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wrf

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 4, 2004

Bert W. Rein
202.719.7080
brein@wrf.com

VIA HAND DELIVERY

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

RE: Written Ex Parte
SAT-ASG-20030728-00138
SAT-ASG-20030728-00139

Dear Ms. Dortch:

I. INTRODUCTION

Intelsat North America LLC ("Intelsat"), by its attorneys, hereby submits this letter to supplement and clarify its Opposition to SES AMERICOM's pending Application for Review[1] in the above-referenced proceeding. On February 11, 2004, the International Bureau ("Bureau") assigned certain Loral spacecraft and licenses to Intelsat and granted Intelsat special temporary authorization ("STA") to continue the provision of certain "additional services," as defined by the Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act" or "Act"),[2] to then-existing Loral customers.[3] SES AMERICOM

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[1] *SES AMERICOM, Inc., Application for Review*, File Nos. SAT-ASG-20030728-00138/00139 (filed Mar. 12, 2004) ("*SES Application for Review*").

[2] Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), § 681(a)(12)(B) ("additional services" defined as "for INTELSAT, direct-to-home (DTH) or direct broadcast satellite (DBS) video services, or services in the Ka or V bands."), *as amended,* Pub. L. No. 107-233 (2002), *as amended*, Pub. L. No. 108-228 (2004).

argues that Intelsat cannot be allowed to continue providing these services to former Loral customers prior to Intelsat conducting an initial public offering ("IPO"). SES AMERICOM is wrong. As shown below, the Federal Communications Commission ("FCC" or "Commission") has ample statutory authority to authorize privatized Intelsat to provide additional services prior to conducting an IPO, whether by full license or STA. The Commission, therefore, should deny the Application for Review.

II. PRINCIPLES OF STATUTORY CONSTRUCTION

When interpreting a federal statute, a court (or an agency) "look[s] first to the words that Congress used."[4] Those words are given their "plain meaning" unless "it would produce an absurd result or one manifestly at odds with the statute's intended effect."[5] Moreover, a court must "interpret the language as it is written, 'giving effect, if possible, to every clause and word of a statute.'"[6]

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[3] *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors and Intelsat North America, LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations and Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934*, Order and Authorization, 19 FCC Rcd 2404, 2430 (2004) ("*Loral/Intelsat Order*"), as amended, *Supplemental Order*, 19 FCC Rcd 4029 (2004).

[4] *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999).

[5] *Wade v. Life Ins. Co. of North Am.*, 245 F. Supp. 2d 182, 190 (D. Me. 2003) (quoting *Parisi v. Chater*, 69 F.3d 614, 617 (1st Cir. 1995)).

[6] *Fed. Deposit Ins. Corp. v. County of Orange*, 262 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). *See also Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9703 n.570 (2002).

Statutory language and sections must be read *in pari materia,* meaning that they should be construed as a whole and with reference to each other.[7]

Where the "meaning of a word is clearly explained in a statute, courts are not at liberty to look beyond the statutory definition."[8] If a statute does not define a term, however, the court "generally interpret[s] that term by employing the ordinary, contemporary, and common meaning of the words that Congress used."[9] This ordinary and common meaning may be obtained by using a dictionary.[10] Where Congress did not speak to the precise question at issue, the statute is ambiguous and in such circumstances, "the FCC's reading must be accepted nonetheless, provided it is a reasonable interpretation."[11] As explained below, the language of the ORBIT Act provides the FCC with the authority to authorize Intelsat to provide additional services now, subject to the condition that Intelsat satisfy the IPO requirement by the date set forth in Section 621(5).

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7 *See Motion Picture Ass'n of Am., Inc., v. FCC*, 309 F3d 796 (D.C. Cir. 2002) ("[Communications Act] provisions *in pari materia* normally are construed together to discern their meaning."); *Erlenbaugh v. United States,* 409 U.S. 239, 244 (1972) ("individual sections of a single statute should be construed together"); *Clark v. Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480, 489 (1947) ("To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.").

8 *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999).

9 *Zimmerman*, 170 F.3d at 1174 (quoting *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998)).

10 *True Oil Co. v. Commissioner of Internal Revenue*, 170 F.3d 1294, 1299 (10th Cir. 1999).

11 *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002).

III. SECTION 602(a) OF THE ORBIT ACT DOES NOT BAR INTELSAT FROM PROVIDING ADDITIONAL SERVICES PRIOR TO HOLDING AN IPO

Section 602(a) of the ORBIT Act addresses the conditions under which Intelsat can offer additional services. Section 602(a) states:

> SEC. 602. INCENTIVES; LIMITATION ON EXPANSION PENDING PRIVATIZATION. (A) LIMITATION.--Until INTELSAT, Inmarsat, and their successor or separate entities are privatized in accordance with the requirements of this title, INTELSAT, Inmarsat and their successor or separate entities, respectively, shall not be permitted to provide additional services. The Commission shall take all necessary measures to implement this requirement, including denial by the Commission of licensing for such services.[12]

The standard set forth in this section requires only that Intelsat be "privatized in accordance with the requirements of this title." Two independent statutory interpretations of Section 602(a) would permit the FCC to find that Intelsat satisfies that condition and thus is permitted currently to offer additional services either by STA or full license.

