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June 10, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission
File No. SAT-MSC-20040210-00027

Dear Ms. Dortch:

In response to inquiries from Commission staff made during Inmarsat's June 2, 2004 ex *parte* meeting, Inmarsat submits the following letter discussing the flexibility granted the Commission under the Open-Market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act" or "Act").[1]

Congress did not draft the ORBIT Act simply as a check list of requirements that the Commission must blindly apply. To the contrary, the ORBIT Act is designed to provide considerable flexibility to the Commission in evaluating whether the privatization of Inmarsat has satisfied the requirements as well as the purpose of the Act. Congress empowered the Commission with discretion in two ways. First, the Act provides that Inmarsat may be either a "national corporation *or similar accepted commercial structure*."[2] Expressly authorizing the use of an alternative commercial structure both informs the interpretation of the specific requirements of the sub-sections of Section 621(5) and affirmatively grants the Commission the ability to determine that a commercial structure not specifically described in the Act nevertheless satisfies the requirements and purpose of the Act. Second, as supported by substantial case law, the Commission has significant flexibility under the "consistent with" and "in accordance with" standards expressed in the ORBIT Act to find that Inmarsat's privatization has satisfied the ORBIT Act, even if the Commission believes that some specific provision may not have been met.

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1 Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000).

2 *See* ORBIT Act § 621(5) (emphasis added).

A. Inmarsat's Commercial Structure Is Similar to a National Corporation

By providing that Inmarsat could be either a "national corporation *or similar accepted commercial structure,*" Congress specifically contemplated that commercial structures other than the one that fits the definition of "national corporation" would satisfy the requirements of the ORBIT Act. The definition of "national corporation" provides a benchmark for one type of entity that Congress believed would satisfy the Act, but the ORBIT Act leaves it to the Commission to determine whether a similar commercial structure also acceptably satisfies the Act. As discussed below, Inmarsat's commercial structure is substantially similar to that of a "national corporation" and Inmarsat's privatization has exceeded the results that could have been achieved had Inmarsat effectuated a public offering of equity. Therefore, Inmarsat urges the Commission to find that Inmarsat has satisfied the remaining requirements of the Act.

The ORBIT Act provides that "national corporation" means "[(i)] a corporation [(ii)] the ownership of which is held through publicly traded securities, and [(iii)] that is incorporated under, and subject to, the laws of a national, state, or territorial government."[3] Logic dictates that a similar accepted commercial structure need not meet each of the three prongs of the definition of "national corporation." If the entity did, then it would be a "national corporation" and the term "similar accepted commercial structure" would be rendered meaningless.

Inmarsat is a corporation, incorporated under U.K. law, whose ownership is held through privately held equity securities, but which has publicly traded debt securities – its Series A notes. Inmarsat's commercial structure specifically fulfills two of the three prongs of the definition of "national corporation" – Inmarsat is a corporation and it is organized under national law. Inmarsat's structure varies from the definition of "national corporation" only in that Inmarsat's publicly traded securities are debt as opposed to equity securities. An examination of the language and purpose of the Act, however, demonstrates that this variation is not material.

Whether Inmarsat's public securities represent "ownership" is not important to furthering any purpose of the Act. The crucial element is that the securities are publicly listed for trading. The listing of public securities on a major stock exchange – be they debt or equity – ensures that the issuer is subject to securities regulations and reporting requirements. Such reporting provides transparency into the operations of Inmarsat, access to audited financial reports, and disclosures of transactions with major stockholders, officers and directors. In other words, transparent and effective securities regulation enables the public, Congress and the Commission to ensure that Inmarsat has privatized in a manner consistent with the purpose of the ORBIT Act.

As discussed in the *February 10th Letter*, Inmarsat debt securities, the Series A notes, were issued in conjunction with the leveraged buyout of over 57% of the aggregate ownership interest of Inmarsat's former Signatories, and those notes are listed on the

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[3] ORBIT Act § 681(a)(17).

