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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Rulemaking to Amend Parts 1, 2, 21, and 25
of the Commission's Rules to Redesignate
the 27.5 - 29.5 GHz Frequency Band, to
Reallocate the 29.5 - 30.0 GHz Frequency
Band, to Establish Rules and Policies for
Local Multipoint Distribution Service and
for Fixed Satellite Services

CC Docket No. 92-297

PETITION FOR RECONSIDERATION

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bar application pending.

TABLE OF CONTENTS

	<u>Page</u>
Summary.....	i
I. Authorization.....	1
II. International Deviations From 28 Ghz Band Plan.....	7
III. Conclusion	11

SUMMARY

Authorization. The Commission decided in the Third Report and Order of this proceeding that U.S.-licensed satellite systems must operate in accordance with the 28 GHz band plan throughout the world. In that order, the Commission gave GSO FSS coordination priority over NGSO FSS in the 27.5-28.35 GHz band segment. Subsequently, in the 18 GHz proceeding, the Commission deleted the domestic allocation for FSS at the 17.7-18.3 GHz. The Commission recently concluded in the underlying Memorandum Opinion and Order that the deletion of the domestic FSS allocation at 17.7-18.3 GHz leaves no basis for providing GSO FSS systems with priority over NGSO FSS systems in that band internationally.

The Commission's conclusion that there is no guidance for international coordination between GSO FSS and NGSO FSS is illogical and constitutes an unexplained change in policy. If the Commission now seeks to change the international coordination priority between GSO FSS and NGSO FSS systems, Hughes and the industry must be given notice and an opportunity to comment on the impact of such changes in policy. Furthermore, eliminating the international priority coordination for the GSO FSS downlinks while retaining the international priority coordination for the GSO FSS uplinks results in an imbalance between the designation for GSO FSS uplinks and downlinks. In addition, Hughes urges the Commission to reconsider its requirement that Hughes coordinate with other U.S.-licensed GSO FSS systems that are authorized to use the 17.7-18.3 GHz band segment before undertaking coordination with foreign-licensed systems in that band. The Commission has not explained why the 17.7-18.3 GHz band and other downlink portions of the Ka band should be treated differently.

International Deviations from 28 GHz Band Plan. The Commission concluded in the Third Report and Order that, because of the existence of some international coordination

agreements that existed prior to the adoption of the 28 GHz band plan, satellite systems would be required to comply with certain rare deviations from the policy that U.S.-licensed satellite systems operate in accordance with the 28 GHz band plan throughout the world. Hughes has requested from the Commission information detailing the impact of these deviations on Hughes' licensed Spaceway system, but the Commission declined in the Memorandum Opinion and Order to provide Hughes with the requested information, stating that the information is a matter of public record, and that Hughes will obtain the information during the international coordination process. Not only is the Commission's Order unresponsive to Hughes' request, but the Commission's assumptions also are unreasonable. There is no reason to believe that the Japanese administration will give Hughes this information, nor can the Japanese administration be reasonably expected to inform a U.S. licensee that it may encounter interference from another U.S. license. Hughes requests that the Commission provide Hughes information regarding the deviations, subject to any appropriate safeguards to enable Hughes to comply with the terms of its license. Alternatively, the Commission should eliminate this condition.

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PETITION FOR RECONSIDERATION

Hughes Communications Galaxy, Inc. (“Hughes”) hereby respectfully requests that the Commission reconsider its Memorandum Opinion and Order, FCC 01-172 (released May 25, 2001)¹ in this proceeding as set forth below.

