FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inmarsat Ventures Limited	)	File No. SAT-MSC-2004[illegible]-00027
	)	

CONSOLIDATED RESPONSE OF INMARSAT

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Inmarsat Ventures Limited ("Inmarsat") hereby provides its consolidated response to the two comments and one opposition filed in response to Inmarsat's February 10, 2004 letter to the Commission[1] regarding its compliance with the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act").[2]

INTRODUCTION AND SUMMARY

The primary purpose of the ORBIT Act requirement that Inmarsat conduct an initial public offering of securities is to "substantially dilute" the ownership interests of its former Signatories. Inmarsat has managed to fully privatize by putting affirmative control into the hands of two entities that are neither affiliated with any former Signatory, nor controlled by any foreign government. By diluting former Signatory ownership by 57%, Inmarsat has achieved a level of independence far in excess of that mandated – or even contemplated – by the ORBIT Act, and a level of dilution twice that previously approved by the Commission. This dilution was achieved, in part, through the issuance of public debt securities listed for trading on a major stock exchange (the Luxembourg Stock Exchange), which listing subjects Inmarsat to essentially the same level of transparency into its business and finances, and essentially the same level of securities regulation, as if Inmarsat had issued public equity securities.

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

2 ORBIT Act, Pub. L. No. 106-180, 115 Stat. 48 (2000) (as amended).

Neither the goal of "substantial" dilution, nor the goal of transparent and effective securities regulation, would be furthered by requiring Inmarsat to also list public equity securities for trading on a major stock exchange. The only effect would be to disrupt Inmarsat's business, force the company to focus significant resources on a further public offering, and divert Inmarsat's attention from deploying its $1.5 billion, next generation mobile satellite service ("MSS") system that promises to enhance competition with both SES AMERICOM, Inc. ("SES") and Mobile Satellite Ventures Subsidiary LLC ("MSV").

Stratos Mobile Networks, Inc. ("Stratos") has aptly explained why a positive determination that Inmarsat has satisfied the ORBIT Act is necessary to ensure the continuity of "important competition in the U.S. market," as well as continuity of critical services to the U.S. military, State Department, Department of Homeland Security, Federal Bureau of Investigation, Drug Enforcement Administration, Coast Guard, and U.S. state and local governments, all of whom have increased their reliance on Inmarsat services since the September 11 attacks on America.[3]

It is only two current and future competitors of Inmarsat, SES and MSV, who request that the Commission determine that the steps taken by Inmarsat to satisfy the final applicable ORBIT Act requirement are not adequate. Significantly, these entities do not complain about the level of dilution that has occurred, or that Inmarsat is in fact fully independent from both former Signatories and foreign government control.

With respect to the arguments that ownership and control of Inmarsat must be "widely diffused," the irony should not be lost on the Commission that MSV, who is not "widely

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[3] *See* Comments of Stratos Mobile Networks, Inc., File No. SAT-MSC-20040210-00027 (filed April 5, 2004) at 1-2 ("*Stratos Comments*").

held,"[4] and SES, almost 2/3 of whose voting power rests in the hands of three entities.[5] More fundamentally, there is nothing in the ORBIT Act suggesting that Inmarsat may not achieve independence from its former Signatories by becoming majority owned by investment funds advised by two entities – Apax Partners and Permira. In any event, beneficial ownership of Inmarsat is in fact widely held – by the myriad public pension funds, corporate pension funds, and endowments, among other institutions, who invest in the funds that actually own Inmarsat.[6]

As much as SES and MSV attempt to dissect the series of integrated transactions by which Inmarsat diluted the interests of former Signatories, achieved independence, and became subject to transparent and effective securities regulation, they cannot rebut the fact that Inmarsat's initial public offering of debt securities is integrally connected with the sale of former Signatory ownership interests that it funded. As Inmarsat previously represented:

> Indeed, funding the acquisition of a 52.28% equity position by the funds advised by Apax Partners and by Permira was the primary purpose of that Public Offering. . . . [T]he proceeds of the Public Offering were used to repay a $365 million temporary bridge loan that provided funding for that majority equity investment. Indeed, without the expectation of the Public Offering, the funds advised by Apax Partners and by Permira would not have been able to secure the bridge loan that made their acquisition possible. *And without the need to fund that equity investment, Inmarsat would not have conducted its IPO of debt securities.*[7]

Inmarsat anticipates that its new ownership will invigorate the company and promote the continued growth and development of Inmarsat's MSS services. As SES has recognized, Inmarsat is a global provider of MSS voice and data services to maritime, aeronautical and land-based users. Indeed, Inmarsat is a provider of essential services to the U.S.

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4 *See In the Matter of Mobile Satellite Ventures Subsidiary LLC*, Application for Authority to Launch and Operate an L-band Mobile Satellite Service Satellite at 82°W, File No. SAT-LOA-20030827-00174 at Attachment 2 (response to question No. 34) (filed Aug. 27, 2003).

5 *See SES Form 312*, File No. SAT-RPL-20040227-00024 at Exhibit B, p.2 (filed Feb. 27, 2004).

6 *See February 10th Letter*, Ex. A. Offering Memorandum at 123.

7 *February 10th Letter* at 7 (emphasis supplied).

military, State Department, Department of Homeland Security, Federal Bureau of Investigation, Drug Enforcement Administration, Coast Guard, and U.S. state and local governments. Inmarsat's maritime and aeronautical users include governmental entities, commercial maritime companies engaged in activities such as shipping, passenger transport, and fishing, and commercial and private airplanes. Its land-based users include government and military agencies, the oil and gas industry, relief organizations, media companies and farmers.

Inmarsat provides many essential services to its users, including voice and data applications. In addition, Inmarsat maritime terminals are used for distress and safety-of-life services and maritime rescue coordination, and aeronautical terminals are used for safety services and as support for automatic positioning systems.

While Inmarsat provided limited maritime and aeronautical services in the U.S. prior to October 2001, it was only after the Commission released its *Market Access Order* that Inmarsat was able to begin to offer MSS services to users on land in the U.S. MSV's customers finally were given a competitive MSS alternative. As the Commission has determined, the presence of Inmarsat in the U.S. market "serve[s] the public interest by increasing competition and providing additional services for U.S. consumers."[8]

Since 2001, Inmarsat has continued to improve its services in many ways, including by offering higher-speed data links. Currently, Inmarsat is developing its next generation service, BGAN, which will provide voice and broadband speed data services to land-based users. To implement this service, Inmarsat is building and launching three satellites, Inmarsat-4, as part of a network with a total cost of over $1.5 billion. Inmarsat anticipates that the first Inmarsat-4 satellite will be launched during the second half of 2004 and the second in

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8 *In the Matter of Comsat Corporation d/b/a Comsat Mobile Communications, et al.* 16 FCC Rcd. 21,661 at ¶ 1 (2001) (the "*Market Access Order*").

2005.[9] Under this timeframe, Inmarsat would be in a position to offer the mobile satellite broadband and voice services of its next generation network to U.S. consumers by 2005, but Inmarsat can do so only if it is so authorized by the Commission.

If the Commission were to accept SES' and MSV's arguments, certain current users could lose access to many of the important services that Inmarsat offers, and may be precluded from access to Inmarsat's next-generation services, including BGAN. Fortunately, such a result is not mandated by the ORBIT Act. Moreover, such a result would harm the public interest by limiting the choice of MSS service providers in the U.S., thereby eliminating the competitive benefits cited by the Commission in the *Market Access Order.*[10] Even Inmarsat's customers who primarily may use certain of its services overseas, such as the U.S. military, could be constrained from training troops with the next generation Inmarsat services within the U.S., and therefore may not be able to use those advanced services to achieve U.S. interests in other parts of the world.

Inmarsat has satisfied all the purposes of the ORBIT Act. Inmarsat has substantially diluted the aggregate ownership interests of former Signatories, reduced the level of foreign government ownership, and become subject to transparent and effective securities regulation. In doing so, Inmarsat has engendered a more competitive market for MSS services, which has benefited U.S. consumers, U.S. industry, and the U.S. government. If the Commission were to accept the arguments of SES and MSV, only Inmarsat's competitors would benefit.

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9 Inmarsat currently is maintaining the third Inmarsat-4 satellite as a ground spare.

10 The Commission previously decided that it could authorize "additional services" over the Inmarsat system, pending compliance with the remaining initial public offering ORBIT criteria. *See Market Access Order* at ¶ 60.

DISCUSSION

I. INMARSAT'S ACTIONS SATISFY THE THE ORBIT ACT AND ITS STATED OBJECTIVES

An analysis of the issues raised by SES and MSV requires, at the outset, a review of the stated purpose of the ORBIT Act, an understanding of the statutory requirements that remain to be satisfied, a careful reading of what the statute says (and does not say), and, finally, an analysis of what policy goals would be served if the Commission were to provide the relief sought by MSV and SES.

