

ORIGINAL

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 Corporation for Authority to Launch and Operate a Geostationary Orbit Fixed-Satellite Service System in the Ka band

Front Office

DA 03-3665  
Files Nos. SAT-LOA-20030827-00169  
SAT-LOA-20030827-00171  
SAT-LOA-20031030-00319

**PETITION FOR RECONSIDERATION**

Pegasus Development Corporation ("Pegasus"), pursuant to 47 C.F.R. § 1.106, hereby files this Petition for Reconsideration of the letter order issued by the International Bureau ("Bureau") dismissing the above-captioned applications.<sup>1</sup> Pegasus met the requirement for submitting "substantially complete" applications. Accordingly, the Bureau should reconsider its dismissal and reinstate the applications.

**Background**

On August 27, 2003, Pegasus filed two Ka-band geostationary orbit, fixed-satellite service applications for the 79°W and 87°W orbital locations under the Commission's new first-come, first-served ("FCFS") filing process.<sup>2</sup> Each application contained a completed FCC Form

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<sup>1</sup> See Letter to John K. Hane, Senior Vice President, Pegasus Development Corporation, from Thomas S. Tycz, DA 03-3665 (November 19, 2003), as corrected (November 26, 2003) ("Dismissal Letter").

<sup>2</sup> Under the FCFS process, only the first-filed, acceptable application for a particular orbital location and frequency band is considered. See *In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847, at ¶ 32 (2002) ("*Satellite Licensing NPRM*"); First Report and Order, 18 FCC Rcd 10760 (2003) ("*Satellite Licensing Order*"). Subsequently filed mutually exclusive applications are not considered unless the first-filed application can not be granted.

312, two exhibits, and a 32-page (including technical appendix) detailed description of the proposed satellite system, which specified, *inter alia*, link noise budgets, modulation parameters, and an overall link performance analysis for each type of r.f. carrier and demonstrated that the satellite's PFD limits and earth station EIRP density values are consistent with the Commission's rules.<sup>3</sup> Pegasus was first in line for the applied for locations and frequencies, and on September 12, 2003, the Commission placed Pegasus' two applications on public notice. Although one other applicant submitted a Ka-band application for the 87°W orbital location, no party challenged or filed comments regarding either of Pegasus' applications.<sup>4</sup>

On October 29, 2003, the Bureau announced that the Ka-band frequencies at the 73°W orbital location were available, and Pegasus filed an application for those frequencies.<sup>5</sup> That application contained technical data and other information similar to the two previously filed applications.

On November 19, 2003, the Bureau issued the letter order at issue dismissing all three Pegasus applications without prejudice to refile. The Bureau's sole justification for dismissing the applications was because Pegasus specified a station keeping tolerance of  $\pm 0.1^\circ$ , rather than  $\pm 0.05^\circ$ , the tolerance specified in 47 C.F.R. § 25.210(j)(1), and did not request a waiver of that

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<sup>3</sup> The information is contained in the Technical Appendix and Tables 4 and 5 of the narrative description of Pegasus' applications.

<sup>4</sup> The applicant next in line at 87°W subsequently amended its application requesting the 77°W orbital location. *See* SAT-AMD-20031009-00312 (October 9, 2003); SAT-LOA-20030827-00173 (August 27, 2003).

<sup>5</sup> *See* SAT-LOA-20031030-00319 (October 30, 2003).

rule. *See* Dismissal Letter, at 2-3. Pegasus refiled the applications on November 19, 2003 and changed the station keeping tolerance of the proposed satellites to  $\pm 0.05^\circ$ .<sup>6</sup>

### Discussion

Under the Commission's rules, satellite applications will be processed if they are "substantially complete" when they are filed.<sup>7</sup> Part 25 of the Commission's rules obligate an applicant to provide detailed technical information regarding its proposed satellite system.<sup>8</sup> Pegasus provided the Commission all such relevant information.