A. Intelsat is Already "Privatized" As Required in Section 602(a)

The term "privatized" could have many meanings. In Section 602(a), however, Congress clarified that the privatization in question was privatization "in accordance with the requirements" of the ORBIT Act. Thus, the Commission must

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[12] *ORBIT Act*, § 602(a), *codified at* 47 U.S.C. § 761a(a) (2000).

look to the other provisions of the ORBIT Act to determine if Intelsat is "privatized" and thus permitted to offer "additional services".

As an initial matter, although Section 2 of the ORBIT Act explains that the "purpose of this Act is to promote a fully competitive global market ... by fully privatizing ... INTELSAT and Inmarsat,"[13] Section 602(a) does *not* include the modifier "fully" when establishing the privatization required before Intelsat may provide additional services.[14] Indeed, the fact that the ORBIT Act itself distinguishes between "full[] privatiz[ation]" in one section and "privatization" (or "privatized") in the rest of the Act [15] is further evidence that Congress directed the FCC to authorize additional services prior to "full" privatization, however defined.[16]

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13 ORBIT Act, § 2.

14 *See id.*, § 602(a).

15 Elsewhere in the ORBIT Act, Congress clearly understood and distinguished between "privatized" and "full privatization." Section 681(a)(8)—the definition of "separated entity"—plainly differentiates the two terms:

> The term 'separated entity' means a privatized entity to whom a portion of the assets owned by INTELSAT or Inmarsat are transferred prior to full privatization of INTELSAT or Inmarsat, including in particular the entity whose structure was under discussion by INTELSAT as of March 25, 1998, but excluding ICO. *ORBIT Act*, § 681(a)(8).

In this context, the use of "full privatization" reflects Congress's understanding that separated entities would be created no later than when the former IGOs were transformed into entities satisfying *all* the ORBIT Act obligations. For example, New Skies was created as a separated entity in 1998, well prior to INTELSAT's full privatization.

16 *See Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996) ("Where Congress has chosen different language in proximate subsections of the same statute, the courts are obligated to give that choice effect") (citation omitted). *See also* 2A N. Singer, Sutherland on Statutory Construction § 46.06 (6th ed. 2000 at 194) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. In like manner, where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.").

The ORBIT Act introduces the terms "privatized" and "privatization" to describe actions Congress expected INTELSAT, the former intergovernmental organization ("IGO"), to complete soon after the effective date of the Act:

- "Privatization shall be obtained" by April 1, 2001;[17]
- "the Commission shall determine whether. . . after April 1, 2001, . . . INTELSAT and any successor entities have been privatized. . ."[18]

The Act also established certain requirements of a satisfactory privatization and directed the FCC, as a prerequisite to licensing Intelsat, to review and determine whether INTELSAT's privatization was "consistent with" these criteria:

- "conver[ting] to a "stock corporation[]" (or "similar accepted structure") organized under national law[19];
- having a "pro-competitive ownership structure,"[20]
  - ⇒ controlled by a "fiduciary" board of directors[21] substantially unconnected with former Signatories[22] (and unconnected to the residual IGO[23]);
  - ⇒ employing only "officers and managers" unrelated to, and without any financial interest in, former signatories[24] or the residual IGO[25];
- foregoing all former IGO "privileges and immunities;" and

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17 *ORBIT Act*, § 621(1)(A).
18 *Id.*, § 601(b)(1)(A)(i).
19 *Id.*, § 621(5).
20 *Id.*, § 621(2).
21 *Id.*, § 621(5)(D)(i).
22 *Id.*, § 621(5)(C).
23 *Id.*, §§ 621(5)(D)(iii-iv).
24 *Id.*, § 621(5)(D)(ii).
25 *Id.*, §§ 621(5)(D)(iii-iv).

– serving customers as an "independent commercial entit[y]."[26]

Notably, however, Congress established Intelsat's IPO as a requirement independent from and on a date certain subsequent to privatization:[27]

– An "initial public offering" "shall be conducted" by October 1, 2001 -- since amended by Congress to June 30, 2005;[28]

As with the "privatization" requirement, the ORBIT Act cataloged components of a successful IPO.[29] Thus, the plain language of the ORBIT Act establishes that Congress viewed "privatization" as an early test, to be judged prior to any IPO.[30]

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[26] *Id.*, § 621(2).

