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

In the Matter of	)	
	)	
IDB Mobile Communications, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-48
	)	
COMSAT Corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2001 Released: May 24, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we deny a complaint filed by IDB Mobile Communications, Inc. ("IDB") against COMSAT Corporation ("COMSAT") pursuant to section 208 of the Communications Act of 1934, as amended ("Communications Act" or "Act").[1] IDB alleges that COMSAT violated sections 201(b) and 202(a) of the Communications Act[2] by refusing to reduce the price for certain satellite communications services provided under a four-year contract between the parties.[3] IDB's claims rest on the fact that, halfway through the contract period, COMSAT began to provide satellite communications services to another entity at a price that was lower than the price contained in the IDB/COMSAT contract. For the reasons described below, we deny IDB's complaint, because IDB has failed to meet its burden under the "Sierra-Mobile" doctrine[4] of demonstrating that COMSAT harmed the

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[1] 47 U.S.C. § 208.

[2] 47 U.S.C. §§ 201(b), 202(a).

[3] *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Formal Complaint, File No. E-97-48 (filed Sept. 25, 1997) ("Complaint").

[4] *See Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"). The doctrine is also known as the "Mobile-Sierra" doctrine.

public interest by refusing to reduce the contract price at issue halfway through the contract's term.

II. BACKGROUND

A. The Parties

2. This is yet another salvo in the long-running and multi-forum feud between IDB and COMSAT.[5] At all relevant times, IDB provided many international satellite communications services, including international maritime satellite services, international aeronautical satellite services, and international land mobile satellite services.[6] COMSAT was a corporation created pursuant to the Communications Satellite Act of 1962 that provided a wide range of international satellite communications services.[7] At all relevant times, COMSAT provided such services by, *inter alia*, combining the capabilities of its land earth stations ("LESs") in the United States with satellite capacity purchased from the International Mobile Satellite Organization ("INMARSAT"). These services included INMARSAT Standard-A, Standard-B, and Standard-M services.[8]

B. A Brief Description of the Relevant INMARSAT Services

3. Fixed-to-mobile INMARSAT Standard-A service is an *analog* satellite communication service that is used, *inter alia*, to complete transmissions from a fixed land location to a mobile maritime terminal installed on a ship.[9] Fixed-to-mobile INMARSAT

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[5] *See, e.g.*, *COMSAT Corp. v. Stratos Mobile Networks (USA), LLC*, Memorandum Opinion and Order, 15 FCC Rcd 22338 (Enf. Bur. 2000), *aff'd, COMSAT Corp. v. Stratos Mobile Networks (USA), LLC*, Order on Review, FCC 01-72, 2001 WL 178414 (F.C.C.) (released Feb. 26, 2001), *petition for review pending, COMSAT Corp. v. FCC*, Docket No. 01-1161 (D.C. Cir. filed April 6, 2001); *COMSAT Corp. v. IDB Mobile Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7906 (Enf. Bur. 2000), *Order on Review*, 15 FCC Rcd 14697 (2000), *petition for review pending, COMSAT Corp. v. FCC*, Docket No. 00-1383 (D.C. Cir. filed Aug. 24, 2000).

[6] Complaint at 2-3, ¶ 6; *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Answer of COMSAT Corporation, File No. E-97-48 (filed Nov. 10, 1997) at 17, ¶ 30 ("Answer").

[7] Answer at 1, ¶ 1. *See* 47 U.S.C. §§ 701, *et seq.* On July 31, 2000, COMSAT was granted authority to assign its space and earth station licenses to Comsat Government Systems, LLC (CGS-LLC), a wholly owned subsidiary of Lockheed Martin Corporation, as part of the merger of Lockheed Martin and COMSAT. *Lockheed Martin Corp., COMSAT Government Systems, LLC, and COMSAT Corp., Applications for Transfer of Control of COMSAT Corporation and Its Subsidiaries, Licensees of Various Satellite, Earth Station Private Land Mobile Radio and Experimental Licenses, and Holders of International Section 214 Authorizations*, Order and Authorization, 15 FCC Rcd 22910 (2000).

[8] Answer at 2, ¶ 3. Except where otherwise indicated, references to "INMARSAT services" refer to a combination of space segment (*i.e.*, satellite capacity) and ground segment (*i.e.*, LES capacity).

