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

In the Matter of	)	
	)	
Inmarsat Ventures Limited	)	File No. SAT-MSC-20040210-00027
	)	
	)	

To: The Commission

COMMENTS OF SES AMERICOM, INC.

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SUMMARY

SES AMERICOM hereby comments on Inmarsat's Letter claiming that Inmarsat has complied with the requirement of the ORBIT Act that Inmarsat conduct an initial public offering of its securities to achieve a substantial dilution of its former ownership interests. In its Letter, Inmarsat declares its compliance with the foregoing pursuant to a series of transactions through which Inmarsat acquired and redistributed much of its equity interests to new shareholders, and then financed this acquisition through the public offering of debt securities on the Luxembourg Stock Market, and in the near future, on the PORTAL market in the United States. For several reasons, SES AMERICOM believes that Inmarsat's claims of compliance are unfounded, and it urges the Commission to find the same.

The debt and equity transactions undertaken by Inmarsat fail to conform to the IPO process delineated by Congress in the plain language of the ORBIT Act. Although the ORBIT Act does not expressly require an IPO of "stock," the terms chosen by Congress to describe the offering process, such as "shares," "ownership," and even "initial public offering," have ordinary meanings that suggest Congress desired for Inmarsat to conduct an equity IPO, rather than the debt offering it is undertaking instead. This conclusion is bolstered by both the legislative history of the ORBIT Act and statements of key Members of Congress.

Inmarsat attempts to circumvent the statutory strictures by claiming that its transactions, although different from what is explicitly required by the ORBIT Act, are nonetheless "consistent with" the ORBIT Act. Although the ORBIT Act provides for a "consistent with" standard of review to evaluate Inmarsat's progress toward privatization, Inmarsat should not be permitted to evade the policy objectives of the legislation, especially when the ORBIT Act itself offers a means of accommodating Inmarsat's concerns regarding an equity IPO.

Even under a lesser standard of review, moreover, there are several compelling reasons for the Commission to conclude that Inmarsat's actions are inconsistent with the IPO process delineated by the ORBIT Act.

First, the equity restructuring described by Inmarsat did not achieve the substantial dilution of Inmarsat equity envisioned by Congress. Although Inmarsat has transferred much of its equity interests to new shareholders, it has not diversified its ownership, as is typical of an equity IPO. Instead, the equity transaction actually consolidated ownership and control of the company into the hands of two shareholders: Permira and Apax Partners.

Second, the transactions did not transform Inmarsat into a publicly held company, as is the natural result of an equity IPO. Inmarsat's equity is not publicly traded on any stock exchange, and in fact, because of substantial restrictions on the transfer of its equity, there is arguably no private market for Inmarsat shares either. Although there is now a public market for Inmarsat's debt securities, a debt offering does not distribute corporate ownership to the public, and therefore cannot transform Inmarsat into a public company.

Third, the oversight and transparency mechanisms to which Inmarsat is subject as a result of its debt offering are not comparable to those envisioned by the ORBIT Act. Had Inmarsat conducted an equity IPO on a U.S. stock exchange, it would have been subject to listing requirements relating to corporate governance that would have furthered Inmarsat's transformation into an independent commercial entity. Inmarsat does not appear to be subject to these requirements under the regulatory regimes it has chosen to govern its debt offering.

In summary, Inmarsat failed to satisfy the IPO requirements of the ORBIT Act, and failed to demonstrate that it has established an ownership structure "consistent with" these stated requirements. The Commission should thus reject Inmarsat's statement of compliance, and insist that Inmarsat comply (as it is still able to do) with the IPO requirement of the ORBIT Act.

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SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to a Public Notice issued by the Federal Communications Commission (the "FCC" or the "Commission") on March 5, 2004,[1] hereby submits these Comments on the letter filed with the Commission by Inmarsat Ventures Limited ("Inmarsat") on February 10, 2004.[2]

I. INTRODUCTION

A. SES AMERICOM

SES AMERICOM and its subsidiaries provide U.S. and international satellite services through a fleet of geosynchronous satellites. SES AMERICOM is one of the largest U.S. providers of fixed satellite service ("FSS") transponder capacity, and SES AMERICOM's parent company, SES GLOBAL S.A., is the premier global FSS operator. Through its operating units, which also include its European-based subsidiary, SES ASTRA S.A., and its equity interests in satellite service providers in various

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[1] Public Notice Report No. SAT-00197.

