

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

In the Matter of	)	IB Docket No. 08-143
)	
Robert M. Franklin, Trustee, Inmarsat plc	)	DA 08-1659
And Stratos Global Corporation)	
	)	FCC File Nos.:
)	
Applications for Consent to Transfer of	)	ITC-T/C-20080618-00276
Control of Stratos Global Corporation and Its)	
Subsidiaries from an Irrevocable Trust	)	ITC-T/C-20080618-00275
To Inmarsat plc, and Petition for a	)	SES-T/C-20080618-00818
Declaratory Ruling	)	SES-T/C-20080618-00821
	)	SES-T/C-20080618-00820
	)	SES-T/C-20080618-00819
	)	0003453455
	)	ISP-PDR-20080618-00013

To: The Commission

**APPLICATION BY VIZADA FOR EXPEDITED REVIEW OF
THE INTERNATIONAL BUREAU'S DECISION APPROVING INMARSAT'S
ACQUISITION OF STRATOS GLOBAL**

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SUMMARY

On the final business day of the Martin administration, the International Bureau rushed out an order allowing Inmarsat to acquire Stratos Global on April 15, 2009 or very shortly thereafter. This Bureau Order was issued without any independent investigation of critical facts or the usual information requests to the parties and is fundamentally deficient under the Communications Act and the Administrative Procedure Act

Until recently the *de jure* monopoly operator of mobile service satellites (“MSS”), the now privatized Inmarsat retains overwhelming dominance in the provision of numerous MSS relevant products (*e.g.*, maritime low-speed data, maritime broadband, aeronautical broadband, and remote land-based mobile broadband) needed by large categories of customers who, given their particularized functional and geographic needs, have no realistic choice but Inmarsat-branded services. Stratos is the largest Inmarsat distributor in the world and also a distributor for other MSS operators. Vizada, the next largest Inmarsat distributor and also a distributor for other MSS operators, petitioned to deny the Inmarsat/Stratos merger and files this application for expedited review of the Bureau’s erroneous ruling. */

Acting Chairman Copps and Commissioners Adelstein and McDowell have repeatedly endorsed the view that sound Commission decision making cannot occur without pro-active data collection and solid fact-based analysis. Reliance on the minimal information that parties typically volunteer inevitably leads to bad decisions and poor public policy. No important satellite merger decision – and certainly not one that threatens to undermine the competitive viability of the MSS industry – should be left for the staff to decide on the basis of the applicants’ self-serving assertions, preconceived notions drawn from inadequately researched industrywide reports, and no current factual investigation.

The Bureau Order must be overturned for four main reasons. First, the Bureau arbitrarily departed from precedent by failing, even in the face of strong factual evidence backed by an expert report from Vizada, to request from the parties documents and data bearing on critical facts such as distinctions in customer demand, the existence of multiple relevant product and geographic markets based on those distinctions, market shares, entry/expansion barriers, incentives and ability of the combined firm to leverage market power from the operator level to the distribution level through discrimination, price squeezes, information misuse, etc. **The Commission should act immediately to cure the Bureau’s action and issue essential data and document requests to the parties.**

Second, the Bureau arbitrarily and capriciously: (i) disregarded applicable law and Commission precedent on how to define relevant product markets, (ii) refused to credit Vizada’s extensive factual and expert evidence that Inmarsat still possesses market power in four vital

*/ More than a year earlier, the Commission had approved CIP’s acquisition of control over Stratos and the placement of CIP’s interest in a trust, and also noted that Inmarsat was acquiring but not then seeking to exercise an option to potentially acquire Stratos. The Commission expressly reserved to a later time (if ever) all aspects of the question whether Inmarsat should actually be permitted to exercise that option.

MSS relevant product markets, (iii) declined to credit or investigate Inmarsat's own contemporaneous statements acknowledging its market dominance and its competitors' present and future inability to constrain that dominance, (iv) denigrated the merger's probable vertical anti-competitive effects while accepting on faith the parties' claims of vertical efficiencies, (v) dismissed as essentially valueless the preservation of intra-brand competition among distributors in markets still dominated by Inmarsat products, and (vi) ignored the fact that the merger would eliminate the highly probable head-to-head horizontal competition between Inmarsat and Stratos at the distributor level.

Third, the Bureau Order erred in not classifying this as an anti-competitive vertical merger that could not lawfully be approved absent conditions imposing stringent safeguards to prevent discrimination, information misuse, and other predatory conduct.

Fourth, the Bureau Order erred in failing to evaluate this as also essentially a horizontal merger resulting in the unacceptable loss of highly significant actual potential competition.

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Vizada, Inc. and VIZADA Services LLC (together, “Vizada”) submit this Application for Expedited Review of an Order released at the last moments of former Chairman Martin’s term by the then-Chief of the International Bureau. 1/ As explained below, this Bureau Order is fundamentally deficient under the Communications Act and the Administrative Procedure Act because it is not supported by record evidence regarding (1) various mobile satellite service (“MSS”) markets, (2) the degree of Inmarsat plc (“Inmarsat”) dominance in four of those

1/ *In the Matter of Robert M. Franklin, Transferor, and Inmarsat plc, Transferee, Consolidated Application for Consent to Transfer of Control of Stratos Global Corporation and Its Subsidiaries from an Irrevocable Trust to Inmarsat plc, Memorandum Opinion & Order, IB Docket No. 08-143 (IB, Jan. 16, 2009)(“Bureau Order”).*

markets from which Inmarsat derives over half of its revenues, or (3) the impact on competition and the public interest if Inmarsat is allowed to acquire Stratos Global Corporation (“Stratos”) without at least the most basic safeguards to prevent abuse of its market power. Expedited review is necessary because Inmarsat apparently intends to consummate the transaction “on or shortly after April 15, 2009.” ^{2/}

I. INTRODUCTION

A. The Commission Cannot Rule on this Transformational MSS Industry Transaction Without First Developing an Adequate Factual Record

Acting Chairman Copps recently observed: “[O]ne of my top priorities here at the Commission has been to improve our data-gathering for *all* the industries we regulate and to ensure that *all* our decisions are grounded in the best available data and analysis.” ^{3/} In the recent past, both he and Commissioner Adelstein have expressed grave concerns regarding the inadequacy of data gathering in satellite competition matters ^{4/} and have criticized significant deficiencies in the quality of competition analysis for satellite industry mergers in particular. ^{5/} Commissioner McDowell has also been in the forefront of urging the agency proactively to

^{2/} Inmarsat/Stratos Application Narrative at 12.

^{3/} *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Thirteenth Annual Report, FCC 07-206, (rel. Jan. 16, 2009) (Copps)(emphasis in original).

^{4/} *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, First Report*, 22 FCC Rcd 5954, 6016 (Copps), 6017 (Adelstein).