[27] In triggering other legislative requirements, other ORBIT Act provisions link the terms "privatized" and "privatization" with events expected long before Intelsat would be required to conduct an IPO. *See* ORBIT Act, § 644(b) (instructing the President and the FCC to "take the action necessary to ensure that the United States remains the ITU notifying administration for the privatized INTELSAT's existing and future orbital slot registrations."); *id.*, § 661 (directing the President to "secure the pro-competitive privatizations required by this subchapter."); *id.*, § 645 (repealing most of the former 1962 Communications Satellite Act upon "the effective date of a Commission order determining under section 761(b)(2) of this title that INTELSAT privatization is consistent with criteria in sections 763 and 763a of this title."). The events tied to "privatization" in the first two provisions authorize the continuation of then-current negotiations with foreign sovereigns to transfer the bulk of INTELSAT's assets to the new U.S. licensed Intelsat—which occurred in 2001, long before any IPO. The third provision acknowledged that prior law regulating the conduct of Comsat (or any successor) as signatory became moot once new Intelsat metamorphosed from IGO to a "privatized" corporation licensed by the FCC—which also occurred in 2001, prior to the deadline for an IPO.

[28] *Id.*, § 621(5)(A)(i), as amended by Pub. L. No. 108-228 (2004). This subsection now permits the FCC to extend Intelsat's IPO deadline until December 31, 2005.

[29] The ORBIT Act's IPO requirements include "substantially dilut[ing] the aggregate ownership" of former signatories, *id.*, § 621(5)(B).

[30] In addition, the FCC treated New Skies as a "separated entity" even before conducting its IPO, *New Skies Satellites N.V. Request for an Extension Under Section 623(l) of the ORBIT Act*, Memorandum Opinion and Order, 15 FCC Rcd 11934, 11935 & n.8 (2000), despite the fact that Section 681(a)(8) of the ORBIT Act requires any separated entity to be 'a privatized entity.'"

The legislative history of the ORBIT Act confirms that Congress viewed the "privatization" requirement as prior in time and separate from the IPO deadline. *See* 146 Cong. Rec. S1155 (daily ed. Mar. 2, 2000) (statement of Sen. Burns) (first two objectives of the ORBIT Act:

- "Establishing definite and reasonable criteria and dates certain for the privatization of INTELSAT and Inmarsat."

Commission precedent supports this statutory analysis. For example, in the *Intelsat Compliance Order*, the Commission stated,

> The ORBIT Act identifies April 1, 2001 as the date for INTELSAT's privatization and directs the Commission to review the privatization after that date. Section 621(1)(A) requires that INTELSAT privatize in accordance with the criteria in the Act 'as soon as practicable, but no later than April 1, 2001 ... As discussed above, the Act's requirement that INTELSAT conduct an IPO is not subject to the April 1, 2001 date...'[31]

Accordingly, the Commission found that Intelsat had been privatized in a manner that would not harm competition in the telecommunications market of the U.S.[32] and—prior to Intelsat conducting an IPO[33]—licensed Intelsat services in the U.S.

▪ "Calling for an IPO of the privatized INTELSAT of October 1, 2001, but prudently recognizing that market conditions must be taken into account and therefore, allowing the IPO date to be extended to no later than December 31, 2002.").

See also 146 Cong. Rec. H904 (daily ed. Mar. 9, 2000) (statement of Rep. Dingell) (concluding "Inmarsat has already privatized" though it had not conducted an IPO by that date).

[31] *Applications of Intelsat LLC for Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, Memorandum Opinion Order and Authorization, 16 FCC Rcd 12280, 12297 (2001) ("*Intelsat Compliance Order*"). *See also Applications of Intelsat LLC For Authority to Operate, and to Further Construct, Launch, and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, Memorandum Opinion Order and Authorization, 15 FCC Rcd 15460, 15462 ("*Intelsat Licensing Order*") ("Intelsat LLC would begin operation upon INTELSAT's transfer of the satellites and assets necessary to operate the satellites on the effective date of privatization—currently targeted for April 1, 2001."), *recon. denied* 15 FCC Rcd 25234 (2000); *see FCC Report to Congress as Required by the ORBIT Act,* 16 FCC Rcd 12810, 12820 (2001) ("*FCC 2001 ORBIT Act Report*") ("Upon privatization, former INTELSAT Signatories or non-Signatory investing entities will be issued shares in Intelsat Ltd. according to their March 2001 investment shares in INTELSAT. They will be the shareholders of Intelsat Ltd. until it conducts an IPO.").

[32] *ORBIT Act,* §601(b)(1)(A).

[33] *Id.,* § 601(b)(1)(D).