[2] Letter from Alan Auckenthaler, Inmarsat, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 10, 2004) (the "*Inmarsat Letter*").

locations, the SES GLOBAL family of companies competes with Inmarsat to provide satellite services to customers throughout the world.

B. *Inmarsat*

The International Maritime Satellite Organization ("Inmarsat") was established in 1978 as an intergovernmental organization ("IGO") charged with the development of a global maritime satellite system to service the commercial maritime and safety communications needs of the United States and other countries.[3] Inmarsat currently owns and operates a fleet of nine geostationary satellites.[4] It is a provider of global mobile satellite communications services to end users at sea, on land, and in the air. Its primary markets are for maritime and high-speed data services.[5]

As an IGO formed by international treaty, Inmarsat was, until recently, owned by the states that signed the treaty (the "Signatories"). Even after Inmarsat was restructured as a corporation in 1999, it maintained close ties to its Signatories, which became equity holders in the company. Over time, these affiliations became a source of concern among Inmarsat's competitors and government officials alike, who feared that Inmarsat enjoyed an unfair competitive advantage in its Signatories' markets.

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[3] *In the Matter of Comsat Corporation d/b/a Comsat Mobile Communications, et al.*, 16 FCC Rcd 21661, 21669 (2001) ("*Inmarsat Market Access Order*").

[4] *See Offering Memorandum of Inmarsat Finance plc for $375,000,000 of 7-5/8% Senior Notes due 2012* (filed at the Luxembourg Stock Exchange in February 2004), at 1 ("*Inmarsat Offering Memorandum*").

C. *The ORBIT Act*

In 2000, the U.S. Congress passed the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act").[6] The stated purpose of this Act was to "promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment by fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat."[7] Congress sought to achieve this goal by directing the Commission to condition its grant of U.S. market access upon Inmarsat's satisfaction of specified criteria, including a determination that Inmarsat has fully privatized in a manner that does not harm competition in the telecommunications markets of the United States.[8]

To achieve privatization, Section 621 of the ORBIT Act requires that Inmarsat conduct an initial public offering ("IPO") of securities. The specific IPO requirements of Section 621 are as follows:

> (2) INDEPENDENCE. – The privatized successor entities and separated entities of INTELSAT and Inmarsat shall operate as independent commercial entities, and have a pro-competitive ownership structure. The successor entities and separated entities of INTELSAT and Inmarsat shall conduct an initial public offering in accordance with paragraph (5) to achieve such independence. Such offering shall substantially dilute the aggregate ownership of such entities by such signatories or former signatories. In

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[5] *See id.*

[6] ORBIT Act, Pub. L. No. 106-180, 115 Stat. 48 (2000) (codified as amended in scattered sections of 47 U.S.C.).

[7] *Id.* § 2.

[8] *Id.* § 601(b).

> determining whether a public offering attains such substantial dilution, the Commission shall take into account the purposes and intent, privatization criteria, and other provisions of this title, as well as market conditions.
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> . . .
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> (5) CONVERSION TO STOCK CORPORATIONS. – Any successor entity or separated entity created out of INTELSAT or Inmarsat shall be a national corporation or similarly accepted commercial structure, subject to the laws of the nation in which incorporated, as follows:
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> > (A) An initial public offering of securities of any successor entity or separated entity –
> >
> > . . .
> >
> > (ii) shall be conducted, for the successor entities of Inmarsat, on or about October 1, 2000, except that the Commission may extend this deadline in consideration of market conditions and relevant business factors relating to the timing of an initial public offering, but to no later than December 31, 2001.
>
> > (B) The shares of any successor entities and separated entities shall be listed for trading on one or more major stock exchanges with transparent and effective securities regulation.[9]

As stated above, Congress set a December 31, 2001, deadline for the completion of the Inmarsat IPO.[10] It subsequently amended the ORBIT Act to extend the IPO deadline until June 30, 2004, with the possibility of a further extension until December 31, 2004.[11]

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[9] *Id.* § 621.

[10] *Id.* § 621(5)(A)(ii).

[11] ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003).