^{5/} *Constellation LLC et al., Transferors, and Intelsat Holdings Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp.*, 21 FCC Rcd 7368, 7420 (2006) (Copps) (“I have serious doubts about the competitive effects of allowing a merger between two of the three leading Fixed Satellite Service providers in North America.”). *Id.* at 7471 (Adelstein) (“...[W]e should not turn a blind eye to the competitive effects of consolidation . . .”).

collect and thoroughly analyze all the relevant data before making important regulatory decisions. ^{6/}

If there ever were a satellite competition proceeding that demanded granular market investigation, thorough data collection, and careful decisionmaking of the sort urged by all the incumbent Commissioners, *supra*, this is it. Inmarsat, until recently a *de jure* MSS monopoly, proposes a transformational transaction that will set back the cause of competition for years to come. Inmarsat remains today by far the *largest* mobile satellite services operator and possesses powerful technical, geographic, and financial advantages in virtually all significant MSS markets. Inmarsat proposes to expand and entrench its power and transform the MSS industry by acquiring and integrating into its midst the *largest* distributor of its services and an important distributor of other MSS operators' services (Stratos).

The proposed transaction presents deeply troubling competitive concerns in two respects. Previously Inmarsat made clear its intention to enter the MSS retail distribution market in April 2009, when certain contractual restraints expire. Such a move into downstream distribution would have placed Inmarsat in direct horizontal competition with Stratos. Now instead Inmarsat seeks to acquire its largest potential competitor, depriving customers of the competition that otherwise would occur from rivalry between an independent Stratos and Inmarsat. Second, because of its vertical characteristics, the proposed acquisition radically increases Inmarsat's incentives and ability to (1) abuse confidential information received from other MSS providers dependent on Inmarsat's services, and (2) engage in other discriminatory conduct in favor of

^{6/} *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Reporting Reqs.*, Memorandum Opinion and Order, 23 FCC Rcd 13,647, 13,703 (2008) (Statement of Comm'r McDowell).

itself and Stratos. Such conduct would not be nearly so profitable and anticompetitive were Inmarsat not the owner of Stratos.

In a transaction such as this, the Commission has the statutory responsibility to define the relevant geographic and product markets accurately and assess competitive effects based on actual market data and documents. In recent years, the Commission has not undertaken any in-depth investigation, based on actual granular pricing and market share data, of the extent (if any) to which Inmarsat's once *de jure* monopoly power actually has eroded in key MSS markets. This has left the Commission dependent on anecdotal and often unreliable trade press reports, and the self-serving statements of Inmarsat itself.

To disguise its persistent market power and its anticompetitive plans for the Stratos acquisition, Inmarsat has so far stone-walled the Commission. ^{7/} Inmarsat has declined to provide the specific data needed to define the different relevant product markets, and to reveal market shares, information about entry barriers, and the like. More troubling, behind closed doors with investors and others, Inmarsat continues to tout its dominant positions in key markets and its expectations that its dominance will persist and strengthen.

Unfortunately, the Bureau Order is defective because it fails to call Inmarsat to account for its refusal to provide necessary information solely within the possession of Inmarsat and Stratos. This is more than a missed opportunity for the Commission to understand the state of MSS markets today and learn definitively where and how much Inmarsat's former monopoly dominance has declined or strengthened in key markets in the relatively short time since

^{7/} Not surprisingly, Inmarsat argued that all MSS services fall into a single global market (Application at 7), an argument that is absurd given that markets are defined from the customer's perspective and different types of MSS customers have entirely different functional needs for the widely varied geographic areas in which they operate. Inmarsat declined to proffer any hard data from which the Commission might accurately define the different relevant product markets and measure Inmarsat's market dominance in those markets.

privatization. The failure to obtain relevant facts renders the Bureau Order deficient as a matter of law.

B. The Commission Should Immediately Send Inmarsat and Stratos Overdue Requests for Essential Data and Documents

It is not too late for the Commission to cure the defects in the Bureau Order and meet its public interest obligations under the Act. Inmarsat and Stratos have represented to the Commission that they will not close their transaction until mid-April. At the least, the Commission should hold the parties to that representation and immediately commence the investigation that ought to have begun months ago.

Specifically, Vizada urgently requests that the Commission not await opposition and reply pleadings on this Appeal, but immediately instruct the Bureau to obtain expeditiously from the parties key internal documents and data the Commission needs to decide this matter.

In comparable merger matters, the relevant Bureau has typically issued information requests to the applicants relatively early in the process, so as to provide critical data for the proper definition of relevant markets, the identification and measurement of market power, and the evaluation of whether and how the transaction may affect the competitive incentives and abilities of the combined entity. ^{8/} Here, the parties failed to provide any such data with their applications and acted throughout as if the burden of proof to provide the hard competitive facts was not their burden but rather Vizada's or the Commission's.

As discussed below, the Bureau did not have delegated authority to approve this transaction without an adequate record. ^{9/} It certainly need not have acted so far in advance of

^{8/} See numerous information requests cited in footnote 29, *infra*.

^{9/} The Bureau lacked the requisite delegated authority under Commission rules to: (1) decide the "novel" and critically important question of whether Inmarsat may integrate downstream by acquiring the largest mobile satellite services wholesale distributor, (2) depart from the established Commission "policy" of requiring applicants to produce decisionally

the time that the parties actually propose to close their transaction. ^{10/} But in any event, action is required now.

The minimally burdensome information requests Vizada proposed to the Bureau ^{11/} would yield decisionally critical materials bearing upon: (1) relevant market definition, (2) market shares, (3) Inmarsat's dominance of four key relevant product markets (maritime low-speed data, maritime broadband, aeronautical broadband, and remote land-based broadband), (4) Inmarsat's prospective post-merger arrangements with independent wholesale distributors, and (5) the extent to which this transaction provides the combined companies enhanced incentives and the strengthened ability to abuse Inmarsat's market dominance to the serious detriment of competition, rival distributors, and consumers.

significant market share and demand-side data, (3) overturn or ignore "outstanding precedents" regarding the need for strong safeguards to deter discrimination and other anti-competitive strategies by dominant firms integrating vertically, and (4) deprive the Commission of a timely opportunity to consider for the first time "new arguments" based on fresh data regarding proper delineation of relevant markets and the presence of market power in such markets. 47 C.F.R. § 0.261(b).

In 2007, the Commission decided the far less competitively significant matter of whether CIP should be allowed to acquire control of Stratos and place that interest in trust. *Stratos Global Corp., Transferor; Robert M. Franklin, Transferee; Consolidated Application for Consent to Transfer Control*, 22 FCC Rcd 21328 (2007) ("Stratos Trust Order"). The Commission made abundantly clear that it was reserving to another day the question of whether Inmarsat would be permitted to exercise an option to take control of Stratos. There is nothing in that decision to suggest that the Commission intended to delegate to the Bureau the far more important future decision about Inmarsat acquiring control of Stratos.