[9] *See IDB Mobile Communications, Inc. v. COMSAT Corporation*, Letter from Martin F. Cuniff, Counsel for COMSAT Corporation, to Warren Firschein, Attorney, Market Disputes Resolution Division,

Standard-B and Standard-M services are *digital* satellite communications services that are typically used to complete transmissions from a fixed land location to a mobile maritime terminal.[10]

4. At all relevant times, a call from an end user in the United States to, for example, an end user on an ocean vessel would, if using fixed-to-mobile INMARSAT Standard-A, Standard-B, or Standard-M service, typically traverse the following path: (1) from the caller in the United States to (2) the caller's interexchange carrier ("IXC") to (3) a land earth station in the United States to (4) an INMARSAT satellite to (5) the INMARSAT mobile terminal on the ocean vessel.[11] A call from an end user located outside the United States to an ocean vessel could also end up travelling through a LES in the United States, if the caller's IXC chose to route the call to such a LES rather than to a LES in another country. A call that originates outside the country in which the LES used is located is called "transit traffic."[12]

5. At all relevant times, COMSAT was the only entity authorized to provide *facilities-based* INMARSAT Standard-B and Standard-M digital services for the delivery of U.S.-originated fixed-to-mobile traffic.[13] Thus, if IDB wished to provide such services to its own end user customers in the United States, it had to purchase both ground segment (*i.e.*, LES capacity)

Enforcement Bureau, FCC, File No. E-97-48 (filed February 2, 2001) at 1 ("February 2, 2001 Letter").

[10] *See IDB Mobile Communications, Inc. v. COMSAT Corporation*, Letter from Alfred M. Mamlet and Colleen A. Sechrest, Counsel for IDB Mobile Communications, Inc., to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. E-97-48 (filed January 16, 2001) ("January 16, 2001 Letter").

[11] Complaint at 4, ¶ 11; Answer at 18, ¶ 35; *IDB Mobile Communications, Inc. v. COMSAT Corporation*, IDB Mobile Communications, Inc. Supplemental Brief, File No. E-97-48 (filed Jul. 14, 2000) at 4 ("IDB Supplemental Brief").

[12] Answer at 5-6, ¶ 13. Domestic transit traffic is any international message communication that passes through U.S. telecommunications facilities but originates and terminates outside the United States. Normally, only the sender's and receiver's carriers participate in the transmission and reception of a message. The process of "transiting" occurs when a third carrier (in this case COMSAT) is needed to serve as an intermediary because the sender and receiver are geographically separate, and direct interconnection is technologically difficult, inferior, or impossible. *See Implementation and Scope of the International Settlements Policy for Parallel International Communications* Routes, Order on Reconsideration, 2 FCC Rcd 1118, 1118, 1124, ¶ 3 n.5 (1987); *Establishment of Regulatory Policies Pursuant to the Communications Act of 1934 With Respect to Use of Communication Facilities in the United States by Foreign Entities for Communication Traffic Transiting the United States*, Memorandum Opinion and Order, Docket No. 19031, FCC 81-188, 1-2, ¶ 2 (rel. May 5, 1981) ("*Transit Traffic Order*"); 47 C.F.R. § 43.61(f) (1991). Unless otherwise indicated, in this order we use the terms "transit traffic" and "foreign-originated traffic" interchangeably.

[13] Complaint at 3, ¶ 10; Answer at 17, ¶ 34; *IDB Mobile Communications, Inc. v. COMSAT Corporation*, IDB Mobile Communications, Inc. Final Brief, File No. E-97-48 (filed Feb. 18, 1998) at 3 ("IDB Brief"); *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Brief of COMSAT Corporation, File No. E-97-48 (filed Feb. 17, 1998) at 6 ("COMSAT Brief"); IDB Supplemental Brief at 23.

and space segment (*i.e.*, satellite capacity) from COMSAT.[14] By contrast, at all relevant times, IDB was authorized to compete with COMSAT in the provision of facilities-based INMARSAT Standard-A analog service for the delivery of U.S.-originated fixed-to-mobile traffic.[15] Therefore, if IDB wished to provide this service to its domestic end user customers, it could do so by purchasing only space segment from COMSAT and combining that with its own LES operations in the United States.[16]

C. The Contractual Relationship Between IDB and COMSAT

6. On May 25, 1990, the parties entered into an agreement setting forth the terms and conditions under which COMSAT would provide a wide range of INMARSAT satellite services to IDB (the "1990 Agreement").[17] Pursuant to the terms of the 1990 Agreement, COMSAT would provide space segment for Standard-A service at a rate of $2.75 for the initial 30 seconds and $.548 for each additional six seconds during peak usage hours, and $1.40 for the initial 30 seconds and $.28 for each additional six seconds during off-peak hours (*i.e.*, $2.80 per minute).[18] The 1990 Agreement also established that COMSAT would provide Standard-B and Standard-M services "as soon as these are available via the INMARSAT system,"[19] and that all new such services would be provided at "comparable discounts (*e.g.*, 25%) below COMSAT's tariffed rates."[20] This Agreement went into effect in September 1991, and was to last for five years thereafter, until September 1996.[21]

7. Over a year prior to the expiration of the 1990 Agreement, IDB sought to renegotiate the Agreement's terms.[22] COMSAT agreed to IDB's request and engaged in contract negotiations.[23] As a result, on June 30, 1995, IDB entered into a new contract ("Contract") with

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[14] Complaint at Appendix A (Affidavit of Joanne Suppa) at 1, ¶ 3;

[15] Complaint at 3, ¶ 10; Answer at 2, ¶ 4; COMSAT Brief at 3, 4.

