

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DUPLICATE

In the Matter of)	
)	
Hughes Communications Galaxy, Inc.)	File Nos. 3-DSS-P/LA-94; 4-DSS-P/LA-94; 174 through 179-SAT-P/LA-95
)	
Motorola, Inc.)	File Nos. 163 through 166-SAT-P/LA-95; 201-SAT-MISC-95
)	
PanAmSat Corporation)	File Nos. 180 through 181-SAT-P/LA-95
)	
Teledesic LLC)	File Nos. 22-DSS-P/LA-94; 43-SAT- AMEND-95; 127-SAT-AMEND-95; 195- SAT-ML-97
)	
VisionStar, Inc.)	File No. 200-SAT-P/LA-95
)	
WB Holdings 1 LLC)	File Nos. 128-SAT-P/LA-95; 203-SAT- P/LA-95
)	
Applications for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service)	

To: Chief, International Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**CONSOLIDATED REPLY TO
OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

Pegasus Development Corporation, Inc. ("Pegasus"), hereby submits its consolidated reply to the above-referenced Oppositions to Petitions for Reconsideration of the Commission's recent orders assigning additional spectrum to the above-referenced applicants from the first Ka-band processing round (jointly, the "Applicants").¹ The theme of Pegasus' petitions for

¹ See *Hughes Communications Galaxy, Inc.*, Order and Authorization, DA 01-226 (January 31, 2001) ("*Hughes ISL Order*"); *Motorola, Inc.*, Order and Authorization, DA 01-222 (January 31, 2001) ("*Motorola ISL Order*"); *PanAmSat Corporation*, Order and Authorization, DA 01-228 (January 31, 2001) ("*PanAmSat ISL Order*"); *Teledesic LLC*, Order and Authorization, DA 01-229 (January 31, 2001) ("*Teledesic ISL Order*"); *VisionStar, Inc.* Order and Authorization, DA 01-230 (January 31, 2001) ("*VisionStar Downlink Order*"); and *WB Holdings 1 LLC*, Order and Authorization, DA 01-231 (January 31, 2001) ("*Wildblue ISL Order*").

reconsideration was the clear peril to the public interest that will result from giving additional spectrum to so many entities that have exhibited so little willingness or ability to bring Ka-band satellites into use prior to the ever more imminent ITU deadlines. The Applicants' oppositions fail completely to respond to this concern.² Uniformly, the Applicants leave the record bare of any evidence that they are committed and able to bring their licensed satellites into use by the ITU deadlines.

Background

In the nearly four years since the Commission first licensed the Applicants, it has become increasingly apparent that few if any of the licensed satellites will actually be built and launched by the relevant ITU deadlines.³ Pegasus, as a second-round applicant that is not likely to be able to get the orbital assignments it needs as long as first-round licensees continue to warehouse orbital slots, filed petitions for reconsideration urging the Commission, rather than granting additional spectrum to this group, to closely examine the current willingness and ability of the first-round licensees to meet their deadlines. Pegasus provided a list of questions that would help facilitate this process.

² Pegasus was not served with an opposition by EchoStar Satellite Corporation ("EchoStar") and cannot locate any such opposition in the Commission's files. Therefore, this reply does not address EchoStar and Pegasus reserves its rights to reply to EchoStar, if necessary. See File Nos. 167-SAT- P/LA-95; 168-SAT-P/LA-95; 54-SAT-AMEND-96.

³ The ITU requires that the United States satellites licensed in the first round for Ka-band CONUS orbital locations be brought into use by deadlines as early as October 10, 2004 and no later than July 16, 2005. See, e.g., Hughes Communications Galaxy, Inc., Order and Authorization, DA 01-226, at ¶ 18, n. 38 (January 31, 2001)(citing ITU Radio Regulations S.11.44, as modified by Final Acts of the 2000 World RadioCommunications Conference, Istanbul, 2000)).

The Applicants' responses focus on procedural issues related to Pegasus' standing and to the timing of Pegasus' request. *See, e.g.*, Hughes Opposition at p. 3; PanAmSat Opposition at p. 2; Teledesic Opposition at p. 2. Not a single response contained any evidence that any of the Applicants will meet the ITU deadlines.

