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April 16, 2009

BY HAND DELIVERY

Anthony Dale
Managing Director
Office of Managing Director
Federal Communications Commission
445 12th Street, SW, Room 1-A836
Washington, DC 20554

Re: FREEDOM OF INFORMATION ACT REQUEST

Call Sign E080100: Applications of Row 44, Inc. for Authority to Operate up to 1,000 Technically-Identical Aeronautical-Mobile Satellite Service Transmit/Receive Earth Stations Aboard Commercial and Private Aircraft, FCC File Nos. SES-LIC-20080508-00570; SES-AMD-20080619-00826; SES-AMD-20080819-01074; SES-AMD-20080829-01117; SES-AMD-20090115-00041 and

Special Temporary Authority, FCC File No. SES-STA-20080711-00928.

Dear Mr. Dale:

ViaSat, Inc. ("ViaSat"), pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, and the Commission's implementing regulations thereunder, 47 C.F.R. § 0.461, *et seq.*, requests inspection of a *non-redacted* version of the detailed report on ground-based testing (the "Report") filed by Row 44, Inc. ("Row 44") pursuant to the *Order and Authorization* adopted by the International Bureau on March 13, 2009 in the above-referenced proceeding. ViaSat believes the Report is in the custody of the Satellite Division. An original and two copies of this letter are enclosed.

As detailed below, expedited disclosure is needed to ensure that ViaSat has a meaningful opportunity to review the Report in connection with any request by Row 44 to renew its existing STA in early May 2009.

ViaSat is currently reviewing the proposed form of protective order filed by Row 44 along with its request for confidential treatment. While ViaSat may be amenable to review of the Report pursuant to a protective order in some form, upon initial review, and in light of the unique circumstances presented by the information at issue here, it is clear that the form of protective order proposed by Row 44 would be unacceptable without certain critical changes. ViaSat urges the Commission to review the instant request on an expedited basis so as not to

prejudice ViaSat's rights while ViaSat attempts to negotiate an acceptable protective order with Row 44.

In the *Order and Authorization*, the Bureau noted numerous occasions on which ViaSat has questioned the ability of Row 44's proposed AMSS system to operate in a manner consistent with a two-degree spacing environment, and without causing harmful interference into adjacent operations. *Order and Authorization* at ¶ 5 n.5. The Bureau also noted ViaSat's contention that Row 44 had not disclosed relevant data from ground-based testing, and therefore should not be allowed to conduct in-flight testing without placing those data on the record. *Id.* at ¶ 5. Accordingly, the Bureau required Row 44 to submit the Report, containing any ground-based testing data collected pursuant to previous STA, within 30 days of the release of the Order, or by April 13, 2009. *Id.* at ¶ 7(e). The Order thus indicates that these data, in addition to in-flight data gathered pursuant to STA granted in the Order, would be used to "facilitat[e] assessment and resolution of concerns regarding interference that might result from full-scale operation as proposed in Row 44's underlying license application." *See id.* at ¶ 6.

The Report contains data that are essential to a full analysis of whether Row 44's proposed system would be capable of operating in a manner consistent with a two-degree spacing environment, and without causing harmful interference into adjacent operations. In particular, the Report contains critical information regarding the ability of Row 44's proposed system to comply with the antenna pointing requirements set forth in Sections 25.222(a)(6) and (7) of the Commission's rules. 47 C.F.R. §§ 25.222(a)(6) and (7). ViaSat requests access to the Report in order to have a meaningful opportunity to review these data, which, if properly submitted, would represent Row 44's first meaningful attempt to validate its antenna pointing claims with operational data.

As the most active commenter in this proceeding, ViaSat has a vested interest in reviewing the Report and evaluating the nature and integrity of Row 44's assertions. ViaSat's previous filings have identified material deficiencies in Row 44's submissions, some of which Row 44 itself has recognized (e.g., Row 44's failure to supply full elevation patterns in its initial application). Accordingly, ViaSat's review of the Report would serve the public interest and facilitate the Commission's efforts to evaluate the data contained therein.

Row 44 has requested confidential treatment of the Report pursuant to 47 C.F.R. §§ 0.457 and 0.459, asserting that the Report contains "trade secrets and commercial or financial information" that "would not customarily be released to the public." However, Row 44 fails to substantiate this claim. In fact, as described by Row 44 the Report contains data with respect to the *performance* of Row 44's proposed system and the *methodology* used to measure that performance. Those data, like antenna patterns, are non-proprietary in nature, and would not allow ViaSat or any other competitor to reverse-engineer Row 44's system design or gain anticompetitive insight into Row 44's business plans or procedures. Rather, those data are precisely the type of data that the Commission requires applicants to file with their initial applications, and which should have been submitted by Row 44 as part of its initial application. Those data are necessary to validate Row 44's performance claims, and while Row 44 might wish to "protect" the fact that its system is incapable of performing to the specifications claimed

in Row 44's application – which is hardly a “secret” in light of ViaSat's previous filings – that desire is not a valid basis for requesting confidential treatment.

Moreover, Row 44 claims that it already has submitted, for the record, information with respect to the ground-based performance of its proposed system – including with respect to pointing accuracy and interference potential. *See, e.g.*, Letter from David S. Keir, Counsel for Row 44, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 26, 2009) (claiming that ground-based testing data was submitted as part of Row 44's initial application and subsequent amendments). While ViaSat disputes this contention, it is worth noting that Row 44 has never sought confidential treatment of any data previously submitted. Row 44 cannot now request confidential treatment while maintaining that similar data are already in the public domain and tacitly conceding that such data do not merit confidential treatment; the public nature of such prior Row 44 filings undermines Row 44's claim that disclosure of the Report could result in substantial competitive harm.

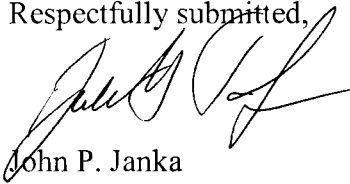
Further, the Bureau required Row 44 to submit the Report after acknowledging ViaSat's contention that Row 44's failure to submit ground-based testing data had frustrated the evaluation of Row 44's performance claims by the Commission and the public. This strongly suggests that the reporting requirement is designed to facilitate the review of Row 44's performance claims by parties such as ViaSat. Row 44's request for confidential treatment directly undermines the intent of that requirement by seeking to deny the public access to those data, and as such should be denied. Particularly given the non-proprietary nature of the Report, the obvious reason for Row 44's request is to shield the data included in that report from scrutiny.

The foregoing constitutes a “persuasive showing” of the reasons for inspection of the Report, notwithstanding Row 44's request for confidential treatment. *See* 47 C.F.R. § 0.457(d)(2). Pursuant to 47 C.F.R. § 0.461(b)(2), ViaSat agrees to pay the cost of producing these documents, without further notification from the Commission, as long as the cost does not exceed \$2,000.00. Please notify ViaSat if the cost exceeds that amount, so that ViaSat may have the opportunity to consent to the payment of further production costs, as appropriate.

ViaSat respectfully requests that the Commission produce the Report as quickly as possible, and in any event within 20 days as indicated in 47 C.F.R. § 0.461(g). The expedited disclosure of the Report would facilitate the resolution of the outstanding issues in this proceeding, which would inure to the benefit of all parties. Further, expedited disclosure would ensure that ViaSat is able to review the Report before commenting on any request by Row 44 to renew its existing STA, which Row 44 would need to file in early May 2009, before the expiration of its current authority.

Please contact the undersigned at (202) 637-2200 should you have any questions.

Respectfully submitted,



John P. Janka
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cc: FOIA Requester Service Center
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