[16] In fact, with regard to Standard-A service to and from the Atlantic and Pacific Ocean regions, the parties' contract provided solely for the sale of INMARSAT space segment. January 16, 2001 Letter at Attachment B, Attachment 1 at § 2.1; Answer at 3, ¶ 5; COMSAT Brief at 4; IDB Supplemental Brief at 4.

[17] *See* January 16, 2001 Letter at Exhibit A.

[18] *Id*. at Exhibit A, § 1.8.

[19] *Id*. at Exhibit A, Annex A, § 1.1.

[20] *Id*. at Exhibit A, § 2.3.

[21] *Id*. at Exhibit A, § 1.3. *See* February 2, 2001 Letter at 1.

[22] COMSAT Brief at 4, 7, 9; *IDB Mobile Communications, Inc. v. COMSAT Corporation*, IDB Mobile Communications, Inc. Final Reply, File No. E-97-48 (filed Mar. 9, 1998) at 10-11 ("IDB Reply").

[23] *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Reply Brief of COMSAT Corporation, File No. E-97-48 (filed Mar. 9, 1998) at 3 ("COMSAT Reply"); COMSAT Brief at 4, 7, 9; IDB Reply at 10-11.

COMSAT that superceded the 1990 Agreement.[24] The new Contract concerned many, if not all, of COMSAT's existing INMARSAT satellite services, including INMARSAT Standard-A, -B, and –M services, as well as any new INMARSAT service that COMSAT might provide in the future.[25] The new Contract contained lower rates than the 1990 Agreement. For example, one rate for INMARSAT Standard-A space segment was reduced from $2.80 per minute to $2.55 per minute.[26] Regarding INMARSAT Standard-B and –M services, the new Contract provided that IDB would purchase satellite and LES capacity for U.S.-originated fixed-to-mobile traffic at a rate of $3.30 per minute.[27] This Contract price of $3.30 was more than 25% below COMSAT's tariffed rates for these services (*i.e.*, $5.55 for Standard-B, $4.95 for Standard-M).[28] Moreover, the Contract expressly entitled IDB to any lower rate that COMSAT might charge other carriers in the future for INMARSAT Standard-B and -M services for the delivery of U.S.-originated fixed-to-mobile traffic.[29] The Contract did not mention foreign-originated fixed-to-mobile traffic.[30]

8. The Contract had a term of approximately four years. Thus, the Contract did not expire until September 2, 1999.[31] As of the date that the instant complaint was filed (*i.e.*, September 25, 1997), IDB had not purchased from COMSAT any INMARSAT Standard-B or

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[24] *See* COMSAT Brief at 9; January 16, 2001 Letter at Exhibit B, Preamble.

[25] Complaint at 4, ¶ 12; Answer at 3, 18, ¶¶ 5, 36; COMSAT Brief at 4, 7-8; January 16, 2001 Letter at Exhibit B. Pursuant to 47 U.S.C. § 211(a), the Contract was filed with the Commission on August 2, 1995. Answer at 28, ¶ 55a; COMSAT Reply at 5.

[26] *See* January 16, 2001 Letter at Exhibit B, Annex. In addition, Standard-A space segment during "peak" hours was reduced from approximately $5.48 per minute to a maximum of $5.10 per minute with the possibility of further discounts that would reduce the per-minute rate to as low as $4.50. January 16, 2001 Letter at Exhibit B, Attachment 1, § 2.2. The Contract also reduced the rates for, *inter alia*, High Gain Aeronautical Data (from $.28 to $.19 per kilobit); Voice Group Call (from approximately $16.50 to $16.10 per minute); and Low-Power Multi-Channel Ship Station Service during off-peak hours (from $2.80 to $2.50 per minute). *Compare* January 16, 2001 Letter at Exhibit A, Annex at § 1.8 *with* January 16, 2001 Letter at Exhibit B, Annex.

[27] Complaint at 4, ¶ 12; Answer at 18-19, ¶ 36; January 16, 2001 Letter at Exhibit B, Attachment 1 at § 4.1.

[28] *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Supplemental Reply Brief of COMSAT Corporation, File No. E-97-48 (filed Jul. 21, 2000) at App. A ("COMSAT Supplemental Reply"). Moreover, in June 1995, COMSAT's tariffed rate for INMARSAT Standard-A space segment was $9.30 per minute, whereas the Contract rate was $5.10. *See* February 2, 2001 Letter at 3; January 16, 2001 Letter at Exhibit B, Annex. In October 1996, COMSAT reduced the tariff rates for Standard-B and Standard-M services to $4.45 and $4.55 per minute, and permitted eligible customers to receive further discounts for high volume through a "customer discount program." COMSAT Supplemental Reply at App. A.

