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

JUL 28 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

HUGHES NETWORK SYSTEMS, INC.

Response to Information Request
Regarding Ka-Band Implementation
Milestone

Info Bureau

AUG 04 2004

File Nos.:

3-4-DSS-P/LA-94;

174-, 176-, 177-, 179-SAT-P/LA-95

IBFS Nos. SAT-LOA-19931203-00040/41;

SAT-LOA-19950929-00125/27/28/37

Call Signs S2132, S2133, S2185, S2187,
S2188, S2190

Front Office

REQUEST FOR CONFIDENTIAL TREATMENT

Pursuant to Sections 0.457 and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457 and 0.459, The DIRECTV Group, Inc. and DIRECTV Enterprises, LLC (collectively, "DIRECTV") respectfully request that the Commission withhold from public inspection, and accord confidential treatment, to: (1) the enclosed Amendment No. 10 to HSCII Agreement (together with all exhibits, the "Amendment"), effective as of July 16, 2004, between DIRECTV and Boeing Satellite Systems International, Inc. ("Boeing"); and (2) those components of the enclosed Authorization to Proceed (together with all exhibits and amendments, the "ATP"), effective as of September 30, 2003, between DIRECTV and Space Systems/Loral, Inc. ("Loral") that have not previously been made public.

The Amendment relates to the Hughes Broadband Services Spaceway North America System HSCII Agreement, dated December 17, 1999, as amended (collectively with the Amendment and all previous amendments, the "Contract"). DIRECTV is the

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successor-in-interest to Hughes Network Systems, Inc., and has assumed its place as a party to this contract. DIRECTV's vendor under the Contract, Boeing, previously was known as Hughes Space and Communications Company. The ATP relates to the construction of a new hybrid satellite (DIRECTV 8) that will operate in both Direct Broadcast Satellite ("DBS") and Ka-band spectrum. Although the parties are in the process of negotiating an agreement to document further refinements in terms and specifications, the ATP represents a binding contract under which satellite construction is currently being performed.

By way of background, the Contract (including a number of amendments) previously has been submitted to the Commission in this proceeding and in another proceeding along with requests for confidentiality filed by DIRECTV's predecessors-in-interest.¹ The Contract provides for the design of a Ka-band satellite network, and the manufacture of three spacecraft, and was submitted to the Commission to demonstrate compliance with the initial milestones under DIRECTV's first and second round Ka-band satellite licenses.² In June 2002, the Commission determined that DIRECTV has met the

¹ Hughes Network Systems, Inc. Responses to Information Request Regarding Ka-Band Implementation Milestone, FCC File Nos. 3 - 4-SAT-P/LA-94, 174-, 176-, 177-, 179-SAT-P/LA-95, IBFS Nos. SAT-LOA-19931203-00040/41, SAT-LOA-19950929-00125/27/28/37, Call Signs S2132, S2133, S2185, S2187, S2188, S2190 (filed May 7, 2003 and August 19, 2003); Hughes Network Systems, Inc., Response to Information Request Regarding Ka-Band Implementation Milestone, File Nos., 45-48-SAT-P/LA-98, IBFS Nos. SAT-LOA-19971222-00201, 205, 207, 209, Call Signs S2338-2134 (filed Dec. 20, 2002) (submitted in connection with initial milestone in response to Letter from Fern J. Jarmulnek to John P. Janka, dated Dec. 12, 2002); Hughes Network Systems, Inc. Response to Information Request Regarding Ka-Band Implementation Milestone, FCC File Nos. 45-48-SAT-P/LA-98, IBFS Nos. SAT-LOA-19971222-00201-00207, Call Signs S2338-2341 (filed Sept. 23, 2002) (submitted in connection with initial milestone in response to Letter from Jennifer Gilsean to John P. Janka, dated Sept. 12, 2002); Hughes Communications Galaxy, Inc., IBFS Nos. SAT-LOA-19950929-00137 (filed Feb. 8, 2002) (submitted to demonstrate compliance with initial license milestone).

² See *Hughes Communications Galaxy, Inc.*, 13 FCC Rcd. 1351 (Int'l Bur. 1997), *modified*, 16 FCC Rcd 2470 (Int'l Bur. 2001), *further modified*, 16 FCC Rcd. 12627 (Int'l Bur. 2001) (the "First Round License"); *Hughes Communications Inc.*, 16 FCC Rcd. 14310 (2001) (the "Second Round License"). HNS has since tendered its Second Round License for cancellation.

initial milestone for its First Round License.³ Because DIRECTV has already provided the Contract to Commission staff in response to their requests, it is providing the Amendment out of an abundance of caution to ensure that the record is complete. Moreover, because the hybrid DIRECTV 8 satellite will operate at 101° W.L. (nominal), one of the slots originally slated for a Boeing spacecraft, the ATP is being provided as well.