The primary purpose of the ORBIT Act is to convert Inmarsat from a Signatory owned and controlled intergovernmental organization, into a pro-competitive commercial entity that has only those advantages that it is able to achieve from its success in the commercial marketplace. The purpose of the ORBIT Act is clearly articulated:

> Sec. 2 PURPOSE.
>
> It is the purpose of this Act 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.[11]

In another provision, Section 621(2), Congress emphasized the need for the Commission to focus on whether Inmarsat had achieved independence from Signatories, former Signatories and any residual intergovernmental organization through the unambiguous requirements that the privatized Inmarsat (i) "operate as [an] independent commercial entit[y], and have a pro-competitive ownership structure," and (ii) substantially dilute the aggregate ownership of Signatories and former Signatories through the initial public offering *of securities* as specified in Section 621(5)(A).[12] Congress further provided the Commission with latitude to

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11 ORBIT Act § 2.

12 *See* ORBIT Act § 621(2) (emphasis supplied).

determine whether "a public offering attains such substantial dilution,"[13] and, in doing so, to take into account a myriad of factors, including the purposes and intent of the Act, and market conditions.

These two statutory provisions are key to interpreting Congress' intent. When Congress has expressly spoken on the purpose of a statute, that expression must be given great weight. When weighed against the words of Congress, MSV's and SES' assertions about Congress' "goals," "policy objectives" and "intentions" are clearly wrong. As explained below, nothing in either of these two statutory provisions suggests that Congress sought to ensure broad ownership or diffuse control of Inmarsat. Rather, what Congress sought to achieve was to eliminate ownership by the former Signatories, as much as possible, and thereby eliminate the associated ownership and control of Inmarsat by the historical governmental telecommunications monopoly owners who it was thought could frustrate Congress' desire to develop competition in the market for global satellite services.[14] And that is exactly what Inmarsat has achieved.

The Commission previously has recognized the dramatic and tangible steps that Inmarsat has taken to privatize in a manner consistent with the requirements of the ORBIT Act. First, in 1999, Inmarsat was transformed from an Inter-governmental organization ("IGO") into a stock corporation that the Commission unambiguously approved as ORBIT-compliant over three years ago: "The ORBIT Act requires that privatized Inmarsat be a 'national corporation or similarly accepted commercial structure, subject to the laws of the nation in which incorporated.' This requirement has been satisfied."[15] The Commission also held at the same time that Inmarsat

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13 *See* ORBIT Act § 621(2).

14 *See Stratos Comments* at 3.

15 *Market Access Order* at ¶ 43 (footnote omitted)(citing Pub. L. 106-180, § 621(5)). *See also id.* at ¶ 58 ("Inmarsat has been privatized into a national stock corporation with a fiduciary board of directors that satisfies the Act's restrictions against having interlocking

had eliminated all but minimal IGO ownership,[16] terminated any privileges and immunities it once had as an IGO,[17] appropriately restructured its board of directors and satisfied limitations on its officers and managers,[18] and also satisfied a host of other requirements regarding arm's length relationships,[19] regulation by a national licensing authority,[20] constraint by international competition policies,[21] and limitations on its relationship with ICO.[22] In its 2001 *Market Access Order*, the Commission therefore concluded that "Inmarsat has privatized in a manner consistent with the non-IPO requirements of Sections 621 and 624 of the ORBIT Act."[23] The Commission further provided that the market access authorizations it issued were "subject to a future Commission finding that Inmarsat has conducted an IPO under Sections 621(2) and 621(5)(A)(ii) of the ORBIT Act."[24]

In order to meet the remaining requirement of the ORBIT Act to conduct the "initial public offering of securities" specified in Section 621(5) and substantially dilute the ownership of its former Signatories as specified in Section 621(2), Inmarsat attempted to conduct an initial public offering of common stock a total of five times, at an out-of-pocket cost of well over $10 million for external advisors alone, not including the internal costs attributable to the

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directors, officers, managers and employees with any intergovernmental organization or Signatory or former Signatory.")

16 *Market Access Order* at ¶ 41.

17 *Market Access Order* at ¶ 42.

18 *Market Access Order* at ¶¶ 44-47.

19 *Market Access Order* at ¶ 49.

20 *Market Access Order* at ¶ 50.

21 *Market Access Order* at ¶ 51.

22 *Market Access Order* at ¶¶ 52-53.

23 *Market Access Order* at ¶ 58.

24 *Market Access Order* at ¶ 110.

time expended by Inmarsat's management and staff.[25] As MSV has aptly noted, many other mobile satellite service providers have been through bankruptcy recently.[26] And the ownership of those MSS systems and licensees has been concentrated: Motient – sold its MSS satellite assets to MSV, a privately held company; Globalstar – Thermo Capital Partners LLC acquired most of Globalstar's MSS operations and assets; Iridium – Iridium Satellite LLC purchased the MSS operating assets of Iridium; and ICO – Craig McCaw lead a group of investors to acquire control of ICO's assets. Each time it tried, on the advice of its independent investment advisors, Inmarsat determined that the market conditions were not ripe for a successful public offering of equity securities. The Commission agreed with Inmarsat's assessment of the market and granted extensions of the deadline by which Inmarsat was required to comply with the remaining requirement of the ORBIT Act.[27]

In recognition of the weakness in the public equity market, Inmarsat began to explore alternative means of diluting the ownership interest of its former Signatory owners. Finally, by the end of 2003, Inmarsat concluded an integrated series of transactions, financed in part by a public offering of securities – debt securities – by which funds advised by Apax Partners and Permira acquired a 52.28% combined beneficial ownership interest in the newly-formed parent company, Inmarsat Group Holdings Limited, from the then existing shareholders

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25 *See* Inmarsat Ventures plc Request for Extension of Time, File No. SAT-MSC-20020925-00187 at 8 (Sept. 25, 2002).

26 Opposition for Mobile Satellite Ventures, Subsidiary LLC, File No. SAT-MSC-20040210-00027 at 2 (filed April 5, 2004) ("*MSV Opposition*"). MSV mentioned four MSS operators, but did not include in the list Motient, MSV's predecessor, which also declared bankruptcy in 2002. GlobalStar declared bankruptcy in 2002. TMI filed for bankruptcy in 2000 and Iridium and ICO filed in 1999.

27 *See, e.g., Inmarsat Ventures, plc Request for Extension of Time*, Order, SAT-MSC-20020925-00187 at ¶ 11 (Dec. 17, 2002) ("*Inmarsat 2002 Extension Order*").

of Inmarsat, and Inmarsat management also acquired 4.75% ownership.[28] As a result, the funds advised by Apax Partners and by Permira are able to control Inmarsat. The former Inmarsat Signatories no longer do. The public Inmarsat debt securities became listed for trading on the Luxembourg Stock Exchange on February 27, 2004. As explained in the *February 10th Letter*, Inmarsat further intends to effectuate a registration statement with the U.S. Securities and Exchange Commission to allow these debt securities to be freely traded within the U.S.

Whether or not the public equity market may be improving as of April 2004, as MSV and SES assert, is irrelevant.[29] Having been frustrated for years by the condition of the public equity market, Inmarsat was presented with an opportunity about six months ago to substantially dilute the ownership interests of its former Signatories, and Inmarsat seized it. As discussed below and in the *February 10th Letter*, Inmarsat did so in a manner that meets the requirements of the ORBIT Act, and achieved the stated purpose of the ORBIT Act, in a manner that was not dependent on a capricious public equity market that had five times before stymied Inmarsat's efforts. It boggles the mind to even conceive how the public interest could be better served by, as SES suggests, dismissing the tangible results Inmarsat has achieved, and granting an extension of time so that Inmarsat might be able to do something different, if the public equity market really recovers, and if a public equity offering for an MSS company becomes truly feasible.[30]

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28 *See February 10th Letter* for a full description of the integrated transactions.

29 *See MSV Opposition* at 7-8; *see also* Comments of SES AMERICOM, Inc., File No. SAT-MSC-20040210-00027 at 13-14 (filed April 5, 2004) (asserting that there is no reason Inmarsat could not have conducted an equity IPO under current market conditions) ("*SES Comments*").

30 *See SES Comments* at ii. In this regard, it is not relevant, as MSV asserts (*MSV Opposition* at 9), whether *Intelsat* is able to effectuate a suitable initial public offering of equity securities. Intelsat certainly does not face the market problems presented by the fact that five of Inmarsat's MSS competitors have gone bankrupt *(see supra* n.24) and other potential MSS competitors have simply been unable to implement plans for new

Notwithstanding the other matters that SES and MSV dispute, there are a host of very significant factors that SES and MSV do not contest about the Inmarsat transactions, including the initial public offering of securities:

(i) Inmarsat has substantially diluted the ownership interests of its former Signatories. Of the 85 former Signatories, 70 no longer have any ownership interest in Inmarsat, and three have only a *de minimis* interest of one share

(ii) Non-Signatory interests now account for 57% of the equity ownership in Inmarsat and are able to control Inmarsat;

(iii) In order to fund the transactions that resulted in the ownership dilution, Inmarsat conducted an initial public offering of securities;

(iv) Inmarsat's public securities have been listed on the Luxembourg Stock Exchange and are publicly tradable;

(v) The Luxembourg Stock Exchange is a major stock exchange;

(vi) Inmarsat's business is based in Europe, not in the United States; and

(vii) As a result of listing on the Luxembourg Stock Exchange, Inmarsat currently is subject to the extensive regulatory oversight and reporting requirements of the European Union, which govern Inmarsat's home market, the United Kingdom.