[29] January 16, 2001 Letter at Exhibit B, Attachment 1 at § 4.1.

[30] Answer at 3, ¶ 7. *See* January 16, 2001 Letter at Exhibit B.

[31] January 16, 2001 Letter at Exhibit B, § 1.1; Answer at 3, ¶ 5; COMSAT Brief at 4.

Standard-M service for the delivery of U.S.-originated fixed-to-mobile traffic.[32]

D. IDB's Complaint Against COMSAT

9. In August 1997, COMSAT began charging a foreign carrier, Cable & Wireless, $2.50 per minute for INMARSAT Standard-B and Standard-M services for the delivery of foreign-originated fixed-to-mobile traffic. This was $.80 less than the $3.30 Contract rate for the delivery of U.S.-originated traffic.[33]

10. On September 25, 1997, approximately halfway through the Contract's term, IDB filed the instant complaint. The complaint alleges that COMSAT violated the Communications Act by refusing to lower immediately the Contract's price for INMARSAT Standard-B and –M services from $3.30 to $2.50 per minute.

11. In particular, the complaint alleges that section 202(a)[34] prohibited COMSAT from continuing to charge IDB the Contract price of $3.30 per minute for the delivery of U.S.-originated traffic, because COMSAT was simultaneously charging Cable & Wireless $2.50 per minute for the delivery of foreign-originated traffic.[35] IDB premises this claim on the assertion that COMSAT's fixed-to-mobile INMARSAT Standard-B and Standard-M services are the same for the delivery of U.S.-originated traffic as they are for the delivery of foreign-originated traffic.[36]

12. IDB also asserts that the Contract price for the delivery of U.S.-originated traffic via INMARSAT Standard-B and Standard-M services was unreasonable, in violation of section 201(b) of the Act,[37] because it was unrelated to COMSAT's underlying costs.[38] To support this

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[32] Answer at 2, ¶ 4; COMSAT Brief at 3, 5, 9; IDB Reply at 11.

[33] Answer at 21, ¶ 39; IDB Brief at 6, 9; IDB Reply at 5, 7, 9. IDB initially alleged that COMSAT offered these services to Cable & Wireless at $2.40 per minute. *See* Complaint at 5, ¶ 15.

[34] Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges . . . for or in connection with like communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person . . . ." 47 U.S.C. § 202(a).

[35] Complaint at 2, ¶ 4; IDB Brief at 4-7; IDB Reply at 2-3.

[36] Complaint at 8-9, ¶¶ 20-22; IDB Brief at 5-6; IDB Reply at 4-5; IDB Supplemental Brief at 8-10; *IDB Mobile Communications, Inc. v. COMSAT Corporation*, IDB Mobile Communications, Inc. Supplemental Reply Brief, File No. E-97-48 (filed Jul. 21, 2000) at 4-7 ("IDB Supplemental Reply").

[37] Section 201(b) of the Act states, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . ." 47 U.S.C. § 201(b).

[38] Complaint at 11-12, ¶¶ 26-28; IDB Brief at 7-8; IDB Reply at 5-6.

claim, IDB points out that (i) INMARSAT's price to COMSAT for satellite capacity was no more than $1.50 per minute;[39] and (ii) COMSAT's price to Cable & Wireless of $2.50 per minute presumably covered COMSAT's costs.[40] Therefore, IDB argues that the $3.30 rate at which the Contract offered COMSAT's INMARSAT Standard-B and Standard-M services for U.S.-originated traffic was "clearly related to COMSAT's monopoly status, not to COMSAT's costs."[41]

13. For relief, IDB requests a Commission order requiring COMSAT to disregard the Contract's price terms and offer IDB the same price for fixed-to-mobile INMARSAT Standard-M and Standard-B services that it offers to Cable & Wireless.[42] In other words, IDB is asking the Commission to reform the Contract so that the price at issue for the delivery of U.S.-originated traffic matches the price that COMSAT subsequently agreed to charge Cable & Wireless for the delivery of foreign-originated traffic.[43]

III. IDB HAS FAILED TO SATISFY THE HIGH PUBLIC INTEREST STANDARD UNDER THE SIERRA-MOBILE DOCTRINE FOR THE MODIFICATION OF THE PRE-EXISTING CONTRACT.

A. Description of the Sierra-Mobile Doctrine

14. Under the Sierra-Mobile doctrine, the Commission may revise the terms of a private contract between two carriers concerning communications services.[44] The Commission may do so, however, only when the contract's terms "adversely affect the public interest."[45]

15. The threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the Sierra-Mobile doctrine is much higher than the threshold for

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[39] Complaint at 11, ¶ 26; IDB Brief at 8. INMARSAT charges COMSAT, and all other INMARSAT signatories, $1.25 per minute for INMARSAT Standard-B service and $1.50 per minute for INMARSAT Standard-M service. IDB Brief at 8.

