

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

RECEIVED

In the Matter of	)	DA 04-1299
	)	
Inmarsat Ventures Limited	)	File Nos.
Freedom of Information Act Request	)	SAT-MOD-20031118-00333
Regarding Mobile Satellite Ventures	)	SAT-AMD-20031118-00332
Subsidiary LLC Ex Parte Proceedings	)	SES-MOD-20031118-01879
	)	
Order Adopting Protective Order	)	

MAY 14 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Received

MAY 24 2004

Policy Branch  
International Bureau

To: The Secretary  
The Commission

APPLICATION FOR REVIEW  
REVIEW OF FREEDOM OF INFORMATION ACTION

Mobile Satellite Ventures Subsidiary LLC ("MSV") hereby files this Application for Review of the above-captioned International Bureau ("Bureau") order.<sup>1</sup> The Bureau erred in granting Inmarsat Ventures Limited ("Inmarsat") authority to review, pursuant to a protective order, confidential commercial information submitted by MSV.<sup>2</sup> The information Inmarsat seeks is in no way relevant or material to the interference issues Inmarsat has raised regarding MSV's ATC application, and neither Inmarsat nor the Bureau provided the analysis or justification required for grant of a Freedom of Information Act ("FOIA") request to review such

<sup>1</sup> *In the Matter of Inmarsat Ventures Limited*, DA 04-1299 (May 7, 2004) ("FOIA Order").

<sup>2</sup> See Letter from Bruce D. Jacobs, Counsel for MSV, to Ms. Marlene H. Dortch, FCC, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (December 30, 2003) ("MSV Letter").

information. Accordingly, the Commission should reverse the Bureau's order and deny Inmarsat's FOIA request.<sup>3</sup>

### **Background**

On November 18, 2003, MSV filed an application to add authority to operate an Ancillary Terrestrial Component ("ATC") in connection with the existing and planned L-band Mobile Satellite Service ("MSS") systems of MSV and Mobile Satellite Ventures (Canada) Inc. ("MSV Canada").<sup>4</sup> Among the Commission's rules governing ATC is the requirement that an ATC provider have a spare satellite on the ground within one year of commencing ATC operations. *See* 47 C.F.R. § 25.149(b)(2)(ii). In its application, MSV requested a waiver of this requirement and, instead, proposed to use in-orbit satellites as spares for one another. *See* MSV ATC application, at 8-9.

On December 16, 2003, the Bureau requested certain information from MSV to facilitate its review of MSV's request to use an in-orbit spare to meet the ATC gating requirement, including the following: (i) the current and projected loading on each of the existing satellites and (ii) the projected lifetimes of the current satellites.<sup>5</sup> On December 30, 2003, MSV replied to

---

<sup>3</sup> Because the Bureau did not specify in the *FOIA Order* the regulatory provisions through which it was effectively granting Inmarsat's FOIA request, MSV has sought to comply with all potentially applicable provisions. *See, e.g.*, 47 C.F.R. §§ 0.459(g), 0.461(i).

<sup>4</sup> *See* File No. SAT-MOD-20031118-00333 (minor modification of license for AMSC-1); File No. SAT-AMD-20031118-00332 (minor amendment of pending application to launch and operate replacement satellite); File No. SES-MOD-20031118-01879 (minor modification of earth station license authorizing access to MSAT-1 in the United States) (collectively, "MSV ATC Application").

<sup>5</sup> *See* E-mail from Breck Blalock, FCC, to Bruce D. Jacobs, Counsel for MSV, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (December 16, 2003). The Bureau also inquired as to the proposed capacity of the next

the Bureau request, but redacted commercially sensitive information from the public version of its filing.

Pursuant to Sections 0.457(d) and 0.459(b) of the Commission's rules, MSV sought confidential treatment of the redacted information. *See* MSV Letter, at 1-3. MSV explained that disclosure of the redacted information would affect MSV's negotiating position with current and potential customers and would provide commercially sensitive information to MSV's competitors. *See id.* at 2. Disclosure of the current and projected demand for MSV's satellite services would also impact the ongoing international L-band frequency coordination negotiations. *See id.*

On March 17, 2004, Inmarsat, a competitor to MSV, filed a FOIA request for access to the redacted information in the MSV Letter.<sup>6</sup> Inmarsat did not dispute that the redacted information is confidential commercial information. *See* FOIA Request, at 2.

