

HOGAN & HARTSON

December 8, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC. 20554

**Re: Transfer of Control of Stratos Global Corporation and its
Subsidiaries to Inmarsat, plc, IB Docket No. 08-143, DA 08-1659**

FCC File Nos. ITC-T/C-20080618-00275, ITC-T/C-20080618-00276,
ITC-T/C-20080618-00818, ITC-T/C-20080618-00819, ITC-T/C-
20080618-00820, ITC-T/C-20080618-00821, ISP-PDR-20080618-00013,
0003453455

Ex Parte Presentation

Dear Ms. Dortch:

Vizada, Inc. and VIZADA Services LLC (together, "Vizada") submit this response to new arguments of Inmarsat plc ("Inmarsat"), supported by Stratos Global Corporation ("Stratos"), set forth in their ex parte letter of October 9 and ex parte presentation to the Commission staff on October 28. ^{1/} Those Inmarsat claims are fundamentally inconsistent with marketplace facts and Inmarsat's own characterization of the MSS industry outside the context of this proceeding. Inmarsat's arguments only further demonstrate why the Commission should deny this application, or alternatively designate it for a hearing where Inmarsat would be required to present a full factual record on issues central to its burden of proof under the Communications Act.

^{1/} See Letter of Inmarsat plc and Stratos Global Corporation, IB Docket No. 08-143 (filed Oct. 9, 2008) ("Ex Parte Letter"); Letter of Inmarsat plc and Stratos Global Corporation, IB Docket No. 08-143 (filed Oct. 29, 2008) ("Ex Parte Presentation"). Revealingly, the Trustee that currently owns Stratos did not participate in these filings. In previous proceedings Vizada warned of the danger that Inmarsat would exercise unlawful de facto control over Stratos, notwithstanding the presence of the Trustee. See Vizada Petition to Deny, IB Docket No. 07-73, at 3-21 (filed June 29, 2007). Plainly, Inmarsat is dictating the factual and legal positions taken by the Trustee (and Stratos) in this proceeding.

INTRODUCTION

Inmarsat acknowledges that its proposed acquisition of Stratos from the current Trustee cannot close until next April at the earliest. Nevertheless, Inmarsat urges the Commission to rush to judgment, gloss over irrefutable marketplace facts, and grant this application without taking the time to carefully examine:

1. Inmarsat's current dominant position in important relevant mobile satellite markets;
2. the harmful consequences to end users if Inmarsat is allowed to acquire and consolidate Stratos (which otherwise would be Inmarsat's largest horizontal competitor in the distribution of MSS services post-April 2009); and
3. the vital need for structural safeguards to protect competition for end users if this transaction nevertheless is allowed to proceed.

Each of these elements is crucial to the public interest analysis required by the Communications Act. ^{2/} Each of them requires a complete record and full Commission review. None of them can be short-circuited.

The necessary starting point is a requirement that Inmarsat produce the data and documents that can permit the Commission to engage in this analysis. At a minimum, the Commission should insist that Inmarsat provide it with copies of (i) all documents discussing its proposed acquisition of Stratos, and (ii) all other documents produced by or for Inmarsat since June 2006 (a year before it announced its proposed transaction to acquire Stratos) discussing competition, market shares, and competitive entry and expansion of other operators, in the MSS industry. The Commission can establish an appropriate proprietary order to govern access to those documents. This level of inquiry, at the least, is necessary for the Commission to meet its obligations under the Communications Act. ^{3/}

^{2/} See, e.g., *EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., Hearing Designation Order*, 17 FCC Rcd 20559, 20574-75 ¶¶25-27 (2002) (“*DirectTV-EchoStar Hearing Designation Order*”).

^{3/} In that regard, just a few days ago Inmarsat advised the Commission that “it was considering potential changes to the corporate structure with respect to the licenses that are the subject of this proceeding” and anticipated further “suitable filings” in that event. See Letter of Inmarsat plc, IB Docket No. 08-143 (filed Dec. 4, 2008). This message further underscores why the Commission similarly should require Inmarsat to make “suitable filings” regarding its position in various MSS market segments, including relevant documents in its possession, to permit adequate public interest review.

Vizada already has demonstrated that Inmarsat holds dominant market positions — with no material facilities-based competition — in key maritime, aeronautical and land mobile wholesale markets. Each of these individual markets is crucial to the customers who rely on the particular services; collectively they represent over 57% of Inmarsat’s current revenues.

The record on these matters is strong, which is why Inmarsat would prefer that the Commission ignore it. Inmarsat’s dominant market positions have been carefully analyzed by one of the leading experts in the MSS industry, Dr. Tim Farrar of Telecom, Media and Finance Associates, Inc. Vizada has shown how Inmarsat’s acquisition of Stratos would give it an increased incentive and ability to exploit that dominance to reduce competition in the underlying retail markets, and thereby to raise prices to end users.

Inmarsat’s response here at the Commission has been to criticize Dr. Farrar’s analysis by taking his statements out of context and misrepresenting his conclusions. Significantly, however, Inmarsat does not provide — let alone support with data and analysis — alternative market definitions of its own. Nor does Inmarsat mention its own comments elsewhere confirming its dominant position in multiple MSS market segments. To be sure, as Dr. Farrar notes, in a few subsegments of each category Inmarsat’s shares are lower and significant competition exists. The problem is that in other larger segments — collectively making up over half of Inmarsat’s revenues — effective competition does not exist.

When not before the Commission, Inmarsat makes essentially the same point as Vizada and Dr. Farrar. Inmarsat notes that other MSS operators suffer serious service coverage gaps, technical weaknesses, and related problems that prevent them from being effective competitors in key markets. Inmarsat is assuming that the Commission will not investigate these inconsistencies, both those in public statements, ^{4/} and those made in other contexts where Inmarsat cloaks its comments with an unjustified claim of confidentiality.

