

LATHAM & WATKINS^{LLP}

FIRM / AFFILIATE OFFICES

Abu Dhabi	Munich
Barcelona	New Jersey
Brussels	New York
Chicago	Orange County
Doha	Paris
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
London	Silicon Valley
Los Angeles	Singapore
Madrid	Tokyo
Milan	Washington, D.C.
Moscow	

May 7, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: 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; SES-AMD-20090416-00501 and
Special Temporary Authority, FCC File Nos. SES-STA-20080711-00928; SES-
STA-20090417-00507.

Ex Parte Presentation

Dear Ms. Dortch:

ViaSat, Inc. ("ViaSat") hereby responds to the request for special temporary authority ("STA") submitted by Row 44, Inc. ("Row 44") on April 17, 2009, which seeks extension of STA granted to Row 44 on March 13, 2009 and authorizing Row 44 to conduct "limited mobility testing" of its proposed aeronautical-mobile satellite service ("AMSS") system. As explained below, further testing authority is not warranted because:

- (i) Row 44 has had ample time to test its proposed AMSS system, and has indicated that it will be in a position to submit a "final report" concerning testing prior to the expiration of its existing STA on May 12, 2009, but has not submitted that final report;
- (ii) The purpose of the existing STA is to allow the development and submission of data needed to resolve critical technical issues that are disputed in these proceedings, but Row 44 has failed to submit on the public record any data gleaned either from the ground-based testing of its proposed system or from in-flight testing under its current STA, and limited data that have been filed under seal still are not available for review and comment by interested parties; and
- (iii) There is no justification for extending STA to allow the continuation of the unauthorized marketing trials that apparently are being conducted by Row 44,

since Row 44's existing STA confers no authority to conduct such trials, and there is no indication that Row 44 either intends or needs to gather technical data in connection with such trials.

The unavailability of technical data is of critical importance. As ViaSat has explained before, Row 44 simply has not substantiated its claims that its proposed system would operate in a manner consistent with a two-degree operating environment, and without causing harmful interference into adjacent systems.¹ In particular, ViaSat has detailed Row 44's failure to establish its ability to comply with the pointing accuracy requirements set forth in Sections 25.222(a)(6) and 25.222(a)(7) of the Commission's rules.² In contrast, ViaSat has submitted an interference analysis demonstrating (i) that Row 44's proposed system would pose a substantial and unacceptable threat of harmful interference, even if mispointed by less than the 0.5 degree shut-down limit specified in Section 25.222(a)(7) of the Commission's rules and (ii) that mispointing in excess of the 0.5 degree shut-down limit would pose an even greater threat of harmful interference.³ ViaSat is entitled to review and comment on any technical data that Row 44 submits in an effort to address the technical deficiencies in its applications. The ground-based testing data that Row 44 recently submitted, however, are not publicly available, and have not otherwise been made available to ViaSat. As the party that has raised the technical issues leading to the submission of these data, ViaSat has a vital interest in reviewing any technical data Row 44 has filed or may file before the Commission makes any decisions based on the data that Row 44 provides as required under the terms of the STA.

Row 44 Has Had Ample Time to Test its Proposed AMSS System under Existing STA

Because Row 44 has had ample time to conduct in-flight testing of its proposed AMSS system, no extension of Row 44's STA is warranted. Row 44 sought STA "to conduct limited mobility testing" by observing its proposed AMSS system under actual flight conditions,⁴ and the Commission granted STA 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."⁵ As of the expiration of the STA, Row 44 will have had 60 days

¹ The *Order and Authorization* granting Row 44's existing STA noted numerous occasions on which ViaSat has identified deficiencies and inconsistencies in Row 44's applications. *Row 44, Inc.; Application for Special Temporary Authority for mobility testing of aircraft earth stations*, Order and Authorization, DA 09-585, at ¶ 5 n.5 (Mar. 13, 2009) ("*Order and Authorization*").

² 47 C.F.R. §§ 25.222(a)(6) and 25.222(a)(7).

³ See Letter from John P. Janka, Counsel for ViaSat, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, FCC File No. SES-LIC-20080508-00570 (Dec. 8, 2008).

⁴ See Explanatory Statement, FCC File Nos. SES-STA-20080711-00928 (Jul. 11, 2008).

⁵ *Order and Authorization* at ¶ 6.

to gather operational data pursuant to STA,⁶ which is more than sufficient to allow Row 44 to gather the needed test data.

Notably, the *Order and Authorization* specifically provides that the Commission's grant of STA is "not one relating to an 'activity of a continuing nature' for purposes of 47 C.F.R. § 1.62 and 5 U.S.C. § 558(c)."⁷ The inclusion of this provision – which precludes the automatic extension of Row 44's STA pending resolution of its STA request – strongly suggests that the Commission viewed its grant of STA to Row 44 as a one-time event. This expectation appears to have been well-founded, as Row 44 anticipates submitting its "final report" on in-flight testing "in advance of the expiration of the current STA on May 12[.]"⁸ Since Row 44 itself expects to have the data it needs to draw reasonable conclusions about its operations by the expiration of the existing STA, there is simply no need for the Commission to authorize further testing by continuing Row 44's STA.

