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June 30, 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:

On June 25, 2009, representatives of ViaSat, Inc. ("ViaSat") met with Commission staff regarding the above-captioned applications of Row 44, Inc. ("Row 44"). During the meeting, staff asked whether Section 25.220(d) procedures could be employed to grant an AMSS application that proposed operations that are non-compliant with the Commission's technical standards, based solely upon a showing of coordination with affected satellite operators (in lieu of a case-by-case technical analysis by the Commission). As explained below: (i) Section 25.220(d) is inapplicable to aeronautical-mobile satellite service ("AMSS") earth station applications, such as the one submitted by Row 44; and (ii) even if Section 25.220(d) were applicable, its use would not obviate the Commission's obligation to resolve, on the record, material questions with respect to the technical showing in a pending application — particularly interference-related issues.

As an initial matter, the Communications Act specifies that the Commission may grant an earth station license only after determining "whether the public interest, convenience, and necessity will be served by the granting of such application . . . ."[1] Central to this public

[1] 47 U.S.C. § 309(a).

interest analysis is the Commission's evaluation of whether an applicant would operate in a manner that would not produce "unacceptable levels of interference . . . under conditions of uniform two-degree orbital separation."[2] Thus, absent application of a different standard, the Commission conducts a case-by-case review of each application to determine whether a proposed system can operate in a manner consistent with a two-degree spacing environment.[3]

The Commission's rules do allow for more streamlined processing of applications in specific circumstances. Most obviously, the Commission has recognized that there is no need to perform a case-by-case review where an earth station application demonstrates compliance with the Commission's technical rules. Thus, the Commission "routinely" licenses earth station facilities that meet these technical requirements, without conducting a further technical review to verify that such facilities will not cause unacceptable interference into other satellite systems.[4] Of course, an applicant still must demonstrate rule compliance, which may be contested by other parties. There is no dispute, in this case, that Row 44's system does not satisfy the earth station technical requirements of Part 25.

The Commission also has recognized that "it is possible in some cases for an earth station that does not meet all of the technical standards of Part 25 to operate without causing unacceptable interference in a 2° orbital spacing environment."[5] Historically, the Commission had required such "non-routine" applications — those proposing operations that did not comply with the Commission's technical requirements — to include an Adjacent Satellite Interference Analysis (ASIA) study demonstrating that the proposed operations would not cause harmful interference.[6] In 2005, the Commission modified its rules to eliminate the ASIA requirement, and promulgated Section 25.220, permitting an applicant either to reduce power or submit certifications from potentially affected satellites operators demonstrating that the proposed operations had been coordinated.[7] In 2008, the Commission adapted a new Section 25.218 to specify an off-axis EIRP mask that allows for a "power-pattern" tradeoff in certain bands, and

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2 *See Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25*, 54 RR.2d 577, at ¶ 101 (1983).

3 *2000 Biennial Regulatory Review - Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations*, Eighth Report and Order, 23 FCC Rcd 15099, at ¶ 8 (2008) ("*Eighth Report and Order*").

4 *2000 Biennial Regulatory Review - Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations*, Fifth Report and Order, 20 FCC Rcd 5666, at ¶ 17 (2005) ("*Fifth Report and Order*").

5 *Fifth Report and Order* at ¶ 18; *Eighth Report and Order* at ¶ 8.

6 *See* 47 C.F.R. § 25.134(b) (2004).

7 *See* 47 C.F.R. § 25.220 (2006).

amended Section 25.220 while retaining the basic alternative processing mechanism contained in that rule.[8]

Section 25.220 is subject to two important limitations. First, it is applicable only with respect to services that are applications of the FSS.[9] Second, it is inapplicable to *mobile* applications of the FSS (e.g., earth stations on vessels ("ESVs")).[10] Thus, it is clear that Section 25.220 does not apply to AMSS, which is a mobile application of the mobile satellite service.[11]

The Commission has confirmed that FSS service rules, including Section 25.220, do not govern in the AMSS context.[12] Thus, the mere submission of coordination letters or agreements by an AMSS earth station applicant does not qualify an AMSS applicant for streamlined processing. The Commission still must conduct a case-by-case engineering review to determine whether proposed operations would pose a threat of harmful interference in a two-degree spacing environment. As the Commission has stated clearly in the AMSS context, while coordination agreements may be relevant to the Commission's technical analysis, they do not

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8 *See* 47 C.F.R. § 25.220.