D. Compliance with Non-IPO Privatization Criteria

On September 24, 2001, the Commission determined that Inmarsat had implemented a plan of privatization "consistent with" the non-IPO privatization criteria specified in the ORBIT Act.[12] In support of this determination, the Commission cited Inmarsat's pre-ORBIT Act undertakings towards privatization, including its transfer of assets to a private U.K. company, in which shares were proportionally allocated to Inmarsat Signatories.[13] Furthermore, the Commission cited Inmarsat's post-ORBIT Act restructuring to ensure that no more than five of its thirteen directors are affiliated with former Inmarsat Signatories, and that no officer or manager owns more than a *de minimis* financial interest in a former Signatory.[14]

Pursuant to this determination, the Commission authorized Inmarsat to provide certain services to, from, and within the United States.[15] This grant of authority was made subject to a future finding of the Commission that "Inmarsat has conducted an IPO under Sections 621(2) and 621(5)(A)(ii) of the ORBIT Act."[16] The Commission

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[12] *See Inmarsat Market Access Order*, 16 FCC Rcd at 21694. These non-IPO criteria include the requirement that Inmarsat establish a corporate structure with a board of directors and a set of officers independent of its Signatories. *See* ORBIT Act, § 621(5)(C).

[13] *Inmarsat Market Access Order*, 16 FCC Rcd at 21687.

[14] *See id.* at 21688-90.

[15] *See id.* at 21711.

[16] *See id.* at 21712.

required Inmarsat to file, "within 30 days after the conduct of its IPO a demonstration that the IPO is in compliance with Section 621(2) and 621(5)(A)(ii) of the ORBIT Act."[17]

E. The Transactions

On February 10, 2004, Inmarsat filed a letter with the Commission purporting to demonstrate that it had satisfied the IPO requirements of the ORBIT Act by effectuating two transactions.[18] The first transaction involved the transfer of Inmarsat's existing equity interests to mostly new shareholders (the "Equity Transaction"), while the second transaction involved the financing of the Equity Transaction through a public offering of 7 5/8% notes (the "Debt Transaction," and together with the Equity Transaction, the "Transactions").[19]

1. The Equity Transaction

According to the *Inmarsat Letter*, on December 17, 2003, funds advised by Apax Partners and Permira (both advisors of pension funds, endowments, and other institutions) together acquired a 52.28% equity interest in Inmarsat.[20] Pursuant to this purchase, and a concurrent corporate restructuring involving the creation of Inmarsat Group Holdings Limited ("Inmarsat Group Holdings"), which is the new parent company for all Inmarsat businesses, the Equity Transaction resulted in Apax Partners and Permira

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[17] *See id.*.

[18] *See Inmarsat Letter*.

[19] *See id.* at 2.

[20] *See id.* at 2-3.

each receiving a 26.14% equity stake in Inmarsat Group Holdings.[21] Certain members of Inmarsat management also received a 4.75% ownership interest, resulting in 57% of Inmarsat being held by new, non-Signatory shareholders.[22] Meanwhile, several former shareholders of Inmarsat, including COMSAT Investments, Inc., Telenor Satellite Services AS, and KDDI Corporation, chose to reinvest in the company; they each received 14.1%, 15.1%, and 7.62% ownership interests, respectively.[23]

2. The Debt Transaction

In order to facilitate the financing of the Equity Transaction, the parties arranged for a bridge loan in the amount of $365 million.[24] On February 3, 2004, Inmarsat Finance plc, a wholly-owned, indirect subsidiary of Inmarsat Group Holdings, conducted a "public offering" of 7 5/8% Senior Notes (the "Notes"), with a maturity date of June 30, 2012, in order to repay the bridge loan.[25] Inmarsat has stated that it intends to

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[21] *Id.* According to Inmarsat, two classes of shares were created by the Equity Transaction. Class A shares, which comprise a small portion of the issued and outstanding shares, are held by directors and employees of Inmarsat. Class B shares are those held by Apax Partners and Permira. Neither Apax Partners nor Permira are permitted to transfer their Class B shares except where the transfer, subject to tag along and drag along rights afforded to minority investors, would result in a party other than Apax Partners and Permira holding more than 50% of the issued ordinary shares of Inmarsat Group Holdings. Similarly, other holders of Class B shares are required to obtain the prior written consent of a director appointed by Apax Partners and Permira prior to transferring their shares, and are prohibited from transferring shares to a competitor of Inmarsat or a supplier. *See Inmarsat Offering Memorandum*, at 125-26.

