



April 16, 2010

BY ELECTRONIC FILING

Mr. Robert Nelson
Chief, Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**RE: Hughes Network Systems, LLC, Letters of Intent for SPACEWAY 5 and 6,
Call Signs S2754 & S2755, File Nos. SAT-LOI-20091110-00120/121**

Dear Mr. Nelson:

Ciel Satellite Limited Partnership ("Ciel"), hereby responds to the *ex parte* letter submitted by Hughes Network Systems, LLC ("Hughes") concerning its above-referenced requests for authority to serve the U.S. using SPACEWAY 5 and SPACEWAY 6, United Kingdom-licensed Ka-band space stations to be located at 109.1° W.L. and 90.9° W.L., respectively (the "Hughes LOIs").

In its prior pleadings, Ciel explained that it has priority under the rules of the International Telecommunication Union ("ITU") for the Ka-band spectrum at these orbital locations pursuant to filings by the Canadian administration.¹ Ciel has not opposed grant of the Hughes LOIs, but has simply requested that any such grant reflect the conditions that are routinely imposed by the Commission when an applicant for U.S. market access lacks ITU priority.²

¹ See Comments of Ciel Satellite Limited Partnership, File Nos. SAT-LOI-20091110-00120/121, filed Feb. 16, 2010 ("Ciel Comments"); Reply Comments of Ciel Satellite Limited Partnership, File Nos. SAT-LOI-20091110-00120/121, filed Mar. 10, 2010 ("Ciel Reply Comments").

² Specifically, Ciel requested imposition of the following conditions with respect to any grant of the Hughes LOIs: (1) Communications between U.S. earth stations and SPACEWAY 5 and 6 shall be in compliance with the satellite coordination agreements reached between the United Kingdom and other Administrations. (2) In the absence of a coordination agreement with a satellite network with higher ITU priority, SPACEWAY 5 and 6 must cease service to the U.S. market immediately upon launch and operation of the higher ITU priority satellite, or be subject to further conditions designed to address potential harmful interference to a satellite with ITU date precedence. (3) In the

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Hughes continues to object to these conditions, which it views as “burdensome” and believes would “constrain Hughes arbitrarily” in connection with its LOI filings.³ Ciel is surprised by this reaction, because the conditions it requested are regularly applied by the Commission under the circumstances here.⁴ Furthermore, the conditions grow out of the nature of the ITU priority system and embody the obligations to which Hughes is subject under the ITU rules independent of any Commission action. Those rules require Hughes to immediately eliminate any harmful interference its operations cause to a network with higher ITU priority with which it has not reached a coordination agreement.⁵

Hughes, however, insists that ITU priority “has no bearing on the assignment of orbit/spectrum resources through the FCC’s first-come/first-served process.”⁶ Hughes accuses Ciel of failing to recognize that such resources “can be assigned to a licensee or reserved for the exclusive use of a letter of intent filer without regard to whether the filer has ‘ITU priority,’”⁷ claiming that an assignment of orbit spectrum resources, once made, “cannot be disturbed simply because another entity may have submitted an earlier ITU filing.”⁸ Finally, Hughes for the first time here suggests that its position is different from that of the applicants in the *Star One C5* and *Telstar 13* cases because Hughes has submitted letters of intent to seek U.S. market access instead of proceeding under the process for adding space stations to the permitted space station list.⁹ Ciel will respond to each of these arguments in turn.

absence of a coordination agreement with a satellite network with higher ITU priority, earth station licensees communicating with SPACEWAY 5 and 6 must terminate immediately any operations that cause harmful interference. Ciel also asked that the Commission require Hughes to inform its customers that its rights to serve the U.S. market are subject to these limitations.

³ Letter of Stephen D. Baruch and David S. Keir, counsel to Hughes Network Systems, LLC, to Mr. Robert Nelson, Chief, Satellite Division, International Bureau, Federal Communications Commission, File Nos. SAT-LOI-20091110-00120/121, filed Mar. 23, 2010 (“Hughes Letter”) at 1, 4.

⁴ The conditions Ciel seeks were imposed in two cases whose relevant facts are identical to those here: *Star One S.A., Petition for Declaratory Ruling to Add the Star One C5 Satellite at 68° W.L. to the Permitted Space Station List*, Order on Reconsideration, DA 08-1645, 23 FCC Rcd 10896 (Sat. Div. 2008) (“*Star One C5*”) and *Loral Spacecom Corp., Petition for Declaratory Ruling to Add Telstar 13 to the Permitted Space Station List*, Order, DA 03-2624, 18 FCC Rcd 16374 (Sat. Div. 2003) (“*Telstar 13*”).

