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June 19, 2006

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, TW-B204
Washington, DC 20554

Federal Communications Commission
Office of Secretary

Re: Inmarsat Ventures Limited, Reply
File Nos. SAT-LOA-19980702-00066 (Call Sign S2358); SAT-LOA-20030827-
00174 (Call Sign S2487)

Dear Ms. Dortch:

Inmarsat Ventures Limited respectfully requests that the Commission accept for filing the enclosed redacted, public version of its Reply in these proceedings. This submission is made pursuant to the Protective Order issued by the Commission (DA 06-1037, rel. May 15, 2006). A non-redacted, confidential version of the Reply was filed under separate cover on June 16, 2006. Due to unexpected technical problems involved with redacting confidential information, Inmarsat was unable to submit this redacted version of the Reply on Friday, June 16, 2006.

Respectfully submitted,



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Counsel for Inmarsat Ventures Limited

cc: CurTrisha Banks, International Bureau
Bruce Jacobs, David Konczal, Tony Lin, *Counsel for MSV*

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

JUN 19 2006
Federal Communications Commission
Office of Secretary

In the matter of)
)
Mobile Satellite Ventures Subsidiary, LLC) File No. SAT-LOA-19980702-00066
) File No. SAT-LOA-20030827-00174

REPLY

Inmarsat Ventures Limited (“Inmarsat”) replies to MSV’s opposition to Inmarsat’s Petition for Reconsideration of the milestone determinations with regard to MSV’s authorizations for two new spacecraft: MSV-1 at 101° W.L. and MSV-SA at 63.5° W.L.¹

In its Petition for Reconsideration, Inmarsat demonstrated that the contract that MSV filed on January 11, 2006 (the “Boeing Contract”) fails to satisfy the requirement that MSV enter into a “binding non-contingent contract” to construct the MSV-1 and MSV-SA spacecraft. In particular, MSV’s ability to terminate for convenience [REDACTED], coupled with MSV’s low initial payment obligations, indicates that the Boeing Contract is a mere option and is not a firm commitment to implement MSV’s two licensed spacecraft in accordance with its Commission milestones. In the intervening time, MSV has tendered for cancellation its license for MSV-SA, because MSV made a business decision not to construct that spacecraft in a timely fashion.² This development underscores the significance of [REDACTED]

¹ Public Notice, Report No. SAT-00356, DA 06-918, at 2 (rel. Apr. 21, 2006).

² Letter from Jennifer Manner, MSV, to Marlene Dortch, FCC, June 12, 2006 (surrendering MSV’s authorization to launch and operate MSV-SA at 63.5° W.L. and requesting return of performance bond).

under the Boeing Contract in circumstances where MSV chooses not to implement its licensed systems.³

In its Opposition, MSV fails to refute the principal argument of Inmarsat's Petition: that [REDACTED] if MSV decides today to walk away from the Boeing Contract.

Moreover, MSV's responses to Inmarsat rely on entirely new information: a May 19, 2006 amendment to the Boeing Contract that has not been submitted as part of the record. MSV indicates that the amendment alters the payment schedules and other contractual terms in the Boeing Contract that are in dispute in this proceeding, but MSV does not submit the amendment.⁴ Obviously, neither Inmarsat nor the Commission can comment on such new information unless and until they have access to it and can review it.⁵ In the meantime, there is no record basis to conclude that MSV is committed to constructing its spacecraft in accordance with a non-contingent contract and in accordance with MSV's milestone requirements.

I. MSV CANNOT RELY ON INFORMATION THAT IS NOT PART OF THE RECORD

In its Opposition, MSV indicates that it has amended the Boeing Contract and touts the aspects of the amendment that purport to show an increased commitment to launch and operate its Canadian-licensed spacecraft at 106.5° W.L. (MSV-2) and its FCC-licensed

³ MSV is wrong that Inmarsat has "sat on the sidelines" in implementing new technologies. MSV Opposition at i. Just last year, Inmarsat launched two next-generation Inmarsat-4 spacecraft, which are the most advanced commercial communications satellites currently in orbit, and enable BGAN service – broadband MSS at speeds of almost half a megabit per second to satellite earth terminals one third the price, size and weight of those previously used. In stark contrast, MSV has held FCC licenses for four L-Band spacecraft (at 62° W.L., 63.5° W.L., 101° W.L. and 139° W.L.), and has tendered three of those licenses for cancellation without implementing the systems.

