

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In re: Applications of)
)
ViaSat, Inc.)
) File Nos. SES-MOD-20100714-00158
) SES-MOD-20100714-00159
For Modification of its Ka-Band Geostationary)
Space Station Authorizations for the 115.1° and)
77.3° West Longitude Orbital Locations to)
Waive or Extend the Satellite Implementation) Call Signs S2737 & S2747
Milestones)
)
To: Chief, Satellite Division,
International Bureau

COMMENTS OF HUGHES NETWORK SYSTEMS, LLC

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COMMENTS OF HUGHES NETWORK SYSTEMS, LLC

Hughes Network Systems, LLC (“Hughes”), by its attorneys and pursuant to Section 25.154 of the Commission’s Rules, hereby comments on the above-captioned modification applications through which ViaSat, Inc. (“ViaSat”) seeks to alter the implementation milestones that apply to its authorized satellites at the 115.1° West longitude (“115° W.L.”) and 77.3° West longitude (“77° W.L.”) orbital locations. Based on the information provided in ViaSat’s applications, Hughes does not believe that ViaSat has made a showing sufficient to justify a waiver of the implementation milestone schedule that applies to its 77° W.L. satellite. In fact, the intertwined modification proposals seem to be little more than a contrivance to preserve a license for which only preliminary progress has been made toward satellite implementation in the three years since its grant; therefore, grant of ViaSat’s requests would contravene important Commission satellite licensing policies.

I. Summary and Statement of Interest

Hughes is the largest satellite Internet access provider to the North American consumer market, providing satellite broadband connectivity to more than 530,000 consumer and small business subscribers through its HughesNet service, as well as many large enterprises and governmental entities. The facilities used to provide these services include satellite Earth station facilities, including multiple VSAT networks, in the C-band, Ku-band and Ka-band fixed-satellite service (“FSS”) and a space segment authorization for in-orbit Ka-band space station SPACEWAY 3 (Call Sign S2663) at the nominal 95° W.L. orbital location. Hughes also holds a Ka-band space segment reservation for the 107.1° W.L. orbital location (Call Sign S2753) and is the applicant for additional letter of intent reservations that will comprise its next generation Jupiter satellite program.¹

Given its interest in operation of Ka-band space segment and the inherent challenges that exist in conceiving and executing plans to implement new satellite technology, Hughes is sympathetic to licensees’ potential need to adjust their plans as changes in technology and the marketplace warrant. These considerations are especially salient when relatively new services are being implemented in frequency bands not previously used to provide commercial FSS service. However, based on the showing offered by ViaSat, it is far from clear that this is a circumstance where such latitude is warranted.

The key justification ViaSat offers for making the proposed switch in its satellite implementation milestones is a business decision that ViaSat made in early 2008 to pursue construction of a new satellite at the 115° W.L. orbital location before constructing the already-authorized 77° W.L. satellite. Despite having sought authority for the 115° W.L. satellite in

¹ See FCC File Nos. SAT-LOI-20091110-00120 and SAT-LOI-20091110-00121.

January 2008, ViaSat did not seek to realign its milestones between the two orbital locations until July 2010, just a few days before the Commencement of Physical Construction (“Physical Construction”) milestone date. Such milestone extensions, particularly those involving the initial stages of construction, are not typically granted absent events beyond the control of the licensee, or other extraordinary circumstances. Under the facts and circumstances offered here by ViaSat, there is no credible basis, either in precedent or the FCC’s rules, for the Bureau to waive or extend the Physical Construction milestone, as ViaSat requests.

II. The Facts Cited By ViaSat in its Modification Applications Do Not Support a Waiver of the Satellite Implementation Milestones for the 77° W.L. Orbital Location.

In its narrative accompanying both of its modification applications, ViaSat goes to great lengths to tout its technology as unique and highly advanced, and to wrap its plans and business objectives in the policy goals embraced by the National Broadband Plan. *See* ViaSat Application at 11-13 & 28-35. Even a cursory examination of the underlying facts in this situation, however, reveals that the grand policy claims and hortatory language seem intended to obscure ViaSat’s own delay in seeking the requested relief. ViaSat filed its request to exchange the milestone schedules for its authorized space stations at the 77° W.L. and 115° W.L orbital locations ***just four days before*** the passage of the Physical Construction milestone for the 77° W.L. orbital location.²

In seeking to justify what amounts to a lengthy extension of the timetable within which it would be required to launch its authorized 77° W.L. space station, ViaSat refers to a series of events that took place in 2007 and 2008, more than two years in advance of the milestone waiver extension sought on July 14, 2010. In particular, as ViaSat describes it, it was presented “in the