Inmarsat acknowledged that in order to review the confidential information it was required to make a "persuasive showing" as to the reasons for inspection.<sup>7</sup> Inmarsat asserted that it met that standard because it is a party to the proceeding regarding MSV's ATC application and because its L-band MSS system is potentially subject to interference from MSV's proposed ATC network. *See* FOIA Request, at 2-3. Inmarsat also argued generally that MSV's responses to the

---

generation satellites relative to the capacity of the current generation satellites and the anticipated launch date of the new satellites. MSV provided this information in unredacted form.

<sup>6</sup> *See* Letter from John P. Janka, Counsel for Inmarsat, to Andrew S. Fishel, Managing Director, FCC, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (March 17, 2004) ("FOIA Request").

<sup>7</sup> FOIA Request, at 2 (citing 47 C.F.R. § 0.457(d)(1) ("A persuasive showing as to the reasons for inspection will be required in requests for inspection of [confidential information].")).

Bureau inquiries “are essential to a full examination and discussion of the issues presented by MSV’s application for ATC authority” (*id.* at 3), that “[i]f the Commission acts on less than a full record and authorizes MSV to implement ATC based on unchallenged information provided by MSV, Inmarsat may be significantly harmed” (*id.* at 4), and that “any proposed waiver ... threatens the integrity of the Commission’s ATC licensing scheme.” *Id.* at 3. Inmarsat did not further elaborate on the “issues” or “harm” alluded to above. With respect to information concerning the current and projected demand for MSV’s satellite services, Inmarsat argued that this type of information is already shared between MSV and Inmarsat pursuant to the Mexico City Memorandum of Understanding (“MOU”) regarding international coordination of L-band spectrum and, thus, can be disclosed to Inmarsat without harm to MSV. *See id.* at 4.

On March 25, 2004, Inmarsat filed the only opposition to MSV’s ATC application.<sup>8</sup> In the opposition, Inmarsat focused on the potential interference of MSV’s proposed ATC facilities with Inmarsat’s operations. *See generally*, Inmarsat Opposition, at i-v. Inmarsat challenged virtually every variance MSV proposed from the Commission’s reference ATC system, but it specifically took no position regarding MSV’s request for a waiver of the on-ground spare requirement.<sup>9</sup> Thus, there was no opposition to MSV’s waiver request.

---

<sup>8</sup> *See* Opposition of Inmarsat Ventures Ltd., File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (March 25, 2004) (“Inmarsat Opposition”).

<sup>9</sup> *See* Inmarsat Opposition, at 7.

On April 14, 2004, MSV filed a letter opposing Inmarsat's FOIA request.<sup>10</sup> MSV demonstrated that Inmarsat failed to make the required "persuasive showing" as to the reasons for its need to see the confidential information. *See* Opposition to FOIA, at 3. MSV noted the irrelevance of the confidential information to the issues Inmarsat had raised in its opposition to the MSV ATC application. *See id.* at 2-3. MSV also pointed out that the harm from disclosing the confidential commercial information to a direct competitor would outweigh any benefit from disclosure. *See id.* at 3. With respect to Inmarsat's claim that current and projected demand for satellite services is already shared pursuant to the Mexico City MOU, MSV noted that the information MSV submitted to the Commission is in a substantially different form. *See id.* at 4. For these reasons, MSV concluded that Inmarsat failed to make a "persuasive showing" as to why it should be accorded access to the unredacted MSV Letter.

On May 7, 2004, the Bureau released the order at issue providing Inmarsat, and any other entity willing to adhere to the associated Protective Order, the right to review the unredacted MSV Letter.<sup>11</sup> The Protective Order restricts review of the unredacted MSV Letter to outside counsel and to in-house counsel not involved in competitive decision-making.<sup>12</sup> In general, individuals reviewing the confidential information are prohibited from disclosing such information to any person other than the Commission and its staff. *See* Protective Order, at ¶ 5.

---

<sup>10</sup> *See* Letter from Bruce D. Jacobs, Counsel for MSV, to Andrew S. Fishel, Managing Director, FCC, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (April 14, 2004) ("Opposition to FOIA").

<sup>11</sup> *See FOIA Order*, at ¶ 3. The Protective Order is attached as Appendix A to the *FOIA Order*.

<sup>12</sup> *See* Protective Order, at ¶ 3.

Such prohibition would also apply to communications to Inmarsat from its counsel. *See id.* at ¶ 12.