Luxembourg Stock Exchange.[4] Pursuant to a forthcoming A/B exchange of notes, they will be replaced with Inmarsat Series B notes, the issuance of which is being registered with the U.S. Securities and Exchange Commission ("SEC"). As a result, Inmarsat is subject to the transparent and effective securities regulations of the Luxembourg Stock Exchange and the European Union and Inmarsat soon will be subject to SEC regulation.[5] No more meaningful regulation would have been imposed upon Inmarsat had it listed equity securities on the Luxembourg Stock Exchange and then conducted an A/B exchange of equity securities that was registered in the U.S. As a company with publicly traded and listed debt securities, Inmarsat is structured in a manner that achieves substantially the same results as one would expect from an entity, a portion of whose ownership is held through publicly traded securities.

Requiring Inmarsat to publicly list "ownership" or equity securities would not achieve any objective of the ORBIT Act.[6] If the Act required that all or even a majority of Inmarsat be publicly owned, then a public listing of equity securities could be important, but this is *not* the case. In fact, the ORBIT Act merely requires that privately held Signatory ownership interests be *substantially diluted,* not eliminated, and the Commission found that New Skies – with 77% of its equity privately owned – satisfied the requirements of the Act, including the "national corporation" requirement.[7]

If Inmarsat had made a public offering of equity securities in an amount similar to New Skies, in lieu of the transaction Inmarsat in fact conducted, (i) there would have been less dilution of former Signatory ownership interests; (ii) Inmarsat would be subject to substantially the same securities regulations, (iii) control of Inmarsat would still rest with the former Signatories as a group, and (iv) 70 more former Signatories would hold an interest in Inmarsat than is the case today.[8] A number of individual public investors might hold an ownership interest in Inmarsat, but they would have no practical influence on the management and operations of the company. Indeed, it is not uncommon for "publicly owned" companies to be

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4 *See* Inmarsat's February 10, 2004 letter to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. SAT-MSC-20040210-00027 at 2-5 ("*February 10th Letter*").

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

6 *See* ORBIT Act § 2.

7 *See In the Matter of New Skies, N.V. Request for Unconditional Authority to Access the U.S. Market*, 16 FCC Rcd. 7482 at ¶¶ 24 and 46 (2001).

8 The ownership interests of 70 of the 85 former Signatories of Inmarsat were redeemed in full as a result of the leveraged buy-out. If Inmarsat had conducted an initial public offering of equity, the dilution of the former Signatory interests most likely would have been on a pro rata basis and therefore no Signatory's ownership interest would have been fully redeemed.

controlled by "privately held" interests.[9] If Congress had mandated diffuse public ownership, it could have made such a requirement explicit as it did in the provision of the Satellite Act of 1962,[10] which the ORBIT Act repealed.[11] Instead, Congress mentions "ownership" only in the definition of "national corporation," a type of structure from which Congress expressly permitted deviation.

The only material result of a listing of equity that advances the purpose of the Act is the imposition of securities regulations. Inmarsat achieved that same result with the issuance of debt securities. By granting the Commission the authority to accept commercial structures similar to a national corporation, Congress provided flexibility to the Commission to ensure that the purpose of the Act is achieved. Inmarsat's commercial structure (i) resulted in greater dilution of its former Signatory ownership interests than any equity offering, and (ii) subjects the company to transparent and effective securities regulations. Moreover, no greater competition would result from Inmarsat conducting an equity public offering. Therefore, Inmarsat urges the Commission to find that its commercial structure is acceptable under 621(5) as similar to a "national corporation."

B. The Provision Allowing Alternative Commercial Structures Mandates a Broad Reading of the Meaning of the Terms "Initial Public Offering of Securities" and "Shares"

In addition to granting flexibility to the Commission, the use of the phrase "national corporation or similar accepted commercial structure" has significant ramifications for the interpretation of the subsections of Section 621(5). Because Congress intended that commercial structures other than a national corporation may satisfy the purpose of the ORBIT Act, the language of Section 621(5) must be read in a manner that permits the use of those structures.