The FCC has repeatedly confirmed that Intelsat already had privatized under the ORBIT Act—despite the not-yet-applicable IPO requirement.[34]

The ORBIT Act thus allowed the Commission to authorize Intelsat services in the U.S. market prior to conducting an IPO,[35] but this authority is conditioned upon compliance with the IPO requirements. The full Commission has interpreted the IPO obligation as a condition subsequent to privatization, required no earlier than the date Congress specified: "[T]he authorizations issued in the Licensing Order are subject to a future Commission finding that the Intelsat Ltd. has conducted an IPO consistent with the requirements of Sections 621(2) and 621(5)(A)(i) of the ORBIT Act."[36] Section 601(b)(1)(B) preserves the

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[34] *See, e.g.*, FCC Report To Congress As Required By The ORBIT Act, 18 FCC Rcd 12525, 12527-28 (2003) ("INTELSAT privatized on July 18, 2001. The Commission previously had granted authorizations conditioned on compliance with the ORBIT Act to Intelsat LLC ('Intelsat'), the separate private Delaware company created by INTELSAT, prior to privatization, to hold the U.S. authorizations and associated space segment assets upon privatization."); INTELSAT Privatizes Its Commercial Operations; New Company An FCC Licensee, FCC News Release (July 19, 2001) (INTELSAT has completed privatization of its commercial operations. This historic action on July 18 will promote greater competition in satellite communications bringing benefits to consumers around the globe. The new company will continue to operate at its Washington, D.C. location."); *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, FCC 01-332, para 18 (Nov. 5, 2001) ("Disco II Recon. Order") ("Inmarsat and INTELSAT have become privatized companies subject to the laws of the countries in which they are incorporated."); id. at note 55 ("A small residual IGO will remain in place after the privatization of INTELSAT. . . This small residual IGO is to be known as the International Telecommunications Satellite Organization (ITSO), and will monitor the performance of the privatized company's public service obligations to customers in poor or underserved countries that have a high degree of dependence on INTELSAT. *See* FCC Report to Congress as Required by the ORBIT Act, FCC 01-190 (June 15, 2001) at 10.").

[35] *Id.*, § 601(b)(1)(D).

[36] *Applications of Intelsat LLC; For Authority to Operate, and to Further Construct, Launch and Operate C-and and Ku-band Satellite that Form a Global Communications System in Geostationary Orbit*, 16 FCC Rcd 12280, 12303 (2001) ("*Intelsat Compliance Order*"). *See also COMSAT CORPORATION d/b/a COMSAT MOBILE COMMUNICATIONS*, Memorandum Opinion,

Commission's authority "to limit or revoke previous authorizations" if it were to determine that competition is being harmed or an authorization is not otherwise in the public interest.[37]

Section 602(a) of the ORBIT Act also set forth a "carrot and stick" approach to licensing "additional services." Section 602(a) permitted Intelsat to offer additional services in the U.S. market provided its privatization was "in accordance with the requirements" of the ORBIT Act—the "carrot." In the event that Intelsat fails to satisfy the IPO requirement, *i.e.,* if Intelsat is no longer "privatized in accordance with the requirements of this title," Section 602(a)'s "stick" is triggered and Intelsat *must* cease providing additional services.[38] Indeed, Congress directed the Commission to "take all necessary measures" to bar a non-compliant Intelsat from providing additional services.[39] In contrast, Congress granted the Commission considerable discretion to determine an appropriate penalty against all "non-core services" – from imposing some form of a "limit" on non-core services to full revocation of authority – in the event the Commission finds that Intelsat's action harm competition or are not otherwise in the public interest.[40] In other words,

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Order and Authorization, 16 FCC Rcd 21661, 21694 (2001) ("*Inmarsat Compliance Order*") ("[FCC approved privatization] subject to Inmarsat's conducting an IPO in compliance with Section 621."). In addition, the FCC treated New Skies as a "separated entity" even before conducting its IPO, *New Skies,* 15 FCC Rcd at 11935 & n.8, despite the fact that Section 681(a)(8) of the ORBIT Act requires any separated entity to be 'a privatized entity.'"

[37] ORBIT Act, § 601(B)(1)(b).

[38] *ORBIT Act,* § 602(a).

[39] *Id.*

[40] *Id.,* § 601(b)(1)(B).

Section 602(a) focused on encouraging Intelsat to detach from the IGO and established a significant sanction with respect to additional services should privatization not occur in conformity with the specified criteria in the ORBIT Act.

Importantly, in an analogous decision involving Inmarsat, the full Commission interpreted the ORBIT Act to allow Inmarsat to provide additional services prior to conducting an IPO. Specifically, the Commission stated:

> Having found that Inmarsat privatized in a manner consistent with the non-IPO requirements of the Act, we may authorize any services, including 'additional' services, under the ORBIT Act, that meet our rules, subject to Inmarsat's conducting an IPO in compliance with Section 621.[41]

In sum, the language of the ORBIT Act clearly confines "privatization" as the process by which a former IGO would be transformed into a national corporation, under supervision of a fiduciary board of directors, employing independent officers and managers, and under FCC licensing jurisdiction. Intelsat complied three years ago—without regard to any future, unrelated, IPO condition subsequent. The Bureau's contrary interpretation (1) misreads the ORBIT Act; (2) discriminates against similarly situated entities;[42] (3) and conflicts with controlling FCC precedent.