[40] Complaint at 11-12, ¶¶ 26-27; Answer at 27, ¶ 50; IDB Brief at 8.

[41] Complaint at 12, ¶ 28. *See* IDB Brief at 7-8.

[42] Complaint at 15, ¶ 35; IDB Brief at 14-15; IDB Reply at 13.

[43] IDB also reserves its right to file a supplemental complaint for specific damages, should it prevail on the issue of liability. Complaint at 15, ¶ 35. In light of our denial of contract reformation, however, IDB has no basis on which to seek damages because reformation would be a necessary predicate to such damages.

[44] *See, e.g., Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 654 (1995).

[45] *Sierra*, 350 U.S. at 355. *See, e.g., Western Union*, 815 F.2d at 1501; *Yankee Microwave*, 10 FCC Rcd at 657, ¶ 17. The parties agree that the Sierra-Mobile doctrine applies in this proceeding. *See, e.g.*, Complaint at 13, ¶ 32; Answer at 29, ¶ 56; IDB Brief at 11-12; COMSAT Reply at 5.

demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act.[46] Thus, a carrier cannot obtain the remedy of contract reformation by showing only that the contract requires it to pay an unduly high price for communications services.[47] Such *private* economic harm, standing alone, lacks the substantial and clear detriment to the *public* interest required by the Sierra-Mobile doctrine.[48]

16. There is a well-established reason why the Sierra-Mobile standard for contract reformation is high: preserving the integrity of contracts is vital to the proper functioning of the carrier-to-carrier communications market.[49] Indeed, the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of carrier-to-carrier contracts. As one court aptly stated in an analogous context, "[i]f the integrity of contracts is undermined, business would be transacted without legally enforceable assurances and . . . the market, the industry and ultimately the consumer would

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[46] *See Potomac Electric Power Company v. Federal Energy Regulatory Commission*, 210 F.3d 403, 407-408 (D.C. Cir. 2000); *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission*, 723 F.2d 950, 953-54 (D.C. Cir. 1983) (Scalia, J.); *Kansas Cities v. Federal Energy Regulatory Commission*, 723 F.2d 82, 87-88 (D.C. Cir. 1983) (Scalia, J.); *Town of Norwood, Massachusetts v. Federal Energy Regulatory Commission*, 587 F.2d 1306, 1313, n.21 (D.C. Cir. 1978); *Yankee Microwave*, 10 FCC Rcd at 657, ¶¶ 17-19. We rely herein on court decisions construing the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, and the Federal Power Act, 16 U.S.C. §§ 792 *et seq.*, because the relevant provisions of those Acts are virtually identical in language and purpose to sections 201(b) and 202(a) of the Communications Act. *Compare* 15 U.S.C. § 717c (a) and 16 U.S.C. § 824d (a) *with* 47 U.S.C. § 201(b), and 15 U.S.C. § 717c (b) and 16 U.S.C. § 824d (b) *with* 47 U.S.C. § 202(a); s*ee Western Union, supra*; *Yankee Microwave, supra* (both relying on court decisions construing the Natural Gas Act and the Federal Power Act in applying the Sierra-Mobile doctrine to common carriers under the Communications Act).

[47] *See generally San Diego Gas & Electric Co. v. Federal Energy Regulatory Commission*, 904 F.2d 727 (D.C. Cir. 1990) (rejecting request for contract reformation because request stemmed solely from subsequent drop in market price); *Yankee Microwave*, 10 FCC Rcd at 656-57, ¶ 16 (holding that the Sierra-Mobile doctrine applies where "a buyer subsequently demands lower rates when the market price falls after the contract has been signed").

[48] *See, e.g., Sierra*, 350 U.S. at 354-55 (explaining that a contract that may be "unreasonable" from a contracting party's perspective may nevertheless not contravene the public interest); *PEPCO v. FERC*, 210 F.3d at 409 (explaining that "the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest"); *Papago v. FERC*, 723 F.2d at 953, n.4 (explaining that discrimination against the contracting purchaser does not meet the Sierra-Mobile threshold, absent "some independent harm to the public interest"); *Yankee Microwave*, 10 FCC Rcd at 657, ¶¶ 17-18 (declining to reform contract, because the complainant "allege[d] only private injury, an injury that resulted solely from [its] improvident bargain").

