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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA MESSENGER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Attn: Mr. Thomas S. Tycz
Chief, Satellite and Radiocommunication Division
International Bureau

Re: Response to International Bureau's Request for Information dated January 28, 2002-- Hughes Communications Galaxy, Inc., File Nos. IBFS No. SAT-LOA-19931203-00040/41; IBFS No. SAT-LOA-19950929-00125/00129; IBFS No. SAT-LOA-19950929-00137 (the "Information Request")

Dear Mr. Tycz:

In response to the Information Request, and on behalf of Hughes Communications Galaxy, Inc. ("HCG"), we have today submitted to the Commission a copy of the Hughes Broadband Services Spaceway North America System HSCII Agreement dated December 17, 1999, together with Amendments 1 through 6 thereto (collectively, the "Contract"). The Contract has been submitted under separate cover together with a Request for Confidential Treatment under the Commission's Rules. A copy of the Request for Confidential Treatment (excluding the Contract) is being provided along with this letter.

Pursuant to the Information Request, the executed, non-contingent Contract is being submitted to reconfirm HCG's compliance with its January 31, 2002 milestone--- commencement of construction of the first satellite in the Spaceway Ka band network originally licensed in 1997. When reviewing such a submission, the Commission seeks to confirm that there will be neither significant delays between the execution of the construction contract and the

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actual commencement of construction, nor conditions precedent to construction.¹ As previously demonstrated in HCG's Annual Status Reports on the Spaceway system, neither is the case here, and actual construction of the first Spaceway spacecraft has been underway for some time now.

HCG has submitted the portions of the Contract that are relevant to confirming that it has entered into a non-contingent agreement and has met its first milestone--- commencement of construction of the first Spaceway satellite. The HCG submission includes the commercial terms and conditions of the agreement, the statement of work for the spacecraft, the milestone schedule, the payment schedule, and the guarantee from Hughes' vendor. The Contract, however, covers much more than the construction of the first Spaceway satellite. It provides for the construction and launch of three Spaceway spacecraft, and it provides for a variety of other engineering and network development services. Thus, as indicated by the places noted as "omitted" in the submitted Contract, HCG has redacted competitively sensitive provisions that (i) do not relate to the non-contingent nature of the Contract, and (ii) do not relate to the fact that construction of the first spacecraft has actually commenced, such as detailed technical information, provisions concerning on-orbit failures, line-item cost breakdowns, and statements of work for engineering services.

As indicated in the enclosed Request for Confidential Treatment, HCG believes that submission of an executed, non-contingent contract is not the only way to demonstrate compliance with a commencement of construction milestone.


Please note that HCG believes that the Contract submitted may contain ITAR and/or Commerce controlled information, and therefore should be handled appropriately by the Commission.

¹ *PanAmSat Licensee Corp.*, 15 FCC Rcd 18720 (2000), *aff'd* 16 FCC Rcd 11534 (2001).

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In conclusion, HCG believes that its submission is fully responsive to the Commission's request. If you should have any questions in this regard, please do not hesitate to contact us.

Respectfully submitted,


John P. Janka
Elizabeth R. Park

Enclosure (w/o Contract)

cc: Alyssa Roberts, FCC (w/ Contract)
Bruce Jacobs, Shaw Pittman, LLP (w/o Contract)

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	File Nos.:
)	IBFS No. SAT-LOA-19931203-00040/41;
Hughes Communications)	IBFS No. SAT-LOA-19950929-00125/00129;
Galaxy, Inc.)	IBFS No. SAT-LOA-19950929-00137

REQUEST FOR CONFIDENTIAL TREATMENT

Pursuant to Sections 0.457 and 0.459 of the Commission's rules, 47 C.F.R. § 0.457 & 0.459, Hughes Communications Galaxy, Inc. ("HCG"), Hughes Network Systems, Inc. ("HNS") and Hughes Electronics Corporation ("HEC," and, together with HCG and HNS, "Hughes") respectfully request that the Commission withhold from public inspection, and accord confidential treatment to, the attached Hughes Broadband Services Spaceway North America System HSCII Agreement, dated December 17, 1999, together with Amendments 1 through 6 thereto (including the attachments to the foregoing) (collectively, the "Contract").