Discussion

The public interest issue here is the use of scarce resources to provide new services to the public. The Ka-band holds the promise of providing important, new, pro-competitive multichannel-video and data services to millions of Americans, particularly in rural areas. Those prospects, however, depend on the satellites being launched before the ITU deadlines, something that is plainly impossible for many, if not most, of the satellites the Commission has authorized. There is insufficient financing, construction, and launch capacity available to accommodate all the first-round Ka-band satellites the Commission has authorized. Under these circumstances, the Commission is shirking its spectrum management responsibilities if it does not undertake more careful examination of which applicants, if any, are truly prepared to bring their satellites into use in a timely fashion.

The Applicants' responses provide no comfort. Instead of making even a minimal effort to demonstrate their willingness and ability to timely launch even one of their 317 licensed satellites,⁴ the Applicants acted outraged that they should be required to account for their ability to meet their public trust. *See, e.g.*, Hughes Opposition at p. 6-7; Motorola Opposition at p. 2; Teledesic Opposition at p. 5. This response is typified by PanAmSat, which argued that it is under no obligation to do anything. Apparently, PanAmSat believes that if it permits its license

⁴ Teledesic was licensed for 288 NGSO satellites; the GSO licensees were licensed for the other 29 satellites.

to become null and void, it has done nothing wrong, even if its inaction prevents a new licensee from putting that orbital assignment to use. *See* PanAmSat Opposition at p. 4. It is time for the Commission to put an end to this arrogance and put all first-round licensees in clear jeopardy if they choose to warehouse their licenses.

The procedural arguments the Applicants raise are without merit. Pegasus's standing is clear as a second-round applicant whose ability to move forward is being blocked by the warehousing of first-round licenses. Moreover, Pegasus has been raising this issue for several years now. It has urged the Commission to accelerate the milestones for first-round licensees and require them to provide further evidence of their ability to timely launch their licensed satellites. *See, e.g.,* Petition for Expedited Action filed by Pegasus Development Corporation, CC Docket No. 92-297 (May 21, 1999).

In addition to the general discussion set forth above concerning the Applicants' failure to comply with mandated Commission requirements, Pegasus offers the following additional reply with respect to certain of these Applicants:

Hughes

Pegasus challenged Hughes' failure to alert the Commission that it was dropping Intersatellite links ("ISLs") from two of its satellites until after a Commission inquiry. Petition for Reconsideration at p. 5. Hughes' opposition fails to respond directly to the question of when Hughes made this decision and whether Hughes met its obligation, under Section 1.65 of the Commission's rules, to notify the Commission within 30 days of making such a decision.

Motorola

Pegasus cited evidence that Motorola effectively abandoned its plans for a Ka-band satellite system at least several months ago, and possibly as long ago as 1998. In a joint opposition with Teledesic LLC (“Teledesic”), which is trying to acquire the Motorola licenses, Motorola never explains when it decided to abandon its Ka-band plans. Motorola also fails to respond to the evidence that it decided some time ago that it would no longer need additional spectrum for ISLs.

VisionStar

Pegasus demonstrated, and VisionStar’s Opposition does not dispute the conclusion, that *if* VisionStar’s underlying Ka-band authorization is null and void for failure to meet the commencement milestone requirements of its Ka-band authorization, or revoked for trafficking and warehousing, the Commission must reconsider and rescind the Downlink Order. Pegasus has demonstrated, *inter alia*, that the VisionStar Ka-band authorization is null and void due to its failure to meet the commencement milestone. Nonetheless, VisionStar persistently (and without proof) claims that the Commission has already reviewed its milestone compliance and was “satisfied” with its compliance. *See* VisionStar Opposition at p. 3. As Pegasus noted in its reply in the transfer of control proceeding,⁵ VisionStar cannot cite any such ruling. VisionStar also fails to refute evidence that VisionStar’s principal, Shant Hovanian, is trafficking and warehousing its Ka-band authorization.

⁵ File No. SAT-T/C-20001215-00163.