In addition to unfairly attacking Dr. Farrar, Inmarsat glibly states that, even assuming it enjoys market power, this is irrelevant because after April 2009 it may sell to relevant end users anyway without acquiring Stratos. But this argument ignores the very material difference between buying (and thereby eliminating all potential competition with) its largest independent distributor, or instead entering a market *de novo* in head-to-head competition with Stratos and other established distributors. Inmarsat asks the Commission to find that customers would not benefit greatly from the horizontal competition between Inmarsat and an independent Stratos -- or be harmed by elimination of that competition.

This is most significant. For example, Inmarsat asks the Commission to ignore the harm to competition that would arise from its potential abuse of confidential customer

^{4/} See, e.g., Vizada Petition to Deny, IB Docket No. 08-143, at 24-26 (“Vizada Petition”).

information it routinely receives from distributors of its monopoly input services. Inmarsat similarly ignores the harm to competition if it discriminates against other distributors in the release of important information regarding those services, or in the deployment of new MSS network assets or technology — or in particular, in how it prices services to unaffiliated competitors.

These structural market problems explain why structural safeguards are needed to prevent anti-competitive conduct after April 2009, when Inmarsat becomes more free to participate in downstream markets in competition with independent distributors of its dominant services. Without such safeguards, Inmarsat would act on its evident incentives and abilities to reduce competition and increase price, just as would any other dominant firm.

But this is all the more true if Inmarsat is allowed to acquire and thus eliminate Stratos, the largest independent distributor Inmarsat otherwise would face in the market. As discussed below, Inmarsat's acquisition of Stratos would increase both Inmarsat's incentives and its ability to discriminate against other firms dependent on the company's dominant wholesale services. End users dependent on Inmarsat services in key markets will see higher prices and lower service quality due to the reduction in the intra-brand competition that exists today.

Vizada believes that the Commission should deny this application, leaving the Trustee free to operate Stratos independently of Inmarsat or sell Stratos to a third party. While undoubtedly such a decision would require Inmarsat to revise its business strategy, the company recognized from the outset that the Commission might not approve this transaction. Indeed, Inmarsat made clear that it might never exercise the option to acquire Stratos. These future contingencies were critical pieces of Inmarsat's argument for why the Commission should not find that the company would exercise unlawful de facto control of Stratos during the period when Stratos was owned by the Trust. ^{5/} If the Commission now disallows Inmarsat's acquisition of Stratos, that is an outcome that is both in the public interest and entirely foreseeable to Inmarsat, notwithstanding Inmarsat's "revisionist history" attempting to suggest that this application, and the Commission's approval of it, is little more than a formality. ^{6/}

^{5/} See, e.g., Application, IB Docket No. 07-73, at 9, 12-14 (filed Apr. 30, 2007). The applicants emphasized at the time: "Since there is no application to transfer control to anyone other than the Trustee, and since the eventual acquirer is not known, consideration of the qualifications of CIP Canada or Inmarsat Finance would be premature. Indeed, it is likely that the competitive environment and other public interest considerations will be different in April 2009 than they are in April 2007." *Id* at 14.

^{6/} In that regard, it is striking (and telling) that Inmarsat continues to claim that the Commission already has fully addressed the competitive implications of the company's acquisition of Stratos. See Ex Parte Letter at 2. The Commission has done no such thing, nor could it given how strongly Inmarsat emphasized that this issue would not be ripe until and unless it filed this further application with the Commission to exercise its option. Vizada relied on Inmarsat's representation and deferred a full discussion of market issues until this proceeding, just as Inmarsat (and Stratos) said was required. See Vizada

Alternatively, if the Stratos acquisition is to be allowed, the Commission at least must condition its approval on implementation of structural safeguards to reduce the ability of Inmarsat to harm competition once it has eliminated Stratos as an independent company. It would be critical for Inmarsat's wholesale operations to deal at arms' length and on a non-discriminatory basis with all distributors, both its affiliate Stratos and others such as Vizada. This separation, best achieved through mandatory structural means, is crucial to protect competition that otherwise would be harmed by Inmarsat's abuse of proprietary information of other firms such as Vizada, and by affirmative discrimination in favor of Stratos 7/.

These matters are discussed in more detail below.

I. INMARSAT DISTORTS VIZADA'S MARKET ANALYSIS RATHER THAN PRESENT AND DEFEND ANY DETAILED MARKET ANALYSIS OF ITS OWN

A. Inmarsat's Continued Failure to Present Relevant Market Data and Analysis

Inmarsat (and Stratos) have yet to clearly present and defend in detail any definition of a relevant market in this proceeding. Instead, they have contented themselves with generalized pronouncements based on the implicit assumption that all mobile satellite services constitute a single geographic and product market. They have presented only a supply-side approach that contravenes Commission precedent and Justice Department guidelines requiring demand-side definition of markets. Inmarsat has simply lumped together various satellite operators and suggested that, collectively, those operators provide a meaningful competitive check in that single market. 8/

Consistent with this purely rhetorical advocacy, Inmarsat has provided no material market data to the FCC about itself, Stratos, specific MSS business segments, or even MSS generally. Inmarsat certainly has not told the Commission what it says

Petition at 17, n.8. The Commission can readily dismiss Inmarsat's "bait and switch" rhetoric here.

7/ Inmarsat has indicated that its present plans are not to consolidate Stratos operationally until the end of 2009. However, this is no substitute for a legal obligation to separate wholesale and retail distribution functions.

