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AUG 30 2005

Federal Communication Commission
Bureau / Office

ORIGINAL

August 30, 2005

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VIA COURIER

Managing Director
Attn: FOIA Officer
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Pegasus Development Corporation
FOIA Control No: 2005-512
Supplement to Opposition to Freedom of Information Act Request**

To whom it may concern:

Pegasus Development Corporation ("Pegasus") hereby submits this letter in response to the additional comments of Highcast Network, Inc. filed in the above-referenced proceeding. *See* Letter to Managing Director from Mark S. Halpren (August 25, 2005) ("Additional Comments"). The International Bureau ("Bureau") should reject Highcast's unauthorized and procedurally improper filing. Despite Highcast's claim, Bureau staff expressly informed the parties that it did not seek additional pleadings from either party, and nothing in the Commission's rules permit supplemental filings.¹ In any event, if the Bureau considers the filing on its merits, the letter provides no justification for deviating from the Bureau's proposal to issue a protective order consistent with well-established Commission precedent in the satellite context. Accordingly, to the extent Highcast is unwilling to accept the Bureau proposal, Pegasus urges the Bureau to dismiss the FOIA request outright.

The sole new issue raised in Highcast's recent letter is whether its President, Mr. John Hane, should be permitted to review Pegasus' confidential satellite contract. However, Bureau determination of this issue would be premature. It is not relevant for purposes of assessing the confidentiality of the redacted provisions of the satellite

¹ *See* 47 C.F.R. § 0.461. If the Bureau nonetheless considers the Additional Comments, Pegasus requests that it also accept this filing.

contract, and Highcast cites no precedent requiring the FCC to “pre-approve” the review of confidential documents by a specific individual. In any event, Highcast’s stated justifications for its extraordinary request fail on the merits.

As Pegasus stated in its Opposition, there are genuine concerns regarding the propriety of Mr. Hane’s personal review of the confidential material in light of his ongoing litigation, as an individual, with Pegasus.² In its FOIA request, Highcast failed to identify any specific reason why it would be interested in the confidential satellite contract, other than an apparent abstract interest in ensuring that licensees comply with FCC regulations. Only when challenged did Highcast assert, *inter alia*, that it was a prospective satellite licensee considering the 87°W orbital location – a position it now retracts.³ Under such circumstances, it would be eminently reasonable for the Bureau to prevent Mr. Hane’s review of the confidential documents in order to “minimize the potential for inadvertent misuse of such information.”⁴

Additionally, as noted above, Highcast itself at one point stated that it is a potential competitor to Pegasus, and the FCC has consistently issued protective orders

² Contrary to Highcast’s misleading statement, Pegasus has never stated that it is in litigation with Highcast, as opposed to Mr. Hane. *See* Letter to Managing Director from Mark Halpren, at 3 n.3 (August 9, 2005). In any event, Highcast has asserted that Pegasus “defaulted on its obligations to Highcast” (*id.* at 2) and has orally threatened Pegasus with litigation.

³ Letter to Managing Director from Mark Halpren, at 2 (August 9, 2005) (“If [Pegasus] is not in compliance[,] Highcast must look elsewhere for access to satellite broadcasting services. Filing its own application for a Ka band orbital slot (including perhaps the 87 degree WL slot should [Pegasus] not proceed with developing it) or allying with another Ka band licensee or applicant are among the most likely options.”) (emphasis added); *compare* Additional Comments, at 1-2 (Highcast does not now and has never sought to be operate [sic] a satellite or to provide satellite services directly . . .”). Highcast’s contradictory statements further support the conclusion that Highcast seeks review of the confidential material for no legitimate FCC purpose.

⁴ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, at ¶ 26 (1998) (“*Confidential Information Policy Order*”); *see also In Re Request of Louis A. Goodman*, 81 FCC 2d 124 (1980) (“The Commission generally has denied requests for inspection . . . where the [confidential] information is to be used for the resolution of essentially private disputes, unrelated to public interest determinations required by the Communications Act”); *McKeon Construction Co.*, 21 RR 2d 919 (1971) (denying FOIA request by entity seeking confidential information of FCC licensee because such material was sought in non-FCC related litigation and discoverable in that proceeding).

preventing the review of satellite construction contracts by individuals in the industry engaged in competitive decision-making.⁵ The fact that Highcast's President is also coincidentally its in-house counsel⁶ or that Highcast has voluntarily chosen outside counsel unfamiliar with FCC practice does not warrant an exception to this well-established rule. Any contrary conclusion would establish a dangerous loophole and deny Pegasus basic FOIA protection against disclosure of competitively sensitive materials.

There is no merit to Highcast's argument that the specific facts of this proceeding warrant the issuance of a non-standard protective order. To Pegasus' knowledge, Bureau staff selected the DirecTV/Pegasus protective order to be used as a template for this proceeding simply because it was a recent satellite matter and one in which Pegasus had participated. In fact, that protective order is not substantially different from any of the protective orders cited by Highcast in its FOIA request. Thus, contrary to Highcast's arguments otherwise, the facts of that case are simply irrelevant.

There is also no reason to adopt the "Model Protective Order" established by the Commission in 1998, as Highcast urges. That dated template has long been in disuse, and there is no reason to believe that it would be appropriate here. In fact, in an analogous case nearly four years ago, *In the Matter of Motorola, Inc. and Teledesic, LLC*, DA 01-2231 (September 25, 2001), the Bureau rejected a similar request to use the Model Protective Order. *See* Comments on Proposed Protective Order, File No. SAT-ASG-20010109-00005, at 4-5 (August 2, 2001).

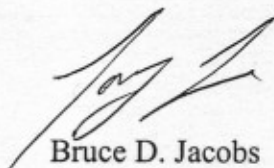
Accordingly, nothing in this case warrants deviation from the FCC's well-established precedent. To the extent Highcast is unwilling to accept the review of the confidential material under the terms of a standard protective order, Pegasus urges the Commission to dismiss the FOIA request outright.

⁵ The numerous cases cited by Highcast in its initial FOIA request confirm this conclusion. *See* Letter to Managing Director from Mark Halpern, at 3 n. 6 (July 14, 2005).

⁶ In light of the well-established Commission precedent, there was no logical need for Pegasus to request at the time of the submission of its request for confidential treatment that in-house counsel engaged in competitive decision-making be barred from reviewing the competitively sensitive documents.

Managing Director
August 30, 2005
Page 4

Very truly yours,

A handwritten signature in black ink, appearing to read 'B. Jacobs', written in a cursive style.

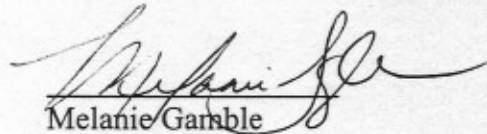
Bruce D. Jacobs
Tony Lin
*Counsel for Pegasus Development
Corporation*

cc: Andrea Kelly

Certificate of Service

I, Melanie Gamble, hereby certify that on the 30th day of August, 2005, the foregoing Supplement to Opposition to Freedom of Information Act Request was served by first-class U.S. mail on the following:

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Halpern & Levy, P.C.
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Bala Cynwyd, PA 19004


Melanie Gamble