While the Bureau appeared to concede that the submitted information was confidential, it did not address whether Inmarsat had made a “persuasive showing,” as required by the Commission’s rules. 47 C.F.R. § 0.457(d)(1). Rather, the Bureau stated without any analysis that “[w]e conclude that requiring MSV to disclose the redacted information contained in the MSV December 30, 2003 letter to a Reviewing Party pursuant to the terms of a protective order will provide adequate protection to the confidential information included in the documents, without depriving a Reviewing Party of a meaningful opportunity to comment, as required by the Administrative Procedure Act.” *FOIA Order*, at 3.

On May 11, 2004, outside counsel for Inmarsat submitted Confidentiality Acknowledgements, as required under the Protective Order for review of the confidential information.<sup>13</sup> On May 12, 2004, Inmarsat’s engineering consultant submitted a Confidentiality Acknowledgement,<sup>14</sup> and Inmarsat withdrew its FOIA request in light of the *FOIA Order*.<sup>15</sup>

---

<sup>13</sup> *See* Letter from Alexander D. Hoehn-Saric, Counsel for Inmarsat, to Thomas S. Tycz, Chief, Satellite Division, FCC, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (May 11, 2004).

<sup>14</sup> *See* Letter from Alexander D. Hoehn-Saric, Counsel for Inmarsat, to Thomas S. Tycz, Chief, Satellite Division, FCC, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (May 12, 2004).

<sup>15</sup> *See* Letter from Alexander D. Hoehn-Saric, Counsel for Inmarsat, to Andrew S. Fishel, Managing Director, FCC, File No. SAT-MOD-20031118-00333, File No. SAT-AMD-20031118-00332, File No. SES-MOD-20031118-01879 (May 12, 2004).

## Discussion

Under the Commission's rules, the FCC will permit the review of confidential commercial information only if the requesting party makes a "persuasive showing as to the reasons for inspection."<sup>16</sup> In assessing such a request, the Commission, on a case-by-case basis, "will engage in a balancing of the public and private interests when determining whether the 'persuasive showing' standard has been met."<sup>17</sup> This demonstration is necessary even if the Commission conditions review of the confidential information on the reviewing entity's adherence to a protective order.<sup>18</sup>

The Bureau failed to demonstrate that the standard had been met. The *FOIA Order* itself provides no analysis or justification for the Bureau's effective grant of Inmarsat's FOIA request, and nothing in Inmarsat's filings meets the "persuasive showing" standard. Accordingly,

---

<sup>16</sup> 47 C.F.R. § 0.457(d)(1). Inmarsat did not dispute that the redacted information is confidential (FOIA Request, at 2), and the Bureau also appears to acknowledge that the submitted information is confidential. See *FOIA Order*, at ¶ 3 (stating that the "protective order will provide adequate protection to the confidential information included in the document") (emphasis added); see also *In the Matter of Southern Company*, 14 FCC Rcd 1851, at ¶ 17 (1998) (concluding, *inter alia*, that "information about system use" is confidential commercial information).

<sup>17</sup> See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order*, 13 FCC Rcd 24816, ¶ 16 (1998) ("*Confidentiality Order*").

<sup>18</sup> See *Confidentiality Order*, at ¶ 9 (noting that under 47 C.F.R. § 0.461(f)(4) the FCC has authority to grant conditional review of confidential information only after weighing the considerations favoring disclosure and those favoring non-disclosure); see also *In the Matter of Application of Mobile Communications Holdings, Inc.*, 10 FCC Rcd 1547, at ¶ 8 (1994) (Commission may permit limited disclosure of confidential information, pursuant to a protective order, where it is "necessary" for other parties' participation in a licensing proceeding).

Commission review and reversal of the Bureau decision is appropriate. *See* 47 C.F.R. § 1.115(b)(2)(i).

Inmarsat identified no legitimate grounds for review of the confidential information regarding MSV's proposal to use an in-orbit satellite. In its FOIA request and opposition to the MSV application, Inmarsat expressed concerns regarding the potential interference of MSV's ATC network to Inmarsat's operations. Those technical interference issues, however, have no relevance to MSV's request to use an in-orbit satellite in lieu of an on-ground spare. Inmarsat admitted as much in declining to challenge or raise any specific issues regarding that request in its opposition to MSV's ATC application.

