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VIA E-MAIL and REGULAR MAIL
Managing Director
Attention: FOIA Officer
Federal Communications Commission
445 12th Street, S.W., Room 1-A835
Washington, D.C. 20554

Re: FOIA Control No: 2005-512
ADDITIONAL COMMENTS IN SUPPORT OF FREEDOM OF INFORMATION ACT REQUEST

To whom it may concern:

Highcast Network, Inc. ("Highcast"), by counsel and at the request of Commission staff, hereby submits additional comments in this proceeding. Specifically, Highcast addresses the proper form, applicability and interpretation of the protective order proposed by the staff to govern access to materials pursuant to Pegasus Development Corp.'s ("PDC") request for confidential treatment of certain information.

In attempting to reach a resolution of PDC's confidentiality request that reasonably accommodates the interests of all, the International Bureau has proposed permitting access to the requested materials pursuant to a protective order with terms similar to those included *In the Matter of DIRECTV Enterprises, Inc.,* DA 04-755, File No. SAT-STA-20030903-00300, released March 22, 2004 ("*DIRECTV*"). Highcast has generally agreed to accept a protective order but sought clarification that John Hane, President of Highcast, its in-house counsel and sole employee, would be permitted to review the materials upon execution of the requisite Acknowledgment of Confidentiality. It is Highcast's understanding that PDC has objected to review by Mr. Hane, apparently though not explicitly on grounds that he is a "competitive decision maker".

Highcast urges the Commission to order release of the unredacted documents to Mr. Hane as well as Highcast's outside counsel pursuant to the protective order proposed or, alternately, to adopt a modified protective order that is more consistent with the requirements of this case and better reflects the terms of the Model Protective Order ("MPO") adopted by the Commission in the *Confidential Information Policy Order*[1].

As explained below, the existence of some level of "competition" between a submitting and a requesting party under the FCC's FOIA rules does not in and of itself preclude review by employees of a requesting party, even if they are not lawyers at all and, when the balance of interests requires, even if they could be engaged in competitive decision-making. In this case, the notion that Highcast is in any way competitive with PDC is fanciful and the prospect of competitive harm to PDC is remote. Highcast does not now and has never sought to be operate a satellite or to provide satellite services directly, nor does it have any ambition to provide broadband services in rural areas, which appears to be PDC's parent's sole business. (PDC's parent provides that service by terrestrial wireless links, not satellite links.)

Highcast is a technology development company, and until it became expedient to change its position, PDC itself argued to the Bureau the satellite contract is in no way "germane" to Highcast's business. Now that both parties have consented to a protective order approach, at the eleventh hour PDC sets up the contradictory argument that Highcast is a competitor and that review by Mr. Hane should therefore be disallowed. In so doing PDC appears to be invoking the definition of "In-House Counsel" employed in the *DIRECTV* case. That definition would prohibit review by in-house counsel that are "involved in competitive decision-making". *DIRECTV* at at 5.

It is clear that PDC does not consider Highcast to be a competitor, and no such argument could be made persuasively. For that reason alone PDC's attempt to constrain review of the redacted information should be rejected. Yet the question of whether Highcast is a competitor of PDC is not the first question to be asked and answered in the FOIA analysis, it is the last. The first point of analysis is recognition that it is PDC, not Highcast, that is seeking unusual relief. PDC therefore has the burden of making its case. Review of Commission policy regarding the use of protective orders illuminates the deviations from that policy PDC seeks.

Since 2003 the Commission has treated the submission of satellite construction

[1]Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GEN Docket No. 96-55, *Report and Order*, 13 FCC Rcd 24816 (1998).

contracts for the purpose of demonstrating milestone compliance as a submission under Section 0.459(b) of the Commission's rules. [2] Accordingly, PDC has the initial burden of demonstrating that the information submitted is subject to confidential treatment. Although PDC's letter submitting the contract documents does argue that the information contained therein is competitively sensitive, it did not argue then, as it does now, that the class of persons authorized to review the redacted information pursuant to a protective order should be restricted beyond the scope of review that is generally allowed pursuant to a protective order. As detailed below, the Commission has specifically addressed this issue and has ruled that a party such as PDC seeking to restrict the scope of review pursuant to a protective order must make that request *when the request for confidential treatment is initially filed.*