Certain commercial entities (*e.g.*, a partnership or limited liability corporation) do not have "stock," and other entities may be structured in a manner where it makes more sense, in light of various considerations, to list public debt securities, rather than public equity securities. To interpret the terms "initial public offering of securities" in Section 621(5)(A) and "shares" in Section 621(5)(B) as requiring a public offering and listing of "stock" would preclude the use of a "similar accepted commercial structure," thus rendering those words of the Act meaningless.[12]

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9 *See, e.g.,* Kmart Holding Corp. Definitive Proxy Statement at 2 (filed April 8, 2004) ("more than 50% of the Company's voting power is held by ESL Investments, Inc. and its affiliates"); MicroStrategy, Inc. Definitive Proxy Statement at 7 (filed May 25, 2004) ("more than 50% of the voting power of the Company is controlled by the Company's Chairman and Chief Executive Officer, Michael J. Saylor").

10 Satellite Act § 304.

11 *See* ORBIT Act § 645.

12 Use of the term "stock" in the section heading of 621(5) should not be read to contradict the explicit language of that section that contemplates the existence of commercial

Section 621(5)(B) therefore should be read broadly to allow a range of securities to satisfy the "listing on a major stock exchange with transparent and effective securities regulations" provision. Doing so would allow the Commission to give each word of the statute meaning.[13] Moreover, it would avoid frustrating the purpose of the ORBIT Act by requiring Inmarsat now to take further actions – listing equity securities on a major stock exchange – that would not advance any articulated purpose of the Act,[14] but in fact (i) would cause American investors who have an interest in Inmarsat to lose significant value[15] and (ii) would saddle Inmarsat and its investors with a public equity ownership structure to which none of its competitors in the U.S. is subject.[16]

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structures without stock under the "similar accepted commercial structure" provision. *See, e.g., M.A. v. State-operated School District of the City of Newark*, 344 F.3d 335, 348 (3d Cir. 2003) ("It is a well-settled rule of statutory interpretation that titles and section headings cannot limit the plain meaning of statutory text where that text is clear."); *see also U.S. v. Minker*, 350 U.S. 179, 185 (1956) ("the title of the statute and the heading of a section cannot limit the plain meaning") (quoting *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528 (1947)).

13 The use of the word "shares" as opposed to "stock" in the Act is also pertinent as the first definition of "share" in Black's Law Dictionary is "[a]n allotted portion owned by, contributed by, or due to someone" – a definition that encompasses a share, or portion, of the capital structure of a company, whether that portion is a debt or equity interest in the capital structure. *See* Black's Law Dictionary p. 1380, definition 1 (7th Edition 1999). Interpreting this provision of the Act using a broad definition of "shares" would allow an internally consistent reading of the Act that provides meaning to all the words in the Act. *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)).

14 *See Attorney General v. School Committee of Essex*, 387 Mass. 326, 336 (1982) ("We will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable."); *United States v. Kirby*, 74 U.S. 482, 486-87 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.").

15 *See* Statement of Representative John Dingell, Congressional Record H2600 (House of Representatives – May 5, 2004) ("forcing INTELSAT to conduct an IPO next month is bad policy and will cost INTELSAT's owners, including many U.S. investors, hundreds of millions of dollars").

16 *See* Consolidated Response of Inmarsat, File No. SAT-MSC-20040210-00027 at 12 (April 20, 2004).

Regardless whether the Commission interprets the Act in the manner discussed above, Inmarsat's satisfaction of the purpose of the Act and the benefits U.S. users receive from Inmarsat's provision of MSS services support the Commission's use of discretion under other provisions of the Act to reach a favorable result in this matter.

C. *The Commission Has Broad Discretion Under Either a "Consistent With" or an "In Accordance With" Standard*

In addition to authorizing the Commission to permit use of commercial structures other than a "national corporation," the Act provides the Commission with discretion by allowing the Commission to find privatization to be achieved in a manner "consistent with" or "in accordance with" the Act. As the Commission noted in the *Market Access Order* with respect to the "consistent with" standard, "[t]his flexibility allows [the Commission] to avoid frustrating Congressional intent to enhance competition in the U.S. telecommunications market by an overly narrow interpretation."[17] As demonstrated below, the same should be true under the "in accordance with" standard of review.[18]

