ 65 ("Because the mere receipt of written reports from the trustee would not provide the offeror with the means by which to influence corporate affairs, we do not find it necessary to prohibit the trustee from sending such reports to the offeror informing him or her about matters related to the company.").

4. Involvement in Negotiating and Structuring the Transaction

The Commission has recognized that it is in the public interest to encourage entities to identify transaction opportunities, bring in others who will acquire control, and participate with the licensee in ensuring that the transaction is successfully consummated.⁵¹ Thus, an entity may engage in those types of activities without being deemed in control, even where it may not be able to acquire the target company itself.⁵²

No one forced Stratos or CIP to engage in this transaction.⁵³ Stratos' Board and management and CIP's principals are sophisticated businesspeople with extensive experience in the field of satellite communications. Each of Stratos and CIP was actively involved in negotiating and structuring the transaction. In fact, each was represented by multiple law firms, and each contributed substantially and substantively to the terms of the transaction and the transaction documents.⁵⁴ For its own part, Inmarsat has a business interest in ensuring that the transaction is consistent with its contractual obligations, and ensuring that the structure is suitable to support the debt financing that Inmarsat Finance has committed to provide. The record provides no basis on which to conclude that the parties are not able to fulfill their responsibilities and obligations under the transaction documents, or to the Commission.

* * * * *

In summary, there is no basis for concluding that Inmarsat Finance would have *de facto* control over Stratos, because it has no contractual or other legal rights that provide a mechanism by which it could exercise control. Inmarsat Finance will hold no equity or debt interest in Stratos, will have no seat on the Stratos Board, and will have no ability to select Stratos management. The continuation of Inmarsat's existing ability to speak with Stratos management does not, under Commission precedent, provide *de facto* control. Inmarsat Finance's relationship with CIP, including its option to acquire CIP UK and its loan to CIP UK, can not provide Inmarsat Finance with control over Stratos, because CIP itself does not have control over Stratos. Moreover, the Commission has found that far greater levels of influence not constitute *de facto* control (or raise "real party in interest" issues). As in prior cases, the Commission should examine the absence of any legal or contractual rights by which Inmarsat Finance could exercise control over Stratos, and also note the complete absence of

⁵¹ *Paramount Stations Group of Kerrville, Inc.*, 12 FCC Rcd 6135, 6142-44 (1997).

⁵² *Id.*

⁵³ *See id.*

⁵⁴ This was true as well in the case of the Structure Memo, which was the result of a lengthy negotiation in which all parties participated, and was not the product of one party's unilateral actions. *Cf. Iridium Reply* at 6.

“particularized facts to overcome the presumption that all of the directors [and the Trustee] will fulfill their fiduciary obligations.”⁵⁵

The Applications Provide All Relevant Information

The Applications properly list the Trustee as the recipient of *de jure* control, and no Petitioner contends that any other party will hold *de jure* control. Further, Petitioners cite no basis for the proposal that the parties should have ignored the holder of *de jure* control in favor of naming as the applicant a participant who may (or may not) be deemed to have *de facto* control under a case-by-case “totality of circumstances” test.⁵⁶ Even where there is a controlling party in addition to the named transferee (which is not the case here), it is common practice before the Commission to name the entity directly acquiring the voting stock as the “transferee” on the application forms.⁵⁷

Here, the parties provided the relevant information on the record about the role of each participant, including Inmarsat Finance, and thus have provided the Commission the basis to make an appropriate determination. The Public Notice in fact specifically relates the position of the parties that Inmarsat Finance “will not be able to exercise control over the management and affairs of Stratos” and identifies Inmarsat Finance as a party to the transaction. Moreover, the Application asserts that even if the Commission were to address the qualifications of CIP Canada or Inmarsat Finance at this time, there is no public interest concern that would preclude approval of this transaction. Furthermore, almost the entirety of the pleadings filed in response to the Public Notice address the consequences of Inmarsat Finance’s involvement, including competitive considerations, arising from its *alleged* control.⁵⁸

⁵⁵ *Lockheed Martin*, 14 FCC Rcd at 15835, ¶ 37.

⁵⁶ See *Vizada Reply* at 6; *Iridium Reply* at 12; *Telenor Reply* at 2.