I. Authorization.

In the Third Report and Order in this proceeding, the Commission decided that U.S.-licensed satellite systems must honor the GSO/NGSO/MSS Feeder Link sharing aspects of the Commission’s band plan for the Ka band with respect to their operations outside the United States.² Namely, for U.S.-licensed systems, satellite-to-satellite sharing outside the U.S. would be on the same terms as within the U.S. The Commission expressly decided to provide the GSO

¹ *In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Memorandum Opinion and Order, FCC 01-172 (rel. May 25, 2001) (“Memorandum Opinion and Order”).*

² *In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Third Report and Order, 12 FCC Rcd 22310 at ¶ 67 (“Third Report and Order”).*

FSS with coordination priority over the NGSO FSS in the 27.5-28.35 GHz band segment.³ That decision corresponded with the Commission's decision in the First Report and Order in this proceeding to provide the GSO FSS with coordination priority over the NGSO FSS in the corresponding part of the downlink band (17.7-18.8 GHz).⁴

The Third Report and Order cleared the way to grant an aspect of the Hughes Spaceway application that had been pending since September 1995. Hughes had requested the authority to use the 17.7-17.8, 19.7-20.2, 27.5-28.6, and 29.25-30.0 GHz bands *for international service* on the Spaceway system, which request had been deferred until resolution of the issues in the Third Report and Order.⁵

Last Summer, in the 18 GHz proceeding, the Commission revised its domestic Table of Frequency Allocations and, in doing so, deleted the *domestic* allocation for the FSS at 17.7-18.3 GHz.⁶ That proceeding, like the First Report and Order in the 28 GHz proceeding, dealt *entirely* with *domestic* spectrum issues within the United States. Nowhere in the 18 GHz Order did the Commission even intimate that the decision would in any way alter the satellite-to-

³ *Third Report and Order* at ¶ 70.

⁴ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd 19005 at ¶ 77 (1996).

⁵ *Hughes Communications Galaxy, Inc. Application for Authority to Construct, Launch, and Operate a Ka-Band Satellite Systems in the Fixed-Satellite Service and a Ku-band Broadcast Communications Satellite System*, Order and Authorization, 13 FCC Rcd 1351 (1997).

⁶ *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Report and Order, 15 FCC Rcd 13430 ("18 GHz Order") (2000).

satellite sharing priorities for *international* operations outside the United States that were established in the Third Report and Order.

The Commission now appears to have concluded in the Memorandum Opinion and Order that, because the 17.7-18.3 GHz band segment is no longer available in the U.S. for domestic FSS downlinks, there is no longer a basis for providing U.S.-licensed GSO FSS systems with coordination priority over U.S.-licensed NGSO FSS systems in that band with respect to international operations.⁷ Based on this conclusion, the Commission indicates that it will impose a condition on Hughes' authority to use the 17.7-18.3 GHz band: Prior to undertaking coordination with foreign-licensed systems, Hughes must demonstrate to the Commission that it has coordinated with other U.S. FSS licensees with authority for global operation in the band regarding Hughes' use of the 17.7-18.3 GHz band.⁸ Hughes respectfully requests that the Commission reconsider this aspect of its decision as it relates to both GSO and NGSO systems.

It is a non sequitur to conclude that there is no longer any guidance for international coordination between the GSO FSS and the NGSO FSS because satellite systems may no longer use the 17.7-18.3 GHz band within the U.S. While it is true that the band is no longer available domestically for FSS downlinks, it does not logically follow that there must be a change in the policy determination about the way in which the GSO FSS may use the 17.7-18.3 GHz band internationally vis-à-vis the NGSO FSS. Nothing in the Third Report and Order suggests that how the band is shared *internationally* between different types of satellite systems is dependent upon whether the band is now dedicated *domestically* for terrestrial service.

⁷ Memorandum Opinion and Order at ¶ 15 (stating that “the policy for coordination between FCC-licensed systems adopted in the Third Report and Order provides no guidance for coordination of international operation in that segment”).

