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

REPLY OF SES AMERICOM, INC.

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SUMMARY

Inmarsat's Consolidated Response offers no persuasive arguments to support its assertion that, by executing a private equity transfer and a public debt offering, it has complied with the IPO requirements of Section 621 of the ORBIT Act.

Congress clearly did not intend for compliance with the ORBIT Act to be effectuated by an offering of debt securities. In fact, the plain words of Section 621 conclusively show that Congress wanted Inmarsat to achieve compliance by conducting an IPO of equity securities.

Having failed to comply with this statutory mandate, Inmarsat argues that its transactions need only be "consistent with" the stated purposes of the ORBIT Act to be compliant with Section 621. However, application of such a standard of review would be inappropriate in this instance. The ORBIT Act already offers a means to accommodate Inmarsat's concerns regarding the timing of its equity IPO. There is thus no need for the Commission to grant Inmarsat further flexibility to depart from the statutory text.

Even if the "consistent with" standard of review were appropriate in this instance, there is no basis for the Commission to interpret this standard in the lax manner requested by Inmarsat. Inmarsat does not ask the Commission for mere "flexibility" in reviewing its compliance; rather, it asks the FCC to sanction a wholesale abrogation of a detailed scheme of statutory compliance. This request is unwarranted and unreasonable.

Assuming again that Inmarsat's transactions are to be judged by their consistency with the stated goals of the ORBIT Act, Inmarsat ignores the fact that Congress' decision to achieve these goals by requiring an equity IPO was itself a purposeful act to which the "consistent with" standard of review must apply. In this regard, Imarsat fails to demonstrate that

its transactions achieve the stated goals of the ORBIT Act in a manner consistent with an equity IPO.

Unlike a typical equity IPO, Inmarsat's transactions fail to effectuate broader ownership and control of the company. Instead, the transactions consolidate ownership and control of Inmarsat into the hands of only two entities, Apax Partners and Permira. Likewise, Inmarsat's transactions do not convert Inmarsat into a publicly held and traded company, as would an equity IPO. Inmarsat's equity remains locked in private hands and is essentially non-transferrable. Although Inmarsat's debt is publicly available, a mere debt offering cannot and does not transform Inmarsat into a publicly owned company.

Inmarsat also fails to demonstrate that it is subject to securities regulation that is consistent with what would have resulted from an equity IPO. Had Inmarsat conducted an equity IPO, it likely would have conducted at least a secondary offering on a U.S. stock exchange, and therefore would have become subject to exchange listing requirements that include the creation of an independent audit committee. These listing requirements would have applied notwithstanding the fact that Inmarsat is a "foreign private issuer." They do not apply to Inmarsat by virtue of its listing of debt on the PORTAL Market.

In sum, Inmarsat has failed to prove its compliance with the IPO requirements of the ORBIT Act. Inmarsat should proceed to conduct an equity IPO in accordance with Section 621, as it is still able to do prior to the statutory deadline.

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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 this Reply to the Consolidated Response of Inmarsat Ventures Limited ("Inmarsat"),[2] as well as to comments of Mobile Satellite Ventures Subsidiary LLC ("MSV"),[3] Deere & Company ("Deere"),[4] Stratos Mobile Networks, Inc., Stratos Communications, Inc. ("Stratos"),[5]

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1 Public Notice Report No. SAT-00197.

2 *Consolidated Response of Inmarsat*, File No. SAT-MSC-20040210-00027 (filed Apr. 20, 2004) ("*Response*").

3 *Opposition of Mobile Satellite Venures Subsidiary, LLC*, File No. SAT-MSC-20040210-00027 (filed Apr. 5, 2004).

4 *Reply Comments of Deere & Company*, File No. SAT-MSC-20040210-00027 (filed Apr. 20, 2004).

5 *Comments of Stratos Mobile Networks, Inc.*, File No. SAT-MSC-20040210-00027 (filed Apr. 5, 2004); *Reply Comments of Stratos Mobile Networks, Inc.*, File No. SAT-MSC-20040210-00027 (filed Apr. 20, 2004).

and Telenor Satellite Services, Inc. ("Telenor"),[6] all of which have been filed in the above captioned proceeding.

In its *Response,* Inmarsat fails to establish that by effectuating both a private equity sale and a public debt offering (the "Transactions"),[7] Inmarsat has achieved compliance with the initial public offering ("IPO") requirements of Section 621 of the ORBIT Act.[8] Inmarsat fails in its attempt to refute SES AMERICOM's showing that Section 621 clearly and unambiguously requires Inmarsat to conduct an IPO of equity securities.

Having failed by its own admission to conduct an equity IPO, Inmarsat suggests that its Transactions need only be "consistent with" Section 621 to be compliant.

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[6] *Reply of Telenor Satellite Services, Inc.*, File No. SAT-MSC-20040210-00027 (filed Apr. 20, 2004).