8/ See, e.g., Application at 7. Inmarsat now suggests that the MSS industry is characterized only by "product differentiation" within a single market. Ex Parte Letter at 4. But Inmarsat makes no attempt — at least in front of this Commission — to address the fundamental distinctions that prevent key Inmarsat service from facing practical competitive substitutes. It is correct that distributors of Inmarsat services differentiate themselves through value-add features in the course of their intra-brand competition to sell Inmarsat services. But as Vizada has discussed, it is just such intra-brand competition that is threatened by Inmarsat's proposed acquisition and consolidation of Stratos. See Vizada Petition at 28-30.

elsewhere: that the company controls extremely large shares of key market segments, with important barriers facing the operators they claim here as vibrant competitors in those markets. At the least, Inmarsat has not met its burden of proof to demonstrate convincingly that its elimination of Stratos as an independent competitor — especially without structural safeguards — is in the public interest.

In contrast, Vizada has presented detailed MSS market information from one of the leading analysts in the mobile satellite industry. ^{9/} Dr. Farrar studies the MSS industry closely and his analysis is highly valued by industry observers and participants. He has explained here how and why Inmarsat continues to dominate key markets in the aeronautical, maritime, and land mobile arenas.

Inmarsat's response is telling, both in what it says and what it does not. First, Inmarsat continues its obstructionist strategy of providing no market definitions of its own, and no material market data that would permit the Commission to analyze the MSS industry or Inmarsat's place in it. This is true even with respect to the product markets identified by Dr. Farrar. It is Inmarsat's responsibility and burden to address these matters to justify the Commission action it requests, but even now it refuses to do so. ^{10/}

Second, and instead, Inmarsat repeatedly distorts Dr. Farrar's conclusions. It takes statements out of context. It sets up "strawman" arguments that do not represent Dr. Farrar's views and then knocks them down. It wholly ignores his main points when they are inconvenient and not rebuttable. At the highest level, Inmarsat tries to suggest that Vizada is claiming that Inmarsat dominates all markets -- or in Inmarsat's apparent view, a single unified MSS market -- and then rebuts that position. But that is not a correct statement of the issue. Vizada agrees that Inmarsat faces competition in some markets, and Dr. Farrar fully acknowledges as much. The problem is that competition is lacking in many other key markets, each individually important on its own, and collectively representing over half of Inmarsat's revenues.

Indeed, this emphasizes the conservative approach taken by Dr. Farrar. His analysis does not depend on assumptions that Inmarsat rivals will go out of business,

^{9/} See T. Farrar, "The Mobile Satellite Services Business: Competitive Structure, Size, Segments, and the Unique Role of Inmarsat in Certain Segments" (Sept. 2008) ("Farrar Report"), provided at Vizada Reply, Attachment A. Although Inmarsat attempts to disparage Dr. Farrar, they cannot rebut that he is a leading market analyst in the MSS industry, publishing the most comprehensive research based on extensive data collection and consultancy with industry participants. See Vizada Reply at 33.

^{10/} Inmarsat unfairly attacks Dr. Farrar for not being an economist, but they know this is a red herring. See Ex Parte Letter at 3. Dr. Farrar makes clear that he is presenting expert analysis of market data for review by the Commission under its own economic guidelines for market definition. Inmarsat should not be attacking Dr. Farrar for providing this expert factual assistance to the Commission; it should be presenting facts and articulating market definitions of its own.

notwithstanding Inmarsat's disparaging view of their prospects stated elsewhere. ^{11/} He agrees that, at least at the present time, Inmarsat faces competition in some markets, but not others, depending on the current strengths and weaknesses of the various operators. His analysis is nuanced and sophisticated, distinguishing the parameters of the competition Inmarsat faces, and explaining why Inmarsat enjoys a dominant position in several separate markets that collectively make up over half of its revenue.

These matters are highly relevant to the Commission's review of this application. The Communications Act requires the Commission to carefully evaluate this transaction, and the need for structural safeguards, based on concrete evidence and not surmise. Furthermore, it is the responsibility of Inmarsat to supply those hard facts and meet its burden of proof. ^{12/} So far, however, Inmarsat has only stone-walled the Commission, hiding behind broad unsupported generalities here, while elsewhere Inmarsat has painted an entirely different picture – market segment by market segment – of its dominance and competitors' chronic weaknesses and likely failures.

With that background, Vizada turns to address the argumentation Inmarsat has presented against Dr. Farrar's analysis. Inmarsat not only has failed to define and prove its single broad and allegedly fully competitive MSS relevant product market; it has failed to rebut Dr. Farrar's showing that Inmarsat particularly dominates key MSS markets today.

B. Inmarsat Dominance in Maritime Services

Dr. Farrar has described Inmarsat as dominating two major maritime wholesale service product markets, low speed data and maritime broadband, representing collectively 54% of Inmarsat's wholesale maritime revenues. This conclusion is consistent with Inmarsat's own statements outside the Commission regarding its very large market share in the maritime segment generally, including both voice and data services. Notwithstanding that, Inmarsat would have the Commission refrain from examining its market position more closely in the context of this application.

1. Low Speed Maritime Data Service

In the case of low speed data, Inmarsat's dominance arises primarily from its operation of the only global maritime system, and in particular its monopoly over satellite services for the Global Maritime Distress and Safety System ("GMDSS"), which must be deployed on all ships of more than 300 gross tons. Inmarsat C, which provides low speed

^{11/} Inmarsat's views on Iridium's recent announcement of new investment are representative: "Inmarsat remains skeptical about Iridium's ability to maintain profitability once it finances its \$2.7 billion second generation system. Inmarsat officials also have wondered aloud whether Iridium's satellites, which are 10 years old and were designed to last for seven years, will remain fully operational through 2014." Space News, Sept. 29, 2008, at 6.

^{12/} *DirecTV-EchoStar Hearing Designation Order* at 20575 ¶ 27; see Vizada Reply, IB Docket No. 08-143, at 9-11.

data services, is the most cost effective satellite terminal that meets GMDSS requirements. A vessel equipped with Inmarsat C for GMDSS purposes is unlikely to be available to potential competitors in the low speed data maritime market. Dr. Farrar estimates that approximately 64,000 end users are in this market today.^{13/}

Inmarsat's response to this analysis is to blow a smokescreen. For example, the company references statements TMF has made regarding low speed data service of Orbcomm and Globalstar ^{14/} without acknowledging that those statements concern land-based MSS data service where GMDSS is not an issue.