² *See ViaSat, Inc.*, Grant Stamp, FCC File No. SAT-LOA-20070314-00051, at 1 (Sat. Div., July 18, 2007); 47 C.F.R. § 25.164(a).

fall of 2007... with a proposal that would help ensure that ViaSat could fully finance the construction and launch of [its] first spacecraft.” ViaSat Application at 8. It further reports that its acceptance of this offer resulted in a decision “in January 2008 ... to deploy its first spacecraft at 115° W.L.,” and the signing of “a construction contract with an accelerated three-year, start-to-finish, delivery schedule.” ViaSat Application at 9. Contemporaneously with that signing, “ViaSat sought Commission authority to implement an additional spacecraft at 115° W.L.,” which was ultimately granted in August of 2009. *Id.*; see FCC File No. SAT-LOI-20080101-00006.³ Six months later, ViaSat sought a modification of its authority at 77° W.L. and “also signed a construction contract for the 77° W.L. satellite in accordance with its license milestone.” *Id.* Left unexplained, given the fact that all of these events were initiated by the time that ViaSat’s first contract milestone for 77° W.L. occurred, is why ViaSat did not at that time also request the relief that it ultimately waited until July 14, 2010 to seek.

The foregoing sequence of events, and ViaSat’s asserted justification for a waiver in these events from 2007-08, is made more perplexing by a statement made in connection with the milestone compliance submission made for the 77° W.L. satellite exactly one year in advance of the waiver request. In response to a request from FCC staff for additional information regarding ViaSat’s March 17, 2009 letter with respect to completion of Critical Design Review (“CDR”), the company submitted a heavily-redacted post-CDR contract amendment dated April 30, 2009. In its description of this amendment, ViaSat made plain that the contract amendment “does not impact ViaSat’s ability to comply with its license milestones.”⁴ Yet more than one year later, it

³ Alternatively, it would seem that ViaSat could have modified its existing 77° W.L. authorization to specify the 115° W.L. orbital location, and submitted a new application for the 77° W.L. slot.

⁴ Letter from John P. Janka and Elizabeth R. Park, Counsel to ViaSat, to Marlene H. Dortch, Secretary, FCC, dated July 14, 2009, Description of Amendment No. 1 to Contract.

is constrained to admit in its application that it “has not yet commenced physical construction of this spacecraft.” ViaSat Application at 16.

In short, ViaSat has determined for business reasons – legitimate reasons perhaps in and of themselves, but reasons that are nonetheless exclusively within ViaSat’s control – to accelerate by several years the deployment of its planned 115° W.L. satellite ahead of the previously-authorized 77° W.L. satellite. These core facts provide no justification for ViaSat’s current attempt to extend the milestones for its 77° W.L. space station, or for its failure until just prior to the expiration of the Physical Construction milestone to request an extension of that milestone.

III. Extension of the Commencement of Construction Milestone in These Circumstances Would Be Inconsistent with the FCC’s Rules, Policies and Applicable Precedents.

ViaSat raises numerous legal theories in an effort to support the relief it seeks, asserting broadly at one point that its “request and the unique circumstances described herein satisfy any legal standard that the Commission may apply to this request.” ViaSat Application at 25.

However, none of the legal arguments asserted provides adequate support for the unusual relief that ViaSat is seeking and, in fact, the Commission’s seminal milestone policies all require denial of the ViaSat proposals.

A. The Contemplated Exchange of Milestone Schedules for Two Satellites that Have Not Yet Been Completed Does Not Constitute Fleet Management.

In the first instance, ViaSat suggests that its proposed swap of the milestone schedules for its two licensed satellites is nothing more than an exercise in “fleet management,” *i.e.*, the rearrangement of satellites to address current customer and business needs. *See* ViaSat Application at 18-23. But this assertion does not hold up to scrutiny. From the beginning of its

consideration of satellite modifications to rearrange the deployment of satellites, the Commission has made plain that its policies and rules are merely intended to “allow satellite operators to rearrange satellites in their fleets among their assigned orbital locations to reflect business and customer considerations *where no other public interest factors are adversely affected.*”⁵ These circumstances typically involve satellites that are already in orbit or are nearing completion. While one of the satellites for which ViaSat seeks milestone modification is a work in progress that is apparently close to completion, construction has not even commenced on the other (77° W.L.) – the very circumstance necessitating a waiver of the rules. There is no “fleet,” and the requisite authorizations at the relevant orbital locations are already in place, such that no rearrangement of space stations is necessary.

