

ROW 44/VIASAT PROPOSED PROTECTIVE ORDER

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Row 44, Inc.) File Nos. SES-LIC-20080508-00571
) SES-AMD-20080619-00826
Application for Authority to Operate Up To) SES-AMD-20080819-01074
1,000 Technically-Identical Aeronautical-) SES-AMD-20080829-01117
Mobile Satellite Service (AMSS) Earth Stations) SES-AMD-20090115-00041
In the 14.05-14.47 GHz (Transmit) and) SES-STA-20080711-00928
11.7-12.2 MHz (Receive) Frequency Bands and)
For Associated Special Temporary Authority)
For Mobility Testing of AMSS Earth Stations)

FORM OF PROTECTIVE ORDER

Adopted: April __, 2009

Released: April __, 2009

By the Chief, Satellite Division, International Bureau:

1. On April 13, 2009, Row 44, Inc. (“Row 44”) filed with the Commission a “Report Concerning Pointing Accuracy Ground Testing of the HR6400 Antenna System for Aeronautical Mobile-Satellite Service” (“Report”) in response to a reporting condition attached to the above-captioned special temporary authorization (“STA”).¹ In the cover letter transmitting the Report, Row 44 requested confidential treatment for this Report, and included a proposed Protective Order.²

2. ViaSat, Inc. has been a party to the above-captioned proceedings (hereafter the “Relevant Proceedings”), filing several pleadings with the International Bureau (“Bureau”) with respect to certain aspects of the Relevant Proceedings. Following the submission of

¹ See *Row 44, Inc.*, Order and Authorization, DA 09-585, slip op. at 4 (¶ 7(e)) (Sat. Div., rel. March 13, 2009).

² Letter to Robert G. Nelson, Chief, Satellite Division, FCC, from David S. Keir, Counsel to Row 44 at 1 and Attachment (April 13, 2009).

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the Report, ViaSat sought access to it by filing a request pursuant to the Freedom of Information Act (“FOIA Request”).³

3. Row 44 has agreed to provide to ViaSat, pursuant to the attached Commission Protective Order, a copy of the Report (hereafter the “Confidential Report”). We conclude that the voluntary disclosure proposed by Row 44 serves the public interest and satisfactorily resolves ViaSat’s FOIA Request under § 0.461 of the FCC’s Rules. *See* 47 C.F.R. § 0.461. Row 44’s disclosure to ViaSat pursuant to the terms of the attached Protective Order will provide protection of the proprietary information contained in the Confidential Report, and allow ViaSat the opportunity to evaluate the information contained therein in connection with the Relevant Proceedings. Row 44 shall provide the Confidential Report to ViaSat, provided that ViaSat executes and delivers the Acknowledgment of Confidentiality that is part of the Protective Order attached to this Order.⁴

4. Accordingly, IT IS ORDERED that Row 44 SHALL provide to ViaSat, a copy of the Confidential Report, under the terms of the Protective Order attached to this Order, once ViaSat has executed and delivered the Acknowledgment of Confidentiality.

5. This Order is issued pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), Exception 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Sections 0.51 and 0.261 of the Commission’s rules, 47 C.F.R. §§ 0.51, 0.261, and is effective upon its release.

³ Letter to Anthony Dale, Managing Director, FCC, from John P. Janka and Jarrett S. Taubman, Counsel to ViaSat, filed April 16, 2009.

⁴ Row 44 and ViaSat have jointly informed Bureau staff in advance that Row 44 would not object to the review of the Confidential Information by certain Representatives of ViaSat, Outside Counsel of Record, and a designated outside consultant. *See* Letter to Stephen Duall, Chief, Policy Branch, Satellite Division, FCC, from David S. Keir, Counsel to Row 44, Inc. (dated April 23, 2009).

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In the 14.05-14.47 GHz (Transmit) and)	SES-AMD-20090416-00501
11.7-12.2 MHz (Receive) Frequency Bands and)	SES-STA-20080711-00928
For Associated Special Temporary Authority)	
For Mobility Testing of AMSS Earth Stations)	

APPENDIX A: PROTECTIVE ORDER

1. *Introduction.* On April 13, 2009, Row 44, Inc. (“Row 44”) filed with the Commission a “Report Concerning Pointing Accuracy Ground Testing of the HR6400 Antenna System for Aeronautical Mobile-Satellite Service” (“Report”) in response to a reporting condition attached to the above-captioned special temporary authorization (“STA”).¹ Row 44 has agreed to provide to ViaSat, pursuant to a protective order, an unredacted copy of the Report (hereafter the “Confidential Report”). Consequently, the International Bureau (“Bureau”) has adopted this Protective Order to ensure that “Confidential Information,” as defined herein, provided to ViaSat (hereafter referred to as a “Reviewing Party”) is afforded protection from disclosure. The Protective Order reflects the manner in which Confidential Information is to be treated and is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under FOIA or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. *Definitions.* As used herein, capitalized terms, not otherwise defined herein, shall have the following meanings:

“Confidential Information” means any information contained in the Confidential Report or otherwise submitted by Row 44 in connection with a Relevant Proceeding and pursuant to a request for confidential treatment, or derived from any such information (the “Related Information”), but does not include any information that can be demonstrated by documentary evidence to be or to have been (i) generally employed in the industry, (ii) already known by the Reviewing Party or Counsel at the time of disclosure, (iii) obtained

¹ See *Row 44, Inc.*, Order and Authorization, DA 09-585, slip op. at 4 (¶ 7(e)) (Sat. Div., rel. March 13, 2009).

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lawfully by the Reviewing Party or Counsel from a source other than Row 44 that has the right to make disclosure of such information, (iv) publicly available through no violation by the Reviewing Party or Counsel of this Protective Order, or (v) independently developed by employees of the Reviewing Party or Counsel who have had no access to either (1) the Confidential Report or other information submitted by Row 44 in connection with a Relevant Proceeding pursuant to a request for confidential treatment, or (2) any information derived from the Confidential Report or other information submitted by Row 44 pursuant to a request for confidential treatment;

“Counsel” means Outside Counsel of Record;

“Outside Counsel of Record” means the firm(s) of attorneys representing a Reviewing Party;

“Relevant Proceedings” means the proceedings captioned above relating to the application (lead File No. SES-LIC-20080508-00571) filed by Row 44 to operate earth station facilities in the aeronautical-mobile satellite service, as well as any future applications that may seek to amend a captioned application or to obtain special temporary authority with respect to the operations proposed, or to modify following grant any FCC authorization arising from the captioned proceedings;

“Representatives” means employees of the Reviewing Party who are not involved in competitive decision-making (*i.e.*, the employee’s activities, association, and relationship with a Reviewing Party are not such as to involve such employee’s advice concerning, or participation in, any or all of the Reviewing Party’s business decisions made in light of similar or corresponding information about a competitor), and other employees of the Reviewing Party with respect to whom Row 44 has expressly stated it would not object², but excludes in all cases the officers and directors of the Reviewing Party.

3. *Use of Confidential Information.* Persons obtaining access to Confidential Information under this Protective Order shall use the information solely for preparation and conduct of Relevant Proceedings as delineated in this paragraph and paragraphs 5, 10, and 11, and any subsequent judicial proceeding arising directly from these proceedings and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings.

4. *Non-disclosure of Confidential Information.* Except with the prior written consent of Row 44, or as hereinafter provided under this Protective Order, no Confidential Information may be disclosed by a Reviewing Party to any person other than the Commission and its staff.

² Row 44 and ViaSat have jointly informed Bureau staff in advance that Row 44 would not object to the review of the Confidential Information by certain Representatives of ViaSat, Outside Counsel of Record, and a designated outside consultant. See Letter to Stephen Duall, Chief, Policy Branch, Satellite Division, FCC, from David S. Keir, Counsel to Row 44, Inc. (dated April 23, 2009).

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5. *Permissible Disclosure.* Subject to the requirements of paragraph 8, Confidential Information may be reviewed by Counsel and Representatives as defined herein. Subject to the requirements of paragraph 8, Counsel may disclose Confidential Information to the following individuals, *provided that* they are not involved in the analysis underlying the business decisions of any competitor of Row 44 or AeroSat Avionics, LLC (“AeroSat”), nor do they participate directly in those business decisions: (1) outside consultants or experts retained for the purpose of assisting Counsel in these proceedings; (2) paralegals or other employees of such Counsel not described in clause 3 of this paragraph 5 assisting Counsel in this proceeding; (3) employees of such Counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with these proceedings, or performing other clerical or ministerial functions with regard to documents connected with these proceedings; and (4) employees of third-party contractors performing one or more of the functions set forth in clause 3 of this paragraph 5. Individuals who have obtained access to Confidential Information in accordance with the provisions of this paragraph 5 and paragraph 8 may discuss and share the contents of the Confidential Information with any other person who has also obtained access in accordance with the provisions of this paragraph 5 and paragraph 8, and with Commission and its staff.

6. *Protection of Confidential Information.* Persons described in paragraph 5 shall have the obligation to ensure that access to Confidential Information is strictly limited as prescribed in this Protective Order. Such persons shall further have the obligation to ensure that (1) Confidential Information is used only as provided in this Protective Order; and (2) the documents are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 10 below.