The Commission's *Confidential Information Policy Order* thoroughly considers the issues related to release of information filed with the Commission but claimed to be proprietary. In order to balance the interests of parties, the public, and the Commission's limited resources the Commission adopted a Model Protective Order to be used in cases such as this. Paragraphs five through seven of the Model Protective order define the persons who should be allowed to review confidential information subject to a protective order. Neither those sections nor any other provision of the Model Protective Order impose special limits on in-house counsel. To the contrary, the Model Protective Order identifies three classes of eligible Authorized Representatives:

> a. Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding, and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;
>
> b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; or

[2] *First Satellite Licensing Reform Order* at ¶ 187.

c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

Highcast's in-house counsel is clearly within the first two classes and ought to be, if necessary, designated as eligible by the Commission in the public interest. Even if Mr. Hane did not serve as in-house counsel for Highcast he would be eligible to review the redacted information pursuant to a protective order under (b). Notwithstanding the definition of "In-House Counsel" in the *DIRECTV* case, the Commission's FOIA rules and the Model Protective Order provide substantial protection against use of the information disclosed for competitive purposes. Indeed, in adopting the Model Protective Order the Commission noted the serious consequences of violating a Commission protective order made it unnecessary to limit *a priori* the persons who might be eligible to review information:

> We believe such limitations may unreasonably preclude a party from utilizing individuals, *consistent with its needs and resources*, who can provide the requisite expertise to examine the documents. * * * The serious consequences of violating a Commission protective order make this limitation unnecessary. We will, however, in rare instances . . . consider limiting access to documents to outside counsel and experts so as to minimize the potential for inadvertent misuse of such information. A party seeking this additional degree of protection must justify its request *when filing a request for confidential treatment*. . . [and should] specify the modifications to the model protective order that it believes to be necessary.

Confidential Information Policy Order at ¶ 26 (emphasis added). Similarly, the Commission recognized that parties requesting information under FOIA should not face unreasonable burdens because doing so might "deny the Commission with the benefit of comment from commenters with limited resources." *Id* at ¶ 17.

If PDC wished to expand the scope of protection afforded to confidential information it was required to make that case *when it first filed its request for confidential treatment*. PDC now effectively seeks a waiver of Commission policy to allow it to seek an unusual scope of protection for its redacted information after a request for access has been filed. It asks the Bureau to adopt a protective order that differs substantially from the Model Protective Order, and then asks the Bureau to interpret that order in a way that would preclude review by the sole employee and sole in-house counsel of a company that has never been a competitor, is not a competitor today, and is (at best) an exceedingly implausible competitor at any time in the future. This is an extraordinary request and PDC has not justified such relief. PDC's request is both untimely and insufficient on the merits.

As envisioned in *Confidential Information Policy Order*, the International Bureau is free to modify the Model Protective Order as circumstances require if the submitting party has made a timely request. However, the order used in the *DIRECTV* is not an appropriate model. The circumstances of this proceeding are markedly different than those of the *DIRECTV* case (and from other proceedings in which similar orders have been used). *DIRECTV* was the immediate progeny of a heated and high-stakes business conflict: both the submitting and requesting parties were competing for access to the same Canadian orbital resources. Moreover, both the submitting and requesting parties were large, publicly traded corporations with extensive resources. Proscriptions beyond the terms of the Model Protective Order were rational in the context of the direct competition between the two companies for the business resources at issue in the proceeding.

In this case precluding review by Highcast's in-house counsel would be tantamount to denying Highcast's request for access to the information. Mr. Hane is the only counsel to Highcast with meaningful expertise in FCC proceedings. It would be unduly burdensome for the Bureau to require Highcast to hire new outside counsel with expertise in FCC proceedings, or to pay existing counsel to become familiar with the complex and nuanced rules and policies governing milestone compliance and the effect of payment schedules on non-contingent contracts, when Highcast's sole employee is already familiar with those rules and policies. So doing would deprive the Bureau and ultimately the public of the benefit of Highcast's best commentary on PDC's milestone compliance, a loss with no corresponding benefit. PDC's concerns of competitive impact, however gossamer, are addressed by the substantial penalties available should Mr. Hane violate the protective order. This is the procedure the Commission has adopted, and there could hardly be a less persuasive case for departing from that procedure.