[49] *See, e.g., Mobile*, 350 U.S. at 344 ("By preserving the integrity of contracts, it permits the stability of supply arrangements that all agree is essential….'); *PEPCO v. FERC*, 210 F.3d at 409 ("The court has repeatedly emphasized the importance of contract stability in a number of cases involving the Mobile-Sierra doctrine."); *Maine Public Service Co. v. Federal Energy Regulatory Commission*, 964 F.2d 5, 10 (D.C. Cir. 1992) ("This court has determined that contractual rates promote economic stability."); *San Diego v. FERC*, 904 F.2d at 730 (approving the fact that FERC "placed great weight on the policy considerations behind contract stability….").

suffer."[50]

B. Application of the Sierra-Mobile Doctrine

17. All of IDB's assertions that the Commission should reform the Contract under the Sierra-Mobile doctrine rest almost entirely on one fact: two years into the four-year Contract term, COMSAT began to charge Cable & Wireless a lower price for INMARSAT Standard-B and -M services for the delivery of transit traffic than COMSAT charged IDB under the Contract for those services for the delivery of U.S.-originated traffic.[51] As explained above, however, it is well established that, standing alone, a disparity between a long-term contract price and a price subsequently offered to someone else fails to justify the remedy of contract reformation under the Sierra-Mobile doctrine.[52] Though IDB doubtless would have preferred a lower price for COMSAT's services, such private "harm" does not equate to public interest harm.

18. Indeed, one primary purpose of long-term contracts is to allocate between the parties the risk of future changes in the market price. The seller accepts certain risk that the market price will rise, and the buyer accepts certain risk that the market price will fall.[53] IDB's request here is that the Commission frustrate this purpose and impose essentially a "heads I win, tails you lose" regime in IDB's favor – IDB gets to take advantage of subsequent reductions in the market rate, while COMSAT remains locked in to the Contract price even if the market rate later rises.[54] We perceive no public interest in reaching such an unfair and harmful result. Instead, the parties should generally "be required to live with their bargains as time passes and various projections about the future are proved correct or incorrect."[55]

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[50] *San Diego v. FERC*, 904 F.2d at 730 (*quoting Public Service Co. of New Mexico*, 43 FERC ¶ 61,469 at 62,153 (June 13, 1988)). We note that the Sierra-Mobile analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements. *See* 47 U.S.C. § 252(e)(2).

[51] *See, e.g.*, Complaint at 5, 6, 7, 8, 11-12, ¶¶ 15, 17, 18, 20, 27, 29; IDB Brief at 1, 4, 8-9, 12; IDB Reply at 3, 7, 8-9, 12; IDB Supplemental Brief at 5, 20. For the purposes of this discussion, we will assume, *without deciding*, that INMARSAT Standard-B and –M services for the delivery of U.S.-originated fixed-to-mobile traffic are "like" such services for the delivery of transit fixed-to-mobile traffic.

[52] *See, e.g., PEPCO v. FERC, supra*; *Maine v. FERC, supra*; *San Diego v. FERC, supra*; *Norwood v. FERC, supra*; *Boroughs of Chambersburg v. Federal Energy Regulatory Commission*, 580 F.2d 573, 577-78 (D.C. Cir. 1978).

[53] *See, e.g., San Diego v. FERC*, 904 F.2d at 730; *Norwood v. FERC*, 587 F.2d at 1312.

[54] We note that IDB does not allege that, when the Contract was executed, COMSAT was offering a lower price for INMARSAT Standard-B and -M services to anyone else.

[55] *Norwood v. FERC*, 587 F.2d at 1312. *See PEPCO v. FERC*, 210 F.3d at 410.

19. In support of its assertion that there is a public interest component to the alleged harm, IDB argues that the end-user customers of other IXCs (such as AT&T) to whom COMSAT actually charged the same Contract price paid their IXCs more than they should have for calls made via COMSAT's INMARSAT Standard-B and -M services.[56] This argument, however, is conclusory and unsupported in the record. IDB does not "offer any evidence (beyond speculation) that . . . ratepayers . . . were adversely affected by the existing rates; it did not, for example, even attempt to show how much if any of the rate disparity was passed on to [IXC] ratepayers rather than borne by the [IXC] itself."[57] IDB also does not offer any evidence that any price reductions to the IXCs would have been passed through, in whole or in part, to the IXCs' end-user customers. Thus, IDB's bald argument fails to support a finding of the requisite harm to the public interest.[58] As one court assessing similar circumstances stated, "a mere rate disparity or a benefit to the purchasing utility *or its customers* from a rate modification does not suffice, without more, to satisfy" the "stringent Mobile-Sierra public interest standard."[59]