⁴ See, e.g., MSV Opposition at nn.5 & 7.

⁵ Based on a review of the Commission's public file as of May 16, 2006 by counsel for Inmarsat, there is no indication that MSV has submitted this amendment to the Commission.

spacecraft at 101° W.L. (MSV-1). Namely, MSV references accelerated construction and payment schedules.⁶ As an initial matter, MSV's supposedly renewed commitment to implement its Canadian-licensed satellite is entirely irrelevant to this FCC proceeding. More fundamentally, MSV appears to have amended the very terms of the Boeing Contract that are at issue in this proceeding. There is no way for the Commission, or any interested party, to address the impact (if any) of the amended contract until MSV files the amendment with the Commission and makes it available to Inmarsat.

Contrary to MSV's assertion, MSV's amendment to the Boeing Contract is relevant.⁷ MSV relies on its amendment to address issues in dispute, and to attempt to respond to the deficiencies Inmarsat highlighted in its Petition for Reconsideration.⁸ Moreover, MSV entered into the amendment just six days before the May 26, 2006 initial milestone for MSV-1.⁹ Any contract amendment made prior to such a "enter into a binding non-contingent contract" milestone could be of consequence to a determination whether that milestone has been met.¹⁰

⁶ See, e.g., MSV Opposition at 9-10 & nn.5, 8, 9 & 27.

⁷ Cf. *id.* at n.5 (claiming that the contract amendment is not relevant).

⁸ See, e.g., *id.* at 9-10 & nn.5, 8, 9 & 27.

⁹ See MSV, 20 FCC Rcd at 9752, 9776 ¶ 78 (2005) (requiring MSV to enter into a "binding non-contingent contract" by May 26, 2006). Thus, MSV was *not* "between" milestones for MSV-1 when it amended the Boeing Contract, as MSV suggests. MSV Opposition at n.5.

¹⁰ MSV erroneously relies on *Columbia Communications Corporation*, 16 FCC Rcd 10867, 10873-10874 ¶¶ 17-22 (2001) ("*Columbia*"), for the assertion that its contract amendment is not relevant. MSV Opposition at 2, n.5. In *Columbia*, the Commission found, in relevant part, that the following issues did not warrant reconsideration that Loral met its initial milestone: (i) that modifications to Loral's license to include inter-satellite links *may* require contract amendments; (ii) that a press release *omitted* affirmative statements related to the spacecraft at issue; and (iii) that a prospectus indicated delay in development of the spacecraft when the Commission already had found that such delay was not dispositive. *Id.* In contrast, here, *MSV's own filings with the Commission* rely on, and cite to, its amendment to the Boeing Contract.

Without Inmarsat and the Commission having the opportunity to review the amendment to the Boeing Contract, interested parties cannot meaningfully comment on the amended terms.¹¹

II. THE BOEING CONTRACT IS NOT A “BINDING NON-CONTINGENT CONTRACT”

Inmarsat’s principal argument in its Petition for Reconsideration is that the Boeing Contract (dated January 9, 2006) is not the type of “binding non-contingent contract” mandated by MSV’s authorizations because of the combination of three factors: (i) MSV has the ability to terminate for convenience [REDACTED]

[REDACTED], (ii) MSV made a down payment equal to [REDACTED] of the total contract price, and (iii) MSV is obligated [REDACTED]

[REDACTED]¹² Thus, as Inmarsat explained in its Petition for Reconsideration, [REDACTED]

¹¹ See *Amendment of the Commission's Space Station Licensing Rules and Policies; Mitigation of Orbital Debris*, 18 FCC Rcd 10760, 10831 ¶ 185 (2003) (“*Space Station Licensing Reform*”) (requiring licensees to submit their contracts for milestone review because the “licensee’s certification has not always proven dispositive in the past”); *Pegasus Development Corporation Submission of Executed Satellite Construction Contract and Request for Confidential Treatment*, 20 FCC Rcd 14661, 1462 ¶ 2 (2005); *PanAmSat Corporation*, 17 FCC Rcd 4639, 4640 ¶ 5 (2002); *GE American Communications, Inc. Application for Authority to Construct, Launch, and Operate a Ka-Band Satellite System in the Fixed-Satellite Service*, 16 FCC Rcd 17607, 17608 ¶ 4 (2001).