[22] *Inmarsat Letter* at 3.

[23] *Id.* at 3 n.10.

[24] *Id.* at 4.

[25] *Id.*

file with the U.S. Securities and Exchange Commission ("SEC") a registration statement on Form-4 for the issuance of the Notes.[26] According to Inmarsat, it expects to file this document by June, 2004, if not sooner, but in no event later than August 1, 2004.[27] Once the registration statement becomes effective, the Notes will be eligible for trading on the Private Offering, Resales and Trading Automatic Linkages ("PORTAL") Market in the United States.[28] The Notes have already been listed on the Luxembourg Stock Exchange.[29]

F. *Inmarsat's Argument that the Transactions Satisfy Its IPO Obligations*

According to Inmarsat, the Transactions, when analyzed as an integrated whole, are "consistent with" the IPO requirements of the ORBIT Act.[30] As a general matter, Inmarsat alleges that the language of the ORBIT Act permits an offering of debt securities to be treated as the required "initial public offering" because Section 621 of the ORBIT Act requires only that Inmarsat conduct an initial public offering of "securities," without specifically mentioning either debt or equity securities.[31] The term "security," Inmarsat argues, can be broadly defined to include both debt and equity instruments.[32]

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[26] *Id.* at 5.

[27] *Id.*

[28] *Id.*

[29] *See* Letter of Inmarsat Ventures Ltd. to the Federal Communications Commission (filed Mar. 8, 2004).

[30] *See Inmarsat Letter* at 7-15.

[31] *Id.* at 8.

[32] *See id.* at 8 n.27.

Inmarsat further argues that its Equity Transaction achieved a substantial dilution of the ownership interests of former Inmarsat securities as required by the ORBIT Act.[33]

With respect to the requirement of Section 621(5)(B) that Inmarsat's "shares" be listed on one or more stock exchanges with transparent and effective securities regulation, Inmarsat concedes that its Notes "technically may not be 'shares.'"[34] It nevertheless contends that it has acted consistently with Section 621(5)(B) by making its debt instruments publicly tradeable on both the Luxembourg Stock Exchange and the PORTAL market in the United States.[35] Inmarsat asserts that the Luxembourg Stock Exchange qualifies as a major exchange with disclosure requirements that include the filing of annual and semi-annual reports, including audited financial statements prepared in accordance with the International Financial Reporting Standards.[36]

Inmarsat also states that it intends to register its Notes with the SEC, and will thereby be subjected to the SEC's periodic reporting requirements for foreign issuers, including the filing of annual reports on Form 20-F, and interim reports on Form 6-K.[37] Finally, Inmarsat notes that, regardless of its legal obligation to file annual and interim reports with the SEC, it is contractually obligated to do so.[38]

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[33] *Id.* at 7-8.

[34] *Id.* at 9-12.

[35] *Id.* at 9-10.

[36] *See id.* at 11-12.

[37] *See id.* at 12-15.

[38] *Id.* at 15.

II. THE COMMISSION SHOULD CONCLUDE THAT INMARSAT HAS NOT COMPLIED WITH THE ORBIT ACT.

Although Inmarsat appears to have transferred much of its ownership to non-Signatory investors, Inmarsat in doing so has addressed only one of several directives and policy objectives associated with the IPO requirements of the ORBIT Act. Inmarsat's Transactions fail to satisfy the legislative mandate that Inmarsat conduct an IPO of its equity securities and list those equity securities on a major stock exchange. Moreover, Inmarsat's Transactions are not "consistent with" the IPO requirements or their underlying policy objectives, as they do not diversify or create public ownership in the Company, do not subject Inmarsat to a level of regulatory oversight comparable to that which would occur under an equity IPO, and do not achieve Congress' vision of Inmarsat as a fully independent commercial entity.

The Commission should also reject these Transactions because their shortcomings are the product of Inmarsat's own design. If Inmarsat felt that persistent market conditions rendered compliance with the ORBIT Act impractical, it should have worked with the Commission to find a solution. Instead, Inmarsat chose to devise and implement an approach that defies the ORBIT Act, while asking the Commission to forgive its defiance after-the-fact. Such a tactic simply cannot not be condoned by the Commission, which should instruct Inmarsat to comply with the Act.