[7] The private equity sale involved the transfer of 57% of Inmarsat stock held by Inmarsat's former signatories (the "Signatories") to Permira and Apax Partners (the "Equity Transaction"). Inmarsat's debt offering financed the equity sale. The debt offering involved the issuance of 7 5/8% notes on the Luxembourg Stock Exchange, and is expected to involve a private placement of the notes in the United States on the PORTAL Market (the "Debt Transaction," and together with the Equity Transaction, the "Transactions"). *See* Letter from Alan Auckenthaler, Inmarsat, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 10, 2004) at 2-5 (the "*Letter of Compliance*").

[8] Open-market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 115 Stat. 48 (2000) (codified as amended in scattered sections of 47 U.S.C.) (the "ORBIT Act"). Section 621 of the ORBIT Act requires Inmarsat to conduct an "initial public offering of securities" in order to "substantially dilute the aggregate ownership" of its signatory members. As part of this initial public offering, Inmarsat must list "shares" of its stock "for trading on one or more major stock exchanges with transparent and effective securities regulation." Congress originally set a December 31, 2001, deadline for the completion of the Inmarsat IPO. 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. ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003).

Such consistency is not the applicable legal standard. In any event, Inmarsat fails to show that the Transactions achieved results that are "consistent with" the ORBIT Act's requirements. In sum, Inmarsat's Transactions do not meet the requirements of Section 621. The Commission should therefore decline to certify Inmarsat's compliance, and should instead require Inmarsat to conduct an equity IPO in accordance with the ORBIT Act.

I. THE ORBIT ACT REQUIRES INMARSAT TO CONDUCT AN INITIAL PUBLIC OFFERING OF EQUITY SECURITIES.

In its *Comments,* SES AMERICOM demonstrated that Section 621 of the ORBIT Act requires Inmarsat to conduct an IPO of equity securities, and that, by choosing to offer debt rather than equity securities to the public, Inmarsat did not comply with its statutory obligations.[9] Inmarsat asserts that the language of the ORBIT Act permits an offering of debt securities to be treated as compliance with the Act's public offering requirement. Inmarsat rests this claim on erroneous interpretations of the text and legislative history of the ORBIT Act.

A. The Plain Language of Section 621 Unmistakably Requires Inmarsat to Conduct an Equity IPO.

Inmarsat insists that the ORBIT Act contemplates a public offering of debt securities as well as equity securities because Section 621(5)(A) of the ORBIT Act generally describes the required offering as one of "securities," rather than specifically of equity securities or stock.[10] Inmarsat argues that SES AMERICOM ignores the impact of

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[9] *See Comments of SES AMERICOM, Inc.*, File No. SAT-MSC-20040210-00027 (filed Apr. 5, 2004) at 10-13.

[10] *See Response* at 16.

the use of the term "securities" on the scope of Inmarsat's IPO obligations. To the contrary, SES AMERICOM recognizes that, while the word "securities" *may* encompass both debt and equity instruments in ordinary parlance, the word clearly does not encompass debt for purposes of the ORBIT Act, given the context in which the Act uses the term "securities." Inasmuch as Inmarsat points out that principles of statutory construction dictate that all words of a statute should be given meaning,[11] these same principles dictate that the meaning ascribed to such words should be determined by reference to their context.[12]

The proper context in which the word "securities" must be construed is readily apparent from surrounding language of Section 621. These surrounding words and phrases, as SES AMERICOM noted in its *Comments*, have ordinary and common meanings that are exclusive to equity securities. For example, the phrase "initial public offering" is a term that in common parlance indicates a "corporation's first offering of *stock* to the public," not an offering of debt securities.[13] Likewise, only an equity IPO

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[11] *Id.* at 16, n.52.

[12] *See* Norman J. Singer, 2A Sutherland Statutory Construction § 46.05, at 104 (5th Ed. 1994) (*citing Leach v. FDIC*, 860 F.2d 1266, 1270 ("Even apparently plain words, divorced from the context in which they arise and which their creators intended them to function, may not accurately convey the meaning the creators intended to impart; it is only within context that a word, any word, can communicate an idea")). *See also United States v. Wilson*, 290 F.3d 347, 354 (D.C. Cir. 2002) ("[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Meredith v. Fed. Mine Safety and Health Review Comm'n*, 177 F.3d 1042, 1054 (D.C. Cir. 1999) ("a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context") (internal citations omitted).

[13] Jack P. Friedman, Dictionary of Business Terms 297 (2d Ed. 1994) (emphasis added). *See also id.* at 256 (defining "going public" as a "securities industry phrase used when a private company first offers its shares to the public. The firm's ownership

can be expected to "dilute the aggregate ownership" of Inmarsat's former Signatories. This is so because "dilution" is commonly defined to mean a "reduction in the . . . voting power of *stock,*"[14] and a debt offering cannot *dilute* the voting power of stock.

Furthermore, "ownership" of a company is commonly – if not exclusively -- evidenced by equity.[15] From this definition of "ownership" it also follows that Congress was referring to equity when it required Inmarsat to become a "national corporation" – a term that Congress defined to mean a "corporation the *ownership* of which is held through publicly traded securities."[16] Indeed, the only type of "securities" that establish "ownership" in a corporation are equity securities. Finally, it is undisputed -- even by Inmarsat -- that when the ORBIT Act requires Inmarsat to list its "shares" on a major stock exchange, Congress was referring exclusively to a listing of "shares" of Inmarsat's stock.[17]

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shifts from the hands of a few private stockholders to a base that includes public shareholders); NASDAQ Stock Market, *Going Public*, at 166 (2000), *available at* http://www.nasdaq.com/about/going_public.stm (defining an initial public offering as "[a] company's first sale of stock to the public.").

