

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

RECEIVED

MAR 15 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Hughes Communications Galaxy, Inc.
Application for Authority to Construct, Launch,
and Operate a Ka-band Satellite System in the
Fixed-Satellite Service

-) File No. 3-DSS-P/LA-94
-) IBFS No. SAT-LOA-19931203-00040
-) File No. 4-DSS-P/LA-94
-) IBFS No. SAT-LOA-19931203-00041
-) File No. 174-SAT-P/LA-95
-) IBFS No. SAT-LOA-19950929-00125
-) File No. 175-SAT-P/LA-95
-) IBFS No. SAT-LOA-19950929-00126
-) File No. 176-SAT-P/LA-95
-) IBFS No. SAT-LOA-19950929-00127
-) File No. 177-SAT-P/LA-95
-) IBFS No. SAT-LOA-19950929-00128
-) File No. 178-SAT-P/LA-95
-) IBFS No. SAT-LOA-19950929-00129
-) File No. 179-SAT-P/LA-95
-) IBFS No. SAT-LOA-19950929-00137

OPPOSITION OF HUGHES COMMUNICATIONS GALAXY, INC.

Hughes Communications Galaxy, Inc. ("Hughes") hereby opposes the petition for reconsideration filed by Pegasus Development Corporation ("Pegasus") in this proceeding.

Pegasus seeks reconsideration of the Commission's January 31, 2001 Order in this proceeding (the "Order") in which the Commission (i) authorized Hughes to use the 18.3-18.8 GHz band for downlinks, (ii) authorized Hughes to use certain frequencies for inter-satellite links (ISLs), and (iii) adopted construction and launch milestones for the Spaceway system.

I. Introduction.

The Commission should summarily reject the Pegasus petition because (i) Pegasus did not previously participate in this proceeding, but could have done so; (ii) the petition

relies entirely on allegations that Pegasus could have raised, but did not raise, before the release of the Order; (iii) those new allegations are unsubstantiated by Pegasus and are based on mere speculation; and (iv) even if those allegations had a basis in fact, they provide no basis for the requested relief.

Pegasus does not challenge any decision that the Commission made in the Order. Rather, this petition and the seven other petitions for reconsideration that Pegasus has simultaneously filed against other first round Ka band licensees appear to be a “soapbox” on which Pegasus takes issue with the Commission’s general Ka band licensing and service rules and policies, and bemoans the speed with which the Commission acts on satellite applications.

In reality, this petition has nothing to do with the Spaceway license or any other first Ka band processing round issue. Rather, it is a quite desperate attempt by Pegasus to try to obtain leverage over other applicants in the second Ka band processing round. Pegasus may be frustrated with how long the second Ka band processing round has been pending. But there are appropriate procedural avenues for addressing that concern and attempting to resolve the second round. Hughes also is concerned with how long that processing round has taken. For that reason, Hughes and seven other second round GSO Ka band applicants have made compromises in their requested orbital locations. Those compromises have led to the comprehensive “Majority Plan” orbital location solution. That proposal submitted to the Commission in August 2000 provides a framework for resolving the second GSO Ka band processing round, and is supported by eight of the twelve second round applicants.

To the extent that the Pegasus petition argues for results that are inconsistent with the Ka band milestone rule and the reporting requirements for Ka band licensees established in

Part 25, its pleading is essentially an out-of-time petition for reconsideration of the 1997 Ka band service rules order that should summarily be dismissed.

At bottom, none of Pegasus' complaints provides a valid basis for either seeking reconsideration of the Order or attempting to further delay final resolution of the Spaceway application that Hughes first filed in 1993.

II. Pegasus' Petition is Fatally Flawed as a Procedural Matter.

There are two separate reasons why the Commission should dismiss the Pegasus petition on procedural grounds.

First, Pegasus did not previously participate in this proceeding. Under long-established Commission rules, Pegasus is obligated to demonstrate good reason why it was not possible for it to participate in the earlier stages of this proceeding.¹ Pegasus has failed to make such a showing, and provides no explanation for having failed to do so. The Commission has correctly observed that it cannot allow these types of untimely attacks:

Certainly, the Commission cannot allow a party in interest to wait until a decision is made before raising any objections he may have regarding a particular . . . application. No administrative regulatory agency could operate efficiently or accurately if it permitted such parties to wait until a decision is reached and then come forward with an offer of more evidence.²

Thus, Pegasus' petition is fatally flawed and should be dismissed.

Second, Pegasus does not challenge the Commission's application of law, or the Commission's findings of facts, in the Order. Specifically, Pegasus does not allege that the milestones imposed by the Commission in the Order are inconsistent with the requirements of

¹ 47 CFR § 1.106(b)(1).