In any event, as shown in Sections II.B & C below, myriad public interest and policy considerations would, in fact, be adversely affected by grant of ViaSat’s applications. Other reasons ViaSat advances as public interest support for its proposals, such as satisfaction of the ITU bringing into use date at the 77 W.L. orbital location, actually serve private purposes.⁶

B. Commission Precedent Does Not Support Waiving the Construction Commencement Milestone Under these Circumstances.

The public interest factor at the heart of any request to delay a satellite implementation milestone is the Commission’s policy against the warehousing of scarce orbit and spectrum

⁵ See *Amendment of the Commission’s Space Station Licensing Rules and Policies (First Report & Order)*, 18 FCC Rcd 12507, 12509-10 (¶ 7) (2003) (emphasis added) (codifying Section 25.118(e) of the FCC’s Rules); see also *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 15 FCC Rcd 23583, 23588 (¶ 11) (SRD 2000).

⁶ The Bureau has found that preserving ITU date priority is not a public interest factor that it will consider in evaluating applications. *EchoStar Satellite, LLC*, 20 FCC Rcd 9156, 9158 (Sat. Div. 2005); *VisionStar, Inc.*, 19 FCC Rcd 14820, 14824 (¶ 11) (IB 2004).

resources.⁷ Milestones are intended to promote this policy by ensuring that licensees provide service to the public in a timely manner. Under the First-Come, First-Served licensing approach established in the *Satellite Licensing Reform Order*, the intent is that licensees asking for and receiving valuable orbital resources will act in accordance with their milestone schedules to implement their proposals, bringing new satellite capacity to the marketplace within five years. If the Commission were to grant the requested relief in this instance, where no construction has occurred, it could be shelving a valuable orbital location for more than two years longer than the established five year development timetable, a result contrary to the FCC's milestone policy.⁸ During this entire period, no other satellite operator would be able to seek to serve the U.S. market from the unique 77° W.L. slot.⁹

For these prudential reasons, the Commission has been more receptive to offering licensees some flexibility with respect to later milestones, once a satellite is already under construction and the licensee has invested significant effort and money in bringing its planned

⁷ See, e.g., *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, 10827 (¶ 173) (2003) ("*Satellite Licensing Reform Order*").

⁸ See, e.g., *ATCONTACT Communications, LLC*, 25 FCC Rcd 7567, 7580-81 (¶ 38) (2010) (milestone extension "would allow [the licensee] to hold space station licenses for at least three additional years, with no assurance that it will ever be able to implement its plans ... this would undermine the Commission's milestone policy").

⁹ The 77° W.L. orbital location represents a unique development opportunity. The establishment of the First-Come, First-Served policy marked the abandonment of the prior policy holding that orbital slots were fungible. See *Satellite Licensing Reform Order*, 18 FCC Rcd at 10821-22 (¶ 158).

facility to fruition.¹⁰ In contrast, ViaSat is seeking waiver of the Physical Construction milestone, waiver of which appears to be unprecedented.¹¹

In support of its waiver/extension request, ViaSat nonetheless relies heavily on a 2003 case in which Loral SpaceCom Corporation (“Loral”) was granted authority both to modify the technical specifications of its Telstar 8 satellite and to extend significantly the completion and launch milestones for the satellite in order to allow it to be moved from its originally planned 77° W.L. orbital location and repurposed as a C-/Ku-/Ka-band hybrid at the 89° W.L. orbital location, where its in-orbit Telstar 4 satellite was already providing service in the C- and Ku-bands.¹² The new Ka-band portion of Telstar 8’s capacity relied on a portion of the Orion F7 Ka-band authorization at this orbital location, which Loral had acquired in its 1998 merger with Orion. In turn, upon launch of Telstar 8 at 89° W.L., Telstar 4 was to be redeployed at the 77° W.L. orbital location.

The *Loral Milestone Decision* is distinguishable from the present circumstances based on several significant factors, not the least of which is fact that Loral already had a satellite under construction to which it sought to add the Ka-band capacity that had become available to it in

¹⁰ See, e.g., *TerreStar Networks, Inc.*, 22 FCC Rcd 17698, 17700 (¶ 7) (Sat. Div. 2007) (“*TerreStar*”) (“TerreStar’s satellite is in the final stages of construction, is almost completely paid for, and is slated for launch pursuant to a launch services agreement under which substantial payments have also been made.”)

¹¹ ViaSat makes one ultimately half-hearted effort to assert that its request does not require any waiver or milestone extension at all. See ViaSat Application at 23. This view is unavailing as the Commission has made it clear that any request to change the milestone dates for an unconstructed satellite requires a request for milestone waiver or extension, as applicable. See *EchoStar Satellite Corporation*, 13 FCC Red. 8595, 8601 (¶ 10) (Int’l Bur. 1998).