[14] Black's Law Dictionary 469 (7th Ed. 1999).

[15] *Compare* Friedman, *supra* at 199 (defining 'equity' as "residual ownership") *with id.* at 147 (defining "debt" as an "obligation to pay," and "debt security" as a "security representing money borrowed that must be repaid").

[16] ORBIT Act, §§ 621(5), 681(17) (emphasis added).

[17] *Response* at 26 n.84 ("[t]he 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'") (quoting *Oxford English Dictionary* (online ed.) (hyperlink omitted))).

Taken together, all of these words and phrases provide inescapable evidence of a statutory requirement that Inmarsat is to conduct an IPO of equity securities.[18] A broad definition of the word "securities" that includes both equity and debt securities would be inconsistent with this statutory scheme.

Inmarsat tries to distort the meaning of Section 621 by relying on semantics. For instance, Inmarsat suggests that the aforementioned terms "initial public offering" and "ownership" should be ascribed esoteric definitions in order to reconcile them with Inmarsat's broad interpretation of the word "securities." Unfortunately for Inmarsat, Congress is presumed to give statutory terms their ordinary and common meanings.[19] As such, there is no basis for Inmarsat to conclude that the traditional understanding of "initial public offering" should be extended to refer to debt, especially because instances of the issuance of debt as a company's first offering to the public are decidedly uncommon, even by the admission of Inmarsat's cited authorities.[20] Likewise,

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[18] In spite of the foregoing, Inmarsat still argues that the language of Section 621 is not explicit enough to evidence Congressional intent to require an equity IPO. To emphasize its point, Inmarsat makes frequent comparisons to sections of the Communications Satellite Act of 1962 in which Congress specified COMSAT's power to issue and distribute capital stock. These comparisons to the Communications Satellite Act are entirely unnecessary because Congress has indeed spoken with sufficient clarity and without ambiguity in delineating the IPO requirements of the ORBIT Act. Likewise, given the now commonly accepted meaning of the term IPO, there was clearly no need in the ORBIT Act for Congress to spell out what it meant by that term in the same way that it may have felt it needed to more than 40 years ago in the Communications Satellite Act.

[19] *See* Singer, *supra,* 2A Sutherland Statutory Construction § 47.28, at 248. *See also United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("[w]e assume that Congress used the words in a statute as they are commonly and ordinarily understood").

[20] *Response* at 18 n.58 (*quoting* Gail Sanger, *Financing the Small Business*, 758 PLI/Comm 247, 268 (Oct. 1997) ("[a] private company can also have an initial public

there is no basis to conclude that Congress intended for "ownership" to mean debt, because debt does not grant ownership.

Inmarsat further resorts to semantics in its attempt to reconcile its interpretation of the word "securities" with the use of the term "shares" elsewhere in Section 621(5). Because Inmarsat does not dispute that the word "shares," as used in Section 621(5), refers exclusively to shares of stock (equity), Inmarsat is left to explain why, under its interpretation of the statute, Congress would have permitted Inmarsat to conduct an IPO of debt securities, but then curiously would have required it to list its "shares" of stock for trading. Inmarsat's only explanation for this incongruence is that Congress must have intended for the listing requirement of Section 621(5)(B) to be independent of the IPO requirement of 621(5)(A).[21] This explanation is devoid of credibility.

For one thing, Section 621(2) requires Inmarsat to conduct "an initial public offering in accordance with paragraph (5)," not just (5)(A). Furthermore, even by Inmarsat's own logic, the mere fact that the listing and IPO requirements are divided into different (albeit consecutive) sub-clauses of Section 621 does not render them conceptually independent.[22] In fact, these sub-clauses are understood to be intertwined,[23]

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offering of debt or preferred stock, *but this is less common*") (emphasis added)), n.59 (*citing* Harold S. Bloomenthal and Samuel Wolff, *Going Public and the Public Corporation* (2003), I. § 1.2, at 1-5 (discussing why debt IPOs are rare)).

[21] *Response* at 22.

[22] As Inmarsat itself notes, the corporate restructuring requirements of Section 621(5), although divided into subclauses (C) and (D), are nonetheless related and should be construed together. Inmarsat offers no substantive reason as to why subclauses (A) and (B), which are also related, should not be similarly construed.

and rightfully so, because the listing of a company's stock for public trading is an integral part of an initial public offering – indeed, it is the defining characteristic of a "public" offering. Section 621(5)(B) is a necessary addition to Section 621(5)(A), however, because it ensures that the shares offered by Inmarsat as part of the IPO are subjected to transparent and effective securities regulation on a major stock exchange.