^{10/} Telephone calls on the day of the decision from Inmarsat's CEO to then-Chairman Martin and to his Chief of Staff, and one by another Inmarsat official to Chairman Martin's legal advisor, urged the Chairman to instruct the Bureau to act on that day. Letter from Diane J. Cornell, Vice Pres. Gov't Affairs, Inmarsat, to Marlene H. Dortch, Sec'y, FCC, (filed Jan. 21, 2009) (reporting calls of Jan. 16, 2009).

^{11/} Letter of Peter A. Rohrbach, Counsel for Vizada, to Marlene H. Dortch, Sec'y, FCC, at 19 (filed Dec. 8, 2008) ("Vizada Dec. 8 Letter"). See also Letter from Peter A. Rohrbach, Counsel for Vizada to Marlene H. Dortch, Sec'y, FCC (filed Dec. 10, 2008) (Attachment, "Intelsat Market Power and Its Relevance to the Proposed Acquisition of Stratos," *Ex parte presentation of Dec. 9, 2008*) at slide 15.

II. THE FACTUAL RECORD TO DATE DEMONSTRATES CONTINUING INMARSAT MARKET POWER IN FOUR CRITICAL MSS PRODUCT MARKETS

As the largest current provider of mobile satellite services for government and commercial customers, Inmarsat inherited its market dominance from its days as an inter-governmental monopoly. To perpetuate the healthy intra-brand competition that existed in the reselling of dominant Inmarsat's MSS services before privatization, Inmarsat agreed to refrain from competing downstream as a retail distributor of its services, either by *de novo* entry or by acquiring an existing distribution partner, until April 15, 2009.

Although Inmarsat has said for years that it fully intends to enter the retail distribution level starting in April 2009, its acquisition of Stratos will eliminate any possibility of what otherwise would be a competitive and strong rivalry between the two companies. Moreover, Inmarsat's downstream vertical integration through acquisition of Stratos will incent and enable discriminatory vertical behavior *many magnitudes greater* than if Inmarsat had simply entered the retail distribution market *de novo* or by a small toehold acquisition.

A long-time major distributor of Inmarsat services and a direct competitor of Stratos, Vizada petitioned to deny the applications. ^{12/} Vizada explained that wholesale Inmarsat inputs remain essential to the provision of competitive services to customers in key maritime, aeronautical, and remote land mobile markets. Vizada submitted extensive verified pleadings based upon its own long-term familiarity with (i) Inmarsat's products, (ii) the features, functional uses, pricing, etc. of Inmarsat services and associated equipment, (iii) the many and varied needs of resellers and retail customers, and (iv) the limited capabilities of rival mobile and fixed

^{12/} Petition to Deny of Vizada, Inc. and VIZADA Services LLC, August 13, 2008 ("Vizada Petition").

satellite operators whose products Vizada also distributes. [13/](#) Vizada also submitted the declaration of Dr. Tim Farrar, a leading independent industry expert on the MSS business. [14/](#) As his declaration makes manifest, Farrar knows intimately the industry segments where Inmarsat does face effective competition, and those distinct relevant markets at issue here where Inmarsat does not today and will not any time soon face effective competition.

Vizada showed with numerous illustrations those particular functional and pricing differences – *as seen from the customers’ perspectives* – that make each of the four important Inmarsat-dominated segments – (1) maritime low-speed data, (2) maritime broadband, (3) aeronautical broadband, and (4) remote land-based broadband – distinct relevant product markets under DOJ/FTC merger guidelines and Commission precedents. [15/](#) None of these four Inmarsat services is a substitute for any other mobile satellite service, nor – in the eyes of major categories of customers – do any of these four Inmarsat services face effective competition from fixed satellite or terrestrial services. With the assistance of Dr. Farrar and buttressed by several of Inmarsat’s own candid admissions to investment analysts and others [16/](#), Vizada showed why and how Inmarsat will exploit (1) the uniqueness of its services, (2) the fact that many customers

[13/](#) See, e.g., Vizada Petition at 2-6, 16-17, 20-26, 29-30, 38-43; Reply of Vizada, Inc. and VIZADA Services LLC to Oppositions of Inmarsat plc and Stratos Global Corporation, September 10, 2008 (“Vizada Reply”) at 4-5, 33-51.

[14/](#) Vizada Reply, Attachment A, “The Mobile Satellite Services Business: Competitive Structure, Size, Segments, and the Unique Role of Inmarsat in Certain Segments” (“Farrar Declaration”).

[15/](#) Vizada Petition at 27-28, Vizada Reply at 26-32, 33-51; Farrar Declaration at 4-15.

[16/](#) Vizada Petition at 24-25 (Inmarsat CEO saying that for maritime services “we really don’t have much competition” and that the company’s installed customers stay with Inmarsat “for a very long period of time,” approximately “ten years” for maritime and “even longer” for aeronautical services); Vizada Reply at 50 n.95 (Inmarsat CEO describing Iridium’s dependence on LEO satellites as “a flawed concept” and doubting Iridium’s ability to “get funding for a second constellation”); Vizada Dec. 8 Letter at 7 n.11 (Inmarsat publicly questioning whether Iridium’s current 10-year old constellation will remain operational long enough to transition to the next constellation whose financing and full operation by target date 2016 are so questionable).

are economically “locked in” to Inmarsat, (3) the technical, financial, and operational weaknesses of smaller and newer MSS firms and fixed service alternatives, and (4) numerous other factors, to reinforce and expand Inmarsat’s dominance in these four relevant product markets. [17/](#)

Vizada also showed that the four product markets where Inmarsat is overwhelmingly dominant are not inconsequential niche markets but actually account collectively for more than 57 percent of Inmarsat’s total current revenues. [18/](#) Ocean-going commercial ships, government naval and air forces, private air fleets, and remote land-based military, national security, newsgathering, and natural resource exploration and extraction entities will be dependent upon Inmarsat for their particularized needs many years into the future. [19/](#)

As already noted, Inmarsat’s and Stratos’ basic pleading strategy below was to evade and avoid. They insisted incorrectly that these issues of market definition, market power, and the merger’s competitive effects, were decided definitively in the Commission’s 2007 decision to allow Stratos to be acquired by CIP and placed into a Trust. [20/](#) The parties also sought refuge in

[17/](#) Vizada Petition at 20-28; Vizada Reply at 33-45; Farrar Declaration at 3-15; Vizada Dec. 8 Letter at 7-14.

[18/](#) Farrar Declaration at 17 (“[A]round \$310M of Inmarsat’s 2007 wholesale revenue (57% of its total wholesale service revenue) comes from customers who do not have a readily available satellite alternative.”).

