

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Application of Pegasus Development DBS) Files Nos. SAT-LOA-20020322-00032
Corporation for Authority to Construct, Launch,) SAT-LOA-20020322-00033
and Operate a System of Direct Broadcast) SAT-LOA-20020322-00034
Satellites in the Broadcasting Satellite Service)
)

To: The Secretary
The Commission

APPLICATION FOR REVIEW

Pegasus Development DBS Corporation (“Pegasus”), pursuant to 47 C.F.R. § 1.115, hereby files this Application for Review of the International Bureau (“Bureau”) order denying Pegasus’ Petition for Reconsideration (“Petition”) of the dismissal of the above-captioned application (the “Application”).¹ Commission review of the *Order* is appropriate. The Bureau erred in concluding that grant of Pegasus’ request for waiver of the filing deadline to amend the Application to include an orbital debris mitigation plan would undermine the purpose of the “substantially complete” filing requirement. The overarching policy goal of the Commission’s satellite licensing procedural rules is to facilitate the processing of applications in order to expedite services to consumers and make more efficient use of orbital resources, not -- as the Bureau contends -- simply to ensure that applications are complete and discourage speculators.

¹ See *In the Matter of Application of Pegasus Development DBS Corporation for Authority to Construct, Launch, and Operate a System of Direct Broadcast Satellites in the Broadcasting Satellite Service*, DA 06-1220 (June 6, 2006) (“*Order*”); see also Public Notice, DA No. 05-3152 (December 7, 2005).

Here, because the Commission has established no service, technical, or licensing rules for the spectrum at issue, and the Bureau could not have acted on the merits of the Application, the grant of a waiver would be both fair and consistent with the fundamental policy goal.

The Bureau incorrectly determined that dismissal of the Application would not be unduly harsh. In making that determination, the Bureau failed to consider that the Application had been filed more than three and a half years earlier and is subject to being licensed based on date priority. Dismissal changes that status potentially irreparably.

The Bureau also improperly based its denial of the Petition on several arguments that Pegasus did not in fact raise in its pleading. For these reasons, the Commission should overturn the Bureau's decision, reinstate the Application *nunc pro tunc*, and grant the Pegasus waiver request to accept the late-filed amendment.

Background

On March 22, 2002, Pegasus filed its Application to construct, launch, and operate a system of satellites at the 110°W, 101°W, and 91°W orbital locations in the Broadcasting Satellite Service ("BSS") operating in the 17.3 - 17.8 GHz (downlink) and 24.75 - 25.25 GHz (uplink) bands.² At the time of the filing, the FCC had not established service, technical, or licensing rules for the spectrum.³ Pegasus submitted the Application, in part, to assist in

² Domestically, BSS is referred to as Direct Broadcast Satellite ("DBS") service.

³ On June 23, 2006, the FCC initiated a Notice of Rulemaking Proceeding ("NPRM") for the establishment of such rules. *See In the Matter of The Establishment of Policies and Service Rules for the Broadcasting Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Broadcasting Satellite Service Operating Bi-directionally in the 17.3-17.7 GHz Frequency Band*, IB Docket No. 06-123, FCC 06-90 (June 23, 2006).

preserving U.S. priority for certain full-CONUS orbital locations. The FCC did not put the Application on public notice, as required prior to grant under 47 C.F.R. § 25.151, but entered it into the FCC's IBFS database with a status of "system entry."⁴

More than two years later, in June 2004, the Commission released an order establishing rules requiring an applicant for space station authority to submit with its application a narrative description of its plans to mitigate orbital debris.⁵ In an erratum to the *Orbital Debris Order*, the Commission added a single sentence to the order stating that "Parties that have requests for approval of space stations pending before the Commission shall have 30 days after the effective date of the orbital debris disclosure rules in which to amend their requests by filing a disclosure of debris mitigation plans"⁶

More than a year after release of the *Orbital Debris Order* and three and a half years after the filing of the Application, the orbital debris mitigation plan rules appeared in the Federal Register identifying October 19, 2005 as the effective date of the relevant rules.⁷ Contemporaneously, the Bureau released a general public notice announcing the effective date of

⁴ The FCC's IBFS database now classifies filed Ka-BSS applications as "unblocked." See, e.g., SAT-LOA-20050210-00028 to 31.