7. *Prohibited Copying.* If, in the judgment of Row 44, the documents contain information so sensitive that it should not be copied by anyone, the relevant pages of the documents shall bear the legend “Copying Prohibited,” and no copies of such pages, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Row 44.

8. *Procedures for Obtaining Access to Confidential Information.* In all cases where access to Confidential Information is permitted pursuant to paragraph 5, before reviewing or having access to any Confidential Information, each person seeking such access shall execute the Acknowledgment of Confidentiality (“Acknowledgment”) (*see* Appendix B) and file it with the Bureau, on behalf of the Commission, and serve it upon Row 44 so that the Acknowledgment is received by Row 44 at least two business days prior to such person’s reviewing such Confidential Information. Where the person seeking access is one described in either clause 3 or 4 of paragraph 5, the Acknowledgment shall be delivered promptly prior to the person obtaining access. Row 44 shall have an opportunity to object to the disclosure of the documents to any such persons. Any objection must be filed at the Commission and served on Counsel representing, retaining or employing such person within one business day after receiving a copy of that person’s Acknowledgment (or where the person seeking access is one described in either clause 3 or 4 of paragraph 5, such objection shall be filed and served as promptly as practicable after receipt of the

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relevant Acknowledgment). Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from Row 44 shall not have access to Confidential Information. Upon receipt of an Acknowledgment and upon there being no objection by Row 44 to the person seeking access, Row 44 shall deliver a copy of the documents to such person.

9. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential Information outside of the terms of this Protective Order, requests will be treated in accordance with Sections 0.442 and 0.461 of the Commission's rules.

10. *Filings with the Commission.* Persons described in paragraph 5 may, in any documents that they file in a Relevant Proceeding, reference Confidential Information, but only if they comply with the following procedure:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Confidential Information subject to this order must be clearly marked: "Confidential Information included pursuant to Protective Order, DA 09-____;" and

d. The confidential portion(s) of the pleading shall be served on the Secretary of the Commission, the Bureau, and Row 44. Such confidential portions shall be served under seal, and shall not be placed in the Commission's public file. A party filing a pleading containing Confidential Information shall also file redacted copies of the pleading containing no Confidential Information, which copies shall be placed in the Commission's public files. Parties should not provide courtesy copies of pleadings containing Confidential Information to Commission Staff unless the Bureau so requests. Any courtesy copies shall be submitted under seal.

11. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information; *provided, however,* that in rendering such advice and otherwise communicating with such client, Counsel shall not disclose Confidential Information.

12. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by Row 44 of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing parties, by viewing this material agree: (1) not to assert any such waiver; (2) not to use Confidential Information to seek disclosure in any other proceeding; and (3) that accidental

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disclosure of Confidential Information by Row 44 or any company providing technology or services to Row 44 shall not be deemed a waiver of any privilege or entitlement as long as Row 44 takes prompt remedial action.

13. *Subpoena by Courts, Departments or Agencies.* If a court, or a federal or state department or agency issues a subpoena or orders production of the documents or any Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify Row 44 of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that Row 44 has a full opportunity to oppose such production prior to the production or disclosure of the documents or Confidential Information.

14. *Third Party Beneficiary.* Certain elements of the Confidential Information, including but not limited to the Confidential Report identified in paragraph 1, are proprietary to AeroSat, which is a third party beneficiary of this Protective Order.

15. *Violations of Protective Order.* Should a person that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission and to Row 44. Further, should such violation consist of improper disclosure of Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to Row 44 at law or in equity against any person using Confidential Information in a manner not authorized by this Protective Order.

16. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of the Relevant Proceedings and any administrative or judicial review, persons described in paragraph 5 shall destroy or return to Row 44 the documents and all copies of the same. No material whatsoever derived from these materials may be retained by any person having access thereto, except Counsel (as described in paragraph 5) may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) containing Confidential Information prepared on behalf of the party. All Counsel shall make certification of compliance herewith and shall deliver the same to Counsel for Row 44 not more than three weeks after conclusion of the Relevant Proceedings. The provisions of this paragraph 15 regarding retention of Stamped Confidential Documents and copies of same shall not be construed to apply to the Commission or its staff.

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APPENDIX B

Acknowledgment of Confidentiality

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceedings, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 5 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Confidential Information is used only as provided in the Protective Order; and (2) the documents are not duplicated except as specifically permitted by the terms of paragraph 10 of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at _____ this _____ day of _____, _____.

[Name]

[Position]

[Address]

[Telephone]