To the extent that the Commission now seeks to change the service rules for the 28 GHz band, and the express policy decisions reached in the Third Report and Order with respect to GSO/NGSO sharing, such changes may not be imposed before Hughes and the rest of the industry are provided notice and an opportunity to comment on the impact of these changes in the Commission's rules.⁹ The Commission has not even attempted to articulate a policy basis for changing the priorities for GSO/NGSO sharing that were established almost four years ago, or how this decision to place the NGSO FSS on parity with the GSO FSS at 17.7-18.3 GHz can be reconciled with the Commission's decision last year, in the 18 GHz proceeding, to delete the secondary designation for the GSO FSS at 18.8-19.3 and 28.6-29.1 GHz.¹⁰ To the extent that the Commission wishes to revisit the question of GSO/NGSO priorities in general, that matter also is properly the subject of a full notice and comment rulemaking.

It is arbitrary and capricious to decide here that the GSO FSS should lose its priority over the NGSO FSS in the 17.7-18.3 GHz band without also considering whether the NGSO FSS should lose its priority over the GSO FSS in the 18.8-19.3 GHz and 28.6-29.1 GHz bands.¹¹ In its petition for reconsideration of the 18 GHz Order, Hughes raised similar arguments about why piecemeal alterations to the satellite-to-satellite sharing criteria established in the 28 GHz Order are inappropriate, and why any such changes should be done (i) in the context of a

⁸ *Id.*

⁹ Administrative Procedure Act, 5 U.S.C. § 553.

¹⁰ *See Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automotive Ins. Co.*, 463 U.S. 29, 41-44 (1983) (an agency changing course must supply a reasoned analysis for the change).

¹¹ *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1993) (agency must provide adequate explanation before it treats similarly situated parties differently); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (agency must supply reasoned analysis how prior policies and standards are being deliberately changed), *cert. denied*, 403 U.S. 923 (1971).

further notice of proposed rulemaking, (ii) only with an adequate and refreshed record, and (iii) only after taking into account the results of WRC-2000.

Hughes reasonably believed that it would continue to hold priority coordination internationally over U.S.-licensed NGSO systems for the 17.7-18.3 GHz band. The Commission stated in the Third Report and Order that it gave GSO FSS coordination priority internationally for the uplink frequencies between 27.5-28.35 GHz because dissimilar treatment of the uplink frequencies would render the downlink designation meaningless. Yet, the Commission's most recent decision leads to the exact result that the Commission sought to avoid in the Third Report and Order. Specifically, the Commission's decision to eliminate international priority coordination for the GSO FSS at 17.7-18.3 GHz by definition renders meaningless the international designation for the uplink frequencies that the Commission made in the First Report and Order. As such, the Commission's decision results in an imbalanced treatment between the uplinks and downlinks to and from Spaceway internationally. The rational result would be to allow the GSO FSS to retain priority coordination internationally at 17.7-18.3 GHz, as the Commission originally concluded in the Third Report and Order, a decision upon which Hughes has reasonably relied in awaiting action on Hughes' request for international authority.¹²

The Commission also should reconsider the condition that Hughes coordinate with other U.S.-licensed GSO FSS systems who are authorized to use 17.7-18.3 GHz before Hughes may undertake coordination with foreign-licensed systems in the 17.7-18.3 GHz band. This

¹² Hughes had awaited action on its request for authority to provide service outside the United States for four years since its license was first granted in May 1997. In contrast, another first round licensee was awarded similar international authority in March of 1997, even though the Ka band service rules were still pending. *Teledesic Corp. Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service, Order and Authorization, 12 FCC Rcd 3154 (1997).*

condition precedent to international coordination does not apply to licenses issued to GSO FSS licensees for other downlink portions of the Ka band (e.g., 18.3-18.8 GHz or 19.7-20.2 GHz). The Commission has not articulated *any reason* why such a condition is needed specifically with respect to other GSO FSS systems at 17.7-18.3 GHz, or why the Commission's general requirement that GSO FSS systems coordinate with each other is not sufficient in this case.¹³ Imposing this type of a condition precedent could allow one U.S. GSO FSS licensee to block the international coordination efforts of another U.S. GSO FSS licensee simply by refusing to coordinate with the other U.S. licensee, and is inconsistent with the Commission's general policy not to impose special coordination obligations on GSO FSS licensees.¹⁴ In sum, this condition is legally unsustainable because the Commission has not explained, and cannot explain, any rational basis for the requirement, and it is inconsistent with general Commission policies.¹⁵ Therefore, this condition should be deleted.