¹² *Loral SpaceCom Corporation and Loral Space & Communications Corporation*, 18 FCC Rcd 6301 (IB 2003) (“*Loral Milestone Decision*”).

the Orion merger.¹³ When it acted on the waiver request, the International Bureau also noted that Loral had experienced “numerous unanticipated design problems during Telstar 8’s construction” related to integrating three payloads operating in different frequency bands into its design.¹⁴ Accordingly, it found that the extension request was “based on tangible, physical, construction-related concerns, and thus, grantable under our precedent.”¹⁵ In the present case, ViaSat has alleged no tangible or physical issues related to construction of its 77° W.L. spacecraft, and no satellite construction has occurred.

In fact, the aspect of the *Loral Milestone Decision* that is more relevant in this instance is the portion of that order that upheld a prior Bureau decision not to extend Loral’s construction completion and launch milestones with regard to four other Ka-band payloads originally licensed in May 1997 in the initial Ka-band processing group.¹⁶ In each case, Loral sought to extend the completion and launch milestones associated with its authorizations based on submission of a January 2000 modification application to add inter-satellite links (“ISLs”), which was filed nearly two years after it had contracted for construction, and just over two years before the completion milestone for those licenses. In the *Loral Milestone Decision*, the Bureau found that the business decision to pursue ISLs for its authorizations was “within Loral’s complete control” and did “not constitute good cause for extending milestone schedules.”¹⁷ The Bureau

¹³ Because another operator was assigned the 77° W.L. orbital location in the initial Ka-band processing round, Loral sought to make use of the Ka-band authority acquired in the Orion transaction to repurpose its work in progress at 77° W.L. as a new hybrid satellite at the 89° W.L. orbital location.

¹⁴ *Loral Milestone Decision*, 18 FCC Rcd at 6307 (¶ 9).

¹⁵ *Id.*

¹⁶ *Loral Milestone Decision*, 18 FCC Rcd at 6309-6313 (¶¶ 14-22), citing *Loral Space & Communications Corporation*, 16 FCC Rcd 11044 (IB 2001).

¹⁷ *Id.* at 6310 (¶ 17).

specifically noted that Loral requested ISLs “almost two years after it acquired the licenses subject to those milestones” and “failed to affirmatively pursue the use of ISLs ... at the earliest available opportunity” – once they had first been made available following WRC-97.¹⁸

Like Loral in the case of the authorizations declared null and void, ViaSat has waited two years or more after the relevant triggering events, which it now says necessitate exchanging the milestone schedules for its 115° W.L. and 77° W.L. authorizations, to seek FCC authority to make such a switch. As described above, there is no explanation provided addressing why it took ViaSat until four days before the expiration of the Physical Construction milestone to inform the FCC of new business priorities it had established at least two years earlier.¹⁹ ViaSat has failed to begin construction of the 77° W.L. satellite simply because it made the decision to change its business priorities more than two years ago and, as a result, it has determined not to commence construction of the satellite as required in its authorization.

C. Grant of the Requested Waiver Would Contravene the Commission’s Milestone Policies.

The Commission has often stated that it will deny a milestone extension request where, as in this case, “construction of the satellite either has not begun or is not continuing, raising

¹⁸ *Id.* at 6311 (¶ 18).

¹⁹ Other cases cited by Loral are equally unsupportive of a milestone extension here, as they deal with distinct situations involving integration of single-band authorizations into hybrid satellites *for use as replacement satellites* for existing single-band space stations. *See, e.g., GE American Communications, Inc.*, 7 FCC Rcd 5169 (CCB 1992) (extension of milestones for Satcom H-1 and modification to move satellite from 79° W.L. to 85° W.L. as replacement for existing satellite, along with *relinquishment of 79° W.L. orbital location*); *Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 3423, 3423-24 (¶¶ 2-4 & 11) (CCB 1990) (consolidation of two single-band authorizations into a hybrid satellite and extension of the milestones for C-band payload to align with Ku-band launch deadline where hybrid satellite construction had begun under Section 319(d) Waiver).

questions regarding the licensee's intention to proceed.”²⁰ Despite the fact that ViaSat acknowledges that it failed to begin physical construction of its satellite for the 77° W.L. location before that milestone expired on July 18, 2010, it nonetheless argues that the policy concerns underpinning this approach aren't relevant in its case. It contends that “[w]hile the Commission often has been reluctant to extend the first milestone under a license, in general it has been more flexible in granting relief on requests to extend interim or final milestones (as is the case here).” ViaSat Application at 27. But the cases that ViaSat cites all predate the establishment of the “interim” CDR and Physical Construction milestones. When the Commission added the CDR and Physical Construction milestones to the prior schedule, which had only three benchmarks,²¹ it did so as a means of strengthening these requirements.²² Yet even under the old standard, it was very rare for the FCC to extend a completion or launch milestone in the absence of significant tangible progress toward satellite construction. Moreover, there have been no instances since the adoption of the new milestone schedule where the FCC has extended the

²⁰ See, e.g., *GE American Communications, Inc.*, 16 FCC Rcd 11038, 11041 (¶ 10) (IB 2001).