Wildblue

Pegasus exposed a material and irreconcilable contradiction in two filings made by Wildblue to two government agencies. Wildblue knowingly availed itself of crucially important milestone deferrals by affirmatively misrepresenting material facts to the Commission. Specifically, Wildblue told the FCC that it required and intended to use ISLs at its two licensed orbital locations⁶ at a time when it had already chosen *not* to use ISLs. Wildblue does not deny this fact in its opposition. To the contrary, Wildblue's opposition effectively admits to the misrepresentation; but attempts to justify it by arguing, (i) that the FCC is to blame for taking so long to issue the ISL assignments; (ii) that Wildblue has been "diligent" and has "done nothing inconsistent with an intent to implement ISLs in the future," such that any false statements to the FCC are beside the point, and (iii) that Pegasus was not harmed by the misrepresentation and so has no standing to challenge Wildblue's deception. Wildblue Opposition at pp. 4 – 6. Artful dodging does not explain why Wildblue -- when *specifically* asked about its ISL plans by the FCC -- insisted that it would need a full 1 GHz at *both* orbital locations, at a time when it had already begun construction on a satellite that would *not* use ISLs.

As noted above, Wildblue itself does not deny that its January 2000 filing was intentionally misleading or even attempt to explain what else it could have intended to convey with its clear and direct statement that it still intended to deploy ISLs at both orbital slots. Wildblue had a clear and compelling motive to mislead the Commission: it wanted to delay the onset of milestones, and it could only do that by telling the FCC that it still intended to use ISL

⁶ See Letter from David G. O'Neil, iSky's counsel, to the Federal Communications Commission dated January 19, 2000 ("iSky Letter") (iSky is a former name of Wildblue. See *Wildblue ISL Order* at n. 4.).

spectrum when it had long since abandoned such plans. Wildblue knew its position with respect to milestones was particularly precarious: since it had only requested the “upper” 500 MHz of Ka GSO spectrum; absent ISLs, it had every technical specification it needed from the FCC on the day it was originally licensed in May, 1997.⁷ Wildblue did not meet the first milestone applied to non-ISL licensees -- execution of a non-contingent contract within one year of licensing -- and so was vulnerable to having its license declared null and void.

Wildblue’s alleged “diligence” is not exculpatory of a knowing misrepresentation.

Wildblue argues that it has been diligent in building one of its two satellites when it was under “no obligation to proceed with its system.” Wildblue Opposition at p. 5. This of course assumes that Wildblue was entitled to continue to rely on the milestone deferral when it had voluntarily (but secretly) foresworn the factual basis upon which the deferral was predicated. Pegasus maintains that this very question constitutes Wildblue’s motive for keeping its change of plans secret from the FCC. In any event, Wildblue’s progress in construction of just one of its two licensed satellites does not and cannot excuse its knowing misrepresentation. Whether Wildblue’s asserted diligence is sufficient to toll the milestones in the absence of ISLs is a matter for the Commission to decide, not one for Wildblue to resolve on its own and effectuate through prevarication.

Moreover, to the extent that Wildblue has taken steps to implement a scaled-back service in one slot, equal questions arise about its lack of commitment to its other licensed slot. Wildblue’s S-1 shows that it chose to allocate its capital to purchase of a Canadian payload rather than construction of a satellite for its second US licensed slot. Registration Statement on

⁷ *KaStar Satellite Communications Corp.*, Order and Authorization, 13 FCC Rcd 1366 (1997).

Form S-1, Wildblue Communications, Inc., October 6, 2000 (“Registration Statement”) at 42 . Under the circumstances, the Commission should immediately revoke the license for one of Wildblue’s slots and make it available to the second round

WildBlue’s Response attempts to alleviate this issue by stating that it does intend to deploy ISLs on its satellite at 73°W. See Wildblue Opposition at p. 5. In addition to being unsupported by an affidavit of someone likely to have actual knowledge of Wildblue’s satellite design, it begs the critical question of with what satellites will any Wildblue satellite at 73°W use its ISLs to communicate? ISLs in that slot would serve no purpose at all, since Wildblue’s other two payloads are simple, low-risk, bent pipe systems. Wildblue seems to be simply digging an even bigger hole for itself.

In order for Wildblue to remain licensed, the Commission must first conclude that Wildblue is fit to be a licensee. Assuming the Commission determines that Wildblue is fit, then it must further address the question of whether either or both of its licenses remain valid in spite of a failure to meet the non-ISL milestones. Finally, even if the FCC decides that one or both of Wildblue’s licenses should not be declared null and void immediately, it must then determine what milestones are appropriate.

The FCC is not to blame for Wildblue’s misrepresentation.

Wildblue’s opposition implies that the FCC is responsible for Wildblue’s misstatements, because it took so long to act on the ISL matter. Wildblue Opposition at p. 5. Wildblue did not abandon ISLs because of FCC delay, but rather, did so because ISLs serve no purpose in a last-mile, consumer-focused Internet access system. Wildblue’s own words establish as much: its S-1 disavows ISLs not because of FCC inaction, but explicitly because Wildblue concluded (and

assured prospective investors) that a bent pipe design was better suited for its purposes.