No Further Authority Should Be Granted to Row 44 Until the Commission and the Public Have Had an Opportunity to Review Existing Testing Data

ViaSat has stressed, repeatedly, that Row 44 had not submitted data from ground-based testing to support its claims that its proposed system would operate in a manner consistent with a two-degree operating environment, and without causing harmful interference into adjacent systems. The *Order and Authorization* directed Row 44 to submit within 30 days a report summarizing its ground-based testing data.⁹ This timetable appears to have been designed to allow interested parties to review and comment on the results of ground-based testing *prior* to the grant of any additional STA to Row 44. Such an approach makes sense, because the report should have contained data relevant to the ability of Row 44's proposed system to comply with the Commission's antenna pointing requirements and otherwise to operate on a non-harmful interference basis in a two-degree spacing environment.

While Row 44 claims to have submitted a report satisfying this reporting requirement, Row 44 has submitted its report pursuant to an overly-broad request for confidential treatment.¹⁰ Row 44 has incorrectly claimed that the data in the report are proprietary, and in any event has not provided a redacted, "public" copy of the report as required by the

⁶ Moreover, Row 44 operated for several months prior to the grant of STA without any authority whatsoever, and should have data on hand from such operations.

⁷ *Order and Authorization* at ¶ 8.

⁸ See Explanatory Statement, FCC File Nos. SES-STA-20090417-00507 (Apr. 17, 2009).

⁹ *Order and Authorization* at ¶ 7(e).

¹⁰ See *Letter from David S. Keir, Counsel for Row 44 Inc., to Robert G. Nelson, Chief, Satellite Division, International Bureau, Federal Communications Commission*, FCC File No. SES-LIC-20080508-00571 (Apr. 13, 2009).

Commission's rules.¹¹ Rather, Row 44 apparently is treating the entire report as confidential, even though portions of the report (*e.g.*, cover page, table of contents, certain substantive portions) undoubtedly could be disclosed to the public without causing any threat of competitive harm whatsoever to Row 44. As a result, neither ViaSat nor any other party that has opposed Row 44's applications has had an opportunity to review the report, or even to gauge whether the report is likely to validate Row 44's claims. This state of affairs persists, even though ViaSat submitted a FOIA request for access to the report just three days after Row 44 filed the report, and ViaSat and Row 44 jointly submitted a request to adopt a proposed protective order just one week later (both of which remain pending).

As ViaSat has consistently maintained, a careful review of (i) ground-based testing data and (ii) Row 44's actual in-flight data is necessary *before* Row 44 is authorized to conduct further in-flight testing or otherwise operate its system. Simply put, Row 44 has failed to submit, in a manner that can be reviewed by all interested parties, data gleaned from previous ground-based testing of its proposed system, and has not submitted any data from in-flight operations. Given the outstanding technical issues in this proceeding, Row 44's failure to submit critical data, and the absence of any opportunity for ViaSat and other interested parties to review such data, authorizing further in-flight operations would not be justified.

The Unauthorized Commercial Trials Conducted by Row 44, Which Serve No Technical Function, Provide No Basis for Extending STA

Row 44 suggests that the extension of its existing STA is necessary to "permit Row 44's airline customers to continue their market research concerning passenger preferences and optimal pricing for their ultimate in-flight broadband packages without unnecessary interruption."¹² As an initial matter, those commercial trials are unauthorized; Row 44 did not seek authority to conduct such trials from the Commission, and the Commission did not grant such authority to Row 44. Rather, as noted above, Row 44's existing STA covers only "limited mobility testing" to allow Row 44 to observe its proposed AMSS system under actual flight conditions." Thus, the commercial trials conducted by Row 44's airline customers are beyond the scope of Row 44's existing STA.

Whether such unauthorized commercial trials would be interrupted by the expiration of the current STA is irrelevant. To the extent Row 44 has commenced commercial

¹¹ Section 0.459 of the Commission's rules requires parties requesting confidential treatment to identify the specific portions of a document qualifying for such treatment. *See* 47 C.F.R. § 0.459(b)(1). *See also* *Amendment of Part 0 of the Commission's Rules Regarding Public Information, the Inspection of Records, and Implementing the Freedom of Information Act*, Order, FCC 08-282 (Dec. 31, 2008) ("Where confidential treatment is sought for only a part of a document, we will require the filing of a redacted public version.").

¹² *See* Explanatory Statement at 2, FCC File Nos. SES-STA-20090417-00507 (Apr. 17, 2009).

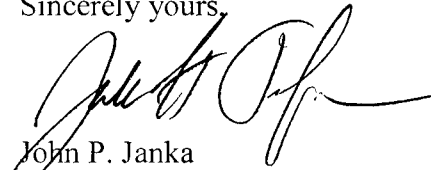
LATHAM & WATKINS LLP

trials, it has done so at its own risk. Any such unauthorized operations cannot form the basis for continued STA.

* * * * *

For the reasons discussed above, the Commission should deny Row 44's request for further STA, and promptly make available for ViaSat's review the ground-based testing data that Row 44 has submitted under seal. Please contact the undersigned should you have any questions.

Sincerely yours,



John P. Janka
Jarrett S. Taubman

Counsel for ViaSat, Inc.

cc: John Giusti
Rod Porter
Bob Nelson
Fern Jarmulnek
Steve Spaeth
Karl Kensinger
Steve Duall

William Bell
Kathryn Medley
Sophie Arrington
Trang Nguyen
Frank Peace
Jeanette Spriggs

David S. Keir, Counsel for Row 44, Inc.