⁵⁷ For example, when Inceptum applied for consent to acquire control of TSS, the applicant was Inceptum, even though Apax would also control TSS. See Public Notice, *Authorizations Granted; Telenor ASA, Transferor, and Inceptum 1, AS, Transferee*, IB Docket No. 06-225, DA 07-2163 (rel. May 23, 2007) (“*Inceptum Order*”); *Telenor ASA, Transferor, and Inceptum 1, AS, Transferee, Consolidated Application*, IB Docket No. 06-225 (filed Nov. 29, 2006).

⁵⁸ In circumstances involving an application to transfer control, where disagreement exists whether a party will have *de facto* control, the Commission does not, as Petitioners urge, require that the applications be re-filed. See *Vizada Reply* at 4. Rather, if the Commission cannot readily resolve the *de facto* control allegations raised here, as in prior cases, the Commission may grant the *application as filed* by assuming for the sake of argument that Inmarsat Finance would have *de facto* control, and addressing the relevant public interest considerations based on the existing record. See *VoiceStream Wireless Corp.*, 16 FCC Rcd 9779, 9814-15, ¶ 58 (2001); *General Electric Capital Corp.*, 16 FCC Rcd 17575, 17590-91, ¶ 34 (2001).

Finally, there is no “real party in interest” issue. The Commission’s real party in interest policy revolves around the involvement of third parties who have *de facto* control, but whose roles are not fully identified. Inmarsat Finance’s role has been fully disclosed on the record, and the Public Notice expressly recognizes Inmarsat Finance’s role. In any event, the real-party-in-interest test is the same as the *de facto* control test, and Inmarsat Finance does not have *de facto* control for the reasons provided above.

Approval of This Transaction Does Not Allow Others to Avoid FCC Scrutiny

Contrary to Vizada’s assertion, approving this transaction simply will not provide a means by which foreign investors in Commission licensees could evade Commission review.⁵⁹ The Commission may consider the interests of a beneficiary of an irrevocable voting trust for alien ownership purposes under Section 310(b)(4).⁶⁰ Moreover, the Commission requires disclosure of the source of debt to facilitate review of a transaction and avoid any “skirting” of Section 310(b)(4).⁶¹

Of course, there has been no evasion of Commission or public scrutiny here. The Application provided full disclosure about the source of financing for this transaction. In fact, the aspect of the Commission’s Public Notice regarding Section 310(b)(4) clearly sets out in considerable detail the foreign ownership in the Trust beneficiary (CIP Canada), and highlights that the financing to CIP is provided by Inmarsat Finance.⁶² Since Petitioners have focused almost exclusively on Inmarsat Finance and CIP -- rather than the Trust and Trustee -- there can be no doubt that the Commission’s Public Notice was sufficient.

Approval of this Transaction Serves the Public Interest

Iridium argues that this transaction is not in the public interest because Stratos’ management will have the incentive to favor Inmarsat instead of investing in the distribution of “new” Iridium services.⁶³ There are several reasons why this is not a valid public interest concern. First, Stratos has a management incentive plan that encourages Stratos management to maximize revenues and earnings from all of its services (Iridium, VSAT, other), not simply Inmarsat services.⁶⁴ Second, to the extent that Stratos management is not operating

⁵⁹ Vizada Reply at 4, 19.

⁶⁰ See *Foreign Ownership Guidelines for FCC Common Carriers and Aeronautical Radio Licenses*, DA 04-3610, ¶ 14 (2004); *PrimeMedia Broadcasting*, 3 FCC Rcd 4293, 4295, ¶¶ 12-13 (1998); see also *Teleport Transmission Holdings*, 8 FCC Rcd 3063, 3064, ¶¶ 7-8 (1993).

⁶¹ *NextWave Personal Comm.*, 12 FCC Rcd 2030, 2049 ¶ 42 (1997).

⁶² *Public Notice* at 8.

⁶³ See Iridium Reply at 11-16.

