

ORIGINAL

**Before the
Federal Communications Commission
Washington, DC 20554**

Applications of)
)
HUGHES NETWORK SYSTEMS, INC.,) IB File No. SES-ASG-20041223-01892
Assignor,)
and) IB File No. SES-ASG-20041223-01893
)
HNS LICENSE SUB LLC,) IB File No. SES-ASG-20041223-01882
HNS LICENSE SUB LTD)
Assignees,)
)
For Consent to Assign Earth Station)
Licenses and Associated STAs)

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MAR 22 2005

To: International Bureau

Federal Communication Commission
Bureau / Office

JOINT RESPONSE TO COMMENTS OF VIASAT, INC.

SkyTerra Communications, Inc. ("SkyTerra") and Hughes Network Systems, Inc. ("HNS") hereby respond to the comments of ViaSat, Inc. ("Comments") regarding the above-referenced applications ("Applications"). ViaSat, one of HNS's competitors, is the only party that filed comments with respect to this transaction. ViaSat's Comments are untimely and its allegations are fundamentally flawed in theory and unsupported by facts. The Federal Communications Commission ("FCC" or "Commission") therefore should summarily dismiss ViaSat's Comments and promptly grant the Applications in order to allow a prompt closing of the proposed transaction. To do otherwise would have the unintended effect of rewarding ViaSat's efforts, through its delayed filing, to abuse the FCC process to gain competitive advantage.

I. VIASAT'S COMMENTS ARE UNTIMELY AND UNSUBSTANTIATED

ViaSat's Comments should be dismissed without further consideration because they are untimely and not properly supported.¹ ViaSat filed its Comments—the only comments filed in the proceeding—almost three weeks late.² ViaSat's claim that it “only recently realized the full impact of the transaction”³ is not an adequate justification for late filing because all of the relevant information has been a matter of public record for months or even years.⁴ Moreover, contrary to ViaSat's assertion,⁵ timeliness is critical in this case. Other than FCC approval, the parties have received all of the outstanding domestic regulatory approvals that are required to consummate the proposed transaction, including early termination of the Hart-Scott-Rodino waiting period, and believe that they will be able to close the transaction within days of receiving Commission approval of the Applications.

¹ See License of National Science and Technology Network, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 365, at ¶ 6 (2001); Additional U.S.-International Routes Exempted From the International Settlements Policy, *Public Notice*, 19 FCC Rcd 22032, at 4 n. 10 (IB 2004).

² Public Notice occurred on January 26, 2005. Report No. SES-00680 (rel. Jan. 26, 2005). Comments were due 30 days thereafter, on February 25, 2005. See 47 C.F.R. §§ 25.151(d), 25.154(a). ViaSat filed its Comments on March 16, 2005—19 days late.

³ See ViaSat Motion for Leave to File Late-Filed Comments, at 1, 3-4.

⁴ Specifically, Liberty's indirect ownership interest in HNS was approved by the Commission in December 2003 and its non-controlling interest in WildBlue Communications, Inc. (“WildBlue”) was a matter of public record long before that date. Intelsat's non-controlling interest in WildBlue has been a matter of public record since June 2003. Apollo's proposed non-controlling interest in Intelsat was announced in a public notice dated September 3, 2004. Finally, Apollo's proposed interest in HNS has been a matter of public record since December 23, 2004.

⁵ See ViaSat Motion for Leave to File Late-Filed Comments, at 3.

Further, ViaSat's Comments rely primarily on speculation rather than facts, and the few facts that are asserted are not supported by the required affidavit or any other type of evidentiary support.⁶ The Commission has previously recognized that "[t]he interests of orderly procedure require that procedural requirements of our rules be observed."⁷ This is especially applicable where, as here, an entity sleeps on its rights and the resulting delay could threaten the timely closing of a transaction. Summary dismissal of the Comments is therefore warranted.⁸

II. VIASAT'S COMMENTS ARE FUNDAMENTALLY AND FATALLY FLAWED

ViaSat requests that the Commission make certain unspecified inquiries⁹ based on unsupported charges that the proposed transaction could cause harm with respect to both: (i) very small aperture terminal ("VSAT") business services; and (ii) residential Ka-band broadband satellite equipment. The theory underlying both arguments is fundamentally and fatally flawed.

