

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Freedom of Information Act Request for Satellite)	
Construction Contract filed by Pegasus)	FOIA File No. 2005-512
Development Corporation)	
)	
Pegasus Development Corporation and Pegasus)	IBFS File No. SAT-LOA-20031119-00336
Development Corporation 107 Request for)	Call Sign: S2603
Confidential Treatment)	

ORDER

Adopted: September 13, 2005

Released: September 13, 2005

By the Chief, International Bureau:

1. By this Order, we grant, in part, and deny, in part, the Freedom of Information Act (FOIA)¹ request filed by Highcast Network, Inc. (Highcast) on July 14, 2005.² In the FOIA request, Highcast seeks the release of information redacted from the public version of a contract submitted by Pegasus Development Corporation and its wholly owned subsidiary Pegasus Development 107 Corporation (collectively, Pegasus) on January 31, 2005. At the same time, we grant, in part, and deny, in part, Pegasus' January 31, 2005 request for confidentiality for the information redacted from the public version of the contract. As we explain more fully below, we determine that only a small portion of the information sought by Highcast is non-confidential information that should be included in the public file.

I. BACKGROUND

2. On January 31, 2005, Pegasus filed with the Commission an unredacted copy of a satellite construction contract and accompanying exhibits executed between itself and Space Systems/Loral, Inc.³ This submission was made to demonstrate that the licensee, Pegasus Development

¹ 5 U.S.C. § 522, *et. seq.*

² Freedom of Information Act Request, Highcast Network, Inc., filed by Highcast on July 14, 2005, FOIA 2005-512 (Highcast FOIA Request).

³ Pegasus Development Corporation, Submission of Executed Satellite Construction Contract and Request for Confidential Treatment, SAT-LOA-20031119-00336, Call Sign S2603, filed January 31, 2005 ("Contract" and "Confidentiality Request" respectively). The documents that Pegasus submitted under a request for confidentiality are as follows: (1) Satellite Purchase Contract By and Between Pegasus Development Corporation and Space Systems/Loral, Inc., Terms and Conditions (including (i) Attachment A, (ii) Annex I to Attachment A, (iii) Schedule 1 to Annex I to Attachment A; (iv) Schedule II to Annex I to Attachment A, (v) Attachment B); (2) Exhibit A, Pegasus Development 107 Corporation K-band FSS Satellite, Statement of Work, August 9, 2002; (3)

(continued....)

107 Corporation, had satisfied the first milestone for its license to construct, launch, and operate a Ka-band geostationary satellite orbit (GSO) fixed-satellite service (FSS) satellite at the 87° W.L. orbital location, *i.e.*, the execution of a non-contingent contract for the construction of the satellite. The cover letter transmitting the Contract requested confidential treatment for the redacted information. In addition to the unredacted copy of the Contract submitted with a request for a confidential treatment, Pegasus simultaneously submitted a redacted copy of the Contract to be placed in the Commission's public files.⁴

3. On July 14, 2005, Highcast filed, pursuant to FOIA, a request to inspect an unredacted copy of the Contract submitted to the Commission by Pegasus.⁵ In its request, Highcast asserts that without disclosure of these documents "it is impossible to assess Pegasus' actual performance" on the Contract.⁶ On July 22, 2005, Pegasus filed an opposition to Highcast's FOIA request.⁷ On August 9, 2005, Highcast filed a reply to Pegasus' opposition, arguing that Pegasus has not demonstrated that the redacted portions of its Contract are subject to confidential treatment subject to Sections 0.457-0.459 of the Commission's rules,⁸ and that therefore the redacted portions of Pegasus' Contract should be made available for public inspection.⁹ On August 25, Highcast submitted further comments in support of its FOIA request.¹⁰ On August 30, 2005, Pegasus submitted a supplement to its opposition to Highcast's FOIA request.¹¹