[19/](#) Vizada Reply at 33-51; Farrar Declaration at 4-15; Vizada Dec. 8 Letter at 7-14.

[20/](#) Opposition of Inmarsat plc at 8-11 (filed Aug. 25, 2008) (“Inmarsat Opposition”). Nowhere in the *Stratos Trust Order*, however, did the Commission face the questions (presented in the instant docket) of whether there are distinct relevant product markets *within* the broader mobile satellite services field and whether Inmarsat dominates four of those markets. Moreover, as Vizada explained in the instant docket (Vizada Reply at 13-14), the Commission explicitly did *not* rule on the merits of Inmarsat acquiring Stratos when the Commission allowed an entirely different company (CIP) to acquire control over Stratos and place that CIP ownership interest in a Trust, with Inmarsat having only an unexercised option to acquire Stratos on/after April 2009. Indeed, in that prior proceeding the Commission found (1) “Inmarsat is not the real party in interest in this transaction” for which Commission approval was sought and (2) there was “no record evidence that Inmarsat will be able to control Stratos Global during the pendency of the

two older Bureau-level decisions that provided absolutely no economic analysis for lumping all MSS into a single market. [21/](#) Inmarsat’s pleadings conveniently ignored many recent assertions by high Inmarsat officials to the business community about other MSS operators, particularly Iridium: their severely limited technical and geographic capabilities, aging and defective satellite fleets, dire financial circumstances, and fundamentally long term weaknesses and uncertainties. [22/](#) Inmarsat asserted, illogically and without providing any meaningful share data for the four particular markets at issue, that rival MSS operators’ wins in *other customer markets* (such as voice) somehow disproved or diminished Inmarsat’s dominance in the four *different* – and very significant – relevant markets discussed by Dr. Farrar.

In short, Inmarsat and Stratos simply ignored their burden to provide relevant facts in Inmarsat’s possession. The merging parties largely contented themselves with wide-of-the-mark potshots at Dr. Farrar, [23/](#) exaggerations and misstatements regarding the capabilities of other MSS operators, [24/](#) and denigration of value-added intra-brand competition dependent on wholesale Inmarsat inputs. [25/](#)

Trust.” *Stratos Trust Order* at ¶ 112. Inmarsat’s argument in the instant IB Docket No. 08-143 that the Commission had already decided in that earlier WC Docket No. 07-73 the market definition, market power, and competitive issues relating to actual control by Inmarsat of Stratos is contradicted by the plain words of the Trust decision in that earlier docket.

[21/](#) See Inmarsat Opposition at 8 n.14. Those two proceedings had no occasion to address whether particular MSS segments were themselves relevant product markets.

[22/](#) See note 16, *supra* (summarizing statements of Inmarsat executives).

[23/](#) See Letter of John P. Janka *et al.*, to Marlene H. Dortch, FCC Sec’y (filed Oct. 9, 2008) (“Inmarsat/Stratos Oct. 9 Letter”).

[24/](#) *Id.* at 4-10.

[25/](#) Inmarsat Opposition at 24 (preserving intra-brand competition is “outdated jurisprudence”), 25 n.70 (innovative forms of competition among intra-brand rivals and particularly competing value-added software tools are “not relevant”), and 27 (“whether and how Inmarsat distributes through Vizada has no conceivable impact on the ability of Inmarsat customers . . . to meet their communications needs”).

Relying upon economic and legal principles endorsed by the Commission in other vertical merger cases, [26/](#) Vizada showed how effective competition provided by independent Inmarsat distributors would be distorted and eventually destroyed absent comprehensive, strongly-enforced, and thoroughly-audited competitive safeguards to prevent the combined company from anti-competitive strategies of discrimination, confidentiality abuse, withholding critical information, and raising rivals' costs in other ways. [27/](#) In line with those prior precedents, Vizada explained why the Commission needed to evaluate as part of this transfer-of-control proceeding Inmarsat's proposed new distribution agreements. [28/](#) As Vizada explained, the Commission can not simply "trust" Inmarsat to resist the strong anti-competitive incentives and capabilities that such a large-scale vertical acquisition inherently creates.

III. THE BUREAU ORDER ARBITRARILY DEPARTED FROM PRECEDENT BY FAILING TO INVESTIGATE CRITICAL DISPUTED FACTS

A. The Commission Should Correct Prior Bureau Management's Rush to Evade Its Investigative Responsibilities

It is standard procedure in the consideration of complex vertical or horizontal mergers for the Bureau staff to request critical data and documents from the parties in order to get to the bottom of significant factual disputes and to prepare an adequate record upon which the Commissioners may base their decision. Time and again the responsible Bureaus have sent

[26/](#) E.g., *News Corp. and The DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, 23 FCC Rcd 3265 (2008) ("Liberty Media/DirecTV"); *General Motors Corp. and Hughes Elec. Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) ("News Corp.-Hughes"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Comm. Corp. to Time Warner Cable, Inc. and Comcast Corp.*, 21 FCC Rcd 8203 (2006) ("Adelphia").

[27/](#) Vizada Petition at 30-44; Vizada Reply at 52-59; Vizada Dec. 8 Letter at 16-18.

[28/](#) Vizada Petition at 7-12; Vizada Reply at 15-26; Vizada Dec. 8 Letter at 16-18.

comprehensive data and document requests to the parties [29/](#) and even sometimes to third parties. [30/](#)

In this case, however, the normal investigative job was not done. As a consequence, the Commission has before it a results-oriented ruling issued at the very end of former Chairman Martin's and the Bureau Chief's tenure, preempting the Commissioners' substantive decisional