The Contract provides for the design of a Ka band satellite network, including the construction of the first spacecraft licensed to HCG in *Hughes Communications Galaxy, Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service*, 13 FCC Rcd. 1351 (1997), *modified*, 16 FCC Rcd 2470 (2001), *further modified*, DA 01-1457 (released June 19, 2001 & erratum released July 13, 2001) (the "SPACEWAY License"). HCG's parent company, HEC (through its Hughes Network Systems business unit) was the original Hughes party to the Contract. HNS is now a subsidiary of HEC,

and the Contract has been assigned to it. Hughes' vendor under the Contract, Boeing Satellite Systems, previously was known as Hughes Space and Communications Company.

The Contract is being submitted in response to a January 28, 2002 letter from the International Bureau¹ requesting the submission of an executed, non-contingent contract to verify compliance with the January 31, 2002 commencement of construction milestone for the first spacecraft authorized under the Spaceway License.

The Contract comprises sensitive trade secrets and commercial and financial information that squarely fall within Exemption 4 of the Freedom of Information Act,² and that are inextricably intertwined with the other provisions of the Contract.³ Exemption 4 of FOIA provides that the public disclosure requirement of the statute "does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁴ Hughes is voluntarily providing this trade secret, commercial and financial information, which is "of a kind that would not customarily be released to the public" by Hughes, in response to a request from International Bureau staff. Therefore, this information is "confidential" under Exemption 4 of FOIA.⁵ Moreover, Hughes would suffer substantial competitive harm if the Contract were disclosed.⁶ The Spaceway system is intended to provide a wide variety of broadband satellite services that will compete with other satellite systems, as well as with cable systems, DSL, and other terrestrial providers of broadband services.

¹ Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, to John P. Janka, counsel for Hughes, dated January 28, 2002.

² 5 U.S.C. § 552(b)(4).

³ *Mead Data Cent. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

⁴ 5 U.S.C. § 552(b)(4).

⁵ *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

⁶ *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In support of this request and pursuant to Section 0.459(b) of the Commission's rules,⁷ Hughes provides the following information.

1. IDENTIFICATION OF THE SPECIFIC INFORMATION FOR WHICH CONFIDENTIAL TREATMENT IS SOUGHT⁸

Hughes seeks confidential treatment of the following documents included with this Request for Confidential Treatment:

(1) Hughes Broadband Service Spaceway North America System HCSII Agreement, dated December 17, 1999 (including the attachments thereto);

(2) Amendment No. 1 to HCSII Agreement, dated March 30, 2000 (including the attachments thereto);

(3) Amendment No. 2 to HCSII Agreement, dated May 15, 2000;

(4) Amendment No. 3 to HCSII Agreement, dated August 24, 2000 (including the attachments thereto);

(5) Amendment No. 4 to HCSII Agreement, dated October 6, 2000 (including the attachments thereto);

(6) Amendment No. 5 to HCSII Agreement, dated December 12, 2000 (including the attachments thereto); and

(7) Amendment No. 6 to HCSII Agreement, dated August 15, 2001 (including the attachments thereto).

⁷ 47 C.F.R. § 0.459(b).

⁸ 47 C.F.R. § 0.459(b)(1).

2. DESCRIPTION OF CIRCUMSTANCES GIVING RISE TO THE SUBMISSION⁹

The Contract is being submitted to the Commission in response to a January 28, 2002 letter to counsel for HCG from the Chief of the Satellite and Radiocommunication Division of the International Bureau, requesting a copy of an executed, non-contingent construction contract to verify that construction has commenced on the first Spaceway satellite. HCG is voluntarily complying with that request.¹⁰

3. EXPLANATION OF THE DEGREE TO WHICH THE INFORMATION IS COMMERCIAL OR FINANCIAL, OR CONTAINS A TRADE SECRET OR IS PRIVILEGED¹¹

The information for which Hughes seeks confidential treatment contains sensitive commercial and financial information “which would customarily be guarded from competitors.”¹² Certain categories of confidential commercial and financial information appear throughout the Contract, including without limitation (a) descriptions of technical work programs; (b) disclosures of business plans; (c) financial terms and conditions; and (d) pricing and financial nonperformance penalties, all of which were negotiated between the parties.

The Contract is not a typical agreement for the purchase of an “off the shelf” spacecraft. Rather, the Contract covers a state-of-the-art satellite network with design elements never before built for the commercial satellite industry. It provides for the custom design and

⁹ 47 C.F.R. § 0.459(b)(2).