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Exhibit B, Attachment 1, Pegasus Development 107 Corporation, Ka-Band FSS Satellites, Specification, August 9, 2002; (4) Exhibit C, Pegasus Development 107 Corporation, Ka-Band FSS Satellites, Program Test Plan, August 9, 2002; (5) Exhibit D, Pegasus Development 107 Corporation, Ka-band FSS Satellites, Program Quality Assurance Plan, August 9, 2002; (6) Exhibit E, Pegasus Development 107 Corporation, Ka-Band FSS Satellites, Program Management Plan, August 9, 2002; (7) Exhibit F, Payment Plan and Termination Liability Amounts, August 9, 2002; (8) Attachment 1, Statement of Work; (8) Attachment 7, Milestone Payment Plan; (9) Attachment 8, Maximum Termination Liability and Letter of Credit Amount Requirements; (10) Attachment 9, Export Laws Compliance Program; (11) Attachment 10, Certification; (12) Attachment 11, Form – Bill of Sale; (13) Attachment 12, Options; (14) Attachment 13, Escrow Agreement: To Be Supplied EDC + 30 Days; (15) Attachment 14, Anomaly Disclosure List; and (16) Attachment 15, Letter of Credit Form. We note that only the redacted copy of the first document listed above is included in the public file and uploaded to the International Bureau Filing System (IBFS). See IBFS File No. SAT-LOA-20031119-00336. The exhibits and attachments listed in this note as number 1 – 16 were not included in the public version of the document. We assume here that Pegasus seeks confidentiality with respect to these documents in their entirety.

⁴ See note 2 above.

⁵ See Highcast FOIA Request.

⁶ See Highcast FOIA Request at 2.

⁷ See Pegasus Development Corporation Opposition to Pegasus Freedom of Information Act Request, filed July 22, 2005 (Pegasus Opposition).

⁸ 47 CFR §§ 0.457-0.459.

⁹ Highcast Reply to Opposition to Freedom of Information Act Request, filed August 9, 2005, at 1-2 (Highcast Reply).

¹⁰ Highcast Network Inc., Additional Comments in Support of Freedom of Information Request, FOIA Control No. 2005-512, filed August 25, 2005.

¹¹ See Pegasus Development Corporation Supplement to Opposition to Freedom of Information Act Request, filed August 30, 2005 (Pegasus Opposition Supplement).

II. DISCUSSION

4. Pegasus has requested that the Commission withhold from public inspection pursuant to Exception 4 of the FOIA¹² all of the redacted information requested by Highcast. The Commission's rules permit parties that have submitted materials or information to the Commission to request that such materials or information be withheld from public inspection.¹⁴ Pursuant to Section 0.459(b),¹⁵ such requests shall contain a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based.¹⁶

5. In its request for confidentiality, Pegasus identifies the specific information for which confidentiality is sought and the relevant proceeding. The request for information discusses the particular types of information redacted, *e.g.* costs, schedules regarding delivery and construction, technical specifications, price and payment terms, distribution of risk and liability, indemnification, intellectual property rights). Pegasus asserts that this information pertains to the construction of satellites (a commercial venture), and is thus customarily guarded from competitors because it could be used to target Pegasus' intended customers, obtain more favorable terms with satellite vendors, or allow competitors to obtain proprietary technical information that was developed and paid for by Pegasus, thereby causing competitive harm.¹⁷ In its request, Pegasus also identifies how it has taken competitive measures to assure that the Contract is not disclosed to the public but is only available to Pegasus employees or agents involved in the contractual negotiation and is not generally available within Pegasus itself.¹⁸ Further, Pegasus indicates that there has been no intentional disclosure to third parties.¹⁹ Finally, consistent with its contractual obligations to Space Systems Loral, Pegasus requests that the Contract be withheld from disclosure for an indefinite period, or in the alternative a ten-year period by the end of which Pegasus says that any anticompetitive effect of disclosure will be attenuated.²⁰ Thus, Pegasus' request for the most part

¹² See Pegasus Contract Submission. 5 USC § 552(b)(4) exempts from public disclosure "trade secrets and commercial information obtained from a person and privileged or confidential."

¹⁴ 47 C.F.R. § 0.459(a).

¹⁵ 47 C.F.R. § 0.459(b).

¹⁶ In particular, the request for confidentiality must contain the following information: (1) an identification of the specific information for which confidential treatment is sought; (2) an identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission; (3) an explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged; (4) an explanation of the degree to which the information concerns a service that is subject to competition; (5) an explanation of how disclosure of the information could result in substantial competitive harm; (6) an identification of any measures taken by the submitting party to prevent unauthorized disclosure; (7) an identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties; (8) a justification of the period during which the submitting party asserts that material should not be available for public disclosure; and, (9) any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted. 47 C.F.R. § 0.459(b).