⁵ See generally *In the Matter of Mitigation of Orbital Debris*, 19 FCC Rcd 11567 (2004) ("*Orbital Debris Order*"); see also 47 C.F.R. § 25.114.

⁶ See Erratum, DA 04-2613 (August 24, 2004).

⁷ See *Mitigation of Orbital Debris*, 70 Fed. Reg. 59276 (October 12, 2005).

the rules and that pending satellite applications would have until November 18, 2005 to be amended, pursuant to the *Orbital Debris Order*.⁸

Approximately two weeks after the filing deadline, on December 2, 2005, Pegasus realized that it had inadvertently failed to amend its Application to include an orbital debris mitigation plan. Pegasus, through its counsel, verbally notified Bureau staff of that fact and indicated that it was in the process of preparing such a plan and would request a waiver of the November deadline. Five days later, the FCC released a public notice dismissing the Application without prejudice to refile. *See* Public Notice, DA 05-3152 (December 7, 2005). The sole justification for the dismissal was Pegasus's failure to submit an orbital debris mitigation plan by the November deadline.

On January 6, 2006, Pegasus timely sought reconsideration of the Bureau decision and included with that filing an orbital debris mitigation plan as an amendment to the Application.⁹ In the Petition, Pegasus demonstrated that waiver of the November deadline for submission of an orbital debris mitigation plan was warranted. *See* Petition, at 3-5. No service, technical, or licensing rules had been established for the spectrum at issue. *See id.* at 4. Thus, grant of the waiver would not undermine the logical purpose of establishing a date certain for the amendment of pending applications, to ensure that the Bureau timely received orbital debris mitigation plans in order to act on such applications expeditiously, consistent with the FCC's first-come, first-serve licensing process applicable to most satellite applications. *See id.* at 4. Moreover, Pegasus

⁸ *See* "Disclosure of Orbital Debris Mitigation Plans, Including Amendment of Pending Applications," Public Notice, DA 05-2698 (October 13, 2005) ("October 2005 Notice").

⁹ *See* Orbital Debris Mitigation Plan, attached to Petition.

argued that dismissal of the Application, which had been entered into the FCC's database more than three and a half years ago, would be unduly harsh. *See id.* at 4. The future licensing rules of the spectrum have not been determined and could in theory be based in whole or in part on the date priority of the filing.¹⁰ As an additional consideration, Pegasus noted that it had in good faith made immediate efforts to remedy the delinquency in filing and informed the Bureau of such efforts, but the Bureau acted before Pegasus could submit its waiver request and amendment. *Id.* at 4-5.

On June 6, 2006, the Bureau denied Pegasus' Petition. In the *Order*, the Bureau concluded that Pegasus was "not simply asking for a waiver of the filing deadline in the *Orbital Debris Mitigation Public Notice*, but in effect . . . asking for a waiver of the Commission's requirement that all applications be substantially complete when filed." *Order*, at ¶ 6. The Bureau held that grant of the waiver would undermine the purposes of that rule, to ensure complete applications and discourage speculative filings.¹¹ The Bureau also concluded that no harm would result from the dismissal because Pegasus could refile its application without submitting a new filing fee. *Id.* at ¶ 10. As further support for its decision, the Bureau rejected three arguments that it erroneously claimed Pegasus had made in the Petition: (i) Pegasus did not receive sufficient notice of the requirement to amend its Application (*Order*, at ¶ 10); (ii) the Application should be reinstated in order to retain U.S. date priority for the orbital locations

¹⁰ The FCC's recent *NPRM* specifically invites comments on exactly that proposal. *See NPRM*, at ¶ 8.