B. *The Legislative History of the ORBIT Act Demonstrates that Congress Intended to Require an Equity IPO.*

Aside from resorting to semantics, Inmarsat attempts to rely upon the legislative history of the ORBIT Act. On the one hand, Inmarsat argues that the legislative history cited by SES AMERICOM is irrelevant to a discussion of an unambiguous statute. On the other hand, Inmarsat sees fit to introduce two *ex post facto* letters, one from Senator Conrad Burns,[24] and the other from the National Telecommunications Information Administration ("NTIA"),[25] that Inmarsat purports to be probative of Congressional intent. Inmarsat cannot have it both ways.

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[23] *See In the Matter of Comsat Corporation d/b/a Comsat Mobile Communications, et al.*, 16 FCC Rcd 21661, 21689 n.118 (the Commission declared that subsections (A) and (B) of Section 621(5) "address the requirements for the corporation to become a publicly held company") (2001) ("*Inmarsat Market Access Order*"); *see also In the Matter of the Applications of INTELSAT LLC*, Memorandum Opinion Order and Authorization, 16 FCC Rcd 12280, 12291 (2001) (the Commission required Intelsat LLC to confirm the exchange on which Intelsat Ltd. would list its shares pursuant to its IPO) ("*Intelsat Market Access Order*").

[24] Letter from Senator Conrad Burns to Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, NTIA (Jan. 21, 2004) (attached as Tab B to the *Response*) (the "Burns Letter").

[25] Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, NTIA, to Senator Conrad Burns (Mar. 16, 2004) (attached as Tab A to the *Response*) (the "NTIA Letter").

Although citation to legislative history may not be required in this instance because the statutory language is clear, the legislative record is by no means irrelevant, as Inmarsat suggests. To the contrary, the Senate Report[26] and floor statements of key Congressmen[27] cited by SES AMERICOM are helpful in underscoring the general intentions and expectations of Congress – made explicit in the statutory text -- that Inmarsat should conduct an IPO of equity securities.[28]

Even if this legislative history is not dispositive of Congressional intent, it certainly offers more probative and reliable evidence than the two 2004 Letters introduced by Inmarsat. The Burns Letter represents no more than the *ex post facto*

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[26] *See* Senate Committee on Commerce, Science, and Transportation, Sen. Rep. No. 106-100, at 6 (Jun. 30, 1999) (In describing the privatization process for INTELSAT – which is subjected to substantially the same IPO requirements as Inmarsat – the Committee noted that the President will seek to ensure that an "initial public offering of *stock* of the privatized INTELSAT entity occurs in a timely fashion." 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") (emphasis added).

[27] *See 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").

[28] Inmarsat is incorrect in suggesting that the Senate Report cited by SES AMERICOM is irrelevant simply because it pertained to a draft of the ORBIT Act that was later changed. Although Congress changed the text of the draft, there is no evidence that Congress also changed its intent to require INTELSAT to conduct an equity IPO. *See DBB, Inc.*, *supra*, 180 F.3d at 1283 n.8 (the fact that the language in draft legislation was not adopted did not alter the court's interpretation of the legislative history of the statute, because the legislative history was silent as to why the draft language was not adopted; the court held that Congress could have decided that the form of the statute actually enacted had the same meaning as the draft version).

views of an individual Senator – views that are reflected nowhere in the actual language or legislative history of Section 621. While Senator Burns states his "belief" that the ORBIT Act may be satisfied by means other than an IPO,[29] the ORBIT Act as written prescribes an equity IPO as the sole means of compliance with Section 621. The views of NTIA, meanwhile, are entirely irrelevant to a discussion of Congressional intent; Congress made the FCC, not the NTIA, the arbiter of compliance with Section 621.[30]

It is furthermore noteworthy that neither the Burns Letter nor the NTIA Letter actually states that Inmarsat has complied with the IPO requirements of the ORBIT Act. Instead, these letters merely suggest that Inmarsat may fulfill or has fulfilled the "goals" and "policy objectives" of the ORBIT Act through its Transactions.[31] Of course, Inmarsat's obligations are not limited to fulfilling certain presumed goals and policy objectives underlying the ORBIT Act; Inmarsat must also comply with the statutory text.

In summary, Inmarsat offers no convincing evidence in its *Response* to refute the showing by SES AMERICOM that the language and legislative history of Section 621 of the ORBIT Act requires Inmarsat to conduct an IPO of equity securities. By choosing to conduct a debt offering rather than an equity IPO, Inmarsat has failed to meet its obligations under the ORBIT Act.

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[29] *See* Burns Letter at 1 ("I believed at the time, and continue to believe today, that these policy objectives [of the ORBIT Act] 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").

[30] *See* ORBIT Act, § 601(b).

[31] *See* NTIA Letter at 2 (stating only the Transactions "materially fulfill[] the goals" of the ORBIT Act); Burns Letter at 1.

II. THE STANDARD OF REVIEW OF THE INMARSAT TRANSACTIONS SHOULD BE COMPLIANCE WITH THE TEXT OF THE ORBIT ACT.

Because Inmarsat cannot claim to have complied with the plain meaning of the ORBIT Act, Inmarsat continues to assert that its Transactions are nonetheless "consistent with" the purposes of Section 621. As SES AMERICOM noted in its *Comments*, however, application of the "consistent with" standard of review is inappropriate in this instance because Inmarsat has not demonstrated a legitimate reason why it should be excused from strict compliance with the statutory text.[32] Furthermore, even if the Commission chooses to apply the "consistent with" standard of review, it has no basis for doing so in the lax manner requested by Inmarsat.