Both SES and MSV wholly ignore probative evidence in the record from the Executive and Legislative Branches. The Bush Administration, through the National Telecommunications and Information Agency ("NTIA") has concluded that Inmarsat has materially fulfilled the goals of the ORBIT Act.[31] Similarly, Senator Conrad Burns, an author of the ORBIT Act, confirms that Inmarsat's approach is consistent with the ORBIT Act: "I believed at the time, and continue to believe today, that [the ORBIT Act] policy objectives may

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MSS systems, s*ee, e.g., In re applications of Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited*, Memorandum and Opinion, File No. SAT-T/C-20020719-00104 (Jan. 30, 2003) (terminating the 2 GHz MSS licenses of MCHI and Constellation).

31 *See* Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, NTIA, to Senator Conrad Burns at 2 (March 16, 2004) ("*NTIA Letter*")("the Administration supports the view that the investment by Apax and Permina [sic] in Inmarsat, together with the debt offering and planned SEC registration, materially fulfills the goals of P.L. 106-180.") attached hereto as Exhibit A; *see also* Letter from Senator Conrad Burns to Michael D. Gallagher, Acting Assistant secretary for Communications and Information, NTIA, (January 21, 2004) ("*Burns Letter*") attached hereto as Exhibit B. Both letters were filed in this proceeding on March 22, 2004.

be achieved in a variety of ways, including an IPO, a private equity takeover, or other transactions that may have a bearing on the overall ownership profile of the former IGOs."[32]

By conducting an initial public offering of securities that were used to finance the acquisition of over 52% of Inmarsat by funds managed by Apax Partners and Permira, Inmarsat has substantially diluted the aggregate ownership interests of its former Signatories, and Inmarsat is now subject to transparent and effective securities regulation. Against this backdrop, it is clear that Inmarsat has not "defied" or "circumvented" the ORBIT Act, as SES baselessly alleges.[33] To the contrary, as Stratos aptly explains, Inmarsat has wrested both *de jure* and *de facto* control from the former Signatories, and placed such control into the hands of new owners.[34] In doing so, Inmarsat has achieved the purpose of the ORBIT Act, and has done so in a manner that far exceeds what could have been achieved in an equity offering comparable to that approved in the *New Skies* case,[35] which would have left former Signatories collectively in control.

Indeed, Inmarsat has a corporate and ownership structure that is even more "competitive" than the ownership structure of its current and potential MSS competitors – MSV, Iridium, Globalstar, and ICO – whose MSS businesses have emerged from bankruptcy and are owned and controlled by private interests. Indeed, of all of those MSS companies, only Inmarsat's financial accounts are public, and only Inmarsat is subject to the transparency and

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32 *Burns Letter.*

33 *See SES Comments* at i and 10.

34 *Stratos Comments* at 4.

35 *See In the Matter of New Skies Satellites, N.V. Request for Unconditional Authority to Access the U.S. Market*, 16 FCC Rcd. 7482, at ¶19 (2001).

other securities regulatory requirements of a *public company*, on account of its public debt securities.[36]

So, whose interests would be served by granting the relief that SES and MSV seek and thereby limiting Inmarsat's ability to serve the needs of U.S. consumers, U.S. businesses and the U.S. government? The U.S. public? No. The U.S. military? Certainly not. Only the interests of MSV and SES.

SES and MSV oppose Inmarsat's submission based on an improper interpretation of the phrase "initial public offering of securities" and by urging the Commission to ignore the flexibility granted the Commission under the ORBIT Act to find Inmarsat's actions "consistent with" the ORBIT Act. To fully address their objections, the following Section II addresses (i) the applicable standard of review for assessing Inmarsat's compliance with the ORBIT Act, (ii) the specific words of the ORBIT Act, and relevant canons of statutory interpretation that support a plain reading of those statutory provisions, and (iii) why the purpose of the ORBIT Act would not be served by granting the relief that SES and MSV seek.

II. THE COMMISSION SHOULD DISMISS MSV'S AND SES' OBJECTIONS

When distilled to their core, the objections raised by SES and MSV can be framed as two fundamental questions:

1) When Congress chose to require an "initial public offering of securities" in Section 621(5)(A), did it really mean to exclude the possibility of issuing public debt securities?

2) Are there any articulated purposes of the ORBIT Act that would be served if the Commission found that Inmarsat's listing of debt securities on a major stock exchange was not "consistent with" the listing of shares provision in Section 621(5)(B) of the ORBIT Act?

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[36] Cf. *SES Comments* at ii (claiming that Inmarsat is not a public company). SES' complaints that Inmarsat is not a public company are groundless. As noted below, even a public company can be controlled by a few shareholders. *See infra* Section II.D.i.

As discussed below, the answer to both questions is "No." The remaining arguments raised by SES and MSV are "red herrings" not even remotely rooted in the requirements of the statute, but nonetheless are addressed below. MSV's timeworn and consistently dismissed claims of anti-competitive behavior by Inmarsat are both unfounded and completely irrelevant to this proceeding.[37]

Next, Inmarsat addresses the relevant standard of review under the ORBIT Act. Then, Inmarsat turns to the substantive arguments of SES and MSV.

A. The Commission's "Consistent With" Standard of Review Applies

No one contests that the Commission has the *authority* to determine whether the steps Inmarsat has taken are "consistent with" and thus satisfy the ORBIT Act. As SES admits, "the ORBIT Act provides for a 'consistent with' standard of review to evaluate Inmarsat's progress toward privatization."[38] While SES and MSV urge the Commission to now reverse course, and impose a new, "strict" compliance standard, they do not explain why the Commission should change a policy that the Commission reaffirmed just two months ago[39] and is based on a consistent course of agency action for over three years.[40]

As the Commission stated, it will "review the Inmarsat privatization to determine whether it is 'consistent with' all of the criteria identified in Section 621 and 624 taken as a whole."[41] The "consistent with" standard confers a degree of flexibility on the Commission in determining whether the steps taken by Inmarsat are compatible or congruous with the ORBIT

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37 *See MSV Opposition* at 5.

38 *SES Comments* at i; *see also id.* at 13 ("Congress required the Commission to determine that Inmarsat's privatization is 'consistent with' the statutory criteria.").

39 *See In the Matter of Loral Satellite, Inc., et al.*, Order and Authorization, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00130 and ISP-PDR-20030925-00024 at ¶¶ 8, 50, 54 (Feb. 11, 2004).

40 *See, e.g., Market Access Order* at ¶¶ 34-40.

41 *See Market Access Order* at ¶ 35.

Act.[42] This flexibility allows the Commission to avoid frustrating Congressional intent by an overly narrow interpretation of the statute.[43] Thus, where the goals of the ORBIT Act are met, the "consistent with" standard gravitates towards a broader interpretation of the statute so as to avoid the imposition of technical obligations that serve no purpose and would harm Inmarsat's position in the competitive marketplace for satellite services

Contrary to MSV's assertion, the *Chevron* "step one" standard is not applicable to the Commission's review of Inmarsat's actions.[44] The Commission is not required to "rewrite" Section 621(5) of the ORBIT Act in order to find that Inmarsat has complied with the statute. Congress delegated to the Commission the obligation and authority to determine whether Inmarsat's compliance efforts are "consistent with" the dictates of the ORBIT Act. Congress codified this standard in the statute,[45] and the Commission has since applied it to Inmarsat in the *Market Access Order*. In doing so, the Commission dismissed "strict compliance" arguments very similar to those made by SES and MSV today. The Commission has already ruled that strict compliance with each ORBIT Act criteria is *not* required.[46] In making a determination of whether Inmarsat's actions are "consistent with" the ORBIT Act, the Commission would not be "rewriting" the statute. Rather, the Commission simply would be comparing the requirements of the ORBIT Act with Inmarsat's efforts, and a myriad of other factors including market conditions,[47] public interest considerations, and the impact on competition,[48] in order to determine whether the objectives of the statute have been met. This discretion is completely

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42 *See id.*

43 *See id.*

44 *See MSV Opposition* at 10-11.

45 *See ORBIT Act* § 601(a)(2).

46 *See Market Access Order* ¶ 35.

47 *See* ORBIT Act § 621(2).

48 *See Market Access Order* ¶ 36.

consistent with the language of the statute and the authority delegated to the Commission by Congress.

B. Comsistency with the Section 621(5)(A) Initial Public Offering of Securities Requirement

1. *The Plain Language of the ORBIT Act Contemplates a Public Offering of Either Debt or Equity Securities*

Section 621(5)(A) of the ORBIT Act plainly provides that "[a]n *initial public offering of securities* of any successor entity or separate entity – (ii) shall be conducted, for the successor entities of Inmarsat . . . ."[49] In the face of this unambiguous language, both MSV and SES assert that this provision requires that Inmarsat conduct an IPO of "equity." SES claims that this is the "common usage" of the term "IPO."[50] Moreover, both SES and MSV argue that, because the ORBIT Act refers in Section 621(2) to this public offering as the means to substantially diluting the ownership of Inmarsat's former Signatories, this must mean Inmarsat must issue public *equity* securities in its initial public offering.[51]

MSV's and SES's interpretation, however, is inconsistent with a basic tenet of statutory construction. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."[52] The statute does not simply provide

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49 ORBIT Act § 621(5)(A) (emphasis added).