20. There are other reasons why the remedy of contract reformation under the Sierra-Mobile doctrine is inappropriate here. First, the Commission has previously recognized a disparity between rates for satellite services for the delivery of U.S.-originated traffic and for the delivery of transit traffic, but declined to regulate transit traffic.[60] Moreover, COMSAT's rate for facilities-based INMARSAT Standard-B and Standard-M services for the delivery of U.S.-originated fixed-to-mobile traffic was but one of many elements of the Contract. For example, the Contract addressed the provision of a wide range of other satellite services, such as space segment for INMARSAT Standard-A services.[61] Often when parties negotiate a contract that addresses such a wide range of products or services, there is some give-and-take between issues. That is, often a party accepts less advantageous terms for the provision or purchase of one product or service in exchange for more favorable terms for the provision or purchase of another product or service. We hesitate to reform one element of a contract given the possibility of this type of

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[56] Complaint at 13, ¶ 31; IDB Brief at 12; IDB Supplemental Brief at 22; IDB Supplemental Reply at 4. IDB does not make this argument regarding its own end-user customers, because IDB never purchased INMARSAT Standard-B or -M services from COMSAT. Answer at 3-4, ¶ 7; COMSAT Brief at 3; IDB Reply at 11; IDB Supplemental Brief at 13; COMSAT Supplemental Brief at 2.

[57] *PEPCO v. FERC*, 210 F.3d at 409.

[58] The bald nature of IDB's claim readily distinguishes it from the circumstances in *International Settlement Rates*, 12 FCC Rcd 19806 (1997), *aff'd sub nom., Cable & Wireless P.L.C. v. Federal Communications Commission*, 166 F.3d 1224 (D.C. Cir. 1999), where the Commission invoked the Sierra-Mobile doctrine in revising international settlement rates that were causing substantial and *substantiated* harm to all Americans engaged in international communications.

[59] *PEPCO v. FERC*, 210 F.3d at 404 (emphasis added).

[60] *Transit Traffic Order* at 6, ¶¶ 15-17.

[61] January 16, 2001 Letter at Exhibit B, Annex.

"horse trading."[62]

21. This does not end our analysis, however. IDB correctly points out that the public interest might be harmed if we were to enforce a contract term obtained through abuse of market power.[63] IDB asserts that COMSAT obtained the Contract rates at issue here through the abuse of market power. IDB bases that assertion solely on the fact that, at the time the Contract was negotiated, COMSAT was the only provider of facilities-based INMARSAT Standard-B and -M services for the delivery of U.S-originated fixed-to-mobile traffic.[64] For the following reasons, we conclude that IDB has failed to meet its burden of demonstrating that COMSAT obtained the contested Contract rates through abuse of market power.

22. In order for an entity to *abuse* market power, it must first *possess* market power. Assessing whether an entity possesses market power is a difficult task. The essential first step in that task is precisely defining the particular product or service market over which the entity allegedly has power.[65] According to one classic iteration of this step, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[66] In other words, a properly defined product or service market includes not only the specific product or service at issue, but also any reasonable substitutes.[67]

23. IDB ignores this threshold step in assessing COMSAT's alleged market power. Although IDB has the burden of showing an absence of available substitutes for these products, IDB makes no effort to demonstrate that facilities-based INMARSAT Standard-B and Standard-M services for the delivery of U.S.-originated fixed-to-mobile traffic, by themselves, constituted a distinct product market during the relevant period. In particular, IDB fails to submit any evidence

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[62] *See, e.g.*, COMSAT Brief at 4, 7-9; COMSAT Reply at 3, 6.

[63] IDB Brief at 4, 10-12; IDB Reply at 7, 9, 10-11. *See PEPCO v. FERC*, 210 F.3d at 410-411; *Maine v. FERC*, 964 F.2d at 10; *Norwood v. FERC*, 587 F.2d at 1312-13; *Yankee Microwave*, 10 FCC Rcd at 657, ¶ 17.

[64] Complaint at 3-4, ¶ 10; IDB Brief at 6; IDB Reply at 10-11. IDB Supplemental Brief at 3-4.

[65] *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *Applications of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20014, ¶ 49 (1997) ("*NYNEX/Bell Atlantic Merger Order*"); *Merger of MCI Communications Corp. and British Telecommunications plc*, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15368, ¶ 35 (1997).

[66] *Brown Shoe*, 370 U.S. at 325. *See, e.g., NYNEX/Bell Atlantic Merger Order*, 12 FCC Rcd at 20014-15, ¶ 50.

[67] *See, e.g., U.S. v. Continental Can Co.*, 378 U.S. 441, 449 (1964); *NYNEX/Bell Atlantic Merger Order*, 12 FCC Rcd at 20014-15, ¶ 50. *See generally* IIA PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 500 *et seq.* (1980). We recognize that this is an extremely oversimplified description of a very complex subject, but it suffices for purposes of this discussion.

that there existed in 1995 no reasonable substitutes for such INMARSAT Standard-B and Standard-M services.