¹¹ *Order*, at ¶ 7. The Bureau emphasized that it did not find the Pegasus application to be speculative, but rather concluded that grant of the waiver would "open the door to future speculators." *Id.* at ¶ 7 n.22.

requested by Pegasus (*Order*, at ¶ 11); and (iii) the Bureau acted improperly by dismissing the Application before Pegasus could submit a waiver request and amendment (*Order*, at ¶ 12).

For the reasons discussed below, the Bureau's conclusions were in error. Accordingly, the Commission should reverse the Bureau's *Order*, reinstate the Application *nunc pro tunc*, and grant Pegasus' waiver request.

Discussion

I. THE BUREAU ERRED IN CONCLUDING THAT GRANT OF PEGASUS' WAIVER REQUEST WOULD UNDERMINE THE PURPOSE OF THE SUBSTANTIALLY COMPLETE FILING REQUIREMENT

The Bureau claims that the limited purpose of the substantially complete filing requirement is to ensure completeness and discourage speculators, and not, as Pegasus had argued, to enable the Bureau to act on applications expeditiously in accord with the Commission's first-come, first-serve, licensing process.¹² However, in establishing this process, the Commission made clear that the overarching policy goal of its licensing procedural rules, including the substantially complete filing requirement, is to facilitate the processing of applications in order to expedite service to consumers and make more efficient use of orbital resources.¹³

¹² See *Order*, at ¶¶ 6-8.

¹³ See *In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order, 18 FCC Rcd 10760, at ¶ 74 (2003) (“[C]onsumers will benefit because they will receive service faster. In addition, our procedure will lead to more efficient spectrum usage because it will reduce the amount of time spectrum lies fallow.”); see also *In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847, at ¶ 11 (2002) (“Under our current procedure, it can take several years to issue satellite licenses. For several reasons, we would like to explore ways to expedite this procedure.”), at ¶ 23 (“[W]e are committed to acting on satellite applications as quickly as our processes will allow. . . . [I]f we can expedite the satellite licensing process, we

The very cases the Bureau cites in the *Order* confirm this conclusion.¹⁴ For example, in the Letter to Robert Lewis, the Bureau specifically explained that the FCC requires substantially complete applications in order “to enable the Commission to establish satellite licensees’ operating rights clearly and quickly, and as a result, allow licensees to provide service to the public”¹⁵ In *EchoStar*, the Bureau stated that such a requirement discouraged speculation by ensuring that “those licensees ready and willing to proceed with their satellite construction plans could do so.”¹⁶

But, as Pegasus explained in the Petition, the Commission has not yet established service, technical, or licensing rules for the spectrum in question. Thus, the Bureau could not have acted on the merits of the Application, and for all practical purposes, acceptance of the late-filed amendment would not have undermined the purpose of the substantially complete filing

will be able to reduce the number of pending satellite applications at a faster rate in the future.”), at ¶ 93 (“By requiring more detailed and standardized information in satellite applications, we intend to facilitate our review of applications”).

¹⁴ These cases are also distinguishable on the facts because they do not involve applications that had been filed years earlier and became “incomplete” only as a result of a subsequent change in Commission rules. See *In the Matter of Echostar Satellite LLC*, 19 FCC Rcd 24953 (2004) (“*EchoStar*”) (affirming decision to dismiss as incomplete application for extended Ku-band space station seven months after its filing); Letter to James V. Heck, World Radio Network, Inc., from Scott A. Kotler, Chief, Systems Analysis Branch, Satellite Division, 20 FCC Rcd 1919 (2005) (“Letter to James Heck”) (dismissing as incomplete Ku-band earth station application thirteen days after filing); Letter to Robert Lewis, SkyTerra Communications, Inc. from Fern J. Jarmulnek, Deputy Chief, Satellite Division, 20 FCC Rcd 2112 (2005) (“Letter to Robert Lewis”) (dismissing as incomplete application for two Ka-band space stations four months after filing).