¹² See Inmarsat Petition at 6 (“If, for any reason whatsoever, MSV chooses not to proceed with Boeing [REDACTED] Thus, the Boeing Contract affords MSV [REDACTED] and therefore does not demonstrate sufficient commitment to proceed with system implementation to satisfy the contract execution milestone. *Under these circumstances* [REDACTED] down payment and initial payments are inadequate under Commission precedent.”(emphasis supplied) (internal quotations omitted); *id.* at 7 (“These modest initial payment obligations, *when viewed in light of MSV’s* [REDACTED] make clear the contingent nature of MSV’s commitment to implement its licensed system during the early part of the Boeing Contract.” (emphasis supplied). *Cf.* MSV Opposition at i (incorrectly claiming that

[REDACTED]. This is why Inmarsat characterized the Boeing Contract as a mere option, not a “binding non-contingent contract” under Commission precedent.

MSV fails to squarely address this argument. Rather than looking at the totality of the circumstances, MSV addresses each individual element in isolation, and argues that the Commission has never established “absolute or relative expenditure requirements.”¹³ But the relevant inquiry is not whether a low down payment or a certain payment schedule, viewed in isolation, has been found acceptable. The relevant inquiry is whether the contract terms, taken as a whole, evidence that the licensee has “significant current obligation[s],” and is substantially “committed to the completion of construction of the satellites.”¹⁴

Commission precedent is clear that a termination for convenience provision that allows too much discretion to terminate at too little cost can constitute an “unresolved contingency” that can render a contract inadequate for purposes of an initial license milestone.¹⁵ In fact, an analysis of the termination for convenience provision in a contract was an essential part of the Commission’s determination whether EchoStar had satisfied its obligation to enter into non-contingent contract.¹⁶ In that case, the Commission favorably noted termination

“Inmarsat’s primary argument [is] that MSV’s initial payments under the contract are not significant.”).

¹³ MSV Opposition at i.

¹⁴ *EchoStar Satellite Corporation*, 5 FCC Rcd 1765, 1769 ¶ 18 (1992) (“*EchoStar*”); cf. MSV Opposition at n.28 (characterizing the Commission’s treatment of termination provisions in *EchoStar*).

¹⁵ *EchoStar*, 5 FCC Rcd at 1769 ¶¶ 12-18.

¹⁶ Thus, the resolution of that case turned on far more than whether the contract term was 40 or 47 months, and precisely what payments were made over the initial period. As MSV correctly notes, in *EchoStar*, there appears to have been a gap between the initial down payment and the start of the 40-month payment period. MSV Opposition at 8-9.

provisions where the licensee's liability could include (i) the total projected contract cost of the spacecraft; (ii) the manufacturer's total direct and indirect costs reasonably incurred with respect to termination and settlement with its vendors and subcontractors, and (iii) "a profit of twelve and one-half percent through month 24 of the construction schedule and fifteen percent thereafter (total profit not to exceed eleven million dollars)."¹⁷ Under these circumstances, the

Commission found that:

Rather than constituting "unresolved contingencies" which might prevent construction of the satellite, it appears that the termination/default provisions in EchoStar's construction contract are designed and intended to minimize the possibility and impact of future events by providing incentives for both parties to perform, and penalties for failure to perform.¹⁸

MSV [REDACTED].

In its *Space Station Licensing Reform* decision, the Commission confirmed this unremarkable proposition that "a contract that allows the licensee to cancel construction of the satellite without significant penalty is not sufficient to meet the construction commencement milestone."¹⁹ As such, contrary to MSV's assertion, [REDACTED] termination for convenience, [REDACTED] crucial to demonstrating a current obligation to complete construction of a satellite, especially when initial

¹⁷ *EchoStar*, 5 FCC Rcd at 1769 ¶ 18.

¹⁸ *Id.*

¹⁹ *Space Station Licensing Reform*, 18 FCC Rcd at 10831 ¶ 184; *see also Columbia* 16 FCC Rcd at 10871, 10872 ¶¶ 11, 15 (noting requirement to pay "penalties" for cancellation as a key element in ascertaining whether a satellite construction contract is binding); *TMI Communications and Company, Limited Partnership and TerreStar Networks Inc.*, 19 FCC Rcd 12603, 12611 ¶ 21 ("contract prescribed substantial penalties, moreover, for non-performance and termination without cause"). The range of termination penalties that applied to the contracts at issue in *TMI* and *Columbia* are not apparent from the text of the decisions, and there is no indication in those decisions that the licensees could terminate the agreement [REDACTED]

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payments are low or non-existent, as they were in *EchoStar*²⁰ and *MCHI*,²¹ and as they are in the Boeing Contract.