Similarly, Inmarsat suggests that Iridium "is poised" to offer GMDSS over "its next generation system." ^{15/} However, Inmarsat fails to acknowledge that Iridium's next generation system is not even scheduled to become fully operational until 2016. ^{16/} This date is well past the time that is relevant for competition analysis, which focuses on whether new entry will constrain the acquiring party from exploiting its market power within two years after closing. ^{17/}

Inmarsat also suggests that Dr. Farrar's credibility is undercut by other statements he has made expressing a cautiously positive view towards Iridium's continued survival. At one level this issue is a red herring given that, even assuming Iridium survives, Dr. Farrar conclude that it is years away from offering the GMDSS critical to competing in the maritime low speed data arena. In any case, Dr. Farrar has not suggested that Iridium is failing, or that it does not compete with Inmarsat in certain market segments -- only that, in the particular context of maritime low speed data and certain others, Iridium simply does not and cannot constrain Inmarsat's market power. Indeed, Inmarsat's rhetoric in its pleadings strikes a very false note given that, as discussed above, elsewhere it publicly and privately questions Iridium's prospects for survival, arguing vociferously that Iridium's fundamental weaknesses seriously impair its competitive position. Inmarsat questions whether Iridium can finance much less launch its next generation system, particularly in the current financial environment. Inmarsat also has warned of the likelihood of earlier than expected Iridium constellation failure. ^{18/}

Inmarsat also criticizes as "offhand" and "unsubstantiated" Dr. Farrar's conclusion that vessel owners would not install separate MSS systems for low speed data in addition to the Inmarsat C terminals installed for GMDSS compliance, citing his suggestion elsewhere that redundant systems are sometimes used in certain aeronautical

^{13/} See Vizada Reply at 34-36.

^{14/} Ex Parte Letter at 6.

^{15/} *Id.*

^{16/} See Iridium Satellite Aero News Brief (Nov. 2008), http://iridium.mediaroom.com/file.php/302/FINAL_Iridium_AeroMediaBrief_v6November_2008.pdf

^{17/} See, e.g., Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, April 2, 1992 (revised April 8, 1997), *available at* <http://www.usdoj.gov/atr/public/guidelines/hmg.htm#01>.

^{18/} See note 12, *supra*.

contexts. One answer is that competition to provide a redundant second service is not the same thing as competition to be a primary vendor, and does not constrain the market power of the entity providing that primary service. And in any event, Inmarsat is being disingenuous regarding the substantial economic barriers even for that slim sub-market. Dr. Farrar projects that each Inmarsat C terminal generates approximately \$34 per month in wholesale revenue for Inmarsat. In contrast, an Iridium SBD based system such as the Beam LeoTRAK RST470 would cost \$1500 to \$2000 plus installation, meaning it would take a minimum of 12.5 years to recover just the cost of the redundant equipment even assuming ten dollars a month in savings using Iridium. 19/

2. Maritime Broadband Service

Dr. Farrar also demonstrated how and why Inmarsat dominates the maritime broadband market today, particularly the large market segment where VSAT services are not a practical alternative to Inmarsat services. Inmarsat's dominant position in that large segment is protected by the serious capacity limitations on Iridium until (and assuming) its next generation system is fully operational in 2016. Dr. Farrar also explained the cost and coverage limitations of VSAT, especially as a primary maritime broadband application. 20/

Inmarsat presents no data in this proceeding to the contrary, and its own statements elsewhere recognize the high barriers that will continue to protect its dominant market share. Here Inmarsat relies instead on taking Dr. Farrar's comments out of context or ignoring his main observation. For example, Inmarsat points to statements Dr. Farrar has made regarding prospective competition from Iridium's new OpenPort product. 21/ But Inmarsat completely ignores the most important elements of Dr. Farrar's analysis: (i) that establishment of Iridium's OpenPort product will take "a minimum of two to three years even if everything goes smoothly with the launch," and (ii) that even at that point the capacity restraints on the current Iridium satellite system will remain so serious that Iridium will be able to contest no more than 18% of Inmarsat's high speed maritime revenues. A competitive alternative to Inmarsat for the remaining 82% will appear only if and when the next generation Iridium system is fully operational in 2016. 22/

Inmarsat ignores these fundamental issues and instead debates Iridium's likelihood of survival (again, suggesting a positive view it does not express in other contexts). And Inmarsat does not tell the Commission what it tells others: that Iridium's ability to perform is questionable given that its constellation is already well past its expected useful life. 23/ At the least, the Commission cannot approve this transaction,

19/ Inmarsat C estimates from TMF profile of Inmarsat, Dec. 2007 (cited in the Ex Parte Letter at 10. Iridium SBD modem pricing at <http://www.gmpcs-us.com/Iridium/Beam-LeoTRAK-RST470.htm>

20/ Farrar Report at 8-10.

21/ Ex Parte Letter at 6.

22/ Farrar Report at 5, 8.

23/ See note 12, supra.

especially without structural safeguards, based on an assumption of competition that does not yet and may never exist.

Dr. Farrar also challenged Inmarsat's suggestion that competition from maritime VSAT systems eliminates all concerns about Inmarsat dominance. He explained the numerous constraints on maritime VSAT as an adequate substitute for Inmarsat service due to VSAT equipment size, weight and price, as well as the limitations of FSS satellite service coverage compared with Inmarsat's global system. Based on these considerations, he concluded that most of Inmarsat's maritime broadband network is insulated from effective VSAT competition.