The Contract (including the Amendment) and the ATP comprise sensitive trade secrets and commercial and financial information that squarely fall within Exemption 4 of the Freedom of Information Act,⁴ and that are inextricably intertwined with the other provisions of the Contract and ATP.⁵ Exemption 4 of the 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.”⁶ DIRECTV is voluntarily providing this trade secret, commercial and financial information, which is “of kind that would not customarily be released to the public” by DIRECTV, to supplement its response to a request from International Bureau staff. Therefore, this information is “confidential” under Exemption 4 of FOIA.⁷

³ See *International Bureau Satellite Division Information: First Round Ka-Band License Compliance with Construction Implementation Milestone*, 17 FCC Rcd. 11271 (2002).

⁴ 5 U.S.C. § 552(b)(4).

⁵ *Mead Data Cent. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

⁶ 5 U.S.C. § 552(b)(4).

⁷ See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

Moreover, DIRECTV would suffer substantial competitive harm if the Amendment or ATP were disclosed.⁸ The Spaceway system described in the Contract and the DIRECTV 8 satellite described in the ATP are intended to provide a variety of satellite services that will compete with other satellite systems, as well as with other terrestrial providers of similar services. Information contained in the Contract, the Amendment, or the ATP could be used by DIRECTV's competitors as the basis for (i) negotiating a Ka-band spacecraft construction contract, (ii) developing a competing satellite network, (iii) negotiating a hybrid DBS/Ka-band spacecraft construction contract, and/or (iv) designing competitive broadband or video service offerings (satellite or terrestrial).

In support of this request and pursuant to Section 0.459(b) of the Commission's rules,⁹ DIRECTV provides the following information.

1. IDENTIFICATION OF THE SPECIFIC INFORMATION FOR WHICH CONFIDENTIAL TREATMENT IS SOUGHT¹⁰

DIRECTV seeks confidential treatment of the Amendment and those portions of the ATP not previously disclosed to the public. For purposes of this request, the Amendment comprises the following documents:

1. Amendment No. 10 to HSCII Agreement between The DIRECTV Group, Inc. and Boeing Satellite Systems International, Inc., dated July 16, 2004; and
2. Spaceway Bypass and Band B Payload Internal Design Review, dated May 21, 2004.

⁸ See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir 1974).

⁹ 47 C.F.R. § 0.459(b).

¹⁰ 47 C.F.R. § 0.459(b)(1).

For purposes of this request, the ATP comprises the following documents:

1. Authorization to Proceed between Space Systems/Loral, Inc. and DIRECTV Operations, LLC for the "DIRECTV 8" Program, dated September 30, 2003;
2. Exhibit A: DIRECTV 8 Statement of Work, dated September 29, 2003;
3. Exhibit B: DIRECTV 8 Technical Summary, dated September 26, 2003;
4. Exhibit E: DIRECTV 8 – Quick Satellite Program Payment Plan, dated September 26, 2003;
5. Letter from Jack A. Shaw, President and Chief Executive Officer of Hughes Electronics Corporation, to Space Systems/Loral, Inc., dated October 10, 2003 ("Shaw Letter");
6. Exhibit A: DIRECTV 8 Statement of Work, Revision 2, dated March 15, 2004;
7. Exhibit B: DIRECTV 8 Satellite Performance Specification, Revision 2, dated March 3, 2004;
8. Exhibit D: DIRECTV 8 Spacecraft Test Plan, Revision 2, dated March 15, 2004; and
9. Amendment 1 to Authorization to Proceed: DIRECTV 8 Program Ka-band Payload Modification, dated June 11, 2004.

However, the first and fifth items on this list – the initial Authorization to Proceed without exhibits and the Shaw Letter – have previously been filed in the record of Loral's bankruptcy proceeding. Accordingly, DIRECTV does not seek confidential treatment with respect to these components of the ATP and is filing them in the public record. None of the other materials that comprise the ATP have previously been disclosed to the public.