50 *See SES Comments* at 10-11.

51 *See MSV Opposition* at 7 and *SES Comments* at 11.

52 NORMAN J. SINGER , STATUTES AND STATUTORY CONSTRUCTION, §46:06, p. 181 (6th ed., 2000). *See, e.g., U.S. v. Menasche*, 348 U.S. 528, 538 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,'" quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883), in which the Supreme Court stated "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed"); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant,'" quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

for an "initial public offering"; rather, it says an "initial public offering *of securities.*"[53] The clause "of securities" must be accorded meaning. As a modifier to the phase "initial public offering," the clause "of securities" must be interpreted to describe the types of initial public offerings permissible under Section 621(5)(A) of the ORBIT Act. As explained in the *February 10th Letter*, "securities" has a common and statutory usage that includes both debt and equity securities.[54]

Under SES' interpretation, Congress would have contradicted itself in Section 621(5)(B) by using the phrase "initial public offer of securities." If "initial public offering" refers only to equity and "securities" encompasses (as it must) both equity and debt instruments, then the phrase would be internally inconsistent. At best, under MSV's and SES's reading, the words "of securities" would be entirely redundant. The clause "of securities" may not be read out of the statute to eliminate such an inconsistency or redundancy, because a basic principle of statutory interpretation prohibits ignoring a clause or using an interpretation that would render a clause superfluous or redundant.[55]

Moreover, it is clear from other legislation that Congress knows how and when to separately regulate the issuance of equity versus debt securities. The Communications Satellite Act of 1962 (the "Satellite Act") is particularly instructive because that statute set the stage for the establishment of one of the very intergovernmental organizations – INTELSAT – that the ORBIT Act sought to dismantle. Section 304(a) of the Satellite Act authorized Comsat to issue

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53 ORBIT Act § 621(5)(A) (emphasis added).

54 *See February 10th Letter* at 8, n.27.

55 *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant,'" quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)("[T]he Court will avoid a reading which renders some words altogether redundant.").

shares of capital stock carrying voting rights, and Section 304(c) authorized Comsat to issue non-voting securities, bonds, debentures, and other certificates of indebtedness. Congress, in Section 304(c) then clearly specified which of these securities could be included in Comsat's rate base. Section 304(a) of the Satellite Act demonstrates that Congress also knows how to establish a policy for broad distribution of voting stock among the American public when it means to do so.[56]

If Congress intended in the ORBIT Act to limit the type of securities to be offered, it could have done so. But in this case Congress used the specific phrase "initial public offering of securities" in Section 621(5)(A). In the words of the Supreme Court, where a statutory term is absent in one statute (here, the ORBIT Act), but is explicit in an analogous statute (here, the Satellite Act), "Congress' silence . . . speaks volumes."[57] Thus, Section 621(5)(A) only can be read to allow an initial public offering of either debt or equity securities.

2. *Neither Common Usage, Section 621(2), nor Legislative History, Supports a Narrow Interpretation of the Unambiguous Statutory Phrase "Initial Public Offering of Securities"*

a. Common Usage of the Phrase Initial Public Offering of Debt Securities

SES is simply wrong when it asserts that the phrase "initial public offering of securities" must mean "equity IPO" because the term "IPO," by itself, often refers to a public offering of equity. As noted above, such an interpretation would create an internal inconsistency or redundancy in the ORBIT Act. Moreover, it tells only half of the story. What is also just as true is that relevant securities literature specifically refers to initial public offerings of debt.[58]

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56 This point is relevant in the discussions in Section II.D.1 below.

57 *United States v. Shabani*, 513 U.S. 10, 14 (1994).

58 *See, e.g.*, Gail Sanger, *Financing the Small Business*, 758 PLI/Comm 247, 268 (Oct. 1997) ("A private company can also have an initial public offering of debt or preferred stock but this is less common."); Kenneth L. Josselyn, *et al.*, *Completing Your Offering*

The relevance in the marketplace of initial public offerings of debt securities is underscored by scholarly work focusing on the appropriateness of debt vis-à-vis equity initial public offerings[59] and the pricing of initial public offerings of debt.[60] Initial public offerings of debt may be less common than initial public offerings of equity for a variety of reasons. For example, only a company with a history of earnings will be in a position to offer (and service) public debt, and many start-up companies effectuating initial public offerings do not have a history of earnings.[61] Inmarsat has a long history of profitability, and therefore was able to effectuate an initial public offering of debt securities. Thus, the only reasonable statutory interpretation of Section 621(5)(A) that gives meaning to the entire phase "initial public offering

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on a Timely Basis, 1412 PLI/Corp 143, 167 (Feb. 2004) ("Initial public offerings of debt or equity securities are almost always selected for review."); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 Columbia Business Law Rev. 1, 72-73 (1999) ("Courts have extended the 'bespeaks caution' doctrine not only to trading in informationally efficient markets, but to private placements, initial public offerings (of debt and equity), mergers, and closed-end mutual funds."); *see also* JAMES B. ARKEBAUER, GOING PUBLIC – EVERYTHING YOU NEED TO KNOW TO TAKE YOUR COMPANY PUBLIC, INCLUDING INTERNET DIRECT PUBLIC OFFERINGS (1998), p. 3 ("Basically, going public is the process by which a business owned by one or several individuals is converted into a business owned by many. It involves the offering of part ownership of the company to the public through the sale of equity or debt securities.")

59 *See, e.g.,* HAROLD S. BLOOMENTHAL AND SAMUEL WOLFF, GOING PUBLIC AND THE PUBLIC CORPORATION (2003), I. §1.2, p. 1-5 (discussing initial public offerings of debt securities and explaining why initial public offerings of debt are less frequent than initial public offerings of stock: "With authorized capital consisting of common and preferred shares, most of the types of securities that an underwriter desires to offer will be available since, in addition to the common and preferred, the board of directors typically...can authorize and issue debt securities...Obviously, a company with no history of earnings is not in a very good position to offer debt securities since it is unlikely to be able to service the debt, at least in the near term...Accordingly, about the only security a start-up company or a company without a history of earnings can expect to offer is common stock...A company with a history of earnings may be in a position to offer straight or convertible debt.")

60 *See* Sudip Datta, Mai Iskandar-Datta, and Ajay Patel, *The Pricing of Initial Public Offers of Corporate Straight Debt,* 3/1/97 J. Fin. 379, Vol. 52, No. 1 (1997) (examining the pricing of initial public offerings of debt).

61 *See* HAROLD S. BLOOMENTHAL AND SAMUEL WOLFF, GOING PUBLIC AND THE PUBLIC CORPORATION (2003), I. §1.2, p. 1-5.

of securities" is that "initial public offering" is modified by the general term "of securities," thereby allowing Inmarsat to initially offer either debt or equity securities to the public.

b. Consistency With Substantial Dilution Provision of Section 621(2)

Interpreting "initial public offering of securities" to include both equity and debt is consistent with Section 621(2) of ORBIT Act, which expressly cites to Section 621(5) and provides that such "offering shall substantially dilute the aggregate ownership of [Inmarsat] by such signatories or former signatories."[62] MSV and SES argue that because Congress wanted the public offering of securities specified in Section 621(5) to dilute the ownership of former Signatories, an initial public offering must be limited to equity securities.[63] This is an unnecessarily restrictive reading of the ORBIT Act.

Nothing in the ORBIT Act indicates that an initial public offering of debt securities cannot be used as a means to dilute the ownership of former Signatories. This does not mean that every type of possible initial public offering of debt securities would suffice. But that is irrelevant. Inmarsat has demonstrated how its offering of debt securities resulted in the dilution of ownership of the former Signatories by enabling an acquisition of a majority of their aggregate ownership interests by the funds advised by Apax Partners and Permira. The causation is so important that it bears repeating.

> [F]unding the acquisition of a 52.28% equity position by the funds advised by Apax Partners and by Permira was the primary purpose of [Inmarsat's] Public Offering. [T]he proceeds of the Public Offering were used to repay a $365 million temporary bridge loan that provided funding for that majority equity investment. Indeed, without the expectation of the public offering, the funds advised by Apax Partners

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62 ORBIT Act at § 621(2).

63 *See SES Comments* at 11 and *MSV Opposition* at 7. SES further claims that a debt interest is not ownership interest. *See SES Comments* at 11, *see also MSV Opposition* at 7. That is wrong in this case. Inmarsat's debt securities are secured by stock. Thus, Inmarsat debt holders have a contingent ownership interest in Inmarsat. Moreover, as noted below, debt is treated as the equivalent of ownership for certain Commission purposes. *See infra* p. 33.