Dr. Farrar's analysis is consistent with Inmarsat's own views. For example, in Inmarsat's recent results call on November 10, 2008, the company's CEO noted that Inmarsat's Fleet Broadband service compares favorably to competitors' VSAT offerings "which do not offer global coverage and are significantly more costly compared to the average spend per ship today with us." 24/

However, here at the Commission Inmarsat takes an inconsistent position. First, Inmarsat points to statements by Dr. Farrar discussing that part of the market where VSAT in fact is increasingly practical as broadband demand grows: up to 500 vessels for C-band and up to 2500 vessels for Ku-band over the next five years. 25/ However, Inmarsat ignores Dr. Farrar's conclusion that this area of effective substitutability represents just a small fraction of overall maritime broadband demand. For example, of the 33,000 ships equipped with Inmarsat B or Fleet as of September 2008, only 10% would be economically-sound targets for VSAT service. 26/ The remainder of vessels remain dependent on Inmarsat, except to the limited extent that OpenPort proves out as a potential alternative despite its capacity restraints.

And even this estimate assumes that VSAT is an adequate alternative on technical and geographic coverage grounds. Dr. Farrar described the significant limitations of VSAT coverage in important oceanic areas. Inmarsat's response is singularly weak, and once again impeached by its own statements elsewhere. Here (before the Commission) Inmarsat points to a press release from a company claiming a successful Ku-band VSAT test on a ship traveling from Europe through the Indian Ocean to Japan and back. According to Inmarsat, Dr. Farrar's analysis is "squarely rebutted" by this test. To the contrary, this single trip shows nothing about oceanic coverage, particularly in the Pacific Ocean where Ku-band service is most challenging both operationally and economically. Indeed, Vizada believes that if the Commission conducts a review of its own in this area, it will find inconsistent statements by Inmarsat in its documents explaining the technical and economic weaknesses of Ku-band service, consistent with the conclusions of Dr. Farrar.

24/ FD (Fair Disclosure) Wire, November 10, 2008, Q3 2008 Inmarsat plc Earnings Conference Call – Final ("Inmarsat 3Q Earnings Call").

25/ Ex Parte Letter at 5.

26/ Vizada Reply at 38 n.54.

The issues discussed above explain why Inmarsat not only has such a high share in the maritime market, but why so much of that share — comprising 54% of Inmarsat’s wholesale maritime revenues — is insulated from effective competition today. 27/ Dr. Farrar does not suggest that Inmarsat faces no competition. Nor does his analysis turn on the economic jeopardy facing Inmarsat rivals, jeopardy Inmarsat itself views as a compelling problem for these companies it views in financial or other distress compared to itself. Rather, he has straightforwardly and conservatively identified the maritime markets where Inmarsat is dominant today, and hence where its proposed acquisition poses a material threat to competition.

C. Aeronautical Broadband Services

Dr. Farrar has estimated that Inmarsat’s share of aeronautical MSS revenue was 82% in 2007. 28/ Dr. Farrar evaluated the reasons for Inmarsat’s aeronautical market dominance, bringing the same nuanced and conservative approach he applied to maritime services. He finds that Iridium is “beginning to offer increased competition to Inmarsat” in the voice and low speed data markets serving business jets and general aviation. However, competition to Inmarsat in broadband data is very restricted at this time due to limitations on international coverage, and the cost barriers to switching from Inmarsat to other suppliers. He notes that some competition will be possible from satellite VSAT or terrestrially-based AirCell service installations on new planes with only a North American focus, but that competition to Inmarsat otherwise is foreclosed in the aeronautical broadband market. These non-competitive broadband markets represent approximately 40% of Inmarsat’s overall aeronautical revenue. 29/

Inmarsat’s response is once again to take Dr. Farrar’s statements out of context, and attack a strawman rather than address the facts. Inmarsat states that elsewhere Dr. Farrar predicts VSAT-based and AirCell aeronautical services will grow rapidly in the years to come. 30/ But Inmarsat fails to acknowledge the rest of Dr. Farrar’s conclusion: that “while it is possible that VSAT-based services may achieve some presence in North American routes, and perhaps a few routes in Asia, we expect Inmarsat-based solutions for mobile phones and Blackberries to be regarded as ‘good enough’ at least for the next five to eight years.” 31/ Inmarsat also misinterprets Dr. Farrar’s comments regarding Iridium-based service, failing to acknowledge that Iridium actually does not offer any competitive broadband aeronautical service. 32/

27/ Farrar Report at 10.

28/ *Id.* at 12.

29/ *Id.* at 11-12.

30/ Ex Parte Letter at 8.

31/ See <http://www.tmfassociates.com/Aerobroadband.pdf>.

32/ Inmarsat also challenges Dr. Farrar’s statement that coverage limitations on VSAT prevent it from providing competitive broadband international aeronautical service, Ex Parte Letter at 8, essentially relying on the misunderstandings of maritime VSAT coverage already discussed above. Suffice it to note that Inmarsat does not point to any party offering global aeronautical VSAT-based service, and that elsewhere Inmarsat emphasizes the material advantages its global system has in the aeronautical market.

Importantly, Inmarsat fails to address Dr. Farrar's analysis regarding the economic considerations that severely limit the advisability of installing a North American-only non-Inmarsat broadband system on aircraft used for international service when only Inmarsat can provide the international broadband service. Inmarsat also completely fails to address the economic barriers to retrofitting existing Inmarsat-equipped aircraft with competitive gear, costs ranging from \$100,000-\$350,000. And of course, Inmarsat does not mention its comments elsewhere suggesting that its competitors and potential competitors will not survive.

The bottom line is that Inmarsat has an entrenched position in the broadband aeronautical market, and that the limited opportunities open to new competitors do not eliminate Inmarsat's continued market power based on its incumbent position, substantial installed base, and unique global coverage. Dr. Farrar has demonstrated that 39% of Inmarsat's aeronautical revenue "is derived from that part of the broadband data segment where Inmarsat does not face competition, even from VSAT or terrestrial alternatives." 33/ Inmarsat has not shown otherwise.