A. Inmarsat Should Not Be Relieved from Strict Compliance with the ORBIT Act.

Inmarsat would have the Commission believe that the "consistent with" standard of review authorizes Inmarsat to discard freely the statutory mandate in favor of other schemes that it believes would achieve the stated objectives of the ORBIT Act. However, the Commission must assume that Congress had a purpose in mind when it designated a specific type of transaction to achieve the goals of Section 621, rather than simply providing that any transaction that achieves those goals would suffice. Even if, for argument's sake, the equity IPO is not the only acceptable means of compliance with Section 621, it must certainly be considered to be Congress' primary or preferred method of compliance. Because the equity IPO, at the very least, is a preferred means of compliance with Section 621, Inmarsat should not be permitted to deviate from that statutory scheme without demonstrating its necessity for doing so.

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[32] *See SES Comments* at 13-15.

As SES AMERICOM explained in its *Comments*, Inmarsat has failed to present the Commission with an adequate justification for its pursuit of an alternate course of compliance. Inmarsat's actions are not justified, for example, by its stated frustration with the market volatility that stymied its prior efforts to conduct an equity IPO. Had persistent market volatility in fact rendered Inmarsat's efforts unreasonably expensive or burdensome, Inmarsat could have worked with Congress or with the Commission to devise an appropriate solution. Inmarsat chose instead to take matters into its own hands. Such opportunistic behavior is worthy of rebuke, not reward from the Commission in the form of a lenient standard of review.

Similarly inadequate is Inmarsat's complaint regarding a perceived weakness in the current market for an equity IPO. This complaint lacks credibility. As MSV noted in its *Opposition*, the IPO market has improved dramatically since Congress last extended Inmarsat's IPO deadline in June 2003.[33] Indeed, market conditions have apparently strengthened enough for Intelsat to proceed with its own plans for an equity IPO at the end of June.[34] While Inmarsat argues that "Intelsat . . . does not face the market problems presented by the fact that five of Inmarsat's MSS competitors have gone bankrupt," the fact remains that Inmarsat, by its own admission, is the dominant global

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[33] *See MSV Opposition* at 8.

[34] *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/.

provider of MSS services, is vastly more successful than its competitors,[35] and has just recently completed a successful debt offering. Thus, it is unfounded for Inmarsat to suggest that it is in a poor position, or in a worse position than Intelsat, to find a suitable market for its equity.[36] Indeed, it is revealing that Inmarsat still fails to offer the Commission a letter from its investment banker, as it has done in the past, certifying that poor market conditions require Inmarsat to postpone its equity IPO.[37] SES AMERICOM raised the absence of this letter in its *Comments*, and received only silence in return from Inmarsat.

Even if Inmarsat's concerns about market weakness are justified, they nonetheless are easily addressable within the ambit of the existing regime. The ORBIT Act expressly anticipates market fluctuations by granting flexibility to the Commission to extend the IPO deadline when conditions prove unfavorable to an IPO. In the past, the

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[35] *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 84 ("[i]n the maritme sector, we believe we are the leading provider of global mobile satellite services, with 2002 revenues in excess of 30 times those of our nearest competitor . . . We believe we are also the market leader in the provision of high-speed data services to the maritime and land sectors, with 2002 data revenues of more than 15 times those of our nearest competitor") ("*Offering Memorandum*").

[36] Other technology companies are apparently able to achieve IPOs in the current market environment. *See, e.g.*, Kevin J. Delaney & Robin Sidel, *Google IPO Aims to Change the Rules*, Wall St. J., Apr. 30, 2004, at A1. In addition, the equity markets seem currently interested in satellite transactions. *See, e.g.*, PanAmSat, Press Release, PanAmSat Corp. to be Acquired by KKR (Apr. 20, 2004) (private equity transaction).

[37] *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; *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.

Commission has been accommodating of Inmarsat's requests for deadline extensions,[38] and there is no reason to believe that the Commission would not be similarly accommodating in the future. Likewise, Congress has proven itself willing to extend the IPO deadline by statute when the Commission's discretion has expired. There is no need for the Commission to grant Inmarsat further flexibility by evaluating its Transactions in accordance with the "consistent with" standard of review.

B. *There is No Basis for the Commission to Apply the "Consistent With" Standard of Review in the Manner Requested by Inmarsat*.

Even if the Commission sees fit to apply the "consistent with" standard of review, there is no basis for the Commission to do so in the lax manner requested by Inmarsat. The "consistent with" standard of review has never been interpreted by the Commission to permit the wholesale abrogation of an ORBIT Act provision, as Inmarsat requests. At most, this standard of review has been construed to give the Commission a "degree of flexibility" in evaluating a party's compliance with the text of the ORBIT Act.[39] It has been applied to forgive only minor deviations from, and delays in effectuating, compliance with the statutory text.[40]

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[38] *See SES Comments* at 14.