Two conditions preclude Highcast from providing adequate commentary on PDC's milestone performance without access to the redacted information. First, it is impossible to discern what information in fact has been redacted. PDC's submission simply indicates that the document has been redacted, but there is no indication of what portions have been redacted. At this point no one could conclusively comment on the milestone performance since it is unclear where all or portions of words or numbers have been redacted and whether entire sentences or sections have been redacted.

Second, there is a close correlation between the very information redacted and the information needed to make an informed decision regarding PDC's milestone compliance. The simple existence of a contract is not enough. The contract must be non-contingent. The Commission has described a non-contingent contract as one that:

> identifies specific satellites and their design characteristics, and specifies the dates for the start and completion of construction. The payment terms and schedule demonstrates the [licensee's] investment and commitment to completion of the system. The payments are spread throughout the [term of the] contract, the initial payments are significant, and the majority of payments will be made well before the end of the construction period.[3]

The Commission has also held that a sufficient contract contains no unresolved contingencies that could preclude construction of a satellite and that a contract that allows the licensee to cancel construction of the satellite without significant penalty is

[3] *Memorandum Opinion and Order in the matter of Mobile Communications Holdings, Inc.*, FCC-03-122, released June 4, 2003 at ¶14, see also *In re Petition and Application of Tempo Satellite, Inc.* (Mem. Opinion and Order), 7 FCC Rcd 6597 (1992) at ¶13, quoted in *TMI Communications and Company, Limited Partnership* (Mem. Opinion and Order), DA 03-385, rel. Feb. 10, 2003, at ¶8. *See also Direct Broadcasting Satellite Corp.* (Mem. Opinion and Order), DA 93-1332, 8 FCC Rcd 7959 (Int'l Bur. 1993) at ¶6 (a non-contingent contract must specify a construction timetable with "regular, specific" progress deadlines), quoting *United States Satellite Broadcasting Co., Inc. and Dominion Video Satellite, Inc.*, 3 FCC Rcd 6858 (1988) ("*USSB/Dominion*"), and *CBS, Inc. and Dominion Video Satellite, Inc.* (Mem. Opinion and Order), 98 FCC 2d 1056 (1984) ("*CBS/Dominion*") at ¶16.

not sufficient.[4]

Although the full extent of redaction cannot be discerned, essentially all of the payment terms and schedule have been redacted. Without such information one could scarcely comment on the aspects of the contract that are most significant in determining whether the contract is a non-contingent or is simply another "paper satellite". In *Mobile Communications Holdings, Inc.* the Commission stressed that " . . .[t]he milestone requirements for commencement of satellite construction are especially important. . . because they provide an initial objective indication as to whether licensees are committed to proceeding with implementation of their proposals."[5]

In its July 14, 2005 FOIA request Highcast identified information in PDC's parent's securities filings that appear to be inconsistent with the existence of contract that could meet the Commission's definition of "non-contingent". Moreover, review of even the redacted information suggests that the contract may include material contingencies. Sufficient grounds exist now to oppose PDC's milestone compliance. Highcast prefers to review the redacted information before deciding whether to oppose PDC's milestone compliance. If in fact PDC has a non-contingent contract it would be a waste of resources to file additional comment or to oppose a finding of compliance. However, if denied reasonable access to the requested materials Highcast respectfully requests that it be given ample opportunity to file substantive comments based on the information available while the review of its FOIA request proceeds.

Notably, one of the Commission's primary reasons for adopting the Model Protective Order was to achieve the "substantial" benefits of "reduc[ing] the need for lengthy negotiations or litigation over the terms of such orders and help prevent delay in proceedings." *Confidential Information Policy Order* at ¶ 23. In this case, having failed to seek exceptional restrictions at the threshold as required by Commission policy, PDC's attempt to subject the Bureau and Highcast to lengthy negotiations and possible litigation should be rejected.

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[4] *First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, and First Report and Order in IB Docket No. 02-54,* FCC 03-102, released May 19, 2003 at ¶184 (*"First Satellite Licensing Reform Order"*).

[5] *Memorandum Opinion and Order in the matter of Mobile Communications Holdings, Inc.*, FCC-03-122, released June 4, 2003 at ¶ 14.

For the record, Highcast does not object to use of a protective order similar to that used in *DIRECTV* so long as doing so does not preclude review by Highcast's sole employee.

Very truly yours,

HALPERN & LEVY, P.C.

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HIGHCAST NETWORK INC.

John Hane

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