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[41] *Inmarsat Compliance Order*, 16 FCC Rcd at 21694. The "we may authorize" language reflects the FCC's understanding that the FCC licenses U.S. entities to access Inmarsat, as opposed to the U.K. based Inmarsat itself.

[42] *See Melody Music v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).

B. Intelsat Has Satisfied All Currently Applicable ORBIT Requirements

Even if the term "privatized" as used in Section 602(a) is construed to incorporate future events set forth in the ORBIT Act—specifically, the IPO—the phrase "in accordance with the requirements of this title" cannot be read to impose obligations that, at present, are not yet required or ripe. Rather, the language of the ORBIT Act makes clear that Intelsat lawfully can provide additional services *today* subject to future FCC review of yet-to-be-required compliance.

As noted above, the FCC has repeatedly determined that Intelsat's privatization was "consistent with the ORBIT Act."[43] This finding necessarily establishes that Intelsat's current structure and activities fully comply with *every* obligation *now* imposed by the ORBIT Act. The fact that the ORBIT Act also obliges Intelsat to conduct an IPO *by a given date in the future* cannot alter that conclusion. So long as Intelsat fulfills ORBIT Act obligations *as they come due*, the company remains "privatized in accordance with the requirements of this title." Section 602(a) requires no more—making Intelsat fully qualified to offer additional services and giving the agency ample legal authority for an unconditional license or STA.

This statutory interpretation, and the flexibility it gives the FCC to permit Intelsat to provide additional services prior to holding an IPO, is supported by the

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[43] *Intelsat July 2001 Privatization Notice*.

meaning of the phrase "in accordance with". Common sense, the statutory language, and FCC and judicial precedent suggest that the flexibility the Commission already found inherent in the phrase "consistent with"[44] is identical to that conveyed by "in accordance with." Black's Law Dictionary defines "accordance" as "agreement; harmony; concord; conformity, while it defines "consistent" as "Having agreement with itself or something else; accordant; harmonious; congruous; compatible; compliable; not contradictory."[45]

Case law from the D.C. Circuit, which the Commission relied on in the *Intelsat Compliance Order* and the *Inmarsat Compliance Order*, also concludes that "in accordance with" is equivalent to "consistent with." In *Environmental Defense Fund, Inc. v. EPA*, the court stated, "Preceding the preposition 'with,' 'consistent'

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[44] Specifically, the FCC held that the similar phrase "consistent with" "infer[s] a degree of flexibility" and thus "conclude[d] that, as a whole, INTELSAT's privatization is consistent with [Sections 621 and 622] and achieves the purpose of the Act." *Intelsat Compliance Order*, 16 FCC Rcd at 12287. In the *Inmarsat Compliance Order*, the Commission reaffirmed that the "consistent with" language gave it the flexibility to judge Inmarsat's compliance with the Act. *Inmarsat Compliance Order*, 16 FCC Rcd at 21682. Moreover, the Commission specifically "disagree[d] with Motient and PanAmSat that the 'consistent with' standard requires Inmarsat's strict compliance with each and every criteria as specified in the Act." *Id.*

[45] Black's Law Dictionary (5th ed. 1979). Similarly, the Oxford English Dictionary defines "in accordance with" to mean "in agreement or harmony with; in conformity to," and describes "consistent with" as "agreeing or according in substance or form," "congruous" and "compatible." Oxford English Dictionary (2d ed. 1989). Other dictionaries also read the terms as identical. Webster's II New College Dictionary (2001) defines "accordance" to mean "agreement" and "conformity" and "consistent" to mean "being in agreement" and "compatible." The American Heritage College Dictionary (3d. ed. 1993) defines both "accordance" and "consistent," as "agreement."

means 'agreeing or *according in substance or form*,' that is 'congruous' or 'compatible.'"[46]

Moreover, when considering the ORBIT Act itself, the FCC treated "consistent with" and "in accordance with" interchangeably. In the *Intelsat Compliance Order*, the Commission stated "Section 601(c) [] requires the Commission to construe the licensing requirements of the Act *in accordance with* United States trade obligations under the General Agreement on Trade in Services (GATS)."[47] In reality, the language of Section 601(c) uses the phrase "*consistent with* the United States obligations and commitments for satellite services under the Fourth Protocol to the General Agreement on Trade in Services."[48] The Commission similarly paraphrased Section 601(c)—equating "consistent with" and "in accordance with"—in the *Inmarsat Compliance Order*.[49] Congress, the courts and the Commission treat "in accordance with" and "consistent with" as interchangeable. Therefore, it follows that the phrase "in accordance with" confers no less flexibility and discretion than the flexibility and discretion afforded by the phrase "consistent with" when regulating additional services under Section 602(a).