9 *See, e.g., Fifth Report and Order* at ¶ 7 (adopting rule revisions pending "more dramatic revisions to the FSS earth station licensing rules . . . ."). Notably, Section 25.220 applies only with respect to proposed earth station operations falling outside of the off-axis EIRP envelope specified in Section 25.218 of the Commission's rules. 47 C.F.R. § 25.218. That envelope applies only to FSS earth station applications. *Id.* As such, Section 25.220 does not apply to non-FSS earth station applications (e.g., AMSS earth station applications).

10 Sections 25.218 and 25.220 are inapplicable to ESVs per their terms. Notably, ESVs — unlike AMSS — have been defined as an application of the FSS. *See* 47 C.F.R. § 2.106, NG181 ("In the band 5925-6425 MHz (Earth-to-space), earth stations on vessels are an application of the fixed-satellite service (FSS) and may be authorized to communicate with space stations of the FSS on a primary basis."). This strongly suggests that if AMSS were to be designated an application of the FSS, it still would be excluded from the purview of Sections 25.218 and 25.220.

11 In the ongoing AMSS rulemaking proceeding, the Commission is considering whether to designate AMSS as an application of the FSS. *See Service Rules and Procedures to Govern the Use of Aeronautical Mobile Satellite Service Earth Stations in Frequency Bands Allocated to the Fixed Satellite Service*, IB Docket No. 05-20. Until a decision with respect to such designation is made, however, AMSS must be viewed as an application of the MSS, as both its name and function imply.

12 *See, e.g., ViaSat, Inc.; Application for Blanket Authority for Operation of 1,000 Technically Identical Ku-Band Aircraft Earth Stations in the United States and Over Territorial Waters*, 22 FCC Rcd 19964, at ¶ 11 (2007) ("*ViaSat AMSS Grant*").

"obviate the need to consider," and resolve on the record, "technical arguments" introduced by other parties.[13]

The Commission's approach in this proceeding has been consistent with its processing of the three AMSS applications that have preceded this one.[14] Notably, the Commission issued two separate letters seeking additional information from Row 44 with respect to its technical claims — even though Row 44 claimed to have satisfied Section 25.220 shortly after filing its application.[15] More recently, the Commission granted Row 44 in-flight testing STA specifically 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."[16] Thus, the Commission's own actions have signaled that certifications submitted pursuant to Section 25.220 are no substitute for a careful analysis of the technical issues raised in this proceeding.

The inapplicability of Section 25.220 to AMSS earth station applications makes good policy sense. As ViaSat has explained previously, such applications are fundamentally different from "non-routine" applications for authority to operate Ku band VSATs under Section 25.220 of the Commission's rules, for which there is an allocation and for which service rules have been promulgated.[17] Before the Commission adopted and applied Section 25.220 to permit the streamlined processing of VSAT applications, it had decades of experience with VSAT systems and the technical problems to which they might give rise. In contrast, AMSS is a nascent service, for which there is no allocation and for which there are no service rules, and that in many cases relies upon unproven technology. Consequently: (i) the Commission lacks a foundation to permit streamlined processing of AMSS earth station applications; and (ii) there is little reason to believe that satellite operators are "expert" with respect to the technical issues implicated by such applications. For these reasons, a "hard look" at Row 44's application is more than warranted.

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13 *See ARINC Incorporated; Application for Blanket Authority for Operation of Up to One Thousand Technically Identical Ku-Band Transmit/Receive Airborne Mobile Stations Aboard Aircraft Operating in the United States and Adjacent Waters*, 20 FCC Rcd 7553, at ¶ 19 (2005) ("*ARINC AMSS Grant*").