[29/](#) Letter from James D. Schlichting, Acting Chief, WTB, to Kathleen Q. Abernathy, *et al.* (Sept. 11, 2008) (requesting additional information pursuant to Section 308(b) of the Communications Act as necessary for public interest findings under Section 310(d) concerning *Verizon Wireless/Alltel* transaction); Letters from Monica Shah Desai, Chief, MB, to Richard E. Wiley, *et al.* (Nov. 11, 2007) (requesting information concerning market definition and competition in *XM/Sirius* transaction); Letters from Monica Shah Desai, Chief, MB, to Ellen S. Agress, *et al.* (Jun. 15, 2007) (requesting information from parties to *Liberty Media/DirectTV* transaction concerning consumer demand, cross-elasticity, etc.); Letter from Thomas J. Navin, Chief, WCB, to Wayne Watts, *et al.* (Jun. 23, 2008) (requesting information from parties to *AT&T/Bellsouth* transaction regarding market definition, market shares, geographic coverage, pricing, revenues, customers, competitors, services offered, plans, vertical relationships, agreements, etc.); Letters from Donna C. Gregg, Chief, MB, to Steven N. Teplitz, *et al.* (Dec. 5, 2005) (requesting information from parties to *Adelphia* transaction concerning subscriber shifting, market shares, margins, geographic coverage, vertical relationships and agreements); Letters from James L. Ball, Chief, Policy Div. IB, to Phillip Spector *et al.* (Nov. 23, 2005 and May 23, 2006) (requesting information from parties to *Intelsat/Panamsat* transaction relating to product and geographic market definition, market shares, intermodal market shares, customer switching between modes); Letter from William W. Kunze, Chief, Spectrum and Comp. Policy Div., WTB, to Doane F. Kiechel, *et al.* (Mar. 1, 2005) (requesting information from parties to *Western Wireless/Alltel* transaction concerning market share, vertical issues, pricing, competitive effects, customer shifting); Letters from W. Kenneth Ferree, Chief, MB, to Gary M. Epstein, *et al.* (Jul. 8, 2003, Oct. 16, 2003, and Oct. 31, 2003) (requesting extensive information concerning *NewsCorp/Hughes* transaction); Letter from W. Kenneth Ferree, Chief, CSB to Pantelis Michalopoulos, *et al.* (Feb. 4, 2002) (requesting information from parties to proposed transaction between DirecTV and EchoStar concerning vertical relationships, services offered, customer switching, geographic coverage, prices, costs, plans, etc.); Letters from To-Quyon Truong, Assoc. Chief, CSB, to Arthur H. Harding, *et al.* (Jun. 9, 2000, Jun. 23, 2000, and Aug. 14, 2000) (requesting information regarding *AOL/Time Warner* transaction, especially concerning vertical agreements, plans and relationships).

[30/](#) Vizada has made clear that it also is prepared to provide information to the Commission in this proceeding.

function while obscuring and ignoring fundamental factual disputes that cried out for investigation. [31/](#)

All of the incumbent Commissioners have stressed repeatedly the importance of getting the facts right before plunging ahead to a policy decision. [32/](#) Each of the Commissioners has rightly expressed frustration whenever pressed to draw factual conclusions from stale or selectively distorted data or to rubber stamp reports based on patently inadequate investigation. [33/](#)

Inmarsat has made clear its intention to consummate its acquisition of Stratos in April 2009. For this reason, the Commission should immediately order the Bureau to send to Inmarsat and Stratos those document and data requests that should have been sent several months ago.

[31/](#) Another (unrelated) satellite matter ruled upon in haste the very same day (January 16) by the International Bureau's then-Chief has now been rescinded by the new Acting Chief "to give the Bureau a better opportunity to compile a more detailed record . . . to ensure that we have considered this matter fully." *DIRECTV Enterprises, LLC*, DA 09-204 (Feb. 9, 2009).

[32/](#) *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 21 FCC Rcd 12229, 12264 (2006) (Comm'r Copps: "Our analysis can be only as good as the data going into it."); *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services; First Report*, 22 FCC Rcd 5954, 6016 (2007) (Comm'r Copps) ("In many of the markets examined, we lack the requisite data to determine specific market shares. * * * We need to strengthen and improve our data and analysis I hope we will undertake more proactive and comprehensive information gathering efforts in order to obtain independent, verified data."); (Comm'r Adelstein) ("I am concerned that we lack the level of data granularity that would normally be associated with a competition report."); *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Thirteenth Annual Report, FCC 07-206 (rel. Jan. 16, 2009) (Comm'r Adelstein) ("In order to base our decision on the facts, Commissioners need access to all the facts. * * * I came here to be part of the expert agency – to follow the facts wherever they lead. We cannot cook the books"); (Comm'r McDowell) ("But why was this data omitted or suppressed to begin with?").

[33/](#) *Supra* note 32. Quite recently, when faced with hasty Bureau decisions to short-circuit a sensible process for uncovering crucial facts and developing recommended decisions, the current Commission acted expeditiously to rescind the Bureau's rulings and to resume the process of gathering and analyzing the facts under an administrative law judge's oversight. *Herring Broadcasting, Inc. d/b/a/ WealthTV, Complainant v. Time Warner Cable, Inc., Defendant, and related cases*, Order, MB Docket 08-214, FCC 09-4 (Jan. 27, 2009).

The Commission should not delay unless Inmarsat agrees to postpone consummation until this appeal is completed.

B. The Bureau Order Ignored, Misstated, and Misperceived Key Factual Issues Requiring Investigation

The Bureau Order fails to meet the statutory requirements because Inmarsat has failed to meet its burden to present actual data needed to define the relevant markets and assess market power and the Bureau has not made any pro-active investigation of those critical market facts.

1. Relevant Product Markets

Vizada provided the Bureau extensive evidence to show that Inmarsat continues to dominate four important and distinct product markets: (1) maritime low-speed data, (2) maritime broadband, (3) aeronautical broadband, and (4) remote land-based broadband. [34/](#) Inmarsat and Stratos, in contrast, argued that these product markets were simply parts of a single all-encompassing MSS market (or perhaps a still larger market including even fixed satellite and maybe also terrestrial services). [35/](#)

Unfortunately, the Bureau adopted Inmarsat's self-serving assertion of one worldwide all-MSS services relevant market without conducting any independent data-based analysis. In a display of circular reasoning, the Bureau Order stated that because every MSS customer is seeking "mobile telecommunications connectivity . . . in geographically or remote areas" and thus every MSS service shares that one broadly phrased "demand characteristic," [36/](#) the product market definition must necessarily encompass all those services. The Bureau defined away

[34/](#) Vizada Reply at 26-51; Vizada Dec. 8 Letter at 5-14; see also Vizada Petition at 20-28
[35/](#) Inmarsat/Stratos Oct. 9 Letter at 2-4.
[36/](#) Bureau Order ¶ 31.

Inmarsat’s market power by finding that the relevant wholesale and retail product market is the provision of any and all mobile satellite services. ^{37/}

Notably, the Bureau Order at least claimed that it would, as required by binding Commission and antitrust precedent, “base its market definition[s] on considerations of demand substitutability among services.” ^{38/} But Inmarsat was never required to provide contemporaneous documents, data, and analyses bearing upon those substitutability considerations. It provided no actual data on each service’s functional interchangeability, peculiar characteristics or uses, distinct customers, distinct prices, sensitivity to price changes, cross-elasticity between services, actual shifting between services, supplier perceptions about customers’ shifting, and so forth. ^{39/} The Bureau therefore did not have the data to conduct a standard SSNIP test, *i.e.*, determine whether a hypothetical monopolist of one distinct MSS service could raise the price of that service a significant amount for a non-transitory period without experiencing sufficient customer shifting to one or more other non-monopolized MSS services so as to render the price increase unprofitable. ^{40/} Nor did the Bureau have reliable third party sources for any of the foregoing information – except the opinion of Vizada’s expert, Dr. Farrar, that went un rebutted. In short, the Bureau failed to conduct an independent factual

^{37/} *Id.* ¶ 32.

