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VIA IBFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Application of Panasonic Avionics Corporation; FCC File Nos. SES-LIC-20100805-00992, SES-AMD-20100914-01163 and SES-AMD-20101115-01432 (Call Sign E100089) – Response Concerning Procedural Argument

Dear Ms. Dortch:

Row 44, Inc. (“Row 44”) hereby responds to the procedural argument that Panasonic Avionics Corporation (“PAC”) continues to advance in an effort to evade scrutiny of its aeronautical mobile-satellite service (“AMSS”) application.¹ PAC’s contentions are premised on a fundamental misunderstanding of the Commission’s *ex parte* rules as they apply to this proceeding. These assertions are transparently intended to deflect attention from the substantive issues Row 44 has raised concerning PAC’s application.

About two central facts in this proceeding there is no dispute. First, Row 44 became a party to this restricted proceeding on October 15, 2010 when it filed a Petition concerning PAC’s

¹ See Letter from Carlos M. Nalda, Counsel to PAC, to Marlene H. Dortch, Secretary, FCC, dated December 7, 2010 (“December 7th PAC Letter”); Reply to Consolidated Reply of Row 44, Inc. at 23-25, dated December 13, 2010 (“PAC December 13th Reply”). In the PAC December 13th Reply, PAC gratuitously asserts that Row 44 “ignored” its December 7, 2010 letter objecting to consideration of Row 44’s Consolidated Reply. PAC December 13th Reply at 24. In fact, as that letter was filed independent of the ongoing pleading cycle, made a new request for relief (asking the FCC to reject Row 44’s Consolidated Reply), and was served by mail, the actual response deadline under Section 1.45(b) of the FCC’s Rules would be December 22, 2010. See 47 C.F.R. §§ 1.45(b) & 1.4(h). This clarifying letter is therefore timely. Row 44 limits its comments here to the erroneous procedural objections that PAC has advanced.



application.² Second, PAC filed on November 15, 2010 two separate documents responding to Row 44's Petition, both a responsive pleading and a lengthy amendment to its application ("Amendment").³ In dispute are PAC's contradictory contentions that (1) the same filing deadline (November 26, 2010) applied to both the response and the Amendment⁴, and (2) alternatively, the latest acceptable deadline for a reply would have been November 30, 2010, one day before Row 44 actually filed its Consolidated Reply.

Though PAC's argument suffers from multiple deficiencies, the critical flaw is its groundless assertion that the FCC's *ex parte* rules do not apply to its Amendment, which not only changed aspects of its application thirty days *after* Row 44 filed its timely Petition, but was filed as a direct response to the Row 44 Petition.⁵ In support of its novel interpretation of the FCC's Rules, PAC cites a single Media Bureau case for the untenable proposition that amendments to contested applications are not required to be served on other parties to the proceeding because amendments use "required forms," a category of filings subject to a limited exemption from the *ex parte* filing requirements.⁶ The cited case, however, plainly misapplied the Commission precedent on which it expressly relied.⁷ In *Ass'n for Community Education*, the Commission made clear that where a license remains subject to a petition for reconsideration (or other appeal), the licensee is not required to serve parties to that appeal with any *new application* it files to modify the underlying license.⁸ At the same time, the Commission made equally clear

² See, e.g., December 7th PAC Letter at 1.

³ *Id.* at 1-2.

⁴ In the first instance, of course, PAC asserted that it was "not at all certain" that Row 44 had any right at all to reply to its November 15, 2010 filings. Letter of Carlos M. Nalda, Counsel to PAC, to Marlene H. Dortch, Secretary, FCC, at 1 (dated November 22, 2010).

⁵ Although PAC repeatedly stresses the alleged "minor" nature of the Amendment, this characterization is relevant only to the FCC's Public Notice requirements, and not to its *ex parte* rules. Indeed, although any amendment in a contested proceeding must be served on other parties, failure to serve a "minor" amendment may be more problematic precisely because such amendments are not subject to further public notice.

⁶ See December 7th PAC Letter at 3 n.8, citing *Beyond the Bay Media Group*, 21 FCC Rcd 6967, 6974-75 (¶ 20) (Med. Bur. 2006) ("*Beyond the Bay*") (omitting citation).