Both judicial and Commission precedent establish that, under a substantially complete standard, minor errors in an application do not warrant dismissal of that application. For example, in *James River Broadcasting Corporation v. FCC*, the D.C. Circuit reversed a Commission decision that dismissed a broadcast application under a substantially complete standard because the application failed to protect a neighboring station from harmful interference in express violation of a Commission rule. *See James River Broadcasting Corporation v. FCC*, 399 F.2d 581 (1968). The court held that even though the application was patently not in accordance with the Commission's rules, it was nonetheless substantially complete when filed.

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<sup>6</sup> *See* SAT-LOA-20031119-00336 to 00338 (November 19, 2003). The fact that Pegasus was able to refile promptly and preserve its place in line with respect to each of the proposed satellite systems does not moot this petition for reconsideration. The Bureau has not awarded Pegasus a license for any of the applied for spectrum and could in theory find some "deficiency" with the refiled applications. *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).

<sup>7</sup> *See Satellite Licensing Order*, at ¶ 244 *Satellite Licensing NPRM*, at ¶ 84; *Dismissal Order*, at 2; *see also* 47 C.F.R. § 25.112.

<sup>8</sup> *See* 47 C.F.R. § 25.114(c) (specifying a checklist of over 23 items).

*Id.* at 583. As the court later reiterated in *Salzer v. FCC*, “[u]nder the *James River* standard, the FCC must accept applications that are substantially complete when filed even if they contain minor errors or infractions of agency rules, so long as any such defects may be cured without injury to public or private interest.”<sup>9</sup>

Pegasus’ misspecification in its applications was just such a minor error. Pegasus based its technical interference analysis on a station keeping tolerance of  $\pm 0.05^\circ$ , not  $\pm 0.10^\circ$ . Thus, the misspecification had no effect on any of the interference analysis provided in the application or relevant to the Commission’s processing of the applications. Moreover, a station keeping tolerance of  $\pm 0.05^\circ$  is an established industry design standard for GSO satellites operating in a two degree environment. Thus, the Bureau’s presumption that Pegasus proposed to deploy satellites with substandard specifications was unreasonable.

The Bureau’s own recently announced guidelines for evaluating whether applications are substantially complete does not mention station keeping tolerance.<sup>10</sup> Rather, the Bureau specified that all applications must include: (1) a link noise budget, (2) modulation parameters, (3) an overall link performance analysis for each type of r.f. carrier, and (4) a demonstration that the satellite’s PFD limits and earth station EIRP values are consistent with the Commission’s rules.<sup>11</sup> Pegasus accurately provided all such information in its applications.

The Commission has dismissed applications as incomplete or inconsistent with its rules only in extreme circumstances. For instance, the Commission dismissed applications for failing

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<sup>9</sup> See *Salzer v. FCC*, 778 F.2d 869, 872 n. 7 (D.C. Cir. 1985)

<sup>10</sup> See Public Notice No. SPB-195, DA 03-3863 at 2 (December 3, 2003).

<sup>11</sup> See *id.* at 1-2.

to provide “information as to the number of channels, characteristics of satellites, channel bandwidth, polarization methods, e.i.r.p., service areas, or uplink locations” and for failing to identify parties to the application.<sup>12</sup> Similarly, the Bureau dismissed an application that failed to specify a feeder uplink band or TT&C frequencies and to provide the weight, mass, dimensions, and power budget of the proposed satellites.<sup>13</sup> Pegasus’ misspecification does not rise to this level.

More commonly, the Bureau grants applications which contain minor errors or infractions of the Commission’s rules. For example, the Bureau granted a Pegasus Ka-band application despite the fact that Pegasus proposed, without a waiver request, the use of impermissible frequencies for launch TT&C.<sup>14</sup> The Bureau noted only that Pegasus would not be authorized to use such frequencies. Similarly, the Bureau granted a PanAmSat application that inadvertently proposed domestic service for frequencies limited under the Commission’s rules to only international use.<sup>15</sup> The Bureau conditioned the grant of the license on the PanAmSat’s proper adherence to the relevant Commission rule.<sup>16</sup>

On other occasions, the Bureau has permitted an applicant that initially failed to provide certain information to amend its application to correct that deficiency. As an example, in June

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<sup>12</sup> *In re Advance, Inc. et al.*, 88 FCC 2d 100, at ¶¶ 36-46 (1981), *aff’d on reconsideration*, 89 FCC 2d 177 (1982).