^{38/} *Id.* ¶ 31. Under Commission precedents and the DOJ/FTC Merger Guidelines, relevant markets are required to be defined from the demand or customer side and not from the supplier (or in this case, satellite operator) side. *Liberty Media/DirecTV*, 23 FCC Rcd at 3280-81 ¶ 31; DOJ/FTC Horizontal Merger Guidelines (rev. 1997)(“DOJ/FTC Merger Guidelines”) § 1.0 (“Market definition focuses solely on demand substitution factors – *i.e.*, possible consumer responses.”), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>. However, functional substitutability (or interchangeability) is but one of many tools for determining from the demand-side the boundaries of the relevant market. *Id.* §§ 1.1-1.12. A critical factor is whether a potential substitute will constrain the price of the product in question.

^{39/} *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) listing the foregoing factors as practical indicia in determining relevant market boundaries.

^{40/} The SSNIP test is enshrined in the DOJ/FTC Horizontal Merger Guidelines § 1.11. This Commission has endorsed that test. *Liberty Media/DirecTV*, 23 FCC Rcd at 3280-81 ¶ 31.

investigation regarding demand substitutability, despite the Commission’s insistence upon such data in other cases. [41/](#)

Preferring to rely on intuition and unspecified “information currently available,” the Bureau lamely promised that it would “consider revising” its views on market definition “should more economic evidence on demand substitutability or other factors be[come] available” in later proceedings. [42/](#) But the Bureau refused to require the parties to make such evidence available. [43/](#) The Bureau conceded that “each individual mobile satellite service varies *somewhat* in its consumer demand characteristics” and consequently is an “*imperfect*” substitute for each other service. [44/](#) But the Bureau declined to explore the actual significance of each variation in customer demand and the full practical extent of imperfection in product substitutability.

The Bureau’s “one market” definition gives rise to absurd implications, such as: (1) despite its higher price and different characteristics, maritime broadband is an effective price-constraining substitute for low-speed maritime, (2) a provider of services devised specifically for remote land uses constrains the provider of a unique aeronautical broadband solution, and (3) broadband services developed for large ocean-going vessels are ready alternatives for broadband services to serve a space-and-weight-constrained airplane. [45/](#)

[41/](#) See cases cited in note 29, *supra*.

[42/](#) Bureau Order ¶ 32.

[43/](#) *Id.* ¶ 54 n.152.

[44/](#) *Id.* ¶ 31 (emphasis added).

[45/](#) Incredibly, the Bureau Order faults Vizada for not demonstrating that MSS voice services would be an inadequate substitute for a consumer desiring MSS high-speed data services. *Id.* ¶ 33. Surely, the Bureau is well aware of the many Commission decisions and reports articulating the functional distinctions between voice capacity alone and high-speed (or broadband) data and treating the former as not a reasonable substitute for the latter, even if the latter includes voice capacity. Almost as bizarre is the Bureau’s criticism of Vizada for purportedly asserting that the “locale of consumption,” *i.e.*, air, sea, or land, is relevant to

2. Inmarsat's Persistent Market Power

Vizada provided extensive data, documents, and expert testimony regarding the nature, origins, and persistence of Inmarsat's market power in specific product markets. [46/](#) Vizada furnished evidence regarding the technical, operational and financial weaknesses of third party MSS providers. [47/](#) Vizada explained why users are dependent upon Inmarsat services. [48/](#)

Inmarsat responded with a variety of anecdotal information, much of which was not on point with Vizada's arguments. [49/](#) Inmarsat and Stratos criticized Dr. Farrar, but offered no contradictory industry expert testimony. The record is devoid of *any* contemporaneous Inmarsat planning, operational, or marketing documents, or pricing or customer sales and switching data, or other materials that might tend to refute Vizada's fundamental assertions.

The Bureau Order rejects any suggestion that the staff should follow Commission precedent and conduct an independent investigation on the issue of market power to see whether the merging parties' business people are saying and doing things that contradict their lawyers' arguments. [50/](#) The Bureau Order lacks the benefit of even a review of Inmarsat's business plans and communications to investors and analysts dating from a few months before its proposed

product market definition. *Id.* ¶ 33. But, if the Bureau conducted even a modest factual investigation, it would readily discover that the satellite service beams and bandwidth, the size and weight of the necessary equipment, the pricing, etc., will vary depending upon the type of user. Moreover, the operator of a fleet of airplanes will never switch to ground or sea operations in order to obtain an alternative MSS communications service more to its liking in terms of quality, price, or whatever. Further, the provider knows the type of geophysical environment (air, sea, or land) in which the end user operates and can use its market power to price discriminate accordingly.

[46/](#) See, e.g., Vizada Reply at 33-51; Vizada Dec. 8 Letter at 7-14.

[47/](#) Vizada Reply at 4-5, 35, 36, 37-40, 42-45, 48-51; Farrar Declaration at 3-18; Vizada Dec. 8 Letter at 8, 9, 10, 11, 12, 13-14.

[48/](#) Vizada Petition at 23-26, 27-28, 47; Farrar Declaration at 6-7, 11-12.

[49/](#) For example, they mentioned voice as competitive; but Vizada does not contend Inmarsat dominates mobile satellite voice services.

[50/](#) Bureau Order at ¶¶ 19-20.

acquisition of Stratos to the present. Absent facts, the Bureau can only theorize that other MSS operators constrain Inmarsat by differentiating their services from Inmarsat's. [51/](#)

In any case, the Bureau should have conducted an investigation to see where the truth lies and specifically what Inmarsat's and Stratos' documents and data say on the subject. [52/](#) The failure to do so creates errors and facial inconsistencies. For example, having conceded that "Inmarsat's unique position as a provider of [Global Marine Distress Safety System] GMDSS service . . . give[s] it a competitive advantage . . . in the provision of low-speed maritime data services," and also that GMDSS is generally bundled with other Inmarsat low-speed data services, the Bureau Order *simply assumed without requesting actual market pricing and demand data*, whatever "upward pricing" power that leverage afforded Inmarsat was just not worth worrying about. [53/](#) If the Bureau wanted to test its hypothesis that Inmarsat is effectively constrained in the sale of maritime broadband services to government and commercial fleets on the high seas by (1) "a combination of regional FSS broadband services" that have less portable antennas than Inmarsat, need an integrator, and have coverage gaps, and/or (2) Iridium's just-launched and much lower speed Open Port service, [54/](#) the Bureau should have compelled Inmarsat and Stratos to provide their own critically relevant documents and data. If the Bureau thought that purported US Navy consideration of possibly replacing its Inmarsat infrastructure

[51/](#) Bureau Order ¶ 38.