A. ViaSat's Vertical Foreclosure Concerns Regarding Intelsat are Groundless

ViaSat alleges that Apollo's indirect ownership interest in the Fixed-Satellite Service ("FSS") business of Intelsat, Ltd. ("Intelsat") and Apollo's proposed indirect

⁶ See 47 C.F.R. 25.154(a)(4) (requiring comments to be supported by an affidavit).

⁷ See Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations (Geneva, Ala., et al.), *Memorandum Opinion and Order*, 11 FCC 2d 204, at ¶ 1 n.1 (1967).

⁸ See Application of KGET(TV), Inc. for Renewal of License of Station KGET(TV), Bakersfield, California, *Memorandum Opinion and Order*, 11 FCC Rcd 4168, at ¶ 3 (1996) (dismissing a petition to deny because the petitioner did not include a required supporting affidavit); Claircom Communications Group, L.P., *Memorandum Opinion and Order*, 8 FCC Rcd 7258, at ¶ 2 (MSD 1993) (dismissing a petition as "defective on its face" for failure to include a required affidavit).

⁹ See ViaSat Comments, at 2, 5.

interest in the HNS VSAT business provide Apollo with an incentive to cause Intelsat to raise FSS space segment prices and to restrict overall output. This allegation is groundless for two main reasons: (i) Apollo does not control Intelsat; and (ii) the market in which Intelsat operates is fully competitive.

Apollo does not control Intelsat and therefore is unable to cause Intelsat to take actions merely to benefit Apollo's interest in HNS. Apollo indirectly holds less than 25% of the outstanding voting and equity interest in Intelsat Holdings, Ltd. (formerly named Zeus Holdings Limited),¹⁰ the entity that controls Intelsat, and is entitled to appoint only two of ten Intelsat Holdings, Ltd. directors.¹¹ As ViaSat rightly points out, voting control of Intelsat Holdings, Ltd. is equally split among four private equity fund groups. The three other private equity fund groups indirectly own less than 75% of Intelsat Holdings, Ltd. and will appoint a majority of the company's board of directors.¹² These entities have no incentive to cause Intelsat to take actions merely to benefit HNS—a company in which they have no financial interest.

More fundamentally, from a competition perspective, Intelsat does not have the market power necessary to effectuate vertical foreclosure. A vertical foreclosure strategy only can be undertaken if the upstream company (i.e., Intelsat) possesses sufficient market power to raise prices and restrict output without losing market share.¹³ The

¹⁰ Zeus Holdings Limited recently changed its name to Intelsat Holdings, Ltd.

¹¹ The parties recently agreed to expand the Intelsat Holdings, Ltd. board of directors to ten directors. Each of the private equity funds has the right to appoint two directors and the remaining two directors will be Intelsat executives.

¹² Intelsat management holds the shares not owned by the private equity fund groups.

¹³ The market share of the downstream company (i.e., HNS) is irrelevant to the ability of the upstream supplier (i.e., Intelsat) to practice vertical foreclosure. Consequently, we need not address the relevant market in which HNS participates or HNS's share of that market. *See* ViaSat Comments, at 3 & n 4.

Commission recently held that Intelsat does not possess such market power,¹⁴ and ViaSat does not claim that the competitive landscape has changed. Furthermore, if Intelsat were to raise prices or restrict output, HNS's competitors merely would change their upstream sources and purchase their FSS space segment from an Intelsat competitor, such as SES Americom, PanAmSat, SatMex, or Telesat, among others.¹⁵

B. ViaSat's Allegations About WildBlue Are Groundless

ViaSat's arguments regarding WildBlue are equally untenable. The gravamen of ViaSat's complaint is not about harm to competition, but rather involves ViaSat's private relationship with WildBlue. ViaSat alleges that WildBlue *at some point in the future* may purchase Ka-band consumer broadband ground segment equipment from HNS rather than ViaSat once HNS begins selling such equipment.¹⁶ Besides being absurdly speculative, this complaint involves a private contractual matter. The Commission has a longstanding policy of refraining from intervening in such matters, especially in the context of license assignment proceedings.¹⁷

In any event, ViaSat's theory that the proposed transaction provides News Corporation, Intelsat and/or Liberty Media Corporation ("Liberty") with an "incentive" to

¹⁴ See, e.g., Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors and Intelsat North America, LLC, Assignee, *Order and Authorization*, 19 FCC Rcd 2404, at ¶¶ 30-31 (IB 2004) (holding that Intelsat is incapable of using a vertical foreclosure strategy because it does not have market power with respect to domestic FSS space segment).