Substantial legal precedent supports the determination that the "consistent with" standard grants the Commission flexibility in evaluating whether Inmarsat's privatization satisfies the requirements and goals of the Act.[19] For example, in *Environmental Defense Fund*, petitioners argued that the Environmental Protection Agency's ("EPA's") regulations violated the Clean Air Act by allowing the approval of transportation improvement programs ("TIPs") even when a program's transportation control measures ("TCMs") are behind the schedule established in the application implementation plan. The statute provided that no TIP may be adopted unless a determination is made that such program provides for timely implementation of TCMs "consistent with the schedules in the applicable implementation plan."[20] Rejecting the petitioners' arguments, the court found that the phrase "consistent with" in the statute meant "agreeing or according in substance or form" and therefore "[g]iven the flexible statutory language we must defer to the agency's determination" to allow adoption of the plans despite the variance from the Clean Air Act.[21] Other courts agree that use of "consistent with" in a statute

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17 *Market Access Order* ¶ 35.

18 *See ORBIT Act* § 602.

19 *See, e.g., Environmental Defense Fund, Inc. v. Environmental Protection Agency,* 82 F.3d 451, 457 (D.C. Cir. 1996), *amended on other grounds*, 92 F.3d 1208 (D.C. Cir. 1996), citing Oxford English Dictionary 773 (2d 1989); *N.L. Indes, Inc. v. Kaplan,* 792 F.2d 896, 898-899 (9th Cir. 1996) (statutory phrase "consistent with" does not necessitate strict compliance with provisions of the statute).

20 *See Environmental Defense Fund, Inc.,* 82 F.3d at 457 (quoting 42 U.S.C. § 7506(c)(2)(B)).

21 *See, e.g., Environmental Defense Fund, Inc.,* 82 F.3d at 457.

means that one need not strictly comply with each provision of a statute.[22] And courts recognize that agencies should be granted deference when interpreting a statute using a "consistent with" standard.[23]

It has been suggested that a different standard should apply to Inmarsat's "additional services" because the ORBIT Act provision on additional services discusses Inmarsat's privatizing "in accordance with" requirements of the Act.[24] This position is not supported by case law[25] or common usage of the term.[26] The phrases are synonymous and, to the

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22 *Roanoke Memorial Hospitals v. James B. Kenley, M.D.*, 3 Va. App. 599, 606 (1987) ("'[C]onsistent with' as used in the context of the statute does not mean 'exactly alike' or 'the same in every detail.' It means instead, 'in harmony with,' 'compatible with,' 'holding to the same principles,' or 'in general agreement with.'"); *Chippenham & Johnston-Willis Hospitals, Inc. v. Peterson*, 36 Va. App. 469, 479 (2001) ("'[C]onsistent with' means 'compatible with' . . . or 'in general agreement with' rather than 'exactly alike' or 'the same in every detail.'"); *The Duck Inn v. Montana State University-Northern*, 285 Mont. 519, 523 (1997) ("The only portion of the statute which is at issue here is the meaning of the phrase 'consistent with' . . . . [W]e look first to the plain meaning of the words . . . . [W]e give words their usual and ordinary meaning . . . . MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 247 (10th ed. 1993) defines consistent as 'free from variation or contradiction,' 'compatible.' THE AMERICAN HERITAGE DICTIONARY 402 (3rd ed. 1992), also defines consistent as 'compatible'").

23 *See, e.g., Environmental Defense Fund, Inc.*, 82 F.3d at 457; *Johnston-Willis Hospitals, Inc.*, 36 Va. App. at 479.

24 *See* Response of Mobile Satellite Ventures Subsidiary LLC, File No. SAT-MSC-20040210-00027 at 8, n.14 (filed April 30, 2004).

25 *See, e.g., New York Public Interest Research Group, Inc. v. New York State Department of Insurance*, 66 N.Y.2d 444, 449 (1985) ("Inconsistency as a matter of statutory interpretation within the rule of the *Kurcsics* case exists, however, only if 'in accordance with' means in strict conformity with rather than in harmony with, or not inconsistent with. *Yet the phrase has generally been construed to require not identicality of result but only reasonable or just correspondence* . . . .") (emphasis supplied); *Norfolk v. Norfolk Landmark Publishing Company*, 95 Va. 564, 567 (1898).