A. Inmarsat's Claims are Inconsistent with the Statutory Language and the Legislative History of the ORBIT Act.

The plain language of the ORBIT Act offers the most direct rebuttal to Inmarsat's claim that it has satisfied the ORBIT Act's IPO requirements. Although Inmarsat is correct that Section 621 does not expressly require Inmarsat to undertake an IPO of "stock" or "equity" securities, the use of certain other terminology in the Act does

make it abundantly clear that Congress intended for Inmarsat's offering to be one of equity. First, the Act uses the term "initial public offering" to describe the required privatization process.[39] In its common usage, the term "initial public offering" does not connote an offering of debt, but rather a "corporation's first offering of *stock* to the public."[40]

Second, in Section 621(2) of the ORBIT Act, Congress several times refers to the IPO as being designed to achieve the dilution of aggregate "ownership" interests of Inmarsat's former signatories.[41] The description of an IPO as achieving a dilution of existing "ownership" interests in a company can only be a reference to an IPO of equity securities, which are the securities that connote ownership in a company; it could not have been a reference to debt securities, which do not establish any ownership.[42]

Third, Congress specifically required in Section 621(5)(B) of the ORBIT Act that "*shares*" of a privatized Inmarsat be listed for trading on one or more stock

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[39] ORBIT Act, §§ 621(2), (5)(A).

[40] Jack P. Friedman, Dictionary of Business Terms 297 (2d ed. 1994) (emphasis added). *See also* the NASDAQ Stock Market, *Going Public*, at 166 (2000), *available at* http://www.nasdaq.com/about/going_public.stm (defining an initial public offering (IPO) as "[a] company's first sale of stock to the public. Companies seeking outside equity capital and a public market for their stock will make an initial public offering").

[41] *See* ORBIT Act, § 621(2)

[42] *See generally Going Public*, *supra*, at 6 ("[b]y selling stock to shareholders, the original owners of a public company are, in essence, relinquishing exclusive control of the company's future"). *Compare* Black's Law Dictionary 200 (7th ed. 1999) (equity capital: "funds provided by a company's owners in exchange for evidence of ownership, such as stock") *with id.* at 410 (debt: "liability on a claim").

exchanges.[43] Although Inmarsat tries to portray the term "shares" as one that describes an allotment of any type of securities, the term, in its normal usage, has a meaning specific to only one type of security -- an equity or ownership interest in a company.[44] The notion that Congress intended for shares of equity interests in Inmarsat, rather than debt instruments, to be publicly listed, is consistent with the traditional understanding of an IPO as distributing ownership in a company by creating a liquid market for its equity on a stock exchange.[45]

The legislative history of the ORBIT Act further demonstrates that Congress intended for Inmarsat to conduct an equity IPO. In describing the privatization process for Intelsat -- which is subjected to substantially the same requirements as Inmarsat -- a Senate Committee report notes that the President will seek to ensure that an "initial public offering of *stock* of the privatized INTELSAT entity occurs in a timely fashion . . ."[46] The report further states that the Committee "intends to allow INTELSAT to proceed with a *public stock offering* in a manner consistent with normal business considerations."[47] Floor statements of several key members of Congress, made during

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[43] ORBIT Act, § 621(5)(B) (emphasis added).

[44] *See* Black's Law Dictionary, *supra,* at 1380.

[45] *See generally* Thomas Lee Hazen, 1 *Treatise on the Law of Securities Regulation* § 3.1[2] (4th ed. 2002).

[46] Senate Committee on Commerce, Science, and Transportation, Sen. Rep. No. 106-100, at 6 (Jun. 30, 1999) (emphasis added).

[47] *Id.* (emphasis added).

debate on the ORBIT Technical Corrections Act of 2003, are also instructive in this regard.[48]

In sum, it seems clear from both the language of the ORBIT Act and the legislative history -- that Congress specifically intended for Inmarsat to achieve privatization through an initial public offering of its equity securities, and the subsequent public listing of those equity securities on one or more major stock markets. Because Inmarsat did not follow these prescribed procedures, it has clearly not complied with the IPO requirements of the ORBIT Act.