> and by Permira would not have been able to secure the bridge loan that made their acquisition possible. *And without the need to fund that equity investment, Inmarsat would not have conducted its public offering of debt securities.*[64]

In sum, Inmarsat's initial public offering of debt securities allowed Inmarsat to enter into a series of transactions that resulted in the ownership interests of 70 of 85 former Signatories being fully redeemed, three other former Signatories having their ownership interests redeemed to a residual level of only one share each, and new, non-Signatory owners acquiring ownership of over 57% of the company.

As support for the proposition that Congress intended that Inmarsat be required to conduct an initial public offering of equity securities, SES also cites to the use of the term "shares" in the major stock exchange listing provision of Section 621(5)(B).[65] SES's interpretation is inconsistent with both the use of the broader term "of securities" in Section 621(5)(A), as well as with a prior Commission interpretation of the ways in which dilution may occur. In granting Inmarsat's last extension request, the Commission recognized that dilution might occur a few different ways. The Commission indicated that The ORBIT Act directs the Commission to limit authorizations to use Inmarsat non-core services unless substantial dilution of former Signatory ownership was achieved "through an IPO *or other means*."[66] The Commission's statement recognizes that the dilution goal of Section 621(5)(A) may be achieved by different means than the transparent and effective securities regulation goal of Section 621(5)(B). Moreover, this interpretation in consistent with Senator Burns' understanding of the different ways in which the ORBIT Act allows for achieving the policy objectives of diluting the

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64 *See February 10th Letter* at 7 (emphasis added).

65 *See SES Comments* at 11-12.

66 *See Inmarsat 2002 Extension Order* at ¶ 11 (emphasis supplied).

aggregate ownership of former Signatories, and effectively reducing the amount of foreign government interests.[67]

Finally, SES's argument ignores that the listing of shares requirement appears in a subsection of the ORBIT Act that is separate from the "initial public offering" provision in Section 621(5)(A). Indeed, Section 621(5) contains four major subsections, each of which can be satisfied through separate means. Subsection (A) specifies the timing of the mandated initial public offering, Subsection (B) provides for a listing of shares on a major stock exchange with transparent and effective securities regulation, Subsection (C) prohibits interlocking directorships, and Subsection (D) places additional restrictions on Inmarsat's directors, officers and managers. No one could argue that Subsections (C) and (D) need to be achieved in the same manner as the way dilution is achieved. Nor is there any statutory basis for concluding that Subsections (A) and (B) need to be satisfied in the same manner. If Congress had intended that Inmarsat issue specifically "shares" as part of its mandated initial public offering of securities, Congress could have placed that obligation in Section 621(5)(A). Congress did not do so, and it should not be read to have done so.

c. Cited Legislative History Is Irrelevant

Finally, SES cites certain legislative history to support the assertion that Congress intended for Inmarsat to conduct an initial public offering of equity securities.[68] As an initial matter, where, as here, the language of a statute is unambiguous, it is unnecessary, and in fact

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67 *See Burns Letter* ("I believed at the time, and continue to believe today, that [the ORBIT Act] policy objectives may be achieved in a variety of ways, including an IPO, a private equity takeover, or other transactions that may have a bearing on the overall ownership profile of the former IGOs.").

68 *See SES Comments* at 12.

inappropriate, to rely on legislative history to interpret that provision.[69] Moreover, in this instance the legislative history is ambiguous, at best, about Congress' intentions, and should not be the basis to ignore the plain text and the expressly stated purpose of the statute.

The primary portion of the legislative history that SES cites[70] on its face is not applicable and in any case carries little persuasive weight. The section in the legislative history that SES excerpts discusses a provision of draft legislation that was never adopted by Congress, so that entire discussion is irrelevant.[71] Moreover, the draft legislation discussed by the Senate Commerce Committee Report is an early version of the ORBIT Act that does not reflect the nine months of debate, amendments and reconciliation with the House of Representatives that resulted in the final language of the ORBIT Act in March 2000.[72]

Nor are the statements of Representatives Dingell and Tauzin to which SES cites, in the legislative history to the amendments to the ORBIT Act deadlines for Inmarsat, on point. As Inmarsat has stated, it has worked diligently to conduct an initial public offering of equity securities a total of five times. Representatives Dingell and Tauzin knew, in considering the amendment to the ORBIT Act sought by Inmarsat in 2003, that Inmarsat had been pursuing an equity offering. Therefore, it is no surprise that their discussion of the amendment focused on giving Inmarsat more time to advance the plans it had been pursuing. But discussions of that

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69 *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("legislative history is irrelevant to the construction of an unambiguous statute.").

70 The Senate Committee on Commerce, Science and Transportation Report, Sen. Rep. No. 106-100, at 8 (June 30, 1999) (the "Senate Commerce Committee Report").

71 *See SES Comments* at 12 (citing the Senate Commerce Committee Report discussion of Section 611). Section 611 was not incorporated into the ORBIT Act.

72 Furthermore, the language SES cites occurs in the context of a discussion of INTELSAT. Language related to Inmarsat in that same section simply states "[t]he President and the Commission are also directed to ensure the privatization of Inmarsat continues in a pro-competitive manner." Senate Commerce Committee Report at 8.

approach are not relevant to determining the original intent of Congress in the use of the words "initial public offering of securities." More probative are the views of Senator Burns:

> I believed at the time, and continue to believe today, that [the ORBIT Act] policy objectives may be achieved in a variety of ways, including an IPO, a private equity takeover, or other transactions that may have a bearing on the overall ownership profile of the former IGOs.[73]

Ultimately, SES cites no history that undermines the plain language interpretation that "initial public offering of securities" in Section 621(5)(A) encompasses both equity and debt instruments. Moreover, the views of Senator Burns, an author of the ORBIT Act, are fully consistent with that interpretation.

C. Consistency with Section 621(5)(B) Regarding Stock Exchange Listing and Transparent and Effective Securities Regulation

1. *Inmarsat's Public Listing of Debt Securities Is Consistent with the ORBIT Act*

Inmarsat has previously demonstrated that its listing of debt securities on the Luxembourg Stock Exchange subjects the company to the transparent and effective securities regulations of that exchange and to applicable European Union regulations as well. As Inmarsat explained in its February 10th letter, the Luxembourg Stock Exchange imposes reporting obligations on Inmarsat, including a requirement to submit annual reports that contain financial information subject to a standardized accounting methodology.[74] Moreover, existing and anticipated European Union prospectus and transparency directives will require Inmarsat to, among other things file audited annual and semi-annual financial information, which must be attested to as accurate by Inmarsat's directors.[75]

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73 *See Burns Letter.*

74 *See February 10th Letter* at 11.

75 *See February 10th Letter* at 11-12.

For these reasons, Inmarsat has explained that its listing of public debt securities is consistent with Section 621(5)(B) of the ORBIT Act, which provides that "[t]he 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."[76]

Neither MSV nor SES disputes that the Luxembourg Stock Exchange is a "major exchange" for the purposes of the ORBIT Act. Rather, SES and MSV argue that the fact that Inmarsat does not have "shares" listed for trading is disqualifying, because shares of Inmarsat 's stock are not "traded to and among the general public,"[77] and because Inmarsat's ownership interests are not "available to the public at large, leading to diffuse ownership."[78] As discussed in Section II.D.1. below, there is nothing in the ORBIT Act requiring that ownership of Inmarsat be widely held, or that control over Inmarsat be diffused.

Rather, a plain reading of the ORBIT Act's listing requirement indicates that Section 621(5)(B) is intended only to ensure that Inmarsat is subject to the transparent and effective securities regulations of a major stock exchange. The listing of Inmarsat debt securities on the Luxembourg Stock Exchange has done just that.[79] In addition, Inmarsat intends to register its debt offering with the SEC. This will impose additional reporting requirements and subject Inmarsat to another regulatory oversight body.[80] No one disputes this, either.

Contrary to SES's protestations, even if Inmarsat were to have listed shares on a major stock exchange, there is no requirement in the ORBIT Act that Inmarsat list voting stock that would provide the holders with control over matters such as election of the board of

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76 ORBIT Act § 621(5)(B).

77 *SES Comments* at 16.

78 *MSV Opposition* at 10.

79 Inmarsat is imminently planning the issuance of an additional $105 million in identical public debt securities in a subsequent and related transaction.

80 *See February 10th Letter* at 12-15.

directors, selection of accountants, or other matters typically voted on by holders of voting common stock.[81] Again, unlike in the Communications Satellite Act of 1962, where Congress repeatedly used specific terms such as "shares of capital stock"[82] and "shares of voting capital stock,"[83] the ORBIT Act uses the more general term "shares." The term "shares" encompasses a full range of securities including voting common stock, preferred stock, and non-voting common stock.[84] A listing of any of these types of shares clearly would satisfy the language in Section 621(5)(B) of the ORBIT Act.

In analyzing the requirement of Section 621(5)(B), it is relevant that in today's financial markets, there is little economic distinction between many types of publicly traded preferred stock and many types of publicly traded debt securities. Both types of securities provide for a stated rate of return, and a right to a return of the underlying investment. Neither security typically provides for a right to share in any other economic return of a company. Neither security typically provides the holder with control over the types of matters on which a holder of voting common stock typically may vote. Significantly, however, the issuance of both securities subjects a company to an extensive set of securities regulation. As Inmarsat has demonstrated, its issuance of public debt securities makes it subject in the EU, and soon will make it subject in the United States, to securities controls and transparency requirements that are comparable to those of a public issuer of equity securities.[85]

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81 *Cf. SES Comments* at 16 and *MSV Opposition* at 10.