⁵ See Ciel Reply at 6-7, citing ITU Radio Regulations No. 11.42 & 11.41.

⁶ Hughes Letter at 1.

⁷ *Id.* at 1-2, citing *Amendment of the Commission’s Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760 (2003) (“*First-Come, First-Served Order*”) at ¶ 295.

⁸ Hughes Letter at 2, citing *Pacific Century Group, Inc.*, 16 FCC Rcd 14356, 14361-62 & n.42 (2001) (“*Pacific Century*”).

⁹ Hughes Letter at 2.

Role of ITU Priority in First-Come, First Served Processing: Ciel has never suggested that lack of ITU priority is a bar to Commission licensing or grant of U.S. market access under the first-come, first-served processing framework. To the contrary, the *First-Come, First-Served Order* expressly contemplates the grant of authority absent ITU priority but *subject to conditions designed to ensure that ITU priority is respected*.

As Ciel has previously observed, the *First-Come, First-Served Order* states that the Commission will grant market access by a foreign network that lacks ITU priority “if the higher priority satellite has not been launched.”¹⁰ However, unless the lower priority network demonstrates that it has completed coordination, “the lower priority satellite would be required to cease service to the U.S. market immediately upon launch and operation of the higher priority satellite, or be subject to further conditions designed to address potential harmful interference to a satellite with ITU date precedence.”¹¹

The same principle applies in the case of grants of a U.S. space station license when the U.S. lacks priority.¹² In that context, the Commission has made clear that U.S. licenses are issued subject to the results of international coordination and do not guarantee the ability to operate if coordination with a satellite network with higher ITU priority cannot be completed.¹³

Thus, Hughes is incorrect in suggesting that ITU priority is irrelevant under the first-come, first-served framework to decisions regarding satellite licensing or market access. Under Commission precedent, lack of ITU priority, though it does not stand as an obstacle to grant of a license or market access, requires the imposition of conditions to

¹⁰ Ciel Comments at 3, *quoting First-Come, First-Served Order* at ¶ 296.

¹¹ *Id.*

¹² *First-Come, First-Served Order* at ¶ 295 (“ITU date priority does not preclude us from licensing the operator of a U.S.-licensed GSO satellite *on a temporary basis* pending launch and operation of a satellite with higher priority in cases where the non-U.S.-licensed satellite has not been launched yet. When we have authorized a U.S. licensee to operate at an orbit location at which another Administration has ITU priority, we have issued the license subject to the outcome of the international coordination process, and emphasized that the Commission is not responsible for the success or failure of the required international coordination.”) (emphasis added; footnotes omitted).

¹³ *Id.* at ¶ 96 (“U.S. licensees assigned to a particular orbit location in a first-come, first-served approach take their licenses subject to the outcome of the international coordination process. The Commission is not responsible for the outcome of any particular satellite coordination and does not guarantee the success or failure of the required international coordination. Moreover, we expect U.S. licensees to abide by international regulations when their systems are coordinated. This may mean that the U.S. licensee may not be able to operate its system if the coordination cannot be appropriately completed. Indeed, with the first-come, first served approach, we assign applicants to the orbit location that is requested. Consequently, the applicant assumed the coordination risk when choosing that particular orbit location at the time it submitted its application.”) (footnotes omitted).

ensure that the rights of networks with ITU priority are protected. The imposition of such conditions is the essence of Ciel's request.

Exclusivity of Licensing or Market Access Rights: The Hughes claim that spectrum and orbital resource rights granted to a Commission LOI applicant under the first-come, first-served framework bar a future grant of market access to a foreign network with ITU priority is similarly misplaced. Hughes argues that letters of intent are the same as applications for a Commission satellite license, and therefore confer exclusive spectrum rights. However, Commission precedent prior to the adoption of the first-come, first-served approach makes clear that Commission satellite licenses are granted subject to the outcome of international coordination pursuant to the ITU rules. The language from the *First-Come, First-Served Order* quoted above reaffirms that principle.