¹⁰ HCG respectfully submits that the submission of a construction contract is not the only way that a commencement of construction milestone can be met, and that a demonstration of complying with that milestone could be made by showing factually that a spacecraft is under construction. *See, e.g., Hughes Communications Galaxy, Application for Modification of Construction Permits and Licenses for the Galaxy 4-R and Galaxy A-R Domestic Fixed-Satellites*, 5 FCC Rcd 3423 (1990) (granting extension of launch milestone when it was apparent that applicant had actually begun construction).

¹¹ 47 C.F.R. § 0.459(b)(3).

¹² 47 C.F.R. § 0.457.

construction of a satellite network with on-board processing and phased array antennas that will operate in the nascent Ka band. Unlike most C or Ku band spacecraft, there is no preexisting blueprint or model for such a network. The parties have extensively negotiated the terms of the Contract, including the terms for the development and construction of the satellite network. Thus, the Contract provides insight into the process of developing such a network, the design of the spacecraft, and the process of managing construction and placement into service. Additionally, the six amendments to the Contract document the evolution of the network during the system design and construction process.

This information is inextricably intertwined with the other provisions of the Contract. Thus, the Contract should be treated in its entirety as a trade secret.¹³ In the context of FOIA, a trade secret is defined as “as secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”¹⁴

Moreover, the Contract would not customarily be released to the public by Hughes or its vendor, Boeing, and therefore is covered by Exemption 4 of FOIA when, as here, it is submitted by Hughes to the Government.

4. EXPLANATION OF THE DEGREE TO WHICH THE INFORMATION CONCERNS A SERVICE THAT IS SUBJECT TO COMPETITION¹⁵

The Contract concerns the design, development, and construction of a Ka band system that will be used to provide broadband services throughout North America. That system will compete with the broadband satellite services offered by other companies, as well as with

¹³ *Mead Data Cent. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

¹⁴ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also, AT&T Information Systems, Inc. v. GSA*, 627 F. Supp. 1396, 1401 n.9 (D.D.C. 1986).

¹⁵ 47 C.F.R. § 0.459(b)(4).

the broadband offerings of cable systems and DSL operators. Thus, the Contract concerns a service that is subject to competition. More specifically, HCG was one of thirteen applicants that received a license for a GSO FSS Ka band satellite system in 1997 as part of the Commission's first Ka band processing round. In August 2001, the Commission licensed eleven applicants to launch and operate GSO FSS Ka band systems in the second Ka band processing round. The Commission has further licensed one NGSO FSS system to provide broadband services in the Ka band, and it has applications pending for five other Ka band NGSO FSS systems (including one of Hughes). Hughes will compete against many of the other first and second round GSO and NGSO Ka band licensees and applicants in building, launching and operating Ka band satellite systems.

5. EXPLANATION OF HOW DISCLOSURE OF THE INFORMATION COULD RESULT IN SUBSTANTIAL COMPETITIVE HARM¹⁶

Because the Contract outlines the process of developing a Ka band system, the information for which Hughes seeks confidential treatment could be used by its competitors as the basis for (i) negotiating a Ka band spacecraft construction contract to meet their own license milestones, many of which come due in less than seven months, (ii) developing a competing satellite network, and/or (iii) designing competitive broadband service offerings (satellite or terrestrial). Specifically, as noted above, because Ka band satellites and the related technology are just beginning to enter the marketplace, the design of the Spaceway system is by no means "standard." If Hughes' competitors obtained access to the information for which Hughes seeks confidential treatment, they would unfairly benefit from the time and resources that Hughes has expended in meeting the construction milestone under the Spaceway License. Hughes would be severely disadvantaged if its competitors were able to use Hughes' unique system design, if they

¹⁶ 47 C.F.R. § 0.459(b)(5).

were able to discern the process by which the Spaceway system has developed, or if they were able to divine the detailed capabilities of the Spaceway network.

Further, Hughes's vendor, Boeing Satellite Systems, would be injured by the disclosure of this Contract because it may seek to negotiate contracts with other companies for the construction of other satellite systems. If the other companies had the specific pricing information and commercial terms of the Spaceway Contract, they would have an unfair advantage over Boeing in negotiating their own agreements.