82 Satellite Act at §§ 201(c)(8) and 304(a).

83 Satellite Act at § 303(a).

84 *See Oxford English Dictionary* (online edition) (The common definition of "shares" is "[a] definite portion of a property owned by a number in common; spec.each of the equal parts into which the capital of a joint-stock company or corporation is divided. deferred, preference (or preferred) shares . . . ordinary shares, the shares which form the common stock and are without 'preference'.") (hyperlink omitted).

85 *See February 10th Letter* at 10-15.

For these reasons, Inmarsat submits that its listing of debt securities is "consistent with" the listing provision in Section 621(5). Indeed, it is difficult to imagine how requiring Inmarsat to conduct a second public offering that would result in the technical listing of some form of "shares" would further any purpose of the ORBIT Act. There would be no substantive increase in the transparency or effectiveness of the securities regulation of Inmarsat. And dilution of the aggregate ownership interests of former Signatories would not be any more "substantial" than it already is – former Signatory owners already have ceded control over Inmarsat.

"Strict" compliance with Section 621(5)(B), as SES and MSV urge, would not advance any purpose of the ORBIT Act, but instead would require Inmarsat to expend substantial financial resources and time on a further offering, distract the Company from the deployment of its next-generation broadband MSS services, and potentially reduce competition in the meantime.

2. *No Policy Objective Would Be Advanced By Also Requiring a Listing of Equity Securities*

SES asserts that Inmarsat has not met the listing requirements of the ORBIT Act because:

> "[t]he requirements associated with [the] various listing and trading arrangements [associated with the debt securities], 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. 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 or the NASDAQ."[86]

SES' argument is flawed for two fundamental reasons. First, nothing in the ORBIT Act requires Inmarsat to list its securities in the United States. Thus, the regulation of U.S. stock exchanges simply is not a relevant standard. Second, even if Inmarsat were to list

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86 *SES Comments* at 19.

securities on the New York Stock Exchange ("NYSE"), whether Inmarsat would need to comply with the corporate governance provisions promulgated by the exchange and cited by SES would not depend on whether Inmarsat listed equity or debt securities. Rather, the critical factor would be the fact that Inmarsat, for purposes of these cited provisions, is a "foreign private issuer,"[87] and as such would be allowed to follow home country practice in lieu of such U.S. provisions.[88]

a. Inmarsat Is Not Required To List Any Securities for Trading In The U.S.

SES admits in a footnote that the ORBIT Act does not require Inmarsat to list on a major U.S. stock exchange – SES merely *expects* that Inmarsat would do so.[89] This assumption cannot be used as the standard upon which to assess whether the statutory objectives of the ORBIT Act have been met. A company's decision (especially a non-U.S.-based company's decision) where to list its securities depends on a myriad of factors, including, among others, the applicable regulatory regime and the home jurisdiction of the issuer. Indeed, many foreign companies choose not to list in the U.S., but rather list their securities in a foreign jurisdiction. As noted above, Europe is Inmarsat's home market.

When drafting the ORBIT Act, Congress knew that Inmarsat was not based in the U.S. Congress could have required that Inmarsat list in the U.S. or that the stock market on which it did list have regulatory requirements comparable to the NYSE or NASDAQ. Congress

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87 A "foreign private issuer" is a defined term that refers to a certain non-governmental corporate issuers of public securities in the U.S. *See February 10th Letter* at 13, n.47.

88 *See* Final NYSE Corporate Governance Rules, § 303A NYSE Listed Company Manual (approved by the SEC on June 30, 2003 and November 4, 2003) (stating that "listed companies that are foreign private issuers . . . are permitted to follow home country practice in lieu of the provisions of this Section 303A" except for certain limited provisions). In fact, only a limited number of the corporate governance requirements that U.S. domestic listed companies are required to comply with are applicable to foreign private issuers, and to the extent such requirements are applicable, they (i) are not currently in effect or (ii) in any event are also applicable to issuers of debt securities, such as Inmarsat.

89 *SES Comments* at 19, n.65.

did neither. Instead, the ORBIT Act simply provides for a listing on a "major stock exchange" with transparent and effective securities regulation. Indeed, a comparison with the Satellite Act again demonstrates that Congress knows how to establish a policy for ensuring the broad distribution of securities among the American public when it means to do so.[90] Congress did not do so here.[91]

For these reasons, the NYSE and NASDAQ regulatory requirements cited by SES are not relevant to a determination whether Inmarsat's listing on the Luxembourg Stock Exchange is consistent with the purpose of the ORBIT Act. As discussed above and in the *February 10th Letter*, the Luxembourg Stock Exchange imposes transparency requirements and effectively regulates Inmarsat's listed securities as required and intended by the ORBIT Act.

b. U.S. Corporate Governance Provisions Are Not Dependent on Whether Inmarsat Listed Equity or Debt Securities

In a failed attempt to "bootstrap" its claim that it matters whether Inmarsat has listed public debt versus public equity, SES cites a series of corporate governance requirements that the NYSE requires listed companies to meet, and argues that Inmarsat would have been subject to such requirements if it had listed equity securities in the U.S.[92] Even though these provisions are wholly irrelevant because, as explained above, Inmarsat is not required to list in the United States, Inmarsat is compelled to set the record straight.

First, the NYSE corporate governance provisions to which SES cites were adopted as a result changes in corporate governance practices in the U.S. mandated by the Sarbanes-Oxley Act, almost two years after the ORBIT Act was passed. They were not even

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90 *See* Satellite Act § 304(a).

91 Inmarsat has not argued that the PORTAL market is a "major stock exchange." That U.S. based purchasers may find the PORTAL market "less accessible," as SES asserts, is therefore irrelevant. *See* SES Comments at 17.

92 *See SES Comments* at 19-20.

contemplated in the adoption of the ORBIT Act, and therefore are not remotely probative of whether Inmarsat's listing is consistent with the purpose of the ORBIT Act. More fundamentally, these NYSE provisions would be equally applicable (or inapplicable) to Inmarsat whether Inmarsat listed debt or equity securities on the NYSE.[93]

D. SES and MSV Raise Objections Not Based on the ORBIT Act

MSV and SES assert a series of policy objectives and protests that are not even remotely founded in the requirements of the ORBIT Act, but instead are distractions that the Commission should dismiss as irrelevant.

1. *The ORBIT Act Requires Substantial Dilution of Signatory Ownership Interests, Not Diffuse Ownership of Inmarsat*

MSV and SES allege that an initial public offering of equity securities would have achieved diffuse ownership and control of Inmarsat.[94] Nothing in the ORBIT Act, however, requires that Inmarsat be diffusely owned or controlled. To the contrary, the stated purpose of the initial public offering referred to in the ORBIT Act is solely to "substantially dilute the aggregate ownership of [Inmarsat] by such signatories or former signatories."[95] The Commission confirmed that this is the primary purpose of the initial public offering requirement in its *Market Access Order*.[96]

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93 These corporate governance provisions apply in a different manner to "foreign private issuers," such as Inmarsat, than to U.S. domestic issuers. Moreover, these NYSE provisions are separate from the U.S. Securities and Exchange Commission public disclosure requirements that also have their genesis in the Sarbanes-Oxley Act, and that apply to foreign private issuers.

94 *See MSV Opposition* at 10; *SES Comments* at 15-16.

95 ORBIT Act § 621(2).

96 *See Market Access Order* at ¶ 39 ("The purpose of the IPO is to 'substantially dilute aggregate ownership' in Inmarsat of Signatories or former Signatories of Inmarsat").

SES' citing of the New Skies Order is not on point.[97] The context in which Commission commented favorably on a diversity of ownership was because it "provides reasonable assurance that New Skies will operate as an independent commercial entity as required by the Act."[98] In Inmarsat's case, control of the company has been transferred to non-Signatory shareholders and it is operating as an independent commercial entity with a few former Signatories as minority shareholders. Diverse ownership is not necessary to achieve the "independent commercial entity" goal cited by the Commission in *New Skies*.

As discussed above, the integrated series of transactions leading to the initial public offering of debt securities has met this objective. The ownership interest of a vast majority of former Inmarsat Signatories have been fully redeemed and non-Signatories now own over 57% of the company and control the company. Thus, SES and MSV are constrained to allege "diffuse" ownership and control as new statutory "objectives," because they cannot contest that the plain statutory purpose has been achieved – substantial dilution of the aggregate ownership interests of former Signatories.

In contrast to the case where Congress established one of the very intergovernmental organizations that the ORBIT Act seeks to dismantle, the ORBIT Act does not require, or have as a purpose, diffuse ownership or control. Again, a comparison with the Satellite Act is instructive, because, in an analogous case, it demonstrates that Congress has clearly articulated when it intends to establish a policy of encouraging the wide distribution of voting stock to the American public,[99] when it intends to limit the type of entity that may

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97 *See SES Comments* at 15, n.56.