[39] *See Inmarsat Market Access Order*, 16 FCC Rcd. at 21683; *Intelsat Market Access Order*, 16 FCC Rcd at 12287-88.

[40] *See In the Matter of Loral Satellite, Inc.*, Order and Authorization, 19 FCC Rcd. 2404, 2429-30 (2004) (granting Intelsat special temporary authority to provide additional services for 180 days); *Inmarsat Market Access Order*, 16 FCC Rcd. at 21690 (allowing several of Inmarsat's managers and officers to maintain "truly *de minimis*" financial interests in a former Signatory provided that such interests were held in a blind trust), 21692-93 (forgiving Inmarsat's delay in restructuring its Board of Directors); *Intelsat Market Access Order*, 16 FCC Rcd. at 12298 (forgiving Intelsat's short delay in meeting the ORBIT Act privatization deadline).

The reasonable manner in which the Commission previously has interpreted the "consistent with" standard of review is a far cry from the interpretation that Inmarsat now requests of the Commission. Rather than ask for "flexibility," Inmarsat asks that Commission grant Inmarsat freedom to discard and supplant the legislative mandate. Rather than seek the forgiveness of the Commission for a slight deviation, Inmarsat instead seeks acceptance of a scheme that is wholly different from what is required by the text of Section 621. The standard of review requested by Inmarsat is excessively lenient and unreasonable. The Commission should decline to adopt it.

III. THE INMARSAT TRANSACTIONS ARE NOT "CONSISTENT WITH" AN IPO OF EQUITY SECURITIES.

Even if the Commission were to apply the "consistent with" standard of review, and assuming it does so in a reasonable manner, the Commission must conclude that Inmarsat has failed to satisfy this standard. Inmarsat insists that its Transactions are "consistent with" the ORBIT Act because they "satisfy all the purposes of the ORBIT Act."[41] While dilution of Inmarsat's ownership interests, commercial independence, and subjection to securities regulation are indeed central goals of Section 621, they are by no means the exclusive goals of that provision. Additional goals are implied by Congress' choice of an equity IPO as the prescribed means for Inmarsat to achieve compliance with Section 621. Congress' choice of this type of transaction demonstrates its intent that Inmarsat achieve its dilution in a manner characteristic of an equity IPO. An equity IPO

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[41] *Response* at 5.

is characterized by diffusion of corporate ownership and the creation of a publicly owned and traded corporation. Inmarsat's Transactions do not achieve these ends.

A. *The Transactions Did Not Diffuse Inmarsat's Ownership Interests In a Manner "Consistent With" An IPO.*

Although Inmarsat claims to have diluted the ownership interests of its former Signatories, it has not done so in a manner that is "consistent with" an equity IPO. An equity IPO characteristically results in the wide distribution of corporate ownership and control.[42] Inmarsat disputes the relevance of broad dispersion of ownership,[43] yet it notes in its *Response* that "going public is the process by which a business owned by one or several individuals is converted into a business owned by many."[44] In stark contrast to a typical IPO, Inmarsat's Transactions took a business owned and controlled by many, and converted it into a business owned and controlled by a few. As SES AMERICOM explained in its *Comments*, Inmarsat was previously owned by eighty-five Signatories, with no one or two Signatories exercising control over the company.[45] Today, 57% of Inmarsat is owned by, and all of Inmarsat is controlled by, only two entities – Apax Partners and Permira.[46] These two entities not only dominate the operations of Inmarsat,

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[42] *See* James B. Arkebauer, *Going Public – Everything You Need to Know to Take Your Company Public, Including Internet Direct Public Offerings*, at 6 (1998) (("[b]y selling stock to shareholders, the original owners of a public company are, in essence, relinquishing exclusive control of the company's future").

[43] *Response* at 32.

[44] *Id.* at 33, n.108 (*quoting* Arkebauer, *supra*, at 3).

[45] *SES Comments* at 15-16.

[46] Contrary to Inmarsat's suggestion, the fact that these two entities hold Inmarsat stock on behalf of a myriad of pension funds and endowments does not mean that Inmarsat

but they also exercise control over the disposition of Inmarsat stock, such that they can block any transaction that might actually widen Inmarsat's shareholder base in the future, or further dilute the remaining interests of Inmarsat's former Signatories. This structure does not comport with that of a typical IPO.

B. *Inmarsat Has Failed to Transform Itself into a Publicly Held and Traded Corporation.*

Inmarsat's Transactions are furthermore inconsistent with a second aim of the IPO requirement, which is to establish Inmarsat as a publicly held and traded corporation.[47] In this instance, public ownership is not merely an implied goal of Congress in choosing to require an equity IPO; it is also an express statutory requirement. The ORBIT Act directs Inmarsat to become a "corporation the ownership of which is held through publicly traded securities."[48] Although Inmarsat's Transactions create publicly held and traded debt, these Transactions cannot, by definition, transform Inmarsat into a "publicly owned" or "publicly held" corporation. As noted above, only equity securities evidence "residual ownership" of a company.[49] Debt, by contrast, and in

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stock is now widely-held. Permira and Apax Partners, and not these pension funds or endowments, exercise control over the voting and management rights attendant to the 57% equity interest in Inmarsat.