By effectively accelerating the IPO deadline established by Congress, however, the Bureau's ruling penalizes Intelsat for conduct unquestionably still

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46 *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 457 (D.C. Cir.) (citing Oxford English Dictionary 773 (2d ed. 1989)), *amended on other grounds*, 92 F.3d 1208 (D.C. Cir. 1996).

47 *Intelsat Compliance Order*, 16 FCC Rcd at 12287 (emphasis added).

48 ORBIT Act, § 601(c) (emphasis added).

49 *Inmarsat Compliance Order*, 16 FCC Rcd at 21682-83.

lawful. Such a reading obliterates the ORBIT Act's carefully crafted carrot and stick approach without furthering any conceivable public interest. Indeed, now that the IPO deadline has been extended until next year, Intelsat will remain "privatized in accordance with" all *current* "requirements of this title" long after the September 13, 2004 expiration date of the current STA. As a result, the Bureau's misreading of the ORBIT Act could create an unnecessary "gap" in Intelsat's authority, potentially disrupting untold numbers of U.S. customers. The Commission should confirm privatized Intelsat's authority to provide additional services long before then.

IV. THE BUREAU'S STA IS PERMITTED UNDER SECTION 602(a), WHICH IS NOT AN ABSOLUTE BAR TO INTELSAT'S PROVISION OF ADDITIONAL SERVICES

Even were the Commission to reject these two statutory interpretations permitting the full range of Intelsat licensing for additional services prior to an IPO, the ORBIT Act still affords sufficient flexibility for the Commission to grant, and renew, the existing STA. The STA is unquestionably lawful (under Section 309(f) of the 1934 Act) unless the first sentence of Section 602(a) is read to *compel* the FCC to bar Intelsat from providing *any* additional service prior to conducting an IPO.[50] This interpretation cannot be squared, however, with the very next sentence

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[50] *See SES Application for Review* at 21-22 ("On its face, Section 602(a) of the ORBIT Act declares that Intelsat and its successor entities "*shall not be permitted* [by the Commission] to provide "additional services" pending the completion of its privatization in accordance with statutory requirements ... This language – "shall not be permitted" ... does not merely suggest that Intelsat

in the ORBIT Act, which directs the agency to "take all necessary measures to implement this requirement, including denial by the Commission of licensing."[51] The word "including," coupled with the plural noun "measures," plainly establishes a continuum of permissible Commission actions with respect to Intelsat's provision of pre-IPO additional services.[52] And, because the "denial . . . of licensing" penalty in sentence two is precisely coincident with the absolute prohibition allegedly contained in sentence one (and thus would be superfluous), Congress must have intended the FCC to have authority to regulate pre-IPO additional services through "measures" *other than license denial*, "including" an STA. In addition, the ORBIT Act nowhere defines the word "necessary," suggesting that Congress intended the Commission to determine what measures are "necessary" to implement the "limitation" on a case-by-case basis.

Indeed, were the first sentence of Section 602(a) a flat prohibition on additional services before an IPO, Congress need not have considered alternative outcomes or consequences. But such a reading orphans sentence two. In other words, without interpreting both parts of Section 602(a) *in pari materia* with each other and with the ORBIT Act as a whole, the second sentence becomes mere

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and its successors should not be allowed to provide additional services pending full privatization; it affirmatively directs the Commission to prevent or stop Intelsat from doing so.") (citation omitted).

[51] ORBIT Act, § 602(a).

[52] Put differently, the FCC's power under Section 602(a)—"denial by the Commission of licensing for such services"—is only one possibility within a range of measures that the Commission might choose.

surplusage. This outcome would contravene rudimentary principles of statutory construction obliging the agency to interpret the law "in a manner that gives meaning to each word—if at all possible—over an interpretation that renders certain words superfluous."[53] Instead, the ORBIT Act must be understood so as to give independent meaning to the second sentence of Section 602(a), which plainly envisions a continuum of potential actions "including"—but not limited to—license denial.

Further, the title of Section 602(a) bolsters the Bureau's conclusion that the ORBIT Act permits granting STA for Intelsat additional services.[54] The heading of the provision describes the authority granted by Section 602(a) as a "*limitation* on expansion," not an absolute prohibition.[55] Indeed, such an interpretation would require the agency impermissibly to equate "limitation" with "prevention" when Congress intended a distinction.[56] Thus, when read as a whole—both sentences and

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[53] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range,* Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9703 n.570 (2002).

[54] In interpreting a statute, courts will consider a statutory provision's heading. *See Ranger Cellular v. Federal Communications Commission,* 333 F.3d 255, 259 (D.C. Cir. 2003), *cert. denied,* 124 S. Ct. 2014 (2004).