D. Land-Based Broadband Services

Inmarsat and other potential land-based MSS services necessarily focus on remote locations where terrestrial options are not available. Here Inmarsat faces competition in the voice market from Iridium and other vendors. But the story is different with regard to data, and particularly broadband data. Dr. Farrar calculates that of Inmarsat's total wholesale revenues from land-based customers, 71% is from broadband services where Inmarsat does not face effective competition.

Inmarsat's scattershot response is not convincing. Inmarsat suggests that land mobile broadband is a "nascent service" developed only since the launch of the first Inmarsat 4 satellite. 34/ But Dr. Farrar's analysis defined broadband MSS to include all services capable of 64 kbps and above, including the GAN service offered over Inmarsat's third generation satellites since 1999, and the R-BGAN service launched by Inmarsat using capacity leased from Thuraya in 2002. 35/

Inmarsat also overstates the relevancy of regional competition from Thuraya, stating that "a user is unlikely to roam from one region of the world to another." 36/ Inmarsat provides no support for this assertion, and it is counter to the fact that the largest single customer groups for GAN and BGAN services are media and military users for whom the widest possible coverage is critical. 37/

33/ Farrar Report at 12.

34/ Ex Parte Letter at 9.

35/ Farrar Report at 13.

36/ Ex Parte Letter at 9.

37/ Robert Bishop, commercial manager for land mobile services at Inmarsat, recently observed that: "Broadcasters always want faster guaranteed data speeds, but they

Inmarsat argues that Iridium's OpenPort system for maritime broadband could be used for land-based service. 38/ But Inmarsat completely fails to address Dr. Farrar's observation that the satellites in Iridium's LEO-based system are not suitable for many-land based applications because terminals must be capable of scanning from horizon to horizon with a clear line of sight. Indeed, this is why OpenPort is a maritime-based system where "there is a clear view of the sky in all directions." 39/ This aspect of the Iridium system will not change even assuming full deployment of its next generation system by 2016. 40/

Inmarsat finally is left to take out of context comments by Dr. Farrar regarding Inmarsat revenues in the land mobile market, suggesting that they are inconsistent with his position here. This is wrong. Inmarsat cites to statements regarding a decline in GAN revenues, but does not note that this decline relates to its own planned migration to BGAN. Inmarsat notes the statements of Dr. Farrar relating to a decline in M, Mini-M and Inmarsat C business, ignoring the fact that these are not broadband services and thus irrelevant. Finally, Inmarsat notes Dr. Farrar's predictions that land-mobile BGAN revenue will be "modest." But this only underscores why other parties are unlikely to

also need a mobile service with global reach, which is reliable, and which can be easily integrated into their news operation. BGAN is still the only service that can provide that." <http://www.inmarsat.com/About/Newsroom/00024312.aspx?language=EN&textonly=False> See also Inmarsat marketing of service to media at http://www.inmarsat.com/Services/Land/BGAN/CNN_and_BGAN.aspx?language=EN&textonly=False

38/ Ex Parte Letter at 9.

39/ Farrar Report at 14.

40/ Inmarsat also exaggerates the ability of fly-away VSAT terminals to compete with MSS, arguing that they are reasonable substitutes for BGAN. But that is not the view of customers. The Vice President of CNN Newsbeam has made this clear, explaining that: "Mobile satellite IP terminals are still relatively expensive to own and operate, regardless of their portability, but are still vastly less expensive than buying a satellite truck or flyaway." Via Satellite, *Digital SNG: Technology Gains Make Journalists Even More Mobile* (Oct. 1, 2008).

bring aggressive competition to this market in the future. It does not make Inmarsat any less dominant in the market today.

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Again, the Commission should look through Inmarsat's quibbling argumentation in the recent Ex Parte letter, and keep its eye on the main picture. First, Inmarsat has failed to meet its burden of demonstrating that it does not have market power in key MSS markets that collectively represent over half of its revenues; indeed, the company has failed to come forward with relevant market data at all. Second, Inmarsat speaks inconsistently when it is outside the Commission's walls, emphasizing the barriers to effective competition that shield its dominance (and corresponding enormous market share), while highlighting the weaknesses of other MSS operators and predicting their demise. While some of these inconsistencies are present in publically reported statements, it will be important for the Commission to require Inmarsat to produce other potentially relevant documents in its possession that bear on this point.

To be clear, the Commission is not required to undertake a complete analysis of all MSS markets in order to deny this application. It need only conclude the obvious — that Inmarsat has been hiding the ball (and impeaching its own arguments). Inmarsat's burden of proof is to demonstrate that its acquisition of Stratos is not anti-competitive and instead “will accelerate the decline of market power by dominant firms in the relevant communications market.” ^{41/} Inmarsat's failure to carry that burden is fatal to its application. But if the Commission is not yet disposed to dismiss the application, it at least must designate the application for hearing on these critical factual matters to build the record Inmarsat studiously is trying to avoid. ^{42/} And either before or after doing so, it must require Inmarsat to produce data and documents relevant to the central market issues relevant to the public interest analysis here.

II. IF THE COMMISSION ULTIMATELY ALLOWS INMARSAT TO ACQUIRE STRATOS, IT MUST CONDITION THAT TRANSACTION ON STRUCTURAL REMEDIES TO REDUCE THE HARM TO COMPETITION AND END USERS

Inmarsat goes on to argue that, even if it had market power in one or more markets, its elimination of Stratos as an independent competitor in the distribution chain would benefit consumers. To reach this result, Inmarsat mischaracterizes the distribution structure present in the MSS industry, and ignores the role of distributors as value-added intra-brand competitors in the delivery of dominant Inmarsat services. Inmarsat manufactures alleged “benefits” to end users from its acquisition of Stratos, and completely ignores the ways that it can abuse its market power to diminish what competition exists today.