In 2001, the International Bureau awarded a Commission license to KaStarCom for Ka-band operations at 111.0° W.L.¹⁴ The Bureau specifically advised KaStarCom that its license was "subject to the outcome of the international coordination process, and that the Commission is not responsible for the success or failure of the required international coordination."¹⁵

After grant of the KaStarCom license, Telesat Canada sought authority to access the U.S. market using Ka-band frequencies from Anik F2 at 111.1° W.L. The International Bureau granted Telesat Canada's request notwithstanding the prior award of a license to KaStarCom.¹⁶ In addressing the spectrum availability factor of the Commission's test for foreign market access, the Bureau explained that:

Under the ITU's international Radio Regulations, any U.S. Ka-band satellite at 111.0° W.L. must be coordinated with Telesat's planned satellite at 111.1° W.L. Consequently, we conditioned KaStarCom's license on coordination with any non-U.S. satellite within two degrees of the KaStarCom satellite having filing date priority at the ITU. We also reminded KaStarCom that it takes its license subject to the outcome of the international coordination process, and that the Commission is not responsible for the success or failure of the required international coordination.

In light of the fact that Canada has ITU priority at this location, we find that granting Telesat access to the U.S. market in the Ka-band from the

¹⁴ *KaStarCom. World Satellite LLC*, 16 FCC Rcd 14322 (IB 2001) ("KaStarCom Order").

¹⁵ *Id.* at ¶ 25.

¹⁶ *Telesat Canada Petition for Declaratory Ruling For Inclusion of Anik F2 on the Permitted Space Station List and Petition for Declaratory Ruling to Serve the U.S. Market Using Ka-band Capacity on Anik F2*, 17 FCC Rcd 25287 (IB 2002) ("Anik F2 Order") at ¶¶ 25-26.

*111.1° W.L. location is consistent with the Commission's spectrum management policies.*¹⁷

The following year when the Commission adopted the rules implementing first-come, first-served processing of geostationary satellite applications, it expressly referenced this prior history. Specifically, the Commission cited the *KaStarCom* decision in support of its holding that licenses are granted subject to international coordination with no guarantee that such coordination will be successful.

Hughes cites the International Bureau's decision in *Pacific Century Group* in an attempt to bolster Hughes' claim that the Commission can deny market access based solely on the prior grant of authority for the relevant spectrum and orbital location.¹⁸ But *Pacific Century Group* involved the processing round framework for considering satellite applications and arose under facts very different from those here.

Specifically, Pacific Century submitted a letter of intent in response to a public notice establishing the second Ka-band processing round but sought orbital locations that conflicted with assignments to U.S. licensees in the first processing round.¹⁹ The International Bureau declined to award the locations requested, instead assigning the company locations that had not previously been awarded.²⁰ In its rationale, the International Bureau expressly noted that the first-round licenses for the locations sought by Pacific Century had been granted prior to the adoption of the *DISCO II* framework allowing foreign space stations to serve the U.S. market.²¹

Awarding Pacific Century alternate orbital slots, moreover, was consistent with the assumption of orbital location fungibility that the Commission applied when considering satellite applications in the context of processing rounds.²² The fungibility policy was terminated when the Commission abandoned processing round treatment of geostationary satellite applications in favor of first-come, first served satellite processing based on the assumption "that applicants are willing to be licensed for the orbital locations for which they apply, and that they will either take the location subject to any encumbrances such as ITU priority, and at their own risk, or will reject the license."²³

In short, Commission precedent makes clear that licenses or market access requests granted under the first-come, first-served approach do not confer exclusive rights that would block grant of a subsequent market access filing by a network with ITU priority.

¹⁷ *Id.* at ¶¶ 25-26 (emphasis added).

¹⁸ Hughes Letter at 2, citing *Pacific Century Group, Inc.*, 16 FCC Rcd 14356 (IB 2001) ("*Pacific Century Group*").

¹⁹ *Pacific Century Group*, 16 FCC Rcd at 14357-58, ¶ 6.

²⁰ *Id.* at 14362, ¶ 17.

²¹ *Id.*, citing *Amendment of the Commission's Policies to Allow Non-U.S. Licensed Space Stations providing Domestic and International Service in the United State*, 12 FCC Rcd 24094 (1997) ("*DISCO II*").

²² See *First-Come, First-Served Order* at ¶ 155.

²³ *Id.* at ¶ 158.

Instead, a satellite applicant without ITU priority assumes the risk that a failure to coordinate will require it to modify or terminate its operations.