14 *See The Boeing Company; Application for Blanket Authority To Operate up to Eight Hundred Technically Identical Receive-Only Mobile Earth Stations Aboard Aircraft in the 11.7-12.2 GHz Frequency Band*, 16 FCC Rcd 5864 (2001); *ARINC AMSS Grant*; *ViaSat AMSS Grant*.

15 *See* Letter from Scott A. Kotler, Chief, Systems Analysis Branch, Satellite Division, International Bureau to David S. Keir (Aug. 7, 2008); Letter from Scott A. Kotler, Chief, Systems Analysis Branch, Satellite Division, International Bureau to David S. Keir (Aug. 25, 2008).

16 *See Row 44, Inc.*, Order and Authorization, DA 09-585 at ¶ 5 n.5 (Mar. 13, 2009).

17 *See, e.g.*, ViaSat Reply to Opposition to Supplement to Petition to Deny at 3, 19 (Nov. 4, 2008).

Even assuming *arguendo* that Section 25.220 *did* apply, though, this would not preclude the need for the Commission to evaluate and resolve the technical arguments raised by ViaSat and others in this proceeding. Nothing in Section 25.220 negates the Commission's obligations under the Communications Act to evaluate the potential for harmful interference from operations proposed in an application under review; Section 25.220 permits the Commission to *presume* non-interference in certain cases, but this is a rebuttable presumption. Similarly, nothing in Section 25.220 alters the Commission's standard for granting applications — namely that grants will be awarded only if "upon examination of the application, any pleadings or objections filed, and upon consideration of such other matters as it may officially notice," the Commission finds that grant of the application will serve the public interest, convenience and necessity.[18]

Any contrary reading of Section 25.220 would be inconsistent with D.C. Circuit precedent establishing broad standing to participate in administrative proceedings — particularly for active industry participants and parties that could be impacted by harmful interference (ViaSat currently operates earth station networks on its own behalf or manages them on behalf of its customers on numerous satellites including: Horizons-1, AMC-21, AMC-15, AMC-6, Telstar-14, Telstar-11N, GE-23, and Anik F2).[19] It would make little sense for the court and the Commission to recognize the standing of parties like ViaSat, only to ignore the legitimate, and unrefuted, technical analysis that they have presented to the agency. Notably, in promulgating Section 25.220, the Commission recognized this legal obligation, stating explicitly that it would "not preclude any party from raising concerns about non-routine earth station applications."[20]

Moreover, under the Administrative Procedures Act an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[21] An agency decision will be deemed "arbitrary and capricious" — and countermanded by the courts — if it (i) entirely fails to consider an important aspect of the problem or (ii) offers an explanation that runs counter to the evidence before the agency.[22] Any decision relying entirely on the submission of coordination letters, and ignoring the incomplete and contradictory nature of an application, or record evidence bearing on critical issues with respect to a pending application, necessarily would run afoul of this standard.

If, despite this precedent, the Commission decides to change course and expand the application of Section 25.220 to AMSS earth station applications, it should do so clearly, and

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18 47 C.F.R. § 25.156(a).

19 *See, e.g., FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

20 *Fifth Report and Order* at ¶ 72.

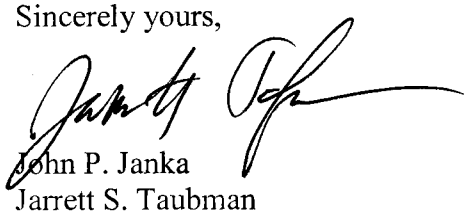
21 *Motor Vehicle Mfs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)).

22 *Id.*

in a manner that is equitable to all industry participants. ViaSat and others have invested heavily to ensure that their systems comply with applicable technical requirements, and do not cause harmful interference into adjacent operations. This compliance comes with an ongoing cost. If the Commission's technical and application standards no longer apply, provided the applicant indicates that its satellite service providers have effectuated coordination, ViaSat would like to know so that it can cease bearing the significant compliance costs that are currently dictated by the Commission's rules and precedent.

Please contact the undersigned should you have any questions.

Sincerely yours,



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