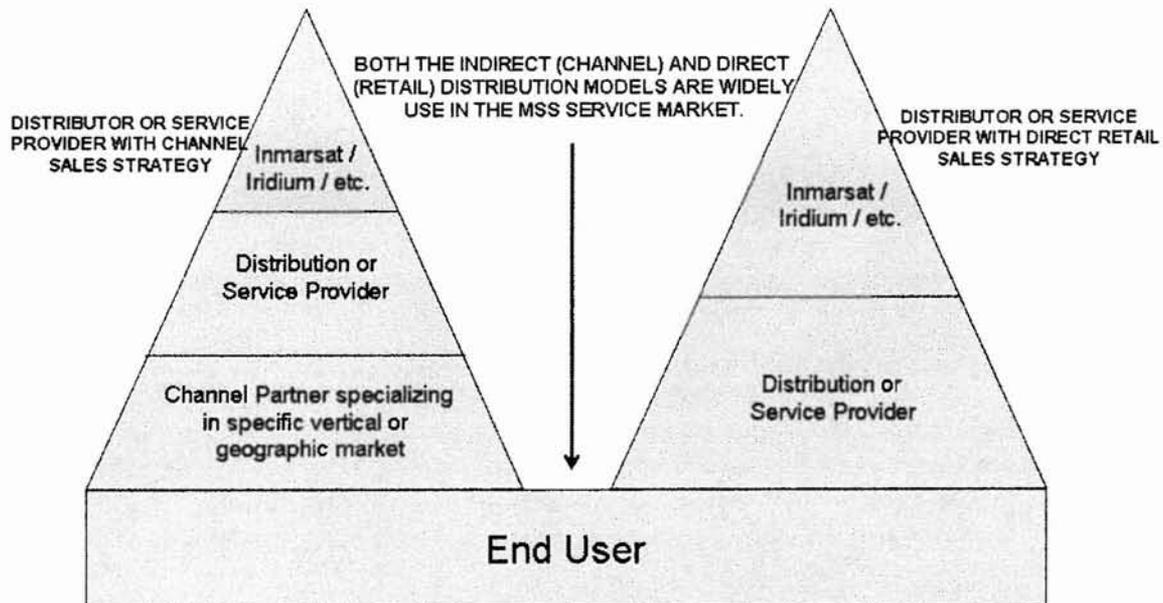
^{41/} *DirectTV-EchoStar Hearing Designation Order*, at 20575 ¶27. See Vizada Petition at 16, Vizada Reply at 9-11.

^{42/} See *DirectTV-EchoStar Hearing Designation Order*.

Inmarsat begins with self-serving and fundamentally flawed diagrams that purport to compare the Inmarsat and Iridium distribution structures. Inmarsat argues that its competitors “use flatter distribution structures,” and claims that it will achieve that allegedly more efficient flatter structure through its acquisition of Stratos. 43/

First of all, Inmarsat’s diagrams do not accurately portray market reality. As Inmarsat acknowledges, Inmarsat owns and controls the Satellite Access Stations that are used to deliver its state-of-the-art portfolio of I4-based services including BGAN, Fleet Broadband and Swift Broadband, as well as planned services including the handheld Global Satellite Phone Service that is scheduled for launch in late 2009. Consequently, for delivery of new growth services both Inmarsat’s and Iridium’s distribution models are in fact very similar (the situation is different for older I3 services that operate via independently owned land earth stations). Inmarsat and Iridium both sell today through distributors or service providers that employ both downstream channel partners and direct retail sales. The fact that some Distributors or Service Providers (i.e., direct Inmarsat or Iridium customers) choose to distribute service through downstream channel partners, while others opt for a direct retail sales approach is purely a matter of commercial strategy. The following diagram demonstrates this point for the new I4-based and Iridium services.

Standard Direct & Indirect MSS Service Distribution Strategies



43/ Ex Parte Letter at 11.

The point here is two-fold. On the one hand, Inmarsat asserts differences in distribution markets that do not exist. Furthermore, the fact that Iridium and others use additional sales levels to reach end users in certain cases is not necessarily a sign of inefficiency; quite the contrary, it can be a more efficient means of marketing to various customer groups, particularly when, as today, distributors add real value through various tailored and ancillary services and provide intra-brand competition to what otherwise would be a monopoly or near-monopoly product produced by a dominant firm.

Second, Inmarsat acknowledges that after April 2009 it will be able to sell more of its services directly to end users. Thus, even if Inmarsat concludes that it is in its interest to modify its distribution channels, it will be free to do so. It does not need to acquire Stratos for this purpose.

One key issue in this proceeding, then, is whether Inmarsat should be allowed to acquire and thus eliminate the firm that otherwise would be its single largest distribution competitor in April 2009 and afterwards. Inmarsat is correct when it asserts that the acquisition of Stratos would serve its private interests by reducing the need to build up a distribution business, though it grossly exaggerates the matter. Inmarsat would not be starting from “scratch,” as it claims here. 44/ The company already engages in direct sales of its “new” services, it already has encyclopedic knowledge of the MSS industry and MSS customers from its many years as the monopoly firm, and it is still the primary operator of MSS satellites.

Indeed, Inmarsat is turning business reality on its head. Even in the absence of the Stratos acquisition, the April 2009 expiration of current marketing restraints on Inmarsat creates competitive issues that are troublesome for the MSS industry and particularly its customers. Inmarsat will have new incentives to discriminate against other value-added distributors of its dominant products, and new ability to harm intra-brand competition and raise price.