<sup>13</sup> *See Applications of the Boeing Company*, DA 03-2073 (June 24, 2003).

<sup>14</sup> *See In the Matter of Pegasus Development Corporation*, 16 FCC Rcd 14378, at ¶ 18 (2001); *see also KaStar Satellite Communications Corp.*, 13 FCC Rcd 1366, at ¶¶ 19-20 (1997).

<sup>15</sup> *See PanAmSat Licensee Corporation*, 17 FCC Rcd 8367, at ¶ 9 (2002).

<sup>16</sup> *See id.*

2003, the Bureau gave DirecTV an opportunity to amend its initial filing, despite the fact that its application was not submitted on an FCC Form 312, failed to provide technical information regarding antenna beams, did not provide performance objectives or link noise budgets, omitted a description of the physical characteristics of the space station, and specified unauthorized transfer orbit and on-station TT&C frequencies.<sup>17</sup> In a more recent example, which post-dates the implementation of the *Satellite Licensing Order*, Iridium filed a modification application but failed to provide ownership information, as required by question 40 of FCC Form 312.<sup>18</sup> Rather than dismissing the application, the Bureau requested that Iridium amend its application to provide the missing information.<sup>19</sup> Even the Bureau's recent public notice regarding the substantially complete standard provides that applications filed prior to the release of the public notice and failing to meet the announced guidelines would be dismissed only after the Bureau provided an opportunity for the applicant to provide supplemental information.<sup>20</sup> Accordingly, consistent with precedent, the Bureau should have requested that Pegasus amend its applications or simply granted the applications noting the Commission requirement to maintain a station

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<sup>17</sup> See Letter to James H. Barker III, Esq. from Thomas S. Tycz, File No. SAT-LOA-20030611-00115 (November 17, 2003). Although the application was for a DBS satellite, which is not subject to FCFS processing, a DBS applicant is, nonetheless, required to provide all relevant information requested in Part 25 of the Commission's rules and is under the same obligation to meet the substantially complete standard. See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, at ¶ 36 (2002); see also *In re Advance, Inc. et al.*, 88 FCC 2d 100, at ¶ 23 (1981) (dismissing incomplete DBS applications under a substantially complete standard).

<sup>18</sup> See SAT-MOD-20030828-00286 (August 28, 2003).

<sup>19</sup> See Letter to Peter D. Shields from Thomas S. Tycz, File No. SAT-MOD-20030828-00286 (October 22, 2003).

<sup>20</sup> See Public Notice No. SPB-195, DA 03-3863 at 2 (December 3, 2003).

keeping tolerance of  $\pm 0.05^\circ$ .<sup>21</sup>

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<sup>21</sup> The *Satellite Licensing Order* did not change the standard for assessing whether an application is substantially complete. See *Satellite Licensing Order*, at ¶ 244 (“[W]e find that continuing to require substantially complete satellite applications will also continue to provide some additional protection against speculative satellite applications.”); see also *Satellite Licensing NPRM*, at ¶ 84 n. 104 (“We emphasize that we are not proposing any changes to the ‘substantially complete’ standard we currently use for satellite license review.”). Had the Commission intended to do so, it would have been required to provide proper notice to potentially affected parties. See *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985). For this same reason, the Bureau may not now adopt its own new interpretation of the substantially complete standard. *But cf. In the Matter of Applications of PanAmSat Licensee Corp.*, DA 03-3633, at 6 n. 12 (implying that precedent regarding the substantially complete standard and predating the *Satellite Licensing Order* is no longer applicable). Additionally, from a policy perspective, the dismissal of the applications for a minor error or infraction of the Commission’s rules undermines the Commission’s objectives of eliminating uncertainty and inefficiency and of establishing operating rights clearly and quickly. By introducing a heightened standard of review for applications, the Bureau has created uncertainty and has opened up the possibility for protracted pleading cycles between parties contesting the completeness of applications.

**Conclusion**

For the reasons stated above, Pegasus requests that the Bureau reconsider its dismissal and reinstate Pegasus' applications.

Respectfully submitted,

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