B. The Standard of Review of the Inmarsat Transactions Should be Compliance With the Text of the ORBIT Act.

In Section 601(b)(2) of the ORBIT Act, Congress required the Commission to determine that Inmarsat's privatization is "consistent with" the statutory criteria.[49] However, the Commission should not judge Inmarsat's compliance with the IPO requirements by any standard other than one of strict compliance, because there is no legitimate reason why Inmarsat cannot meet its full obligations under the text of the ORBIT Act. Although Inmarsat argues that its present course of action is necessitated by market conditions that are not conducive to an equity IPO,[50] such problems are neither

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[48] *See, e.g. Cong. Rec.* H5342 (daily ed. June 12, 2003) (statement of Rep. Dingell) (noting that an extension of the statutory IPO deadline is required so that Inmarsat and its investors would not be unfairly required to "risk capital by offering shares to the public at a time when such shares are likely to be undervalued – perhaps grossly undervalued"); *id.* at H5343 (statement of Rep. Tauzin) ("[i]f forced to move ahead with an IPO at this time, Inmarsat will probably receive a reduced price for its shares offered").

[49] ORBIT Act, § 601(b)(2).

[50] *See Inmarsat Letter* at 7.

new to Inmarsat, nor to the ORBIT Act.[51] The ORBIT Act expressly anticipates market fluctuations by granting flexibility to the Commission to extend the IPO deadline.[52] In the past, the Commission has been willing to accommodate Inmarsat's extension requests,[53] and there is no reason to believe that if current market conditions persist, it will not continue to do so.[54]

Moreover, Congress itself has proven willing to amend the ORBIT Act to extend the deadline further.[55] Accordingly, the system established by Congress is already sufficiently flexible to address Inmarsat's concerns, and there is no need for further flexibility. Indeed, while ongoing delays may prove frustrating to Inmarsat, such

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[51] Although Inmarsat asserts that market conditions for an IPO continue to be unfavorable, Inmarsat has not backed these claims up, as it has in the past, with a letter from its investment bankers advising against an IPO. *See, e.g. In the Matter of Inmarsat Ventures Ltd., Request for Additional Time under Section 621(5) of the ORBIT Act*, FCC-01-193 (released Jun. 28, 2001) at ¶ 19 ("*Inmarsat Request for Additional Time I*"); *In the Matter of Inmarsat Ventures Ltd., Request for Additional Time under Section 621(5) of the ORBIT Act*, FCC 00-356 (released Oct. 3, 2000) at ¶ 4 ("*Inmarsat Request for Additional Time II*"). In addition, Intelsat – facing the same market conditions – is nonetheless proceeding with an ORBIT Act-mandated IPO of equity securities. *See* Intelsat F-1 (filed at the Securities and Exchange Commission on Mar. 12, 2004); Press Release, Intelsat Ltd., Intelsat Ltd. Announces Planned Initial Public Offering (Feb. 4, 2004), *available at* http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040204_01_EN.xml&lang=en&footer=49/.

[52] ORBIT Act, § 621(A)(ii).

[53] *See, e.g. Inmarsat Request for Additional Time I*; *Inmarsat Request for Additional Time II.*

[54] As noted *supra*, the Commission is currently authorized by Congress to extend the deadline for Inmarsat's IPO until December 31, 2004.

[55] *See* ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003).

frustration should not afford it license to adopt a privatization program that is substantively different from the program designed by Congress.

C. *The Inmarsat Transactions Are Not "Consistent" with an IPO of Equity Securities.*

Even if the Commission were to apply the "consistent with" standard to judge Inmarsat's compliance with the ORBIT Act, there are still several reasons as to why the Inmarsat Transactions are, in fact, not consistent with the ORBIT Act.

1. The Equity Transaction did not Achieve a Substantial Dilution of Inmarsat Equity.

First, Inmarsat did not, through the Equity Transaction, achieve a "substantial dilution" of Signatory ownership interests in a manner consistent with FCC precedent and the underlying intent of the ORBIT Act. In the *New Skies Market Access Order*, the Commission suggested that "substantial dilution" results, not merely from a substantial percentage reduction in Signatory ownership, but also from an increase in the "diversity" of the entity's ownership.[56] Indeed, one of the main purposes of conducting a public offering is to increase the breadth of corporate ownership, both relative to pre-existing shareholders, and also in an absolute sense.