¹⁷ See Confidentiality Request 2-3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

contains all of the requisite information needed to determine whether its request for confidentiality is valid.

6. Where a party is required to submit information to a Federal Government agency, the standard for determining if such commercial or financial information is "confidential" under Exemption 4 of FOIA is if disclosure of such information is likely to: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.²¹ Pegasus was required to submit its Contract as part of the Commission's review of Pegasus' milestones as mandated by its satellite authorization.²² We note, however, that Highcast argues in its FOIA request that the Commission has permitted interested parties to review satellite contracts to determine whether the licensee has met its construction milestones, and that therefore, Pegasus' Contract should be released for public inspection.²³ Instances where the Commission allowed inspection of satellite contracts under a "Protective Order"²⁴ which allows a party to review confidential materials pursuant to certain restrictions, however, is not the unfettered public disclosure sought in a FOIA request. Thus, the standard applied in allowing restricted disclosure pursuant to a Protective Order is not relevant in the context of a FOIA request.

7. The majority of the contract submitted was not redacted and no confidential treatment was sought.²⁵ Pegasus only redacted payment terms, terms regarding the distribution of risk and liability between the satellite licensee and manufacturer, intellectual property rights, and costs in the event of termination. We find that the redacted information contained in the Pegasus' Contract (excluding exhibits and attachments) is confidential information under Exemption 4 of the FOIA. Accordingly, the release of this confidential information is likely to cause substantial harm to Pegasus' competitive position. As we explain below, with respect to the Exhibits and Attachments, we do find, however, that a limited amount of information is not confidential information protected from disclosure.

8. Pegasus' Contract contained a number of Attachments and Exhibits.²⁶ The majority of these documents are the epitome of information that is closely held and customarily guarded from competitors, *i.e.*, proprietary technical information. For example, Exhibit B contains the satellite specification,²⁷ Exhibit C contains the test plan,²⁸ and Exhibit D contains the quality assurance plan.²⁹

²¹ *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C.Cir.1992) (en banc), cert. denied, 507 U.S. 984 (1993); 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, 24819 (1998) (*Confidential Information Policy Order*). Our rules provide that the party initially claiming confidentiality pursuant to Section 0.459(a) bears the burden of proving by a preponderance of the evidence that such treatment is appropriate. 47 C.F.R. § 0.459(a).

²² Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10827 ¶ 173 (2003) (*Space Station Licensing Reform Order*).

²³ Highcast FOIA Request at 3.

²⁴ We note that a protective order allowing Highcast access to the Contract subject to certain restrictions is being issued contemporaneously with this Order.

²⁵ See Redacted Contract in IBFS File No. SAT-LOA-20031119-00336.

²⁶ See footnote 3 above.

²⁷ See Exhibit B of the Contract entitled "Attachment 1, Pegasus Development 107 Corporation, Ka-Band FSS Satellites, Specification, August 9, 2002."

Each of these documents contains information that is customarily closely held by satellite manufacturers and would be appropriately withheld from the public file in their entirety. The following Exhibits and Attachments, however, should not have been withheld from the public file in their entirety: (1) Exhibit F, entitled "Payment Plan and Termination Liability Amounts, August 9, 2002;" (2) Attachment 10, entitled "Certification;" (3) Attachment 11, entitled "Form – Bill of Sale;" (4) Attachment 13, entitled "Escrow Agreement: To Be Supplied EDC + 30 Days;" and (5) Attachment 15, entitled "Letter of Credit Form."

9. Pegasus' failure to submit a redacted version of the one page document entitled, "Exhibit F: Payment Plan and Termination Liability Amounts, August 9, 2002, First Satellite and Satellite Operations Equipment" strains the limits of the confidentiality protection. The payment schedule is a one-page document containing only 21 events (such as "Launch" or "CDR" short for critical design review, and "DELIVERY ON ORBIT"). As such, it appears to be a generic document containing well-known and obvious events in the construction of a satellite. Thus, we do not find the exhibit itself to be *per se* confidential in its entirety. The monetary amounts attached to the progress payments, termination liability, or both, however, would be considered confidential information. Accordingly, with respect to Exhibit F, we find that the information contained in the columns with the following headings is not confidential: (1) Payment Number; (2) Month Number; (3) Nominal Invoice Month; (4) Payment Due; (5) Milestone Event; and (5) Completion Criteria. We do, however, find the information contained in the following columns to be confidential and protected from disclosure: (1) Payment %; (2) 1st Satellite; (3) Sat. Oper. Equip.; (4) Payment Amount; (5) Cum. Payment; and (6) Cum. Term. Liability.