Inmarsat's unspecified claims of harm and generic concerns about the legitimacy of the FCC's ATC licensing requirements provide no concrete basis for granting Inmarsat's FOIA request. As the Commission has explained, it will not require disclosure of confidential information "on the mere chance that it might be helpful, but [will insist] upon a showing that the information is a necessary link in a chain of evidence' that will resolve an issue before the Commission."<sup>19</sup> Thus, for example, the FCC has permitted petitioners, alleging that a proposed transaction violates the Commission's anti-trafficking rule, to review, pursuant to a protective order, financial information describing the consideration paid for the license.<sup>20</sup> Because Inmarsat

---

<sup>19</sup> *Confidentiality Order*, at ¶ 8 (citations omitted and emphasis added); *see also In the Matter of Application of Mobile Communications Holdings, Inc.*, 10 FCC Rcd 1547, at ¶ 8 (1994) ("While the [detailed cost and pricing information] that MCHI seeks to protect 'might be helpful,' it falls far short of 'necessary' to the other ... applicants' participation in the licensing process, and we therefore decline to authorize discretionary disclosure here.").

<sup>20</sup> *See, e.g., In the Matter of Applications of Mobile Communications Holdings, Inc. et al.*, 18 FCC Rcd 133, at ¶ 5 (2003); *In the Matter of Motorola, Inc. and Teledesic LLC*, 16 FCC Rcd 17056 (2001); *see also In the Matter of GE American Communications, Inc.*, DA 01-173



here has failed to identify specific, relevant issues associated with MSV's application for which this information is relevant or material, there are no potential benefits associated with disclosure of the confidential information, and release of the redacted information, even pursuant to a protective order, would be both unnecessary and inappropriate.<sup>21</sup> For this same reason, Commission denial of the FOIA Request will not deprive a party to the proceeding of a meaningful opportunity to comment on a relevant issue. *See FOIA Order*, at ¶ 3.

Moreover, from a practical standpoint, it is not clear what disclosure would accomplish. Because Inmarsat has expressly taken no position with respect to MSV's waiver request of the on-ground spare requirement, there is no context for individuals, for whom disclosure is permitted, to evaluate or act on the confidential information.

In contrast, there is no dispute that the potential harm to MSV from disclosure of the confidential information is substantial. The confidential information reveals the current and projected demand for MSV's satellites. Such information can be used to MSV's detriment by current or potential MSV customers during negotiations for satellite service. Disclosure of such commercially sensitive information would also provide competitors, such as Inmarsat, unfair knowledge of MSV's business operations and expectations. The same is true of the disclosure of MSV's response regarding the projected lifetimes of MSV's current satellites.

---

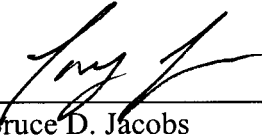
(January 25, 2001) (granting a party the authority to review, pursuant to a protective order, a licensee's satellite construction contract to determine the licensee's compliance with its milestones).

<sup>21</sup> *See Confidentiality Order*, at ¶ 16 (The Commission is "sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage."); *see also In the Matter of Application of Mobile Communications Holdings, Inc.*, 10 FCC Rcd 1547, at ¶ 9 (1994) (overuse of protective orders could lead to a result contrary to the public interest).

**Conclusion**

For the reasons stated above, MSV requests that the Commission reverse the *FOIA Order* and deny Inmarsat's FOIA request to review the unredacted MSV Letter.

Respectfully submitted,

By:   
Bruce D. Jacobs  
David S. Konczal  
Tony Lin

Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1128

*Counsel for Mobile Satellite Ventures  
Subsidiary LLC*

Dated: May 14, 2004

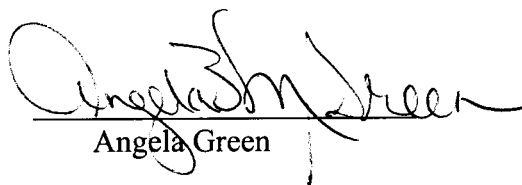
### Certificate of Service

I hereby certify that a true and correct copy of the foregoing Application for Review was sent by hand-delivery (\*) on May 14, 2004 to the following:

John A. Rogovin \*  
Office of General Counsel  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Andrea Kelly \*  
International Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

John P. Janka \*  
Alexander D. Hoehn-Saric  
Latham & Watkins  
555 Eleventh Street, NW  
Washington, DC 20004-1304  
*Counsel for Inmarsat Ventures Limited*

  
Angela Green