While Inmarsat has transferred roughly 57% of its ownership to non-Signatory shareholders, it has done so by substantially narrowing, rather than widening, its shareholder base. Whereas previously, ownership was distributed among eighty-five

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[56] *See In the Matter of New Skies Satellites, N.V. Request for Unconditional Authority to Access the U.S. Market*, 16 FCC Rcd. 7482, 7488 (2001) (the "*New Skies Market Access Order*") ("In particular, we believe that a sufficient level of New Skies stock is now owned by individuals and companies other than INTELSAT Signatories, to give it a strong incentive to act in the interest of all rather than any particular shareholder").

Signatories, with no one or two Signatories having control, today two shareholders -- Apax Partners and Permira – exercise control over Inmarsat. The structure of Inmarsat is now such that holders of Class B shares other than Apax Partners and Permira are restricted from transferring their interests without the effective consent of Apax Partners and Permira. Furthermore, Apax Partners and Permira are themselves restricted from selling shares without the consent of the other. This structure allows Apax Partners and Permira to stifle attempts to diversify ownership, and indeed permits them to prevent the further disposition of Signatory shares to non-Signatory parties, in contravention of the purpose and intent of Section 621.

2. The Transactions did not Transform Inmarsat into a Publicly Held Company.

The Inmarsat Transactions are also inconsistent with the ORBIT Act because they do not result in the transformation of Inmarsat into a publicly held company. As noted by the Commission, public ownership was Congress' objective when it drafted Sections 621(5)(A) and (B) of the ORBIT Act.[57] In its post-Transactions form, Inmarsat fails to satisfy this objective because its shares are still not, as are those of public companies, "traded to and among the general public."[58] The ownership of Inmarsat remains closely held in the hands of a few private investors; its shares are not listed on any stock exchange, and there is no public market for its equity capital.

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[57] *See, e.g., Inmarsat Market Access Order*, 16 FCC Rcd at 21689 n. 118 (the Commission declared that subsections (A) and (B) of Section 621(5) "address requirements for the corporation to become a publicly held company").

[58] Black's Law Dictionary, *supra*, at 344.

Moreover, because there are now substantial restrictions imposed on the transfer of Class B Inmarsat stock, there is effectively no private market either.

Inmarsat's creation of a public market for its debt securities is not a substitute for the creation of a public market for its equity securities. Regardless of the nature of the exchange on which debt is traded, or the size of the market that exists to sell it, the sale of notes and other debt instruments does not, by definition, confer upon its holders ownership or control of the issuing company. A note instrument amounts to no more than a "written promise by one party . . . to pay money to another party."[59] A note does not provide its holder with the right to vote on such key corporate governance matters as the election of the company's board of directors and the selection of the company's independent accountants, as do equity securities. As such, a public offering of notes cannot itself transform a company like Inmarsat into a publicly held corporation.

Moreover, even if debt securities could somehow be equated with equity, for U.S.-based purchasers, obtaining debt securities on the PORTAL market is less accessible than purchasing publicly traded equity. The latter is usually listed on a major stock exchange and is fairly easy to buy through online trading services and other means. Purchasing debt securities on PORTAL, in contrast, generally requires additional know-how, and the use of a knowledgeable, potentially costly broker or other intermediary.[60] PORTAL-listed debt is not typically purchased by individual investors, nor can it

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[59] *Id.* at 1085.

[60] The secondary market for PORTAL securities is broker/dealer-based. *See generally* National Association of Securities Dealers, Inc., *PORTAL Expected to Benefit Private Placement Market* (1990), *available at* http://business.cch.com/primesrc/bin/highwire.dll.

typically be purchased through ordinary retail brokerage arrangements or via the Internet.[61] The result is that, although Inmarsat's debt securities may be "publicly" traded, they will likely continue to be held by a relatively narrow group of experienced investors, and remain inaccessible to the broader public. By contrast, under the IPO scheme specified by Congress, the broader public would have benefitted from ownership of Inmarsat.

Inmarsat tries to avoid this reality by characterizing the public listing requirement of the ORBIT Act as being exclusively intended to provide for public oversight of Inmarsat and the public disclosure of its financial and other information. Although these are certainly some of the stated objectives of Section 621(5)(B), they are not, as noted above, the exclusive objectives of this requirement.