24. This dearth of record evidence is fatal to IDB's assertion, because the lack of reasonable substitutes, for market definition purposes, is far from self-evident. In fact, the record contains some evidence indicating that facilities-based INMARSAT Standard-A service for the delivery of U.S.-originated fixed-to-mobile traffic — which IDB itself provided — was at least one potentially reasonable substitute for INMARSAT Standard-B and Standard-M services;[68] and IDB makes no claim that the Contract price for INMARSAT Standard-A space segment was skewed by market power or in any other way unreasonable. Furthermore, in a related vein, IDB proffers no evidence to rebut COMSAT's contention that COMSAT's bargaining power was circumscribed by the possibility that abusively high prices for facilities-based INMARSAT Standard-B and –M services would have caused IDB to seek authorization to provide such services itself, which IDB had already done with respect to INMARSAT Standard-A services (and which IDB ultimately did do on the day after it filed this complaint).[69] Therefore, the record does not permit us to conclude that COMSAT had market power in any material market, which, in turn, precludes us from concluding that COMSAT abused market power such that we should reform the Contract under the Sierra-Mobile doctrine.[70]

25. In any event, to the extent that the record speaks at all to the issue of COMSAT's conduct during the Contract's formation, it suggests no abuse of any market power. For example, COMSAT agreed to renegotiate the parties' pre-existing 1990 Agreement even though over a year remained on the Agreement's term. In addition, COMSAT agreed in the new Contract to lower rates than were specified in the 1990 Agreement.[71] Moreover, COMSAT agreed in the new Contract to give IDB any lower rate for U.S.-originated traffic that COMSAT might give in the future to some other carrier.[72] Furthermore, the Contract's rates were

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[68] *See* February 2, 2001 Letter at 3.

[69] Answer at 16, ¶ 27b; COMSAT Brief at 6. *See Stratos Mobile Networks (USA), LLC Application For Authority To Provide U.S.-Originated Fixed-To-Mobile and Mobile-To-Fixed INMARSAT-B and –M Services Via U.S. Land Earth Stations*, Memorandum Opinion and Order and Authorization, 14 FCC Rcd 15933 (Int. Bur. 1999).

[70] Because the record has the shortcomings described above, we need not reach the question whether merely the possession of market power, even absent "abuse" of such power, should be considered in a Sierra-Mobile inquiry. We note, however, that at least two federal circuit courts have "expressed skepticism about the relevance of uneven bargaining power in Mobile-Sierra analysis." *PEPCO v. FERC*, 210 F.3d at 411 n.3 (noting the First Circuit's observations in *Northeast Utils. Serv. Co. v. Federal Energy Regulatory Commission*, 993 F.2d 937, 961 (1st Cir. 1993)). *Cf.*, *Norwood v. FERC*, 587 F.2d at 1312 (suggesting that uneven bargaining power is common and not sufficient to question what occurred at the contract formation stage); *but cf.*, *Yankee Microwave*, 10 FCC Rcd at 660, ¶ 34.

[71] COMSAT Reply at 3. *See* ¶ 6, *supra*.

[72] January 16, 2001 Letter at Exhibit B, at Attachment A, § 4.1. The fact that the Contract expressly entitles IDB to subsequent price reductions regarding U.S.-originated traffic, but says nothing about

substantially lower than COMSAT's contemporaneous tariffed rates.[73] Finally, IDB proffered no evidence in the record that, during the Contract negotiations or shortly thereafter, IDB ever complained internally, to COMSAT, or to the Commission that the negotiation process or the Contract's rates were abusive or unfair. Thus, the record fails to justify a conclusion that COMSAT obtained the Contract rates at issue through abuse of market power.

26. In sum, IDB has not submitted sufficient record evidence to demonstrate that COMSAT harmed the public interest by refusing, mid-way through the Contract's term, to reduce the Contract's rates for facilities-based INMARSAT Standard-B and –M services for the delivery of U.S.-originated fixed-to-mobile traffic. Accordingly, IDB has failed to establish entitlement to reformation of the Contract under the Sierra-Mobile doctrine. Thus, we deny IDB's complaint in its entirety.

IV. ORDERING CLAUSE

27. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 208, that the above-captioned formal complaint filed by IDB Mobile Communications, Inc. against COMSAT Corporation IS DENIED IN ITS ENTIRETY, and this proceeding is TERMINATED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

subsequent price reductions regarding transit traffic, bolsters our conclusion that it would be inappropriate to reform the Contract. Had IDB thought to "protect" itself from subsequent price reductions regarding transit traffic, it appears that IDB could have sought a provision in the Contract to do so.

[73] For example, in June 1995, COMSAT's tariffed per-minute rates for facilities-based INMARSAT Standard-B and M services for the delivery of U.S.-originated fixed-to-mobile traffic were $5.55 and $4.95, respectively, whereas the Contract's per-minute rates for those same services were $3.30. *See* COMSAT Supplemental Reply at Exhibit A; January 16, 2001 Letter at Exhibit B, at Attachment A, § 4.1.