⁷ See *Beyond the Bay*, 21 FCC Rcd at 6975 n.50, citing 47 C.F.R. § 1.1204(a)(1) and *Association for Community Education, Inc.*, 19 FCC Rcd 12682 (2004) ("*Ass'n for Community Education*").

⁸ See *Ass'n for Community Education*, 19 FCC Rcd at 12685 (¶ 8).



that the obligation to serve subsequent applications or amendments does arise once a petitioner has obtained “‘party status’ pursuant to Section 1.1202(d)(1) of the rules.”⁹

As *Ass’n for Community Education* makes plain, the *ex parte* exemption for “filing of required forms” upon which PAC attempts to rely, applies only to communications with the FCC using forms that, though they may relate to the same subject matter as a contested proceeding, are not actually submitted within the scope of such a proceeding.¹⁰ Any submission to the FCC that is actually part of a contested restricted proceeding is subject to the requirements of the *ex parte* rules, which require that any written submission, including any amendments to an application, be served on all parties to the proceeding. 47 C.F.R. §§ 1.1202(b)(1) & 1.1208.

The principal error that Row 44 made in its November 19, 2010 Letter was assuming that PAC had properly mailed it a complete copy of the Amendment. Because it never received a service copy of the Amendment, the provisions of Section 1.45(b) of the Commission’s Rules never came into effect to establish a due date for its response. Therefore, an opposition to the Amendment could have been filed at any time during the pendency of the underlying application. Row 44 nonetheless filed on December 1, 2010, consistent with the commitment it made in its November 19th Letter.¹¹

Although Row 44’s December 1st Consolidated Reply is plainly acceptable under the FCC’s rules, two additional facts are notable. First, the issues surrounding PAC’s application were placed squarely at issue with the submission of Row 44’s timely-filed Petition, and both parties have had an opportunity to submit a full complement of opposing and responsive pleadings provided for under the FCC’s rules. Therefore, whether or not PAC has actually submitted a complete application, the Bureau nonetheless has a full complement of pleadings to consider in evaluating whether to grant or deny PAC the authority it seeks, a record which includes both Row 44’s December 1st Consolidated Reply and the PAC December 13th Reply.

⁹ *Id.* (“... the [applicant] had no obligation to serve [the petitioner] with a copy of any of its subsequent applications or amendments thereto *until [the petitioner] had obtained ‘party status’ pursuant to Section 1.1202(d)(1) of the rules*”) (emphasis added).

¹⁰ See also *Saga Communications of New England, LLC*, 21 FCC Rcd 2466, 2468 (¶ 7) (OGC, Admin. Law Div. 2006).

¹¹ As Row 44 indicated in its Consolidated Reply, only if the Amendment had been properly served by mail would the due date under Section 1.45(b) have been established as November 30, 2010, the alternative date now embraced by PAC. See Row 44 Consolidated Reply at 20-21 & n.24. But PAC plainly admits that it failed to serve Row 44 with a copy of the Amendment, so that no such deadline was established with respect to the Amendment. Even if this “late-filed” argument were relevant, the FCC has not been receptive to such claims of disqualifying lateness. See, e.g., *Radio Dinuba Co.*, 38 FCC 2d 573 n.1 (1972) (“basic fairness” compelled acceptance of a pleading filed one-day late due to a miscalculation of time, when “the error was unintentional and the filing was not substantially late”).



Second, even if it had articulated a valid procedural argument under the FCC's Rules, PAC has not alleged any manner in which its substantive rights might be prejudiced by consideration of the entire record that has been established in this proceeding. Given the fact that AMSS licensing proceedings have typically required many months of consideration, and that PAC has already submitted as of this date what it apparently feels is a sufficient response to the Consolidated Reply, there can be no claim of prejudicial impact upon PAC at this juncture due to the date on which Row 44 filed its Consolidated Reply. Conversely, it would be prejudicial to the public interest generally if the FCC did not consider as a threshold matter whether PAC has filed a complete and sufficient AMSS license application. Accordingly, the Bureau should give no weight to PAC's efforts to obscure the substantive issues present in this proceeding.

Respectfully submitted,

A handwritten signature in black ink that reads "David S. Keir/pab".

David S. Keir
Counsel to Row 44, Inc.

cc: Carlos M. Nalda, Counsel to PAC
Stephen Duall, FCC (via email)
Paul Blais, FCC (via email)