2. DESCRIPTION OF CIRCUMSTANCES GIVING RISE TO THE SUBMISSION¹¹

The Amendment and the ATP have been provided to Commission Staff in this proceeding in response to their requests. They are being provided to the Commission out of an abundance of caution to ensure that the record is complete.¹²

3. EXPLANATION OF THE DEGREE TO WHICH THE INFORMATION IS COMMERCIAL OR FINANCIAL, OR CONTAINS A TRADE SECRET OR IS PRIVILEGED¹³

The information for which DIRECTV seeks confidential treatment contains sensitive commercial and financial information "which would customarily be guarded from competitors."¹⁴ Certain categories of confidential commercial and financial information appear throughout the Contract (including the Amendment) and the ATP, 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 Amendment and the ATP are not typical agreements for the purchase of "off the shelf" spacecraft. Rather, the Amendment relates to 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 construction of a satellite network with on-board processing and phased array antennas that will operate in the nascent Ka-band. Unlike

¹¹ 47 C.F.R. § 0.459(b)(2).

¹² The Commission has held 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 compliance with that milestone could be made by showing factually that a spacecraft is under construction. *See, e.g., Hughes Communications Galaxy, Inc.*, 5 FCC Rcd. 3423 (1990) (granting extension of launch milestone when it was apparent that applicant had actually begun construction).

¹³ 47 C.F.R. § 0.459(b)(3).

¹⁴ 47 C.F.R. § 0.457.

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 Amendment 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. Further, the Amendment documents the evolution of the network during the system design and construction process.

Similarly, the ATP relates to a complex hybrid satellite operating in bands that have never before been combined on a commercial single satellite. It involves a custom design in the nascent Ka-band that is the result of extensive negotiations and engineering work. Thus, like the Amendment, the ATP provides insight into the process of designing such a hybrid satellite, as well as the capabilities achieved.

This information is inextricably intertwined with the other provisions of the Contract and the ATP. Thus, the Contract and the ATP should be treated in their entirety as trade secrets.¹⁵ In the context of FOIA, a trade secret is defined as “a 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.”¹⁶

Moreover, neither the Contract nor the ATP would customarily be released to the public by DIRECTV or its vendors, Boeing and Loral, and therefore they are covered by

¹⁵ *Mead Data Cent. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

¹⁶ *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).

Exemption 4 of FOIA when, as here, they are submitted by DIRECTV to the Government.

4. EXPLANATION OF THE DEGREE TO WHICH THE INFORMATION CONCERNS A SERVICE THAT IS SUBJECT TO COMPETITION¹⁷

The Amendment concerns the design, development, and construction of a Ka-band system capable of providing a wide range of satellite services throughout North America. Similarly, the ATP concerns the design and construction of a hybrid DBS/Ka-band satellite capable of delivering direct-to-home video services as well as fixed-satellite services. These systems will provide DIRECTV the ability to compete with the video and broadband satellite services offered by other companies, as well as with terrestrial video and broadband offerings. Thus, the Amendment and the ATP concern services that are subject to competition. More specifically, DIRECTV is one of a number of current Commission licensees of potentially competitive Ka-band satellite systems and DBS systems.

5. EXPLANATION OF HOW DISCLOSURE OF THE INFORMATION COULD RESULT IN SUBSTANTIAL COMPETITIVE HARM¹⁸

Because the Amendment and the ATP outline the process of developing satellite systems, the information for which DIRECTV seeks confidential treatment could be used by its competitors as the basis for (i) negotiating a Ka-band spacecraft construction contract, (ii) developing a competing satellite network, (iii) negotiating a hybrid DBS/Ka-band spacecraft construction contract, and/or (iv) designing competitive broadband or video 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

¹⁷ 47 C.F.R. § 0.459(b)(4).

¹⁸ 47 C.F.R. § 0.459(b)(5).

design of the Spaceway system is by no means "standard." Moreover, the ATP relates to a hybrid satellite with a payload that combines frequency bands never before used on a single commercial platform. If DIRECTV's competitors obtained access to the information for which DIRECTV seeks confidential treatment, they would unfairly benefit from the time and resources that DIRECTV has expended. DIRECTV would be severely disadvantaged if its competitors were able to use DIRECTV's unique system design, if they were able to discern the process by which these satellite systems have developed, or if they were able to divine the detailed capabilities of the Spaceway network or the DIRECTV 8 spacecraft.

Further, DIRECTV's vendors, Boeing and Loral, would be injured by the disclosure of the Amendment or the ATP because they 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 Amendment or the ATP, they would have an unfair advantage over Boeing and Loral in negotiating their own agreements.