[55] ORBIT Act, § 602(a) (emphasis added).

[56] *See* ORBIT Act § 621(4) ("PREVENTION OF EXPANSION DURING TRANSITION." -- During the transition period prior to privatization under this title, INTELSAT and Inmarsat shall be precluded from expanding into additional services."). "Where Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect." *Cabell Huntington Hosp.* 101 F.3d at 988, *quoting United States v. Barial,* 31 F.3d 216, 218 (4th Cir. 1994). *See also* Sutherland Statutory Construction § 46.06 at 194 ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

the title, interpreted *in pari materia*—clearly give the FCC the legal authority to interpret Section 602 flexibly as the public interest requires. This interpretation, moreover, follows the reasoning set forth above reflecting that the Commission must interpret "in accordance with" to provide the same degree of flexibility as "consistent with."

Commission precedent confirms this interpretation. In the *Intelsat Compliance Order*, the Commission held that the former INTELSAT IGOs provision of capacity to the Offices des Postes et Telecommunications, which used the capacity to provide DTH in French Polynesia, did not violate the ORBIT Act.[57] In doing so, the FCC recognized that Congress did not expressly contemplate or intend to terminate contracts for additional services that pre-dated ORBIT. The Commission, therefore, balanced disruption of service and customer interest against the literal language of 621(4)[58] and decided to accommodate such services. If Section 602(a) were an *absolute* bar to privatized Intelsat's provision additional services pre-IPO, the Commission could not have permitted such services to continue to be provided—even under the rationale that such services pre-dated

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57 *Intelsat Compliance Order*, 16 FCC Rcd at 12296-97.

58 *See* ORBIT Act § 621(4) ("PREVENTION OF EXPANSION DURING TRANSITION." -- During the transition period prior to privatization under this title, INTELSAT and Inmarsat shall be precluded from expanding into additional services.").

ORBIT.[59] Here too, Congress did not contemplate or intend to terminate contracts for additional services first contracted by an independent satellite provider and acquired by Intelsat as part of a larger commercial transaction. Just as Section 621(4), and implicitly Section 602(a), afforded the FCC flexibility to permit continuation of such services, Section 602(a) affords the Commission the same flexibility to accommodate Intelsat's additional services acquired from Loral.

The flexibility and discretion incorporated in the ORBIT Act, therefore, are more than sufficient to justify the initial grant, and as necessary, renewal of an STA. At most, any constraint set forth in the second sentence of Section 602(a) is a limitation on full licensing. But STAs are not full "licenses,"[60] and the Bureau did not authorize Intelsat unconditionally to provide all additional services for all time. In granting the STA, the Bureau instead selected one of several alternative "measures" "limit[ing]" Intelsat's authority in both duration (180 days, requiring periodic renewal) and scope (existing customers, not potential new "additional services"). This approach preserves both the interests of the consumers and the incentives for Intelsat to meet all future statutory obligations.

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[59] Although the question arose under Section 621(4), the question implicitly was decided under Section 602(a) as well because Section 602(a) applies to both INTELSAT its successor entity Intelsat. ORBIT Act, § 602(a).

[60] *See Systematics Gen. Corp.*, 2 FCC Rcd. 5406, 5407 ¶ 9 (CCB 1987) ("A regular authorization gives specific rights to a licensee which it does not have under a special temporary authorization.").

Employing the flexibility under the ORBIT Act to preserve the equities of the additional service customers that Intelsat acquired from Loral is particularly in the public interest. These customers made a good faith contract with Loral with a legitimate expectation that the contract would be honored following any assignment. Moreover, the Commission found that the public interest and the competitive marketplace would be enhanced by the Intelsat acquisition of Loral. To the extent that the FCC precludes Intelsat's continued provision of service to these customers, it would be denying the customers the benefit of their prior agreement. In the case of Starband, such favorable terms and conditions are unlikely to be replicated if forced off the Intelsat system.

V. ALLOWING INTELSAT TO PROVIDE ADDITIONAL SERVICES PRE-IPO CONFORMS TO THE PURPOSE OF THE ORBIT ACT AND SERVES THE PUBLIC INTEREST

The ORBIT Act was designed to "promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment. ..."[61] The Act, therefore, establishes a clear preference for increased competition.[62] Allowing Intelsat to continue to provide capacity for additional services to customers acquired in the Loral transaction places

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61 ORBIT Act, § 2.

62 As noted by Senator Conrad Burns—the principal author of the Senate bill that ultimately became the ORBIT Act—the legislation was enacted "to inject more competition and more privatization" into the international satellite market in part by "[u]sing access to the U.S. market as a strong incentive to keep INTELSAT's privatization effort moving forward without delay." *See* 146 Cong. Rec. S1155 (daily ed. Mar. 2, 2000) (statement of Sen. Burns).