[52/](#) Instead of employing its investigative tools, the Bureau Order relies upon a trade magazine article (essentially unsworn hearsay) for proof that VSAT services with a "global reach" and flat pricing structure have cream-skimmed Inmarsat's most valuable customers. *Id.* ¶¶ 38-39 at nn.98, 102. But even that article recognizes that "the penetration into Inmarsat's market by VSAT operators was and remains small" and Inmarsat holds "major advantages in the maritime market, includ[ing] its coverage, spectrum, Global Marine Distress Safety System role, distribution and service networks, range of products, price of user equipment, and not least, the company's brand and name." *Id.*

[53/](#) *Id.* ¶ 40 n.110.

[54/](#) *Id.* ¶¶ 37, 38.

shows that customers of all stripes are free to switch suppliers and are never really “locked in,” [55/](#) the Bureau should have compelled production of the relevant facts from Inmarsat and Stratos rather than just assume long-time distributor Vizada does not understand Inmarsat end-users’ vulnerability.

3. The Transaction’s Probable Adverse Effects on Intra-Brand Competition and Consumer Welfare

Vizada’s pleadings show that intra-brand competition among Stratos, Vizada and other independent retail distributors is beneficial to downstream resellers and end-users. [56/](#) Inmarsat’s acquisition of Stratos, however, will give the merged entity the incentive and ability to diminish drastically or even eliminate the currently vigorous intra-brand competition in the sale of Inmarsat services. [57/](#) Despite Vizada’s explicit urging, the Bureau refused to seek any of Inmarsat’s planning or other contemporaneous documents that would reveal why Inmarsat wants to acquire Stratos, how Inmarsat plans to utilize this new vertical arrangement, and what Inmarsat is doing to revise agreements with its independent distributors such as Vizada. [58/](#)

Whatever changed incentives Inmarsat might have were it to enter *de novo* into retail distribution in April 2009, it would not have the incentive or the ability profitably to crush both Stratos and Vizada through anticompetitive and discriminatory strategies. Inmarsat’s temptation

[55/](#) *Id.* at 39.

[56/](#) Vizada Petition at 28-30; Vizada Reply at 57.

[57/](#) *Id.*

[58/](#) Because Inmarsat has imposed strict confidentiality on its discussions with Vizada about a new distribution arrangement, Vizada faces an impossible dilemma in trying to enable the Commission to understand the tenor and substance of those discussions without breaching their confidentiality. The whole subject cries out for independent investigation (presumably under a protective order) before the acquisition is approved and while there is still an opportunity to condition any possible approval on stringent competitive safeguards. The public interest in maintaining vibrant competition is not adequately protected by saying weakly, as the Bureau did, that “the Commission has continuing oversight with respect to the distribution arrangements of satellite operators” and can always consider allegations of “anticompetitive activity.” Bureau Order ¶ 38 n.74. *Now* is the time to exercise that jurisdiction before damage is done.

to misuse its new vertical integration achieved through *de novo* entry would be tempered by the reality of two strong intra-brand rivals possessing marketing expertise, established reseller networks, and existing customer relationships. But market circumstances are dramatically altered if Stratos, with all its pre-existing marketing and sales strength, becomes vertically integrated through common ownership with Inmarsat, the key input supplier for Stratos, Vizada, and other distributors. [59/](#)

Vizada showed below that as a direct result of this combination of dominant upstream supplier and major downstream distributor, the merged entity would have for the first time the incentive and the ability to: (1) discriminate against Stratos' rivals through Inmarsat's pricing of inputs and engage in anticompetitive price squeezes, (2) misuse information Inmarsat garners from Stratos' rivals to advantage Stratos, (3) withhold timely communication of new Inmarsat operational, technical, or product information from non-owned distributors so as to advantage Stratos, (4) provide Stratos preferential access to space segment resources, (5) reduce service quality to Stratos' rivals, (6) provide more favorable commercial terms and conditions to Stratos than in other distributors' contracts, and (7) deny Stratos' rivals access to important technical, regulatory or product development information. [60/](#) The Bureau Order dismissed these serious competitive concerns as merely "potential harms," downplaying their significance on the basis of (1) Inmarsat's uninvestigated claim that it is offering adequate discrimination and confidentiality pledges in its distribution agreements with independents like Vizada, and (2) the Bureau's

[59/](#) Vizada Petition at 30-31; Vizada Reply at 52-58.

[60/](#) Vizada Petition at 30-45; Vizada Reply at 20-21, 26-51; Vizada Dec. 8 Letter at 2, 16-18.

troubling view that if Vizada does not like Inmarsat’s contract offer, it can distribute just the services of other MSS operators and forget about Inmarsat intra-brand competition. [61/](#)

The Bureau compounded its failure to request data from Inmarsat and Stratos by failing to distinguish between Inmarsat’s contractual freedom after April 14, 2009 to engage in direct distribution, and Inmarsat’s purchase and ownership of a competing distribution partner. In any case, it was fundamental error for the Bureau Order to conclude – without any investigation of Inmarsat’s internal documents and data – that the “reasons to integrate vertically” are “plausible,” “pro-competitive,” and will “yield significant economic efficiencies.” [62/](#) This error is all the greater in the face of Vizada’s fact-laden and expert-supported contentions that the merger would precipitate anti-competitive and discriminatory strategies, that the new distribution agreements would be toothless to prevent such an outcome, and that intra-brand competition and customer welfare would be irreparably damaged.

IV. THE BUREAU ORDER FAILED TO GRASP HOW THIS VERTICAL TRANSACTION FUNDAMENTALLY TRANSFORMS MSS DISTRIBUTION TO THE DETRIMENT OF COMPETITION AND CONSUMERS

A. By Refusing to Investigate Inmarsat’s Market Power, the Bureau Conveniently Avoided the Commission’s Vertical Merger Precedents

The Bureau Order paid lip service to the many “previous Orders in which the Commission has considered the effects of previous vertical mergers and has placed conditions . . . where necessary to protect competition.” [63/](#) The Bureau acknowledged that those precedents “each involve[d] vertical integration resulting in a firm with market power in an upstream market

[61/](#) Bureau Order ¶ 47. Showing further inexplicable hostility to intra-brand competition and a complete refusal to investigate the actual market facts, the Bureau Order said that if Inmarsat service buyers lost the opportunity to use Vizada’s innovative account management software, that was not a “significant problem” because loss of such choices was a “normal outcome” when distribution relationships change. *Id.* ¶ 48

[62/](#) Bureau Order ¶ 45.

[63/](#) *Id.* ¶ 43 n.121.

able to engage in competitive behavior in a downstream market, either by raising the cost of inputs or by withholding a critical input.” [64/](#) The Bureau purported to distinguish these important precedents as “inapplicable” because allegedly “Inmarsat lacks significant market power in the upstream market.” [65/](#)

What the Bureau failed to confront was the fact that in every one of the leading vertical merger precedents, the Commission first thoroughly investigated – by means of extensive document and data requests to the parties – whether the upstream entity possessed market power. [66/](#) In those cases, the Commission did not reach to find reasons to avoid an investigation; instead it conducted an investigation and benefited from the fruits of that analysis.