Rather than addressing Inmarsat's explanation why the Boeing Contract, in its totality, fails to evidence a binding commitment by MSV to build its licensed spacecraft, MSV resorts to mischaracterizing Inmarsat's assertions. For example, MSV wrongly claims that Inmarsat's "primary argument" is that "MSV's initial payments under the contract are not significant."²² As detailed above, Inmarsat's main theme was, and is, that [REDACTED] [REDACTED] for termination for convenience [REDACTED], and that MSV's low down payment and low initial payment obligations are decisional significance in light of that fact.²³ Similarly, MSV misleadingly quotes half a sentence from the Petition for Reconsideration, when it addresses the relevance of MSV's low down payment under Commission precedent.²⁴ Inmarsat accurately characterized the *MCHI* case when it stated that "In a context where a licensee did not otherwise demonstrate a commitment to implement its licensed system, the Commission characterized a down payment of less than 0.5% as 'miniscule' and indicative that the contract was not satisfactory in meeting the initial license milestone."²⁵

Moreover, the Bureau's order in the *MCHI* case was clear that these types of deficiencies in the contracts at issue were a separate basis for finding the contracts inadequate for

²⁰ *EchoStar*, 5 FCC Rcd at 1765-1766 ¶¶ 3-4.

²¹ *Applications of Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited for Transfer of Control*, 18 FCC Rcd 1094 at ¶ 17 (2003) ("*MCHI*").

²² MSV Opposition at i.

²³ See *supra* note 12.

²⁴ MSV Opposition at 7-8.

²⁵ Petition for Reconsideration at 6 (emphasis supplied) (citing *MCHI*, 18 FCC Rcd at 1100 ¶ 17).

license milestone purposes, apart from the issue whether the satellite sharing arrangements at issue also were acceptable.²⁶ In any event, MSV misses the point. Just as the “miniscule” down payment was one of the factors that indicated that the licensees had not met their milestone requirements in *MCHI*, MSV’s low down payment similarly is one of several factors that demonstrates why the Boeing Contract is not a “binding non-contingent contract,” but rather was simply an option when it was executed.

Furthermore, the significance of MSV’s ability [REDACTED]

[REDACTED]
[REDACTED].²⁷ The issue is not whether brief delays in construction may be acceptable. The issue is whether MSV is contractually committed to actually start construction in the first instance. MSV has [REDACTED]

III. INMARSAT HAS STANDING TO SEEK RECONSIDERATION

MSV does not dispute (i) that Inmarsat has a vested interest, as a competitor, in the determination whether MSV has met its milestones, or (ii) that Inmarsat was adversely affected by the Bureau’s finding that MSV complied with its initial milestones.²⁸ Rather, MSV argues that Inmarsat lacks “standing” because Inmarsat did not raise its concerns earlier. As an initial matter, MSV is simply wrong. Inmarsat did timely raise its concerns with the Commission on March 24, 2006, well before the issuance of the milestone determination, and based largely the publicly available information revealed in Motient’s SEC Form 8-K, which was

²⁶ Cf. MSV Opposition at n.19.

²⁷ Cf. MSV Opposition at 9-10.

²⁸ See Petition for Reconsideration at 4 n.15 (citing 47 C.F.R. § 1.106(b)(1); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 475, 477 (1940)).

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dated just eleven days earlier.²⁹ Moreover, in an effort to further buttress its arguments, Inmarsat sought FOIA access to the Boeing Contract. That it took 52 days for confidential portions of the Boeing Contract to be made available was not a matter within Inmarsat's control. As such, "it was not possible"³⁰ for Inmarsat to provide meaningful comments on the redacted portions of the Boeing Contract prior to the Bureau's Public Notice. Therefore, Inmarsat has standing under Commission rules to seek reconsideration of the Bureau's decision.

IV. CONCLUSION

For the foregoing reasons, the Commission should reconsider its determination that MSV has met its initial milestones.

Respectfully submitted,

/s/

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June 16, 2006

²⁹ See Letter from Counsel for Inmarsat to FCC, File Nos. SAT-LOA-19980702-00066 *et al.*, at 2 (Mar. 24, 2006).

³⁰ 47 C.F.R. § 1.106(b)(1).