Alternately, should the Commission not reconsider the matters addressed above, Hughes asks the Commission to clarify that the obligation to coordinate with other U.S. licensees does not include other licensees who hold secondary licenses. By definition, a secondary user is not entitled to interference protection, and cannot complain about receiving interference, from an

¹³ See, e.g., *Loral Space & Communications, Ltd, For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service*, 11 FCC Rcd 20441, ¶ 8 (1996).

¹⁴ See *id.*

¹⁵ *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994) (Commission must demonstrate a rational basis for its decision); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (agency must supply reasoned analysis how prior policies and standards are being deliberately changed), *cert. denied*, 403 U.S. 923 (1971).

authorized primary user.¹⁶ Therefore, there should not be any obligation for a primary license holder to coordinate with a secondary license holder.

II. International Deviations from 28 GHz Band Plan.

As noted above, in the Third Report and Order in this proceeding, the Commission adopted a requirement that U.S. satellite licensees operate in accordance with the 28 GHz band plan throughout the world, to the extent that band plan relates to spectrum sharing between satellite systems.¹⁷ Due to the existence of some international coordination agreements that were negotiated before the 28 GHz band plan was adopted in July 1996, the Commission indicated that certain rare deviations from this rule would apply with respect to certain unspecified geographic areas in foreign countries.¹⁸ On December 18, 1997, Hughes timely filed a petition requesting that the Commission clarify this requirement by providing detailed information about the precise nature of these international deviations from the 28 GHz band plan and the extent to which Hughes will be required to modify its Spaceway system to comply with these rare deviations.¹⁹ Hughes believed that these deviations involved the Iridium system using spectrum designated for GSO FSS use. Hughes was very concerned about the impact of these deviations on Hughes' licensed Spaceway system in light of Iridium's long-standing position in this very proceeding that Iridium could not share spectrum with Spaceway.

In its recent Memorandum Opinion and Order, the Commission declined to provide Hughes with detailed information regarding system modifications that Hughes will be

¹⁶ 47 C.F.R. § 2.104(d)(3).

¹⁷ Third Report and Order at ¶ 67.

¹⁸ *Id.* at ¶ 69.

¹⁹ Hughes Communications Galaxy, Inc., Petition for Reconsideration or Clarification, (filed Dec. 18, 1997).

required to make in order to comply with deviations from the band plan. Rather, the Commission simply stated that (i) an agreement between the United States and Japan regarding the Iridium system and the Japanese N-Star and COMET systems is the only international agreement affecting spectrum that is designated for GSO FSS operations, and (ii) the information Hughes requests is a matter of public record. The Commission further stated that “the international coordination process is designed to elicit information regarding potential conflicts between spectrum uses authorized by different national administrations.” In other words, according to the Commission, Hughes could obtain the requested information during the international coordination process.

The Commission’s rejection of Hughes’ request for detailed information regarding international agreements affecting spectrum availability designated for GSO FSS use is not legally sustainable.²⁰ First, while confirmation that the Iridium agreement is the only relevant international agreement limits the scope of the potential problem, it is unresponsive to Hughes’ request in its Petition. The Commission still has failed to disclose the extent to which Hughes will be required to modify its system to comply with the international coordination agreement. And, contrary to what the Memorandum Opinion and Order suggests, Hughes has been informed by Commission staff that the Iridium agreement is not public, and, because that agreement is confidential, the Commission has declined to provide this information to Hughes. Without access to such information, Hughes cannot be expected to finalize its system design and commence construction, because Hughes does not know the extent of the modifications that the Commission may require. If the Commission imposes a condition on a licensee’s use of spectrum, it is axiomatic that the Commission also must disclose to the licensee the specific terms of that