B. The Bureau Order Erroneously Assumed that Asserted Efficiencies Would Outweigh any Anticompetitive Concerns

The Bureau Order also confuses the efficiencies that might come from *de novo* Inmarsat entry into downstream distribution with those arising from the company simply buying up its largest distributor (Stratos). To be sure, in certain situations, *de novo* entry into distribution might enable Inmarsat to experience certain “efficiencies” as compared to working through an established distributor. But the Bureau assumed that “efficiencies” gained through a vertical *acquisition of the size and scope of Stratos* would be equally and invariably benign. [67/](#)

To the contrary, Vizada has shown how supposed “efficiencies” are really forms of misconduct that harm customers through anticompetitive price and non-price discrimination, price squeezes, various other forms of favoritism such as advance release of critical information just to Stratos, and abuse of confidential information Inmarsat derives from Vizada and other

[64/](#) *Id.* ¶ 43.

[65/](#) *Id.*

[66/](#) *See, e.g., Liberty Media/DirecTV*, 23 FCC Rcd at 3285-3332 ¶¶ 64-121; *News Corp.-Hughes*, 19 FCC Rcd at 510-87 ¶¶ 76-258; *Adelphia*, 21 FCC Rcd at 8256-66 ¶¶ 115-91.

[67/](#) The Bureau inappropriately analogizes the acquisition of a legacy distributor as large as Stratos with “permit[ting] Inmarsat to sell directly to consumers.” Bureau Order ¶ 42.

independent distributors. ^{68/} These actions might lower the combined firm’s “costs” – but to the absolute detriment of competition and long-run consumer welfare. Despite Vizada’s timely suggestions, the Bureau did not seek from Inmarsat any contemporaneous plans and documents or other data that would likely reveal whether Inmarsat’s purported “efficiencies” goal was anything more than a subterfuge to extend its market power downstream and use Stratos as a means of eliminating intra-brand competition and diminishing inter-brand competition as well.

V. THE BUREAU ORDER ERRED IN NOT TREATING THIS AS AN ANTI-COMPETITIVE ACTUAL POTENTIAL HORIZONTAL MERGER

The Bureau Order also erred in failing to consider the public interest consequences of eliminating – at the very inception of Inmarsat’s legal ability to enter the downstream business – all the substantial *horizontal* competition that would certainly have existed between Inmarsat and Stratos (and others) starting in April 2009. The Bureau Order blindly accepts Inmarsat’s empty claim that the acquisition “would not be a horizontal merger.” ^{69/} While the transaction is unquestionably a vertical merger with anticompetitive characteristics, it is also a horizontal merger between the largest distributor of Inmarsat’s and other MSS operators’ services (Stratos) and a potential (indeed, by its own assertions for several years, the highly probable) worldwide entrant into the distribution of mobile satellite services (Inmarsat).

Eliminating the horizontal competition that would surely ensue on and after April 2009 but for the instant transaction has a significant adverse public interest consequence. The antitrust authorities frequently find that the elimination of such actual potential horizontal competition in

^{68/} Vizada Petition at 30-44; Vizada Reply at 52-58; Vizada Dec. 8 Letter at 16-18.
^{69/} Bureau Order ¶ 29.

already concentrated industries with substantial entry barriers is a violation of the antitrust laws. [70/](#)

Under the pertinent DOJ merger guidelines, the elimination of an actual potential entrant is generally viewed as anticompetitive if the market is concentrated, if entry barriers are high, if the putative entrant is the only likely entrant (or one of a very few likely entrants), if the likelihood of that firm's entry would be high but for the proposed transaction, if the acquisition is not a toehold acquisition of a small firm but the acquisition of a large existing competitor, and if the acquisition will raise entry barriers even higher in the future. [71/](#) In this case, all requirements are met.

The horizontal effects of eliminating this probable competition at the distribution level are reason enough to overturn the Bureau Order and either remand to conduct a full factual investigation or designate the transaction for an evidentiary hearing. In no event may alleged but

[70/](#) E.g., *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981)(affirming an FTC decision finding that respondent probably would have entered the relevant market independently absent the joint venture with an existing competitor, which joint venture the FTC properly invalidated for that reason under the antitrust laws); Complaint, *FTC v. Ovation Pharmaceuticals, Inc.*, No. 08-cv-06381-JNE-JJG (D. Minn., filed Dec. 16, 2008)(antitrust suit to force firm to rescind or divest its acquisition of a highly probable entrant and to thereby preserve actual potential competition) ¶ 20; Complaint, *Polypore International, Inc.*, FTC Docket No. 9327 (Sept. 9, 2008)(antitrust proceeding to undo acquisition of a uniquely positioned and probable actual potential entrant) ¶¶ 27-29, 37, 38a, available at <http://www.ftc.gov/os/adjpro/d9327/091008cmp9327.pdf>; *Albertson's, Inc. and American Stores Co.*, C-3986 (Dec. 6, 2000)(antitrust proceeding to enjoin the acquisition of a highly probable actual potential entrant) ¶¶ 17, 18a, available at <http://www.ftc.gov/os/2000/12/albertsoncomp.htm>; Complaint, *ABB AB and ABB AG*, FTC Docket No. C-3867 (April 14, 1999)(Clayton § 7 and FTC § 5 administrative complaint, to enjoin the acquisition of an actual potential entrant) ¶¶ 16, 18(e), available at <http://www.ftc.gov/os/1999/04/abbcmp.htm>; Complaint, *Autodesk, Inc. and Softdesk, Inc.*, FTC Docket No. C-3756 (June 18, 1997)(complaint to enjoin acquisition of an actual potential entrant) ¶ 20b, available at <http://www.ftc.gov/os/1997/06/autodesk.pdf>.

[71/](#) DOJ Non-Horizontal Merger Guidelines §§ 4-4.135, available at <http://www.usdoj.gov/atr/public/guidelines/2614.htm>.

uninvestigated efficiencies purportedly associated with the transaction automatically and without further investigation or hearing trump the significant loss of horizontal competition.

VI. CONCLUSION

For the foregoing reasons, the Commission should overturn the Bureau Order and, in any case, immediately issue to Inmarsat and Stratos the data and document requests that are critical to the correct competitive and public interest analysis of this Inmarsat acquisition of Stratos. In no event should the transaction be allowed to move forward without the imposition of essential competitive safeguards and a thorough fact-based analysis of the vital public interest issues raised by this competitively destructive and negatively transformational transaction.

Respectfully submitted,

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