Moreover, disclosure of these contracts could adversely affect DIRECTV's 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 Amendment and the ATP in this case could harm DIRECTV in its future negotiations with vendors.

6. IDENTIFICATION OF ANY MEASURES TAKEN BY THE SUBMITTING PARTY TO PREVENT UNAUTHORIZED DISCLOSURE¹⁹

Both the Amendment and the ATP contain provisions requiring the parties to maintain confidentiality of proprietary information, which includes the terms of these agreements. 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 return or destroy such proprietary information, including all copies of such information in their possession.

Similarly, the ATP bears the following legend on the bottom of each page of the agreement, including Amendment 1 thereto:

This document contains data and information proprietary to Space Systems/Loral, Inc. and DIRECTV. This data shall not be disclosed, disseminated, or reproduced, in whole or in part, without the express prior written consent of Space Systems/Loral, Inc. and DIRECTV.

The Exhibits include nearly identical language noting the proprietary nature of the information contained therein and prohibiting its disclosure without prior authorization.

¹⁹ 47 C.F.R. § 0.459(b)(6).

7. IDENTIFICATION OF WHETHER THE INFORMATION IS AVAILABLE TO THE PUBLIC AND THE EXTENT OF ANY PREVIOUS DISCLOSURE OF THE INFORMATION TO THIRD PARTIES²⁰

As discussed above, the original Authorization to Proceed – without exhibits – and the Shaw Letter were filed in the Loral bankruptcy proceeding, and accordingly DIRECTV does not seek confidential treatment for those documents. However, at the time that Loral presented the Authorization to Proceed to the Bankruptcy Court, it explicitly declined to submit the exhibits to that agreement on the grounds that they contain “confidential and highly sensitive competitive information.”²¹ Thus, the remainder of the ATP and the entire Amendment submitted today have not previously been publicly disclosed, and DIRECTV is bound not to publicly disclose them by the terms of those agreements. Accordingly, DIRECTV 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 WHETHER THE INFORMATION IS AVAILABLE TO THE PUBLIC AND THE EXTENT OF ANY PREVIOUS DISCLOSURE OF THE INFORMATION TO THIRD PARTIES²²

As demonstrated above, DIRECTV and its contractors, Boeing and Loral, have a significant interest in maintaining the confidentiality of the propriety commercial and financial information contained in the Amendment and the ATP, and have taken steps to ensure such confidentiality. DIRECTV requests that the Amendment and the ATP (with

²⁰ 47 C.F.R. § 0.459(b)(7).

²¹ See Space Systems/Loral Inc.’s Motion Pursuant to Sections 363 and 365 of the Bankruptcy Code and Rule 6004 of the Federal Rules of Bankruptcy Procedure to (i) Authorize Entry Into Agreements to Commence Construction of DIRECTV 8 and DIRECTV 9S Satellites and (ii) Assume DIRECTV 7S Construction Contract, As Amended, U.S. Bankr. Court. S.D.N.Y., Case No. 03-41710, at p. 5 n.1 (filed Oct. 1, 2003).

²² 47 C.F.R. § 0.459(b)(8).

the exceptions noted herein) be treated as confidential for a period of at least 10 years.

The commitment of the parties to these contracts to preserve the proprietary nature of the documents 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, DIRECTV's request for confidential treatment for a period of 10 years is reasonable.

9. OTHER INFORMATION THAT DIRECTV BELIEVES MAY BE USEFUL IN ASSESSING WHETHER ITS REQUEST FOR CONFIDENTIALITY SHOULD BE GRANTED²³

The Commission has recognized that spacecraft construction agreements contain competitively sensitive information, and need to be protected from disclosure.²⁴

Consistent with this conclusion, 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 showing that the information is a *necessary link* in a chain of evidence that will resolve an issue before the Commission.²⁵

²³ 47 C.F.R. § 0.459(b)(9).

²⁴ See, e.g., *GE American Communications, Inc.*, 16 FCC Rcd. 6731 (Int'l Bur. 2001).

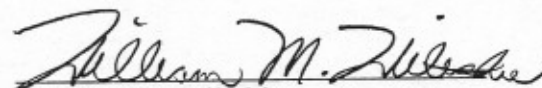
²⁵ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶8 (1998).

For these reasons, DIRECTV respectfully requests that the Commission withhold from public inspection, and accord confidential treatment to, both the Amendment and the ATP (with the exceptions noted herein).

Respectfully submitted,

**THE DIRECTV GROUP, INC. AND
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