²⁰ *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988) (Commission’s approach was irrational because of its incoherent analysis).

condition, and do so in a timely fashion. As Hughes noted in its Petition, the terms must be specified to Hughes because this condition, in its current form, is unconstitutionally vague about the conduct that the Commission will require of Hughes.²¹

Second, the Commission's assumption that Hughes will become aware of international agreements affecting the availability of spectrum during the international coordination process is not reasonable. First, Hughes does not believe that it needs to coordinate Spaceway with either the Japanese N-Star system or the failed Japanese COMET system. Even if Hughes must coordinate with those systems, if the Japanese government determines that the Iridium coordination agreement does not affect the coordination of Spaceway with N-Star or COMET, there is no reason to believe that the Japanese administration would disclose to Hughes the terms of the Iridium coordination. In fact, it is more reasonable to conclude that the Japanese administration would maintain that, to the extent that an international coordination agreement affects another FCC licensee, the Commission should be the one to disclose the details of that arrangement to the affected FCC licensee.

Finally, as the Commission itself has stated, the "ITU's coordination procedures are intended to ensure that the operations of one country's satellites do not cause or receive harmful interference to or from the operations of another country's satellites."²² The process is not intended to resolve potential conflicts between U.S.-licensed satellite systems, as is the case

²¹ See *Freeman United Coal Mining Company v. Federal Mine Safety and Health Review Commission and Secretary of Labor*, 108 F.3d 358, 362 (D.C. Cir. 1997) ("In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit.") Due process and fundamental fairness also prohibit the Commission from imposing a requirement that benefits one licensee at the expense of another licensee when only the other licensee knows the requirements. Hughes is directly affected by this unconstitutional requirement because its Spaceway license is subject to the service rules adopted in the Third Report and Order. See Third Report and Order at ¶ 37.

here between Iridium and Spaceway. As such, the Japanese administration cannot reasonably be expected to inform a U.S. licensee that it may encounter potential conflicts with another U.S. licensee.

Hughes acknowledges that the Commission customarily treats international coordination agreements as confidential. However, that practice does not legally permit the Commission to condition Hughes' license on complying with the terms of a confidential coordination agreement, and then decline to disclose those terms to Hughes. To the contrary, in order for Hughes to design its satellite network such that it does not "jeopardize the successful operation of these systems outside of the United States,"²³ as the Commission so desires, the Commission must disclose to Hughes the terms of the Iridium agreement,²⁴ subject to any appropriate protective safeguards.

On the other hand, Hughes recognizes that the Iridium system may have changed its manner of operations since 1997 when this issue first arose. To the extent that the terms of the Iridium agreement are no longer relevant to Spaceway, the Commission should remove the "international deviation" condition from the Hughes license, in which case there would be no need to disclose to Hughes the terms of the Iridium agreement.

Hughes, therefore, respectfully requests that the Commission disclose to Hughes the specific deviations from the 28 GHz band plan with which Spaceway must comply, or otherwise eliminate this condition on the Spaceway license.

²² Third Report and Order at ¶ 63.

²³ *Id.* at ¶ 67.

III. Conclusion

For the reasons set forth above, Hughes respectfully requests that the Commission reconsider and/or clarify its Memorandum Opinion and Order in this proceeding in order to (i) disclose to Hughes the extent to which Hughes will have to modify the international operations of Spaceway in order to comply with deviations from the 28 GHz band plan that are the result of preexisting U.S. government coordination agreements, and (ii) confirm that Hughes' Spaceway system is authorized to conduct international operations across the full bandwidth at Ka band that was designated for GSO FSS systems on a primary basis in the Third Report and Order.

Respectfully submitted,

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²⁴ The Commission has repeatedly declined to provide Hughes with information regarding how it should modify its system. Hughes therefore may file a Freedom of Information Act request with the Commission seeking access to the Iridium agreement.