This would be another case if Inmarsat did not have market power in the key maritime, aeronautical and land mobile markets discussed above. If Vizada and others could turn to other MSS operators for equivalent wholesale inputs, on a competitive basis, such competitive choice would discipline Inmarsat to protect ultimate prices and service quality to end users. In that case one might agree with Inmarsat’s arguments in favor of allowing its elimination of an independent Stratos.

But that is not the situation. As discussed above and in prior comments, Inmarsat dominates key MSS markets representing over half of its revenues (with the potential to leverage that dominance into other MSS markets through bundling together non-competitive and more competitive services) 45/. Unchecked, Inmarsat has the ability to reduce competition by favoring itself or its affiliate in multiple ways:

44/ Ex Parte Letter at 12.

45/ For example, in Inmarsat’s third quarter earnings call in November 2008, it indicated that “with Stratos, we get the land-earth station infrastructure to support our existing and evolved services and we don’t really need two of those,” suggesting its

- Most obviously, Inmarsat can discriminate against rivals through its pricing of wholesale service inputs in the markets where it is dominant.
- Inmarsat can abuse information regarding rivals' customers that it receives in its capacity as a wholesaler, using that information to solicit those customers itself.
- Inmarsat can withhold timely information from rivals regarding new product developments or technology deployment, or even deny access to such information and technology altogether.
- Inmarsat can provide itself preferential or prioritized access to space segment resources compared to its rivals, or reduce the quality of service provided to rivals.
- Inmarsat can provide more favorable terms and conditions for commercial contracts with its wholly-owned distributor than it provides to unaffiliated companies.
- Inmarsat can deny its rivals access to important technical, regulatory, product development, and similar resources offered to its affiliate.

Inmarsat's response to these dangers is glib and self-serving; it boils down to nothing more than "trust me." The company states that it will need distributors, which may be correct in some cases but not necessarily in others — Inmarsat will control if and when it (directly or through Stratos) will sell to end users. Inmarsat also states that entry barriers to additional distributors will be low, but ignores that those barriers will be set by Inmarsat itself as the gatekeeper. Inmarsat is asking the Commission to disregard the main factual point: because Inmarsat holds market power in key market segments, it will pull the strings of this competition, and those who wish to sell in these markets will need to play by Inmarsat's rules.

Inmarsat is correct that some of these problems will be present in any event beginning in April 2009. But Inmarsat's acquisition of its largest distribution competitor would materially increase both its incentive and its ability to abuse its market power. Inmarsat immediately would have an even greater incentive to favor itself because it would have a large affiliate who would benefit from such discrimination on a significant scale. Furthermore, by eliminating its largest independent distributor, Inmarsat materially increases its ability to engage in anti-competitive discrimination. This action will weaken the negotiating leverage of all other independent distributors. It is one thing, for example, for all of Inmarsat's current distributors (including Stratos) to demand reasonable access to new information on Inmarsat services, and a contractual commitment by Inmarsat to establish structural walls between Inmarsat's wholesale and retail operations to protect customer data, pricing decisions, and the like. Absent a large distribution arm of its own, Inmarsat might be more inclined to listen. But with the elimination of Stratos by acquisition, Inmarsat will face much less pressure to respond to the reasonable needs of its distributors. Quite the contrary, with the immediate ability to

intention to bundle termination with airtime and eliminate the ability of other LES operators to compete. *See* Inmarsat 3Q Earnings Call, *supra*, n. 25.

sell through Stratos, Inmarsat will have every reason to discriminate against other value-added distributors of its dominant services.

For all of these reasons, Inmarsat cannot meet its burden of showing that its acquisition of Stratos “will accelerate the decline of [its] market power,” as required by the Communications Act. ^{46/} At the least, the Commission cannot make this finding unless Inmarsat is subject to structural safeguards designed to limit risk to the intra-brand competition that exists today. Inmarsat studiously avoids discussion of this matter in its Ex Parte Letter, but the need for regulatory-mandated separation of the company’s wholesale and distribution operations is clear.

The pending negotiations of new agreements between Inmarsat and its distributors are directly relevant to this point. Vizada has demonstrated why the Commission should reserve its decision in this proceeding until it can see the new agreements for itself, and evaluate them for the presence or absence of non-discrimination commitments. ^{47/} This is not to suggest that contractual commitments would be a substitute for regulatory conditions if the Stratos acquisition is approved. But the new distribution agreements will be the first real evidence of how Inmarsat intends to conduct itself beginning in April 2009 absent regulatory constraints.

Vizada is not in a position to discuss those negotiations in detail here. However, one issue is representative of the company’s concerns. When Vizada distributes wholesale Inmarsat services, it must provide commercially sensitive information to Inmarsat in multiple contexts. This information can include the identity of end user customers, access to end user contact information, data on vessels where Inmarsat-based service is deployed, and the like. Vizada and other distributors have a fundamental interest in ensuring that such information is only provided to Inmarsat when absolutely necessary, and that it is controlled properly under tight restrictions that prevent it from going to Inmarsat’s sales force (whether within Stratos or not). A related issue is whether and when Inmarsat is allowed to contact end user customers of its distributors, and under what circumstances. These are only some of the issues that take on new urgency as restrictions on Inmarsat expire next April — and particularly if Inmarsat is permitted to acquire and consolidate Stratos at the same time.

Vizada does not concede that Inmarsat could meet its public interest burden under the Communications Act even if it committed to new structural safeguards separating its wholesale and retail functions at the time that it acquires Stratos. As discussed above, Inmarsat’s incentives and ability to maintain its current dominant power still would be increased -- increased in an environment where there is tremendous financial uncertainty regarding the ability of other MSS operators to continue, and ultimately perhaps to erode that dominance across all markets.

^{46/} See *DirectTV-EchoStar Hearing Designation Order*, at 20574-75 ¶¶25-27.

^{47/} Vizada Petition at 8-12; Vizada Reply at 18-20.