26 *See, e.g., San Francisco v. Boyd,* 22 Cal. 2d 685, 690 (1943) ("In our opinion, the phrases ["in accord with" and "in accordance with"] do not require that the rates of wages recommended by the commission or fixed by the board be identical with or not higher than the generally prevailing rates, but rather that there be a reasonable or just correspondence between the rates established and those elsewhere prevailing, i.e., that they be in harmony with and substantially conform to such other rates. . . . The word 'accordance' is defined in Webster, supra, and in Black's Law Dictionary to mean in 'agreement; harmony; concord; conformity.'"); *Estate of Ridenour v. Commissioner*, T.C.

extent that there is a distinction, "in accordance with" provides even greater flexibility to the Commission in the interpretation of the Act. For example, in interpreting a New York insurance statute, the Court of Appeals of New York found that "in accordance with" has "generally been construed to require not identicality of result but only reasonable or just correspondence."[27] Similarly, in interpreting the city of Norfolk's charter, the Supreme Court of Virginia held that "[t]he language, 'in accordance with the constitution and laws of the State,' is the equivalent of 'not repugnant to,' 'not in conflict with,' or 'not inconsistent with' the laws and constitution of the State . . ."[28]

Moreover, there is no policy reason to apply a stricter standard of review to Inmarsat's provision of "additional services." If the Commission determines that Inmarsat has satisfied the ORBIT Act requirements with respect to non-core services and therefore that Inmarsat's provision of those services is in the public interest, there is no rational reason that Inmarsat should be held to a different standard for the provision of "additional services." To impose a different standard may mean that Inmarsat would able to offer its current services in the U.S. but unable to offer new and improved MSS services over next generation spacecraft, which would impede competition and harm U.S. users.

Under both a "consistent with" and "in accordance with" standard, the Commission has significant discretion in evaluating Inmarsat's privatization efforts. As discussed in its *February 10th Letter* and subsequent filings, Inmarsat has satisfied the remaining requirements and fulfilled the purpose of the ORBIT Act by substantially diluting the ownership interests of Inmarsat's former Signatories, placing control into the hands of new, non-Signatory owners, and by listing its debt securities on a major stock exchange, thereby subjecting the company to transparent and substantial securities regulation. To the extent that the Commission determines that Inmarsat has not strictly complied with some aspect of the ORBIT Act, Inmarsat urges the Commission to use its discretion and find that Inmarsat has satisfied the remaining requirements of the Act.

D. Conclusion

The ORBIT Act grants considerable flexibility to the Commission in evaluating whether the privatization of Inmarsat has satisfied the requirements of the Act. Congress explicitly authorized the Commission to accept commercial structures that do not meet the definition of "national corporation" in order to further the purpose of the Act. Moreover, the ORBIT Act directs the Commission to use a standard of review that does not require strict compliance with the provisions of the Act but instead allows the Commission to determine

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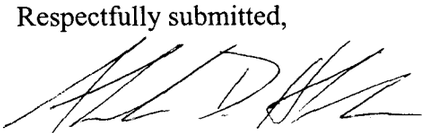
Memo 1993-41, 22 (1993) ("[W]e do not read the phrase 'in accordance with' to mean 'identical' or 'the same as'. Rather, we think the Virginia courts would give the phrase its usual meaning, i.e., 'consistent with'. . . . To interpret the statute as meaning 'identical' would unduly restrict an attorney-in-fact from making a valid gift under the statute.").

27 *New York Public Interest Research Group, Inc.*, 66 N.Y.2d at 449.

28 *Norfolk*, 95 Va. at 567 (1898).

whether the purpose of the Act has been satisfied. As discussed above, Inmarsat's privatization has satisfied both the requirements and purpose of the Act. However, to the extent that the Commission believes that a provision of the Act may not have been met, Inmarsat urges the Commission to find that Inmarsat's privatization is "consistent with" and "in accordance with" the ORBIT Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2004, I caused a true copy of the foregoing "*Ex Parte* Submission" to be served by first-class mail and, where noted, by hand (*) on the following:

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