98 *New Skies Order* at ¶ 20.

99 *See* Satellite Act § 304(a) ("The shares of such stock initially offered shall be sold in a manner to encourage the widest distribution to the American public.").

purchase stock,[100] when it intends to limit how much stock any one investor or group of investors may own at any one time,[101] when it intends to have a mechanism for causing an owner of stock to transfer such stock to another entity,[102] and when it intends to limit how many directors one entity may control.[103]

Moreover, there is no basis to conclude that diffuse ownership and control is an "objective" of the initial public offering requirement of the ORBIT Act, because the causal link between conducting an initial public offering, and achieving diffuse ownership and control is tenuous, at best. Initial public offerings of equity generally represent a small part of the aggregate ownership in a company – something in the 10-25% range. For example, New Skies conducted an IPO of only 23% of the company and, as the Commission noted, the initial public offerings of PanAmSat, SES Astra, and JSAT were for even smaller amounts of 18.92%, 14.93%, and 9.51%, respectively.[104] And even when two-thirds of a new public company is widely held, that does not mean it is not controlled by a single entity. As the Commission well knows, The DIRECTV Group, Inc., a newly-public company, is controlled by The News Corp. Limited through a 34% ownership interest held by Fox Entertainment Group. In short, an initial public offering of equity securities would ensure neither diffuse ownership nor control. Nor is either result a "goal" of the ORBIT Act.

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100 *See* Satellite Act § 304(b)(3) (placing an ownership cap on certain types of shareholders).

101 Section 304(b) of the Satellite Act established two categories of permissible ownership of voting stock: (1) "authorized carriers" were permitted to own, in the aggregate, voting shares not to exceed 50 percent of shares issued and outstanding and (2) stockholders other than authorized carriers may not own more than 10 percent of such shares.

102 Satellite Act § 304(f).

103 Satellite Act § 303(a) (prohibiting authorized carriers from voting, either directly or indirectly, more than three directors onto Comsat's 15 person Board of Directors).

104 *New Skies, N.V. Request for Unconditional Authority to Access the U.S. Market*, Memorandum Opinion and Order, 16 FCC Rcd. 7482 at ¶19 (2001).

In any event, there has in fact been a "diffusion" of ownership interest in Inmarsat. Apax and Permira manage the funds that purchased a controlling interest in Inmarsat. Those funds are owned by a myriad of public pension funds, corporate pension funds, and endowments, among other institutions.[105] It is these entities who constitute the new beneficial owners of the majority interest in Inmarsat.

Contrary to MSV's and SES' assertions,[106] debt securities are sometimes treated as ownership. For example, for purposes of the Commission's broadcast ownership and cross-ownership rules, as well as for purposes of its satellite application limits debt can be counted as ownership.[107] There is no reason the Commission cannot treat public debt as ownership in this instance.[108] Indeed, how better to satisfy the expressly stated purposes of the ORBIT Act than to wrest control firmly from the hands of former Signatories, reduce foreign government ownership, and also subject Inmarsat to both EU and U.S. securities law regulation? Surely this is a much more effective means of implementing the ORBIT Act purposes of "promoting a fully competitive global market for satellite communications services" and "fully privatizing" Inmarsat, than a more limited approach that would satisfy the technical requirements of the statute, but leave the former Signatories collectively in control.[109]

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105 *See February 10th Letter*, Ex. A, Offering Memorandum at 123.

106 *See MSV Comments* at 7, n.18; *SES Comments* at 11.

107 *See* 47 C.F.R. § 73.3555, Note 2 at (i) (setting forth the condition under which the holder of a debt interest shall have their interest attributed for broadcast multiple ownership and cross-ownership purposes); *see also* 47 C.F.R. § 25.159 (calculating debt interests as ownership for purposes of satellite application limits).

108 *See also* JAMES B. ARKEBAUER, GOING PUBLIC – EVERYTHING YOU NEED TO KNOW TO TAKE YOUR COMPANY PUBLIC, INCLUDING INTERNET DIRECT PUBLIC OFFERINGS (1998), p. 3 ("Basically, going public is the process by which a business owned by one or several individuals is converted into a business owned by many. It involves the offering of part ownership of the company to the public through the sale of equity or debt securities.").

109 Cf. *SES Comments* at 1 (asserting that Inmarsat is not a "fully independent commercial entity").

MSV questions, whether Telenor, Comsat and KDDI would have been given "preferential treatment" with respect to Inmarsat's governance through their current shareholders' agreement if Inmarsat had conducted an initial public offering of securities.[110] It is difficult to know precisely about what MSV is complaining. Certainly, there is nothing unusual about major stockholders, such as Telenor and Comsat, ensuring that they have board representation. But this right can hardly be called "preferential," given the right of Apax Partners and Permira to "flood the board" in certain circumstances, to ensure they retain control.[111] Moreover, if Inmarsat had conducted an initial public offering of 23% of its common stock, it is likely that all 85 of the former Signatories would still hold an interest in Inmarsat – their interest would merely have been proportionally diluted. In other words, the former Signatories would have retained control. It is inconceivable how the purpose of the ORBIT Act would have been better served had Inmarsat simply diffused ownership of 23% of its equity to a broad group of shareholders, and had the former Signatories retained control. Indeed, in such a case, MSV certainly would continue to complain about the "continuing influence of foreign governments and PTTs."[112]

At bottom, accepting MSV's and SES' arguments could mean eliminating an effective competitor in the U.S. market, and simply putting off for another day a continued series of arguments about foreign government and PTT influence, and continued complaints about obtaining access to foreign markets. But the Commission need not go there, because the result that Apax Partners and Permira have achieved should put an end to such complaints once and for all.

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110 *See MSV Opposition* at 7.

111 *See February 10th Letter*, Ex. A, Offering Memorandum at 115.

112 *See Comments of MSV,* Report No. SPB-183 at 11 (filed Apr. 17 2003).

The transaction Inmarsat did conduct has resulted in a far greater dilution of the aggregate ownership interests of former Signatories than any realistic equity IPO scenario. Funds managed by Apax Partners and Permira are able to control Inmarsat, and the remaining former Signatories who retained an interest in the company, in the aggregate, constitute a minority of the ownership interests. Such a result is fully consistent with the ORBIT Act, as both the NTIA and Senator Burns have recognized.

2. *MSV's Assertion of Non-Competitive Behavior Is Both Unfounded and Irrelevant*

In the preamble to its opposition, MSV claims that Inmarsat is behaving in an allegedly "monopolistic" and "anticompetitive" manner by (i) frustrating MSV's efforts to coordinate access to L-band spectrum; (ii) denying MSV access to Inmarsat's intellectual property; and (iii) "unreasonably" opposing MSV's ancillary terrestrial component ("ATC") application.[113] MSV's assertions are scurrilous, false, and in any event irrelevant to this proceeding.

As an initial matter, Inmarsat was never a "monopoly."[114] Neither the fact that Inmarsat has a successful business with a large base of installed users, nor that Inmarsat defends itself in domestic and international regulatory venues against its competitors, makes it "anticompetitive." To the contrary, Inmarsat faces substantial competition in the United States and around the world.[115] In fact, prior to 2000, it was Motient, MSV's predecessor, who had a *regulatory monopoly* in the U.S. land mobile market and Inmarsat was entirely blocked from competing there. This was the case even though Inmarsat gave MSV's predecessor, AMSC, a "jump start" on its MSS business by leasing it capacity on Inmarsat spacecraft. AMSC, MSV

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113 *See MSV Opposition* at 5.

114 Nor does Inmarsat "admit," as MSV alleges, that it is "dominant." *See MSV Comments* at 9.

115 *See Inmarsat Letter*, Exhibit A, Offering Memorandum at 101-103.

and Motient nonetheless fought against the opening of the U.S. market for years. After TMI gained access to the U.S. market, Motient entered in to a joint venture to form MSV and thereby regained *de facto* monopoly status in the U.S. It was only in October 2001 that Inmarsat was able to gain market access to the U.S. – access that MSV seeks to terminate by its objection in this proceeding. To this day, MSV retains monopoly protection from potential *U.S. competitors*, because the Commission will not license another U.S. MSS operator in the L-band unless the U.S. coordinates more than 20 MHz of spectrum under the Mexico City MOU.[116]

The specific allegations leveled by MSV have been dispensed with by the Commission multiple times,[117] and all of MSV's spectrum-related issues are appropriately addressed in the context of international coordination.[118] As mentioned above, spectrum usage in the L-band is supposed to be recoordinated annually under the terms of a multi-national agreement (the "Mexico City MOU") to which the U.S. is a party. Under the agreement, spectrum is to be assigned and reassigned among operators based on a demonstration of need. Because MSV uses far less spectrum than it was last assigned, MSV has repeatedly refused to participate in coordination negotiations under the Mexico City MOU.[119] Instead, it prefers to ignore the international agreement entered into by the U.S. and use proceedings such as these to baselessly complain that it cannot have access to even more spectrum.

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116 *Establishing Rules and Policies for the use of Spectrum for Mobile Satellite Services in the Upper and Lower L-band*, IB Docket No. 96-132, Report and Order, FCC 02-24 at ¶ 19 (rel. Feb. 7, 2002).