Intelsat on an equal footing with other satellite providers, thus increasing competition, to the benefit of those consumers. By contrast, prohibiting Intelsat from continuing to offer capacity for these services to such consumers places the company at a further competitive disadvantage vis-à-vis other satellite operators, reducing pricing and other competitive pressure on current U.S. and foreign licensees.

Moreover, there is no reason to believe that the market for DTH has been or will be distorted in the interim period before Intelsat conducts its IPO. Intelsat's privatization three years ago removed all questions regarding Intelsat's ability to leverage an unfair advantage in the marketplace. Indeed, the U.S. market for DTH is the most competitive in the world.

In addition, constraining Intelsat's ability fully to compete in the marketplace could frustrate Intelsat's obligations to serve the needs of its existing satellite capacity customers. This, in turn, could inhibit the ability of such providers from continuing to offer low-price solutions to end-user consumers. For example, in the case of additional services customers of Starband, Intelsat capacity may be the *only* practical choice to reach consumers in Alaska and Hawaii.

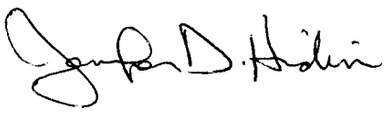
The current STA serves these important objectives. As the Commission acknowledged in the *Intelsat Compliance Order*, "[t]his flexibility allows us to avoid frustrating congressional intent to enhance competition in the U.S.

telecommunications market which could result from an overly narrow interpretation."[63] Thus, reading the ORBIT Act to prohibit special and temporary authority to provide additional services would defeat the Act's pro-competitive purposes. Well-established canons of statutory construction strongly counsel against such a result.[64]

* * *

For the foregoing reasons, Intelsat respectfully requests that the Commission deny SES AMERICOM's Application for Review.

Sincerely,



Bert W. Rein
Jennifer D. Hindin
Counsel to Intelsat North America LLC

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[63] *Intelsat Compliance Order*, 16 FCC Rcd at 12287 (citing *Ameritech Corp.*, 14 FCC Rcd 14712, 14895-96 n.817 (1999)).

[64] *See, e.g., United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940) ("even when the plain meaning [of statutory language does] not produce absurd results but merely an unreasonable 'one plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (citations omitted). *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989) ("[w]here the literal reading of a statutory term would 'compel and odd result,' we must search for other evidence of congressional intent to lend the term its proper scope") (citation omitted); *EDF v. EPA*, 82 F.3d at 469 ("[b]ecause this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the [agency] for an interpretation of the statute more true to Congress's purpose"); *Red River Broadcasting Co. v. FCC*, 98 F.2d 282, 287 (D.C. Cir.) ("a well-settled rule of statutory construction enjoins courts not to attribute to the Legislature a construction which leads to absurd results") (citations omitted), *cert. denied*, 305 U.S. 625 (1938).

Wiley Rein & Fielding LLP

CERTIFICATE OF SERVICE

I, Christopher Ryan, do hereby certify that a true and correct copy of the foregoing was sent by first-class mail, postage prepaid, on the 4th day of June 2004 or by email (*) to the following:

Marlene H. Dortch (hand-delivery)
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Pantelis Michalopoulos
Chung Hsiang Mah
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, DC 20036-1795
Counsel for EchoStar

Phillip L. Spector
Joseph J. Simons
Patrick S. Campbell
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1615 L Street, NW, Suite 1300
Washington, DC 20036
Counsel for SES Americom, Inc.

Earl W. Comstock
John W. Butler
Sher & Blackwell LLP
1850 M Street, NW
Suite 900
Washington, DC 20036
Counsel to Starband Communications, Inc.

John Rogovin (*)
Federal Communications Commission
Office of General Counsel
445 Twelfth Street, S.W.
Washington, D.C. 20554

Philip L. Verveer
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20056
Counsel for Loral

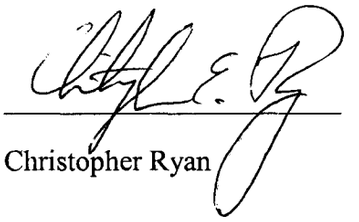
Jeffrey Dygert (*)
Federal Communications Commission
Office of General Counsel
445 Twelfth Street, S.W.
Washington, D.C. 20554

Linda Kinney (*)
Federal Communications Commission
Office of General Counsel
445 Twelfth Street, S.W.
Washington, D.C. 20554

Daniel E. Harrold (*)
Federal Communications Commission
Office of General Counsel
445 Twelfth Street, S.W.
Washington, D.C. 20554

David Horowitz (*)
Federal Communications Commission
Office of General Counsel
445 Twelfth Street, S.W.
Washington, D.C. 20554

Roderick K. Porter (*)
Federal Communications Commission
Office of General Counsel
445 Twelfth Street, S.W.
Washington, D.C. 20554



Christopher Ryan