¹⁵ Letter to Robert Lewis, at p. 1.

¹⁶ *EchoStar*, at ¶ 9.

requirement.¹⁷ Indeed, acceptance of the amendment, as a result of a Commission reversal of the Bureau *Order*, similarly will be timely for any future processing of the Pegasus Application.

II. THE BUREAU INCORRECTLY DETERMINED THAT DISMISSAL OF THE APPLICATION, WHICH HAD BEEN FILED MORE THAN THREE AND A HALF YEARS EARLIER, WOULD NOT BE UNDULY HARSH

The FCC has not established licensing rules for the spectrum at issue, and it has left open the option of licensing applicants based on their date priority.¹⁸ The Bureau's order, however, completely ignores the potential harm associated with Pegasus' loss of date priority and concludes only that the dismissal is not unduly harsh because Pegasus is permitted to resubmit an application without having to pay a new filing fee. Because the limited amount of the filing fee does not accurately reflect the potential harm to Pegasus from dismissal of the Application, Commission reversal of the Bureau *Order* is appropriate.¹⁹

III. THE BUREAU IMPROPERLY BASED ITS DENIAL OF THE PETITION ON ARGUMENTS PEGASUS DID NOT MAKE

Despite the Bureau's belief to the contrary, Pegasus did not allege that it failed to receive sufficient notice of the requirement to amend the Application. *See Order*, at ¶ 10. In fact,

¹⁷ For the same reasons, grant of the waiver would not undermine the FCC's purpose in establishing a date certain for amending pending satellite applications.

¹⁸ *See NPRM*, at ¶ 8 (requesting comments on a first-come, first-serve licensing process for Ka-BSS applications).

¹⁹ *See also McElroy v. FCC*, 990 F.2d 1351, 1358 (1993) (the fact that an applicant may refile a dismissed application does not necessarily address the applicant's interest in seeking reinstatement of the dismissed application).

Pegasus unambiguously conceded in the Petition that it failed to amend its Application by the deadline as a result of its own “inadvertent oversight.”²⁰

Similarly, Pegasus did not argue that preserving U.S. orbital priority justified reinstating the Application. *See Order*, at ¶ 11. Pegasus stated (in the background section of the Petition) that it submitted the Application, in part, to assist in preserving U.S. orbital priority in order to provide some context as to why Pegasus would submit the Application prior to the establishment of any applicable licensing rules.

Pegasus also did not claim that the Bureau acted without authority in dismissing the Application, despite being informed by Pegasus that it would be submitting a late-filed amendment and a waiver request for that filing. *See Order*, at ¶ 12. Rather, Pegasus’ point, which is directly supported by the citation in the text, was that the prompt disclosure to the Bureau evidenced Pegasus’ good faith effort to remedy the delinquency immediately – a factor that the Commission has considered in other waiver cases.²¹ Accordingly, the Bureau’s rejection of these arguments can not be a proper basis for denial of the Petition, and Commission review of the Bureau’s *Order* is appropriate.

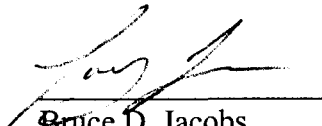
²⁰ Petition, at 1.

²¹ *See* Petition, at 5 n. 11 (citing *Longstreet Communications International, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules Regarding Market No. B012*, 12 FCC Rcd 1549, at ¶ 8 (1997) (granting waiver of payment deadline in part because of “applicant’s prior record of compliance . . . and its prompt action to remedy the delinquency.”); *Roberts-Roberts & Associates, LLC Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules Regarding Various BTA Markets*, 12 FCC Rcd 1825, at ¶ 8 (same)).

Conclusion

For the reasons stated above, Pegasus requests that the Commission reverse the *Order*, reinstate the Application *nunc pro tunc*, and grant the waiver request to accept the late-filed amendment.

Respectfully submitted,



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