117 *See, e.g., Market Access Order* at ¶¶ 69-76; FCC Report to Congress as Requested by ORBIT Act at 16 (June 11, 2003).

118 *See* Market Access Order at ¶¶ 65-73.

119 Inmarsat, in contrast, needs every of megahertz of spectrum that it has coordinated to satisfy the demand of its services. This is true even though Inmarsat continues to seek more and more efficient uses of the limited spectrum resource, by, among other things, deploying next-generation spacecraft with increased frequency reuse.

MSV claims that Inmarsat denies MSV access to proprietary information that Inmarsat has an obligation to provide pursuant to the Inmarsat Convention. MSV fails to explain that once Inmarsat privatized in 1999, the convention to which MSV refers no longer binds Inmarsat – the ORBIT Act ensured that result. Inmarsat therefore has no obligation to reveal its proprietary information to a competitor, such MSV. Even under the defunct convention, Inmarsat had a right to be compensated for the use of its intellectual property, but MSV historically has refused to pay royalties. The Commission has reviewed MSV's claim in the past and appropriately dismissed it as just another a commercial dispute.[120] It should do the same here.

Finally, the only basis on which Inmarsat has opposed MSV's ATC application is the risk of MSV's terrestrial service causing harmful interference to Inmarsat's MSS operations. The Commission in the ATC proceeding acknowledged the potential for harmful interference and imposed strict service rules and gating criteria on any ATC system that is to be deployed.[121] MSV's latest ATC application seeks twelve waivers of these service rules and gating criteria in a gambit to deploy a much larger ATC system than contemplated by the Commission in the ATC proceeding. If MSV's application were granted, not only would the overall quality of Inmarsat's service be degraded, but safety-of-life and navigation communications also would be threatened. Unless those interference issues are addressed, Inmarsat will continue to oppose MSV's ATC application. Inmarsat is acting as any other user of spectrum would act when faced with such a threat to the operations of its business.

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120 *See Market Access Order* at ¶ 76.

121 *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, Report and Order*, 18 FCC Rcd 1962 (2003) (the "*ATC Order*"), *amended by Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, Errata*, IB Docket Nos. 01-185 and 02-364 (March 7, 2003).

In sum, MSV's allegations of anti-competitive conduct continue to be groundless.

III. ALTERNATIVE REQUEST FOR RELIEF

For the reasons set forth above and in Inmarsat's February 10, 2004 submission, Inmarsat's initial public offering of debt securities and the resultant dilution of the aggregate ownership interests of former Signatories fully satisfy the last requirements of the ORBIT Act. Inmarsat has no plans, or ability, to conduct a public offering of equity securities prior to June 30, 2004. In the unlikely event that the Commission finds that a provision of the ORBIT Act has not been met, that must be met, Inmarsat will need additional time to evaluate its options. In order to provide the basis for the Commission to provide such additional time, to the extent necessary, Inmarsat respectfully requests that the Commission exercise its discretion to provide Inmarsat until December 31, 2004 to satisfy such requirements, or to seek an alternative solution.[122] However, as detailed above, no such extension is needed because, as the Bush Administration has recognized, Inmarsat has materially fulfilled the goals of the ORBIT Act. No alternative solution would be more effective in achieving the purpose of the ORBIT Act than the one before the Commission in this proceeding.

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122 ORBIT Act § 621(5)(A) (as amended by ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003)).

CONCLUSION

For the reasons discussed above, Inmarsat urges the Commission to find that Inmarsat has met the remaining requirements of the ORBIT Act.

Respectfully submitted,

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Counsel for INMARSAT VENTURES LIMITED

April 20, 2004

UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and
Information Administration
Washington, D.C. 20230

MAR 16 2004

The Honorable Conrad Burns
Chairman
Subcommittee on Communications
United States Senate
Washington, DC 20510

Dear Senator Burns:

Thank you for your letter seeking the Administration's views on whether the recent majority investment in Inmarsat, PLC by Apax Partners and Permina (the Inmarsat transaction) achieves the policy objectives underlying the initial public offering (IPO) requirement of the Open-Market Reorganization for the Betterment of Telecommunications Act (the ORBIT Act).

I agree with you that the goal of the ORBIT Act is to ensure that the privatization of the international satellite organizations, including Inmarsat, is achieved in a manner that will result in a competitive market for global satellite services. Certainly, the IPO requirement in the ORBIT Act is intended to dilute the ownership of Inmarsat to further that objective.

The ORBIT Act states in Section 621 (2), such "offering shall substantially dilute the aggregate ownership of such entities by such signatories or former signatories. In determining whether a public offering attains such substantial dilution, the Federal Communications Commission (FCC) shall take into account the purposes and intent, privatization criteria, and other provisions of this title, as well as market conditions." In recent years, market conditions have weighed heavily against issuance of initial public offerings. While that circumstance appears to be moderating, the specific character of the Inmarsat transaction was substantially driven by the weak IPO market and Inmarsat's desire to broaden and diversify its ownership profile. In any case, P.L. 106-180 clearly seems to have contemplated poor market conditions as a mitigating circumstance.

In the Administration's view, the Inmarsat transaction appears to meet the objective of the Orbit Act of diluting ownership of Inmarsat PLC by its former signatories. Of primary importance, the Inmarsat transaction will result in an approximate 52% dilution of prior signatory ownership.[2] In addition, section 621(5)(B) of P.L.106-180 helps clarify the requirement for an IPO:

The shares of any successor entities and separated entities shall be listed for

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[2] The Administration notes that in the case of New Skies, PLC, an IPO of 25% of the prior signatory ownership stake was deemed to be a "substantial dilution" of that ownership by the FCC. The effect of the Inmarsat transaction, therefore, goes well beyond that deemed suitable by the FCC in the case of New Skies and is an important step in accomplishing the goal of P.L. 106-180.

trading on one or more major stock exchanges with transparent and effective securities regulation.

Inmarsat PLC's issuance of a publicly-traded debt offering in Luxembourg earlier this year includes a contractual obligation to complete a filing with the Securities Exchange Commission (SEC). That filing should be completed later this Spring and can be anticipated to directly address the objective of the Orbit Act of "transparent and effective securities regulation." Upon completion of the F-4 filing, Inmarsat PLC will have conducted disclosure virtually identical to that required for an equity IPO.

Given the severe difficulties in the equities IPO market in recent years, a transaction that achieves substantial dilution and transparency through a combination of private equity and public debt would appear to be preferable to further delay ownership diversification.

Therefore, the Administration supports the view that the investment by Apax and Permira in Inmarsat, together with the debt offering and planned SEC registration, materially fulfills the goals of P.L.106-180. Nonetheless, the Administration will continue to monitor the competitiveness of the global satellite service sector.

I am confident that the Commission will review this transaction in light of the objectives of the ORBIT Act and the public interest. If I may be of further assistance, please do not hesitate to contact me or Jim Wasilewski, Acting Director of NTIA's Office of Congressional Affairs at (202) 482-1551.

Sincerely,

Michael D. Gallagher

Michael D. Gallagher
Acting Assistant Secretary for
Communications and Information

CONRAD BURNS
MONTANA
DEPUTY WHIP

COMMITTEES:
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SMALL BUSINESS

United States Senate

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January 21, 2004

The Honorable Michael D. Gallagher
Acting Assistant Secretary
Department of Commerce
1401 Constitution Ave., NW
Room 4898
Washington, DC 20230

Dear Assistant Secretary Gallagher:

As the author of the ORBIT Act in 2000, I am keenly interested in the successful implementation of its pro-competitive policy objectives. Among those objectives were (1) to achieve a "substantial dilution" of the aggregate ownership held by former Signatories in the privatized intergovernmental satellite organizations (IGOs), effectively reducing the amount of foreign government interests, and (2) to subject the privatized entities to transparent and effective securities regulation.

I believed at the time, and continue to believe today, that these policy objectives may be achieved in a variety of ways, including an IPO, a private equity takeover, or other transactions that may have a bearing on the overall ownership profile of the former IGOs. Any and all such transactions should be considered to determine whether, considering all relevant market and business factors, the policy objectives reflected in the "substantial dilution" provision of the ORBIT Act have been met.

It is in this context that I bring to your attention the recent acquisition of Inmarsat by a consortium of private equity funds. As I understand it, Inmarsat is now majority owned by Apax Partners and Permira Advisors, has recently obtained credit ratings from Moodys and S&P, has obtained significant bank financing and will soon issue bonds to institutional investors.

I would like to find out the Administration's views on whether this specific transaction achieves the policy objectives above, and would appreciate your response by February 1st.

Sincerely,

Conrad Burns
United States Senator

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 2004, I caused the original and four copies of the foregoing Consolidated Response of Inmarsat Ventures Limited to be filed with Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, and a true and correct copy to be served by first class United States mail, postage prepaid, upon the following:

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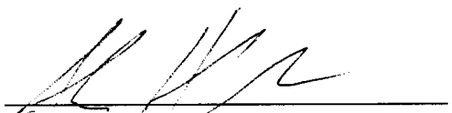

Alex Hoehn-Saric

* By hand delivery