Section 25.145(f), nor does it take issue with the ISL or 18 GHz frequency assignments made in the Order. Rather, Pegasus' petition requests relief based on unsubstantiated allegations that Pegasus failed to timely present to the Commission. Namely, Pegasus speculates that Hughes will not meet the relevant ITU deadlines. Under Commission rules, new "facts" may not be raised on reconsideration unless one of two circumstances exists:

(i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.³

Neither situation is the case here. Pegasus does not even attempt to explain that either set of circumstances exists, nor can it hope to successfully do so. Each of the matters cited by Pegasus in support of its petition---ITU deadlines, historic commercial manufacturing and launch statistics, and Hughes' January 19, 2000 response to the Commission on ISL matters---was a matter of public knowledge well before Pegasus filed its petition and well before the Order was released. Thus, the Commission should not countenance this untimely filing by Pegasus,⁴ and Pegasus is not entitled to try to cure these defects in its forthcoming reply to this opposition.⁵

² *Application of Quixote Broadcasting Co., Inc. For Renewal of License of Station KPUB, Pueblo, Colo.*, 32 FCC 2d 740 at ¶ 4 (1971) ("Quixote").

³ 47 CFR § 1.106(c)(1). The Commission also retains discretion to consider such matters where doing so is required in the public interest. 47 CFR § 1.106(c)(2).

⁴ *See Quixote*, 32 FCC 2d at ¶ 4.

⁵ 47 CFR § 1.106(f) (no supplement or addition to a petition for reconsideration generally permitted); *see Industrial Business Corp., Ogallala, Nebr.; Ogallala Broadcasting Co., Inc., Ogallala, Nebr., For Construction Permits*, 40 FCC 2d 69 at ¶ 4 (1973) ("A petitioner will not be permitted to attempt to cure an otherwise defective petition where information contained in its reply pleading was readily available and could have been included in the original petition to

III. Pegasus' Petition is Devoid of Substance.

As a matter of substance, the Pegasus petition is meritless as well. Pegasus' claims that Hughes is not proceeding with its licensed system are speculative and entirely unsupported as a factual matter. The types of bald assertions made by Pegasus would not successfully support a petition to deny.⁶ Nor should the Commission allow Pegasus to use them in a petition for reconsideration as a basis for a "fishing expedition" into the business plans of Hughes and Pegasus' other competitors.

In any event, Hughes has fulfilled its annual reporting obligations to the Commission with respect to the status of Spaceway, and those filings demonstrate the substantial progress Hughes has made, and the substantial sums that Hughes had expended, on the Spaceway program.⁷ Moreover, as reported in Hughes' last annual status report, Hughes has already met the first milestone for the Spaceway system by executing a construction and launch contract with Boeing Satellite Systems. The first two Spaceway spacecraft are currently scheduled for launch into 99° W.L. and 101° W.L. in late-2002 and mid-2003.

enlarge issue [sic]. To allow the reply to thus serve the purpose of the original petition would be to either (a) effectively render meaningless provisions in the rules for a fair opportunity by another party to respond to allegations or (b) compel the addition of supplementary pleadings not ordinarily contemplated by the rules.")

⁶ See 47 CFR § 25.154(a)(4) (requiring that allegations of fact in a petition to deny be supported by an affidavit of a person with personal knowledge).

⁷ See, e.g., Hughes Communications Galaxy, Inc., Annual Status Report to the Federal Communications Commission (June 30, 2000); Hughes Communications Galaxy, Inc., Annual Status Report to the Federal Communications Commission (June 30, 1999); Hughes Communications Galaxy, Inc., Annual Status Report to the Federal Communications Commission (June 30, 1998).

There is no basis at law for Pegasus' demand that the first round Ka band licensees "demonstrate" their commitment to deploy their licensed spacecraft by responding to a series of interrogatories prepared by Pegasus. Eleven months before Hughes' first license milestone even arises, Pegasus would demand that Hughes (as well as other first round licensees) evidence its continued *bona fides* by submitting information about a wide range of design review, internal and external funding, and construction and launch contract matters.