¹⁵ See ViaSat Comments, at 3.

¹⁶ See ViaSat Comments, at 4-5.

¹⁷ When evaluating the effect of a proposed merger transaction, the Commission focuses on the harm to consumers or competition generally in the relevant market, not the impact on particular service providers. See, e.g., ATT Wireless Services, Inc. and Cingular Wireless Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, at ¶ 172 (2004).

cause WildBlue to change equipment vendors is pure fancy.¹⁸ News Corporation does not hold a direct or indirect interest in WildBlue and Intelsat does not hold a direct or indirect interest in HNS. Further, the only entities that will hold indirect interests in both HNS and WildBlue are Apollo and Liberty.¹⁹ Neither entity has control over WildBlue and Liberty does not have control of HNS. Moreover, Apollo does not control Intelsat and Apollo's interest in HNS does not provide Intelsat with an incentive to select HNS as an equipment vendor. Nothing related to this transaction provides Intelsat with a reason to join with Liberty to change WildBlue's equipment vendor.²⁰ In short, ViaSat's speculation about a future alliance among Intelsat, News Corporation, and Liberty Media regarding WildBlue has no basis in fact and no relationship to the proposed transaction.

III. CONCLUSION

SkyTerra and HNS are prepared to consummate the proposed transaction within the next three weeks and expect all other conditions precedent to closing will be satisfied in that time frame. The parties are presently involved in financing the proposed transaction in the capital markets and timely FCC approval is important to the completion of such financing. ViaSat's late-filed and meritless Comments should not be permitted to

¹⁸ See ViaSat Comments, at 4.

¹⁹ Apollo holds a non-controlling indirect minority interest in Intelsat through its minority interest in Intelsat Holdings, Ltd. (as set forth above) and a controlling interest in HNS through its controlling interest in SkyTerra. Liberty holds a non-controlling indirect minority interest in HNS through its minority interest in News Corporation and a non-controlling direct minority interest in WildBlue.

²⁰ ViaSat's claim that Intelsat "abandoned" an agreement with WildBlue is not supported by the sources to which ViaSat cites. See ViaSat Comments, at 5. Contrary to ViaSat's assertion, there is no suggestion in these sources of any activity beyond normal contractual relationships, nor is there any suggestion of any "influence" being exercised by Apollo.

delay Commission action on the Applications. The Commission should dismiss the Comments or, in the alternative, deny the requested relief. Accordingly, the parties respectfully request the Commission to expeditiously grant the Applications to allow a prompt and timely closing of the proposed transaction.

Respectfully Submitted,

/s/ John P. Janka

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Dated March 22, 2005

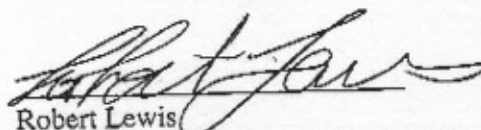
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DECLARATION OF ROBERT LEWIS

I, Robert Lewis, Senior Vice President and General Counsel of SkyTerra Communications, Inc. ("SkyTerra"), hereby declare under penalty of perjury that I have read the foregoing Joint Response to Comments of ViaSat, Inc. prepared by SkyTerra and Hughes Network Systems, Inc. and that the representations, information and facts set forth therein are true and correct to the best of my knowledge and belief.



Robert Lewis
Senior Vice President and General Counsel
SkyTerra Communications, Inc.

March 22, 2005

CERTIFICATE OF SERVICE

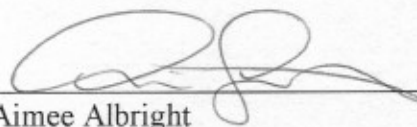
I hereby certify that on this 22nd day of March, 2005, a copy of the foregoing was served upon the following by hand delivery:

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