[47] Going public shifts a company's ownership from "the hands of a few private stockowners to a base that includes public shareholders." Friedman, *supra*, at 256 (defining "going public").

[48] ORBIT Act, §§ 621(5), 681(17) (emphasis added). Although the Commission previously determined that Inmarsat has satisfied the "national corporation" requirement for the purpose of market access, it based this finding on the expectation that Inmarsat would later conduct an IPO of its shares. *See Inmarsat Market Access Order*, 16 FCC Rcd at 21687.

[49] Friedman, *supra*, at 199.

spite of Inmarsat's contrary pleas, evidences only "an obligation to pay" money – and nothing more.[50]

For this same reason, Inmarsat has failed to establish itself as a publicly traded corporation. Inmarsat does not publicly trade its ownership interests, and it has not listed its shares on a major stock exchange as it is required to do under Section 621(5)(B).[51] Instead, Inmarsat's equity remains privately held by a few investors. Far from establishing a public market for these shares, the Transactions actually foreclosed the existence of even a private market for Inmarsat shares by placing substantial restrictions on their sale and transfer.[52]

Inmarsat's debt securities, although listed for trading on a major stock exchange, should not be considered "publicly" tradeable. In the United States, Inmarsat has chosen to offer its debt securities pursuant to SEC Rule 144A – a rule that essentially limits potential purchasers to qualified institutional buyers with assets in excess of $100 million.[53] Inmarsat also has chosen to offer its debt on the PORTAL Market – a market that is dominated by broker/dealers and is generally inaccessible to the public.[54] Thus, while Inmarsat debt is "publicly" available as a technical matter, it will for practical

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[50] *Id.* at 147.

[51] ORBIT Act, §§ 621(5)(B). *See also* Friedman, *supra*, at 488 (A "publicly held corporation" is one that has a "class of common stock registered on a national stock exchange").

[52] *See Offering Memorandum* at 125-26.

[53] *See* SEC Rule 144A.

[54] *See generally* National Association of Securities Dealers, Inc., *Portal Expected to Benefit Private Placement Market* (1990), *available at* http://business.cch.com.primersrc/bin/highwire.dll.

purposes be traded by, and therefore held by, only a narrow group of institutional investors. Had Inmarsat instead conducted an equity IPO, it would have enabled the broader public to benefit from Inmarsat's transformation into a public company. Once again, however, Inmarsat has chosen a path that is inconsistent with this goal.

C. *The Debt Transaction Does Not Subject Inmarsat to Transparent and Effective Securities Regulation that is "Consistent With" an Equity IPO.*

Finally, Inmarsat has failed to demonstrate that, by listing its debt on the Luxembourg Stock Exchange and on the PORTAL Market, Inmarsat will subject itself to "transparent and effective securities regulation" that is "consistent with" the regulation to which it would be subject under an equity IPO. In its *Comments*, SES AMERICOM showed that, had Inmarsat conducted an equity offering in the United States, it would likely have become subject to various listing requirements of the New York Stock Exchange ("NYSE"), the NASDAQ, or a similar stock exchange.[55] These listing requirements, which relate to corporate governance, are not imposed upon Inmarsat through its offering of debt securities on either the PORTAL Market or the Luxembourg Stock Exchange.

Inmarsat tries to dismiss these undisputed facts by asserting that it is not required by the ORBIT Act to list its shares in the United States, and therefore should not be evaluated by reference to the listing requirements of a U.S. stock exchange.[56] This assertion misses the point. SES AMERICOM has never claimed that the ORBIT Act requires Inmarsat to list its equity in the United States. Instead, SES AMERICOM has

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[55] *SES Comments* at 18-20.

[56] *Response* at 29.

demonstrated that, had Inmarsat conducted an equity offering in accordance with the ORBIT Act, it likely would have also conducted at least a secondary offering of such equity in the United States, and furthermore would have listed its equity offering on a major U.S. stock exchange in order to maximize liquidity. Thus, had Inmarsat conducted an equity IPO, it likely would have also become subject to the listing requirements of a U.S. stock exchange.

Importantly, Inmarsat itself previously informed the Commission that it planned to list its equity on either the NASDAQ or the NYSE -- when Inmarsat was still intent on conducting an equity IPO.[57] Furthermore, in offering its debt securities for sale in the United States, Inmarsat has sought to avail itself of U.S. markets in a manner typical of Rule 144A debt offerings. It is thus fair to assume that, had Inmarsat conducted an equity offering, it would have similarly sought to avail itself of U.S. capital markets in the manner typical of equity public offerings – *i.e.*, with a listing on a major U.S. stock exchange.

Inmarsat argues next that, even if it would have listed its equity in the United States, and had thereby become subject to the listing requirements of NYSE, such listing requirements are inapposite, because Inmarsat would have been exempt from them as a "foreign private issuer."[58] This argument is simply incorrect. Even as a "foreign private issuer," Inmarsat would have been required to comply with certain listing

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[57] *See Inmarsat Market Access Order*, 16 FCC Rcd. at 21688. When New Skies conducted its own IPO, it also listed its stock on both the Euronext Amsterdam N.V. stock market and the NYSE. *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 7490 (2001).