Moreover, disclosure of the Contract could adversely affect Hughes' relationship with other vendors. Vendors have a legitimate expectation that their confidential information and trade secrets---pricing information, commercial conditions, design information and processes---will not be made available to third parties who do not have a relationship with their customer's program. Disclosure of the Contract in this case could harm Hughes in its future negotiations with vendors.

6. IDENTIFICATION OF ANY MEASURES TAKEN BY THE SUBMITTING PARTY TO PREVENT UNAUTHORIZED DISCLOSURE¹⁷

The Contract contains provisions requiring both parties to maintain confidentiality of proprietary information, which includes the terms of the Contract. The Contract includes detailed procedures for use of proprietary information by representatives of both parties and requires written consent of the other party for the release of any proprietary information. For instance, each party has agreed to have its consultants agree in writing to be bound to protect the proprietary information on the same conditions as set forth in the Contract, and such proprietary information may not be disclosed to anyone who is a competitor of the other party. Upon termination of the Contract, the parties agree to cease use of all proprietary information and

¹⁷ 47 C.F.R. § 0.459(b)(6).

return or destroy such proprietary information, including all copies of such information in their possession.

7. IDENTIFICATION OF WHETHER THE INFORMATION IS AVAILABLE TO THE PUBLIC AND THE EXTENT OF ANY PREVIOUS DISCLOSURE OF THE INFORMATION TO THIRD PARTIES¹⁸

The Contract submitted today has not previously been publicly disclosed, and Hughes is bound not to publicly disclose it by the terms of the Contract. Accordingly, Hughes requests that the Commission accord the information covered by this Request confidential treatment under Sections 0.457 and 0.459 of the Commission's rules.

8. JUSTIFICATION OF THE PERIOD DURING WHICH THE SUBMITTING PARTY ASSERTS THAT MATERIAL SHOULD NOT BE AVAILABLE FOR PUBLIC DISCLOSURE¹⁹

Hughes requests that the Contract be treated as confidential for a period of at least 10 years. The commitment of the parties to the Contract to preserve the proprietary nature of the Contract is demonstrated by their perpetual obligation to maintain confidentiality of the proprietary information. Additionally, the design life of the spacecraft is in excess of 10 years. Therefore, Hughes' request for confidential treatment for a period of 10 years is reasonable.

9. OTHER INFORMATION THAT HUGHES BELIEVES MAY BE USEFUL IN ASSESSING WHETHER ITS REQUEST FOR CONFIDENTIALITY SHOULD BE GRANTED²⁰

The Commission has recognized that spacecraft construction agreements contain competitively sensitive information, and need to be protected.²¹ Consistent with this policy, the Commission has adhered to a policy of not authorizing the disclosure of confidential information on the mere chance that it might be helpful to a third party. Rather, the Commission insists on a

¹⁸ 47 C.F.R. § 0.459(b)(7).

¹⁹ 47 C.F.R. § 0.459(b)(8).

²⁰ 47 C.F.R. § 0.459(b)(9).

²¹ See, e.g., *GE American Communications*, DA 01-173 (released January 25, 2001).

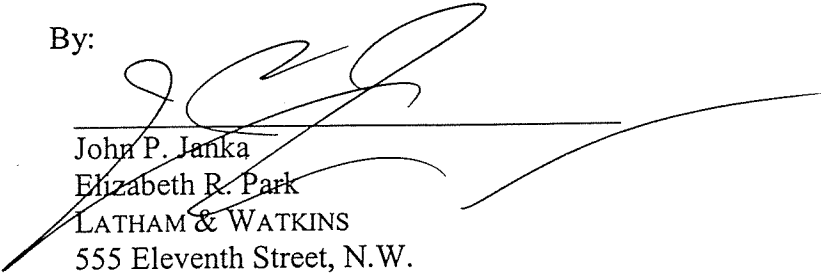
showing that the information is a *necessary link* in a chain of evidence that will resolve an issue before the Commission.²²

For these reasons, Hughes respectfully requests that the Commission withhold from public inspection, and accord confidential treatment to, the enclosed Contract.

Respectfully submitted,

Hughes Electronics Corporation
Hughes Communications Galaxy, Inc.
Hughes Network Systems, Inc.

By:



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²² *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, ¶8 (1998).