10. Pegasus also requested confidentiality for Attachment 10 entitled "Certification," Attachment 11 entitled "Form – Bill of Sale," Attachment 13 entitled "Escrow Agreement: To Be Supplied EDC + 30 Days," and Attachment 15 entitled "Letter of Credit Form." With the exception of Attachment 13, these documents are exactly what their titles imply, blank legal forms without any monetary or technical information attached. Blank legal documents containing boilerplate language would not appear to be confidential information. Pegasus has failed to provide any rationale for treating these blank forms as confidential in this instance. Attachment 13 is merely a one-page document containing only the title, the contract number, and the "confidential stamp." Obviously, it is not confidential. Thus, we deny Pegasus' request for confidentiality with respect to the entirety of Attachments 10, 11, 13, and 15.

11. We, therefore, conclude that, other than the material that we have just outlined in Exhibits F (columns 1-5), Attachments 10, 11, 13, and 15 (in their entirety), the information subject to the request for confidentiality falls squarely under Exemption 4 to the FOIA rules and meets the requirements of Section 0.459³⁰ and may be withheld from public disclosure.

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²⁸ See Exhibit C of the Contract, entitled "Pegasus Development 107 Corporation, Ka-Band FSS Satellites, Program Test Plan, August 9, 2002."

²⁹ See Exhibit D of the Contract, entitled "Pegasus Development 107 Corporation, Ka-band FSS Satellites, Program Quality Assurance Plan, August 9, 2002."

³⁰ 47 C.F.R. § 0.459(c).

III. CONCLUSION

12. IT IS ORDERED that the request for confidentiality submitted by Pegasus on January 31, 2005 is Granted, in part, and Denied, in part to the extent provided herein. Accordingly, we will submit a redacted copy of the "Exhibit F: Payment Plan and Termination Liability Amounts, August 9, 2002," without redacting the information in the following columns, for inclusion in the public file: (1) Payment Number; (2) Month Number; (3) Nominal Invoice Month; (4) Payment Due; (5) Milestone Event; and (5) Completion Criteria. Further, we will provide a complete copy of Attachment 10 entitled "Certification," Attachment 11 entitled "Form - Bill of Sale," Attachment 13 entitled "Escrow Agreement: To Be Supplied EDC + 30 Days," and Attachment 15 entitled "Letter of Credit Form" for inclusion in the public file.³³ Submission of the redacted materials to the Commission's public file as indicated here will not be carried out until the time period within which to file application for review has expired or Pegasus' application for review has been fully and finally resolved by the Commission (or any appropriate court of competent jurisdiction), whichever occurs later. Under 0.461(i) of the Commission's rules, 47 C.F.R. § 0.461(i), Pegasus may file an application for review of the Bureau's handling of partial denial of Pegasus's request for confidential treatment. Such an application for review must be filed with the Office of General Counsel within 10 days from the date of this order.

13. IT FURTHER ORDERED that Highcast Network Inc.'s Freedom of Information Act request, FILE NO. 2005-512, is Granted, in part, and Denied, in part, to the extent provided herein. Under Section 0.461(j) of the Commission's rules, 47 C.F.R. § 0.461(j), Highcast may file an application for review of the Bureau's handling of the FOIA request. Such an application for review must be filed with the Office of General Counsel within 30 days from the date of this order.

14. This Order is issued pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 310(d), the Freedom of Information Act, 5 U.S.C. § 552, and authority delegated under Sections 0.51 and 0.261 of the Commission's rules, 47 C.F.R. §§ 0.51, 0.261, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION



Donald Abelson
Chief, International Bureau

³³ Contemporaneously with the issuance of this order, Pegasus will be provided copies of the documents to be submitted into the public file to ensure that there is no confusion regarding the documents, or portions thereof, that are determined not to be confidential.