Registration Statement at 37.

Although Pegasus is not in a position to prove the precise date on which ISLs were abandoned, Wildblue appears to have abandoned its plans for ISLs as early as 1999, long before Wildblue made a contrary representation to the FCC. Yet, as Pegasus's petition for reconsideration shows, Wildblue's S-1 registration statement attests to its knowledge of and continued reliance on the ISL-related milestone deferral. Wildblue's January 2000 ISL affirmation with the FCC was not an accident or an oversight. Wildblue knew the risks it faced if it informed the FCC that it had chosen not to use ISLs, and it made a deliberate decision to mislead the FCC by presenting false statements and withholding key, material information.

Intentional, material misrepresentations are explicitly prohibited by the Commission:

"Section 1.17 prohibits the making of any misrepresentation or willful material omission in any application, pleading, or any other written submission to the Commission. Moreover, the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. The requirement for absolute truth and candor from those appearing before the Commission is fundamental because the Commission must rely heavily on the completeness and accuracy of the submissions made to it by applicants."

Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980); *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980). When such misrepresentations result in prohibited warehousing of spectrum, as is the case here, they directly prejudice Pegasus, other second round applicants, and the public.

Pegasus recognizes that its exposure of Wildblue's apparently intentional misrepresentation is a very serious matter, and could well serve as the basis of a determination that Wildblue is not fit to be a Commission licensee, which could of course require a forfeiture of

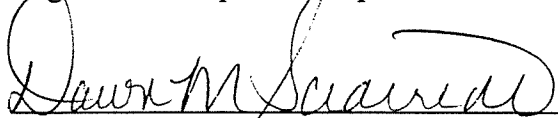
Wildblue's licenses.⁸ This would be a harsh penalty, but one that is a known risk factor when a licensee chooses to mislead the FCC on a material issue.⁹

Conclusion

Pegasus respectfully urges the Commission to review the ability of the Applicants to timely construct and operate their satellites and require that those unable to do so return their licenses for assignment to new entrants in the second round processing group.

Respectfully submitted,

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⁸ "We further note that any false or misleading submissions can have serious implications. Penalties for such conduct may include license revocation, forfeitures, and referral to the Department of Justice for violation of 18 U.S.C. Sec. 1001." *Quatron Communications, Inc.*, 15 FCC Rcd 4749 at ¶ 17 (February 28, 2000) (*footnotes omitted*).

⁹ Wildblue asserts that Pegasus has no cognizable interest in this misrepresentation and is bringing it to light only out of a sense of general frustration with the pace of Ka-band licensing. By whom or why such serious misrepresentation is brought to light is irrelevant. As noted above, the Commission's processes rely on the truthfulness of the statements of its licensees and applicants. Even so, there is a very direct nexus between Wildblue's actions and Pegasus' interests. Not only has Wildblue arrogantly used false representations to hold on to Ka-band licenses that should have long since lapsed pursuant to the appropriate milestones, its affiliate, KaStarComm, is seeking *additional* licenses in the second processing round. See File Nos. SAT-LOA-19980312-00018 and SAT-LOA-19980312-00019. Wildblue's insistence that it be allowed to claim additional CONUS slots using KaStarComm's applications for *international arc* slots is a key, and so far irreconcilable difference, in the main proposals before the Commission for resolution of the second round.

CERTIFICATE OF SERVICE

I, Dawn M. Sciarrino, a lawyer with the law firm of Shaw Pittman, hereby certify that copies of the foregoing "**CONSOLIDATED REPLY**" were served via U.S. mail on this 22nd day of March 2001 to the following:

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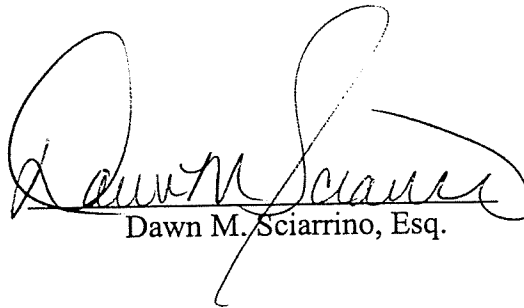
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