⁶⁴ See Stratos Opposition at 19, 26.

independently of Inmarsat and in the best interests of Stratos, the Trustee has a fiduciary duty to take action, which would include causing the replacement of Stratos management by the Board. Third, Iridium offered no response to the only data in the record on this issue, demonstrating that Stratos has increased Iridium subscribership substantially more than Inmarsat subscribership since announcing this transaction.⁶⁵ Fourth, Iridium has not explained why any alleged failure of Stratos to aggressively market Iridium services could not readily be picked up by Iridium itself or any of the 30 other Iridium distributors since Stratos is merely a non-facilities-based reseller. Finally, Iridium has not demonstrated how the public interest could be harmed since any Stratos customer for Iridium services could readily buy from other distributors or Iridium itself.

Accordingly, there is no basis for Iridium's suggestion of a non-discrimination condition.⁶⁶ Iridium offered no precedent for imposing a non-discrimination condition on a non-facilities based reseller. Iridium's sole reliance on *McCaw* is completely misplaced. In that case, AT&T, which was still a major supplier of cellular network equipment to cellular companies, proposed to acquire McCaw Cellular, a leading cellular provider. Opponents raised a laundry list of concerns with respect to potential AT&T discrimination between McCaw and competing cellular companies. The Commission rejected all of these concerns, except for a requirement that AT&T not discriminate in the provision of "aftermarket" services (e.g., maintenance and software upgrades) that were already contracted for as of the effective date of the Order because those customers were "locked-in" to using AT&T to service existing network equipment that had been purchased. No non-discrimination condition was placed on AT&T's cellular network equipment business with respect to sales of network equipment (or even aftermarket service with respect to future sales of equipment).⁶⁷ In this case, Stratos has no ability to "lock-in" customers using Iridium service.

Vizada further complains that a future vertical combination involving Inmarsat Finance and Stratos would raise competitive issues, and not serve the public interest.⁶⁸ As an initial matter, it is noteworthy that concern springs from a competitor, not a consumer. In any event, Vizada's concern about the second possible step of this transaction is entirely speculative and is not before the Commission. The party that will control Stratos as a result of the transaction before the Commission is the Trustee, not Inmarsat Finance or CIP Canada. Moreover, even if Inmarsat Finance were to acquire Stratos, Vizada has not demonstrated how doing so would harm consumers.⁶⁹ Vizada simply states the truism that merger transactions can, in certain circumstances, present a risk of harm to consumers. In this case, however, no petitioner has demonstrated that the possible future acquisition of Stratos by Inmarsat Finance

⁶⁵ Stratos Opposition at 26.

⁶⁶ Iridium Petition at 18.

⁶⁷ *McCaw/AT&T*, 9 FCC Rcd 5836, 5868-71, ¶¶ 52-56, 184 (1994).

⁶⁸ See Vizada Reply at 24-27.

⁶⁹ See Stratos Opposition at 27; Inmarsat Finance Opposition at 22-23.

would harm consumers. To the contrary, to the extent that Inmarsat can distribute its services more efficiently if it does so directly, and the acquisition of Stratos is the most efficient way for Inmarsat to distribute its services directly, a potential second acquisition by Inmarsat Finance would advance the public interest.⁷⁰

Conclusion

The Commission should grant the pending application to transfer control of Stratos to the Trustee. The subsequent transfer of control of Stratos from the Trustee to Inmarsat Finance, CIP or a third party will require a second application and prior Commission approval. Accordingly, the only issue here is whether the Trustee will have ultimate control over Stratos. There is no evidence in the record that the Trustee lacks the basic Commission qualifications, and no record basis on which to conclude that the Trustee will abdicate his responsibilities and cede control over Stratos to Inmarsat Finance, CIP Canada or another third party. Further, there is no evidence that consumers could be harmed by this transaction.⁷¹ To the contrary, there is every indication that Stratos will continue with “business as usual” under the control of the Trustee, and remain a vibrant provider of a wide range of MSS, VSAT and microwave services. The parties therefore urge the Bureau to grant the Applications promptly.

⁷⁰ See Inmarsat Finance Opposition at 12-14 and 24-27.

⁷¹ Thus, Commission precedent requires no further showing regarding public interest benefits. *Inceptum Order*, DA 07-2163 (rel. May 23, 2007) (“There is no evidence in the record to suggest that Inceptum lacks the basic qualifications to be the transferee of the licenses and authorizations held by TSI.”).

Respectfully submitted,

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