3. The Oversight and Transparency Mechanisms to which Inmarsat's U.S. Registered Notes are Now Subject are not Comparable to those Associated with a Public Listing of Equity Securities.

The Transactions furthermore do not provide the same degree of oversight and transparency that would result from a public equity offering. As such, the Transactions do not comport with the IPO requirements of the ORBIT Act.

In its Letter to the Commission, Inmarsat boasts various oversight and transparency requirements associated with the Debt Transaction. For example, it notes that because its debt securities are listed for trading on the Luxembourg Stock Exchange, Inmarsat is subject to ongoing disclosure requirements that include the filing of annual

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[61] Securities listed on the PORTAL Market are limited to private placements exempt from registration under SEC Rule 144A; as such, PORTAL securities are not available to the general public and are instead traded among qualified institutional buyers, including institutional investors with assets in excess of $100 million and certain broker-dealers. *See id.*

and semi-annual reports.[62] With respect to its offerings in the United States, which include a private offering pursuant to SEC Rule 144A, an "A/B" exchange offer to be registered with the SEC under the Securities Act of 1933, and the trading of its securities on the PORTAL market,[63] Inmarsat also notes that it will be required to file periodic and current reports under the Securities Exchange Act of 1934.[64]

The requirements associated with these various listing and trading arrangements, while perhaps better than nothing, are not remotely comparable to requirements associated with an equity IPO on a national stock market in the United States.[65] Had Inmarsat conducted an IPO of equity securities in the United States, even in conjunction with a foreign offering, it would have become subject to the listing requirements of a national stock exchange such as the New York Stock Exchange ("NYSE") or the NASDAQ.

Among these listing requirements are significant corporate governance requirements and standards. The NYSE, for example, requires listed companies to maintain: (1) a fully independent audit committee with a written audit committee charter;

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[62] *See Inmarsat Letter* at 10-12.

[63] *See id.* at 4-5.

[64] *See id.* 12-15.

[65] The requirements of the United States markets are relevant in this instance because, although the ORBIT Act does not expressly require Inmarsat to list its shares on a major United States stock exchange, Inmarsat would, as a practical matter, be expected to do so in an equity IPO in order to maximize liquidity. In fact, when Inmarsat previously contemplated an equity IPO, it informed the Commission that it would likely list its shares on either the NASDAQ or the New York Stock Exchange. *See Inmarsat Market Access Order*, 16 FCC at 21688. New Skies, meanwhile, also listed its stock on both the NYSE and the Euronext Amsterdam N.V. stock markets. *See New Skies Market Access Order*, 16 FCC Rcd at 7490.

(2) a fully independent nominating/corporate governance committee with a written charter; (3) a fully independent compensation committee with a written charter; (4) the independence of a majority of the company's board of directors; (5) non-executive board meetings; and (6) a certification of the chief executive officer of the company that there has been no violation of the corporate governance rules.[66] NASDAQ maintains similar requirements for listed companies.[67] Inmarsat would not become subject to these requirements either through its contemplated offerings of debt securities in the United States, or through its corresponding obligations arising from the Securities Exchange Act of 1934.

Accordingly, had Inmarsat conducted an IPO of equity as the ORBIT Act contemplates, it would likely have become subject to corporate governance requirements to which it is not currently subject. Inmarsat's subjection to these requirements would have significantly furthered the stated goal of the ORBIT Act to transform Inmarsat into an "independent commercial entity" with a "pro-competitive ownership structure."[68] But Inmarsat chose not to subject itself to these requirements, and thereby failed to act consistently with the ORBIT Act.

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[66] *See* NYSE Listing Rules 303.01(A), 303A.

[67] *See* NASDAQ Listing Rule 4350.

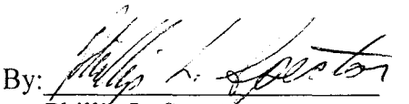
[68] ORBIT Act, § 621(2).

III. CONCLUSION

For the foregoing reasons, SES AMERICOM requests that the Commission reject Inmarsat's statement of compliance with the IPO requirements of the ORBIT Act, and instruct Inmarsat to comply with these requirements.

Respectfully submitted,

SES AMERICOM, INC.

By: 

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April 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2004, I caused a copy of the foregoing Comments of SES AMERICOM, Inc., to be served by hand, on the following:

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