Treatment of Letters of Intent: Finally, there is no basis for Hughes' suggestion that the Commission should depart from the precedent established in *Star One C5* and *Telstar 13* because Hughes has filed letters of intent rather than requests for inclusion on the Commission's permitted space station list. The distinctions Hughes attempts to draw between these two methods for gaining U.S. market access have no support in the Commission's case law or rules.

To the contrary, the discussion in the *First-Come, First-Served Order* of requests for market access by foreign-licensed satellites does not distinguish between the various methods for seeking such market access. The information requirements and substantive standards described therein apply to all forms of market access requests.²⁴

The Commission's treatment of letters of intent and requests for inclusion on the permitted list is the same with respect to every characteristic mentioned by Hughes. For example, Hughes points out that the grant of a Letter of Intent requires the grantee to comply with Commission system implementation milestones.²⁵ Yet Hughes ignores the fact that if an unlaunched satellite is added to the permitted space station list, the operator must also post a bond and comply with milestone requirements.²⁶

Hughes states that inclusion on the permitted list "requires only a determination that the subject satellite is licensed by a WTO-member administration and/or that it has otherwise been demonstrated that allowing access to the U.S. market will be consistent with the public interest based on analysis of 'the effect on competition in the U.S. market, spectrum availability, eligibility and operating (e.g., technical) requirements, and national security, law enforcement, foreign policy and trade concerns.'"²⁷ This, of course, is the same standard that applies to consideration of a letter of intent.²⁸

²⁴ *First-Come, First-Served Order* at ¶¶ 292-302.

²⁵ Hughes Letter at 2 n.2.

²⁶ See, e.g., *Star One S.A.*, Petition for Declaratory Ruling to Add Star One C5 to the Permitted List, File No. SAT-PPL-20071113-00159, Stamp Grant dated Feb. 7, 2008, Conditions of Permitted Space Station List Grant at ¶ 5 (requiring posting of bond and compliance with all implementation milestones).

²⁷ Hughes Letter at 2, quoting *Telesat Canada*, 22 FCC Rcd 588, 589 (¶ 2) (Sat. Div. 2007). Hughes highlights one factor of the market access test, suggesting that because of "the requirement that spectrum be available in the U.S. market," a petitioner can be denied U.S. market access even if it has ITU priority if there is a pre-existing authorization for the same frequency band and orbital location. Hughes Letter at 2. However, the *Anik F2* precedent discussed above makes clear that the grant of a prior authorization is not grounds for denial of market access to an applicant with ITU priority under the spectrum availability prong of *DISCO II*. See *Anik F2* at ¶¶ 25-26.

²⁸ See, e.g., *Pacific Century Group*, 16 FCC Rcd at 14358-59, ¶ 9.

Thus, the terms and conditions for seeking and being granted market access under the letter of intent and permitted space station list procedures are identical in all material respects. The Commission should therefore apply the precedent established in the *Star One C5* and *Telstar 13* decisions here. Specifically, the Commission should impose on Hughes the same conditions that were previously adopted in those proceedings.²⁹ As Ciel has previously explained, the fact that Ciel has not yet sought U.S. market access for the Ka-band spectrum at the orbital locations sought in the Hughes LOIs is irrelevant to the question of appropriate conditions on grant of the Hughes LOIs.³⁰ In both *Star One C5* and *Telstar 13*, the Commission imposed conditions to protect the ITU priority of another administration with ITU priority even when there was no request for U.S. market access by a licensee of that administration.

For the foregoing reasons and those expressed in its previous pleadings, Ciel respectfully requests that the conditions referenced above be included in any grant of the Hughes LOIs. Please direct any questions regarding this submission to the undersigned.

Respectfully submitted,

/s/ *Scott Gibson*

Scott Gibson
Vice President and General Counsel

cc: Stephen Duall, FCC
Steven Doiron, Hughes
Stephen Baruch & David Keir, Counsel to Hughes

²⁹ Hughes selectively quotes language from *Star One C5* to suggest that inclusion of the conditions Ciel requested “may be viewed as unnecessary.” Hughes Letter at 3, quoting *Star One C5*, 23 FCC Rcd at 10897, ¶ 5. Hughes omits the remainder of that passage, in which the Satellite Division concludes “that the public interest would be served by removing any uncertainty as to the applicability of Commission policy in this case.” *Id.*

³⁰ See Ciel Reply at 4-5.