[58] *Response* at 29-30.

requirements of the NYSE, including most notably the requirement that Inmarsat establish an independent audit committee responsible for overseeing the selection of an independent accountant.[59] Inmarsat does not become subject to this important corporate governance provision merely by listing its debt on the PORTAL Market.

Finally, Inmarsat argues that the NYSE listing requirements are not a relevant criteria for determining consistency with the ORBIT Act because they were adopted after the ORBIT Act was passed, and therefore were not contemplated by Congress when it drafted the ORBIT Act. This argument is also unavailing. The Commission must assume that when Congress required Inmarsat to conduct an equity IPO, Congress intended for that IPO to be governed by whatever rules and regulations are attendant to that transaction and to publicly held companies at the time the IPO occurs. It is clearly incorrect for Inmarsat to assert that Congress intended for the IPO to be governed only by the rules and regulations in existence when the ORBIT Act was passed in 2000.

IV. INMARSAT FAILS TO DEMONSTRATE THAT APPROVAL OF ITS TRANSACTIONS IS REQUIRED BY THE PUBLIC INTEREST.

Inmarsat repeatedly warns that a failure of the Commission to certify its compliance with the ORBIT Act would harm the public interest both by jeopardizing Inmarsat's competitive presence in the U.S. market, [60] and by threatening to disrupt the

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[59] *See* NYSE Listing Rules 303A.06. Inmarsat would also be required to disclose any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE listing standards. *Id.* at Rule 303A.11.

[60] *See Response* at 5.

availability of essential Inmarsat services to the United States government and to other U.S. customers.[61] Such arguments are unavailing.

First, the dire consequences of which Inmarsat warns are by no means certain to occur if the Commission rejects the *Inmarsat Letter*. Inmarsat still has time before the current IPO deadline to correct its mistakes by effectuating an equity IPO,[62] and it also has a statutory right – a right that it attempted to exercise in its *Response* -- to request an extension of the IPO deadline in the event that the Commission rejects compliance.[63] As SES AMERICOM noted earlier, the Commission has been gracious in granting extension requests, and there is no reason to believe that the Commission will not be accommodating in the future.[64]

Second, to the extent that revocation or limitation of Inmarsat's U.S market access is indeed a looming consequence of this proceeding, the Commission must remember that this consequence is one of Inmarsat's own making. Inmarsat took a

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[61] *See id.* at 3-4.

[62] There seems little doubt that Inmarsat could succeed with an IPO at present; certainly Inmarsat has not presented any evidence to the contrary from its investment bankers. *See* pp.12-13, *supra*.

[63] *See Response* at 38. There is substantial doubt whether Inmarsat's "alternative request for relief," *id.*, is cognizable in this proceeding. Such requests by both Intelsat and Inmarsat have been the subject of separate FCC public notices in each case, with the Commission specifically soliciting public comment on a request for extension of an IPO deadline. *See, e.g.,* Public Notice Report No. SAT-00163 (Sep. 5, 2003) (Intelsat); Public Notice Report No. SAT-00126 (Oct. 18, 2002) (Inmarsat). No such FCC public notice has been issued as to Inmarsat's "alternative request."

[64] As SES AMERICOM observed *supra*, Congress been willing to amend the ORBIT Act when Inmarsat has made a case for extension of the equity IPO deadline. *See* p.13-14, *supra*. Indeed, the Senate just this week passed and sent to the House of Representatives a bill to extend Intelsat's equity IPO deadline. *See* 150 Cong. Rec. S4443 (daily ed. Apr. 27, 2004).

substantial risk by choosing to deviate from the instructions set forth in Section 621; Inmarsat alone must bear responsibility for this risk. The Commission should not compromise the integrity of the ORBIT Act in order to protect Imarsat from the consequences of its own non-compliant behavior.[65]

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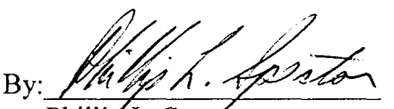
[65] Even if Inmarsat's request to extend the IPO deadline is denied, the ORBIT Act provides that Inmarsat's failure of compliance will not prejudice its provision of services to the United States government for national security, law enforcement, and public health or safety purposes.ORBIT Act, § 601(b)(1)(C). Furthermore, a rejection by the Commission would not affect Inmarsat's ability to offer in the United States global maritime distress and safety services, as well as other maritime and aeronautical services that pre-date the ORBIT Act, for which there are no alternative providers. *Id.* at §§ 601(b)(1)(B), 681(11).

V. CONCLUSION

For the foregoing reasons, the Commission should reject Inmarsat's *Consolidated Response* and its *Letter of Compliance* with the IPO requirements of Section 621 of the ORBIT Act.

Respectfully submitted,

SES AMERICOM, INC.

By: 

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April 30, 2004

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I hereby certify that on this 30th day of April 2004, I caused a copy of the foregoing Reply of SES AMERICOM, Inc., to be served by first-class mail on the following:

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