²¹ Prior to the *Satellite Licensing Reform Order*, there were just three geostationary FSS implementation milestones -- commencement of construction (which was deemed satisfied by entering into a binding construction contract, the same as the current initial contract milestone), construction completion and launch & operation. See *Satellite Licensing Reform Order*, 18 FCC Rcd at 10827-28 (¶ 174) & n.407.

²² See *Amendment of the Commission's Space Station Licensing Rules and Policies (NPRM)*, 17 FCC Rcd 3847, 3883 (2002) (“By strengthening the milestone requirements, we hope to identify licensees that are not proceeding with the implementation of their systems in a timely manner more quickly than we can under our current procedures, so that their licenses can be cancelled and reassigned more expeditiously”).

completion or launch milestones in the absence of tangible construction, despite ViaSat's efforts to analogize its own circumstance to these cases.²³

In contrast to these cases, ViaSat's own words do not offer any assurance that it intends to proceed with the construction and launch of the planned 77° W.L. satellite. ViaSat describes its plans for 77° W.L. only in vague terms:

- “The first [satellite] **will be** launched into 115° W.L. by early 2011, and the second **can be** launched into 77° W.L. a few years later” (ViaSat Application at 10) (emphasis added);
- “ViaSat has raised capital that **may be** used toward the construction and launch of its first two satellites” (ViaSat Application at 15) (emphasis added);
- “ViaSat has procured launch services that **can be** used for a launch of this satellite before December 2014”²⁴ (ViaSat Application at 15) (emphasis added);
- “ViaSat's second satellite **can be** launched prior to the date the Commission expected service to commence at 115° W.L.” (ViaSat Application at 23) (emphasis added).

While ViaSat also cites to significant efforts and sums of money already expended for its “second satellite,” it does not make any effort to quantify these efforts or expenditures or to distinguish them from the general programmatic progress toward implementing a satellite at 115° W.L. Moreover, articulating a plausible future need for the capacity that the space station would provide is not the same as evidencing a clear intent to construct. And in any case, ViaSat's efforts clearly do not rise to the level of effort and investment found in either the

²³ See *TerreStar*, 22 FCC Rcd at 17700 (¶ 17), footnote 7, *supra*; *ICO Satellite Services, G.P.*, 20 FCC Rcd 9797, 9803 (¶ 25) (2005) (“*ICO*”) (extension of launch and operational milestones for a single GSO satellite based on work in progress and prior milestone compliance, “including completing construction of two [NGSO] satellites and launching them, within the time periods originally prescribed”).

²⁴ December 2014 is four months after the expiration of the current launch milestone for the 115° W.L. satellite (and six months after the ITU bringing into use date cited by ViaSat).

TerreStar or *ICO* cases, the only milestone extensions that have been granted under the current, post-*Satellite Licensing Reform Order* rules.²⁵

IV. Conclusion

For all of the foregoing reasons, Hughes urges the Commission to weigh carefully the showing provided by ViaSat against its established policies and precedents before taking action on ViaSat's milestone waiver/extension request. If the Commission does not find that ViaSat's eleventh hour request to alter its milestone deadlines is consistent with these policies and the public interest, then it should deny the request and declare that the 77° W.L. authorization became null and void upon expiration of the Physical Construction milestone.

Respectfully submitted,

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²⁵ Though ViaSat strives to distinguish its own circumstance from the FCC's most recent milestone enforcement case, in which ATCONTACT Communications, LLC's Ka-band authorization was declared null and void (*see* ViaSat Application at 29 n.69), the principal difference between the two companies is that ATCONTACT attempted to make a showing that it had complied with the Physical Construction milestone, whereas ViaSat has chosen to seek an extension of the 77° W.L. milestones instead. *See ATCONTACT Communications, LLC*, 25 FCC Rcd 7567 (2010). Like ViaSat, ATCONTACT had met its first two implementation milestones. *Id.* at 7569-70 (¶ 4).

CERTIFICATE OF SERVICE

I, Sharon Krantzman, hereby certify that a true and correct copy of Hughes Network Systems, LLC's foregoing Comments, Inc. was sent by first-class, postage prepaid mail this 25th day of October, 2010, to the following:

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