Current Commission rules and policies provide for two separate ways for the Commission to ensure that Ka band licensees deploy their systems in a timely manner. After conducting a rulemaking proceeding, the Commission has adopted a milestone approach as a way of measuring the progress of its Ka band satellite licensees, just as it has done for years at C band and Ku band.⁸ In addition, the Commission's rules require that licensees update the Commission on an annual basis about the construction and operation of their systems.⁹

Essentially, Pegasus advocates in its petition that the Commission should now adopt a different approach for monitoring the progress of Hughes and other Ka band licensees. But the time to have suggested changes to the Commission's current rules was during the pendency of the Ka band service rules proceeding,¹⁰ and the time for seeking reconsideration of the October 1997 service rules decision ended over three years ago.¹¹ The Commission should

⁸ 47 CFR § 25.145(f).

⁹ 47 CFR § 25.145(g).

¹⁰ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 22310 (1997).

¹¹ As a separate matter, the Commission should recognize that the information requested by Pegasus is confidential, proprietary, and very sensitive as a competitive matter.

recognize this petition for what it really is and dismiss Pegasus' belated attempt to seek reconsideration of the milestone and reporting requirements of Part 25.¹²

Finally, Pegasus also asks, if Hughes does not adequately make the demonstration about its "commitment" to Spaceway that Pegasus proposes, that the Commission consider whether Hughes acted inappropriately when Hughes informed the Commission, two and a half years after Spaceway was licensed and in the absence of a grant of Hughes' request for ISL spectrum that then was over four years old, that Hughes planned to eliminate ISLs from two Spaceway spacecraft in order to speed the launch of those spacecraft. As noted above, those two spacecraft are now scheduled for launch within the next two years, and, as the Commission is well aware, the ISL licensing decision for the rest of the Spaceway system was issued just six weeks ago. For the reasons set forth above, there is no valid basis for seeking the demonstration of "commitment" that Pegasus requests. Thus, this alternative relief is unwarranted as well.¹³

IV. Conclusion.

At bottom, Pegasus' petition does not challenge any decision that the Commission made in the Order. Rather, it is a thinly-veiled attack on the Commission's general Ka band rules and policies, and an untimely petition for reconsideration of the 1997 Ka band service rules

¹² See *Commercial Realty St. Pete, Inc. Applications for Licenses in the Interactive Video and Data Services*, 11 FCC Rcd 15374 at ¶ 7 (1996).

¹³ Hughes reported in a public document filed in January 2000 that the first Spaceway satellite at each of 99° W.L. and 101° W.L. would not be equipped with ISLs, but that the additional operating spacecraft at those locations still are planned to have ISLs. Hughes believes that it reported its changed ISL plans with respect to the first Spaceway spacecraft at each of 99° W.L. and 101° W.L. in an appropriate and timely manner. Hughes filed that information 14 months ago. If Pegasus really believed that Hughes had done something wrong in that 14-month-old filing, or if Pegasus deemed that information to be relevant for milestone purposes, it had an

decision. The Commission should summarily reject the Pegasus petition because (i) Pegasus did not previously participate in this proceeding, but could have done so; (ii) the petition relies on allegations that Pegasus could have raised, but did not raise, before the release of the Order; (iii) those new allegations are unsubstantiated by Pegasus and based on mere speculation; and (iv) even if those allegations had a basis in fact, they provide no basis for the requested relief. Moreover, Hughes is proceeding with the Spaceway system, and the first two Spaceway spacecraft are currently scheduled for launch into 99° W.L. and 101° W.L. in late-2002 and mid-2003.

Respectfully submitted,

HUGHES COMMUNICATIONS GALAXY, INC.

By: 

Gary M. Epstein
John P. Janka
Arthur S. Landerholm
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 637-2200


March 15, 2001

obligation to raise its concern to the Commission in a timely manner, and well before its March 2, 2001 petition.

AFFIDAVIT

I, Joslyn Read, Assistant Vice President of Hughes Network Systems, do hereby certify under penalty of perjury of the laws of the United States of America that I have read the forgoing Opposition, and that all of the factual statements contained therein are true and correct to the best of my knowledge, information and belief.

Executed this 15th day of March, 2001.



Joslyn Read

CERTIFICATE OF SERVICE

I hereby certify that I have this fifteenth day of March, 2001, caused a true copy of the foregoing "Opposition of Hughes Communications Galaxy, Inc." to be served by hand delivery on the following:

Bruce D. Jacobs
Michael J. Jacobs
Paul A. Cicelski
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

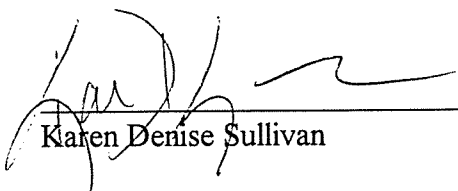
The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-B201
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-B201
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-C302
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-A302
Washington, D.C. 20554

Donald Abelson
Chief, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554



Karen Denise Sullivan