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Policy Branch
International Bureau

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

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Federal Communications Commission
Office of Secretary *Bye*

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

To: The General Counsel

APPLICATION FOR REVIEW

Highcast Network Inc. ("Highcast") seeks review of the above captioned order of the International Bureau, which denied in part Highcast's Freedom of Information Act request. Highcast's request sought access to information redacted from documents submitted to the Bureau by Pegasus Development Corp. ("Pegasus") in support of Pegasus' request for a reduction in the amount of a bond posted to secure satellite construction milestone compliance.¹ Pegasus' submission referred to the documents as the "Contractual Documents". Along with that filing Pegasus included what it called a "redacted version of the Contractual Documents". Pegasus sought confidential treatment of the "Contractual Documents" and asked that the "redacted version" rather than the "Contractual Documents" be included in the public file.

¹ 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).

Pegasus' request for confidential treatment acknowledged that the Commission has permitted review of satellite contracts pursuant to protective orders. The request did not object to such review or identify any circumstances that would require that special conditions be imposed on such review.²

Notably, a substantial number of documents that were submitted to the Bureau for its own review were not included, even in redacted form, in the so-called "redacted version" that Pegasus supplied for public review; indeed, those documents were not identified or even referenced in Pegasus' request for confidential treatment. It was not until the Bureau acted upon Highcast's request that the existence of those documents became known to Highcast. Accordingly, Highcast was unable in its original FOIA request to advance arguments for release of those documents.

On September 13, 2005 the Bureau released two orders related to Highcast's FOIA request. The first order, from which this appeal is taken, required Pegasus to include a limited amount of additional disclosure in the public file, but otherwise denied Highcast's request. The Bureau concurrently released a Protective Order pursuant to which interested parties would be granted access to the redacted (and previously undisclosed) materials.³ Although Highcast believes that Pegasus is withholding from public scrutiny many documents and portions thereof for which confidential treatment is not warranted, Highcast acknowledges the general pragmatism of protective orders and accepts in principle the resolution of this matter pursuant to a protective order. However, the Protective Order left open the possibility that Highcast's sole

² *Id* at page 2.

employee, who also serves as its FCC counsel, would be prohibited from review of the Contractual Documents pursuant to the Protective Order. In the course of proceedings before the Bureau Pegasus indicated that it would object to review by undersigned counsel. Such a restriction would effectively deny access to Highcast pursuant to the Protective Order. Since Highcast cannot be assured of access to the information necessary to provide informed commentary on Pegasus' milestone compliance it must take this appeal, which is based on two specifics in which the Bureau's decision is in conflict with established case law and Commission policy.

I. QUESTION PRESENTED

1. May a licensee redact from its evidence of satellite contact milestone compliance most or all of the information on which the Bureau traditionally relies to test the validity of such a contract?
2. Can a party's assertion of confidentiality be valid as to documents that are not identified in the request for confidential treatment and otherwise unidentified to the public?

II. ARGUMENT

1. Constructive Complete Redaction

Highcast argued in support of its FOIA request that the information redacted by Pegasus while seeking a determination of contract execution milestone compliance correlated closely with the very information the Bureau reviews to determine whether the contract is indeed "non-

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³ *Protective Order, DA-05-2449*, File No. SAT-LOA-20031119-00336, released September 13, 2005 ("Protective Order").

contingent” and thus satisfies the milestone. For purposes of public review Pegasus basically maintained simply that it had a contract. But the Commission has held repeatedly that 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.⁴

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 not sufficient.⁵

The Bureau did not address Highcast’s assertion that the Pegasus submission is constructively empty, but it did conclude that “the majority of the contract submitted was not redacted and no confidential protection was sought.” *Order* at para. 7. Highcast respectfully submits that it is the quality and pertinence of information available, not the quantity, which

⁴ *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.

enables informed public commentary. The Bureau did not require Pegasus to release any of the information that the Bureau itself normally reviews to determine whether a satellite construction contract is non-contingent. The importance of the factors weighed by the Bureau bear emphasis: if a party has not made material payments, or if the contract gives the licensee options, contingencies or loopholes that would allow the licensee to maintain the contract without really constructing a satellite – then the Bureau will conclude that the spectrum (which was awarded without cost) is being warehoused to the detriment of a public and will cancel the license and call the bond.

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.”⁶ The Bureau could not make a reasonable determination as to milestone compliance based on the information in the public file and neither can the public. No one would contend that information in contracts between consenting parties should not be entitled to some level of confidential treatment as an abstract matter. However in this case the submitting party is seeking return of a substantial sum of money from the government based on somewhat questionable claims that are supported by information available only to the government and concealed from the public. Highcast submits that the Bureau erred

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⁵ *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*”).

⁶ *Memorandum Opinion and Order in the matter of Mobile Communications Holdings, Inc.*, FCC-03-122, released June 4, 2003 at ¶ 14.

in determining that Pegasus may withhold from the public essentially all of the key information on which the Bureau bases its decision.

2. Failure to make showing of confidentiality of unidentified documents

Perhaps the most troubling aspect of the Bureau's order is its identification of a large number of documents that apparently were submitted by Pegasus in support of its milestone request but not identified in the request for confidential treatment and not included even in redacted form in the public file. As noted, Highcast was unaware of these documents until September 13, 2005, when the Bureau released the Order and the Protective Order. After reciting a long list of documents submitted by Pegasus in support of its milestone performance, Footnote 2 of the Order concluded

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.

Two days later the Bureau released an errata and a corrected order that listed only 7 documents, but similarly adopted the same assumption – that Pegasus sought confidentiality with respect to all documents that were not included in the public version of the document. Whether it is six documents or fifteen, Pegasus has failed to make the requisite showing for confidential treatment. Since 2003 the Commission has treated the submission of satellite construction contracts for the purpose of demonstrating milestone compliance as a submission under Section

0.459(b) of the Commission's rules.⁷ Accordingly, Pegasus has the initial burden of demonstrating that the information submitted is subject to confidential treatment.

Information submitted by licensees to the Commission in support of requested Commission action is, by default, available for public inspection. Submitting parties may follow established procedures to seek confidential treatment, but it is the parties burden to establish that confidential treatment is warranted. In this case it is impossible for Pegasus to have met that burden, as it does not identify the information for which confidentiality is sought nor does it otherwise even purport to make the showing required by Section 0.459(b) of the Commission's rules.

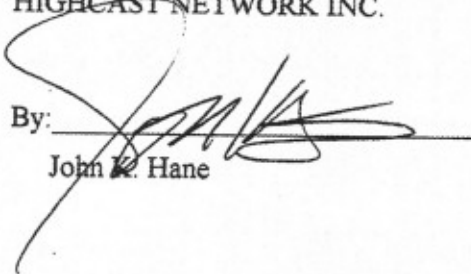
The Bureau erred in "assuming" that Pegasus sought confidential treatment for those documents. The fact that the Bureau had to make an assumption for such a large number of documents should be dispositive: Pegasus cannot have met its burden if the Bureau is required to make assumptions about what Pegasus sought. The default is to disclosure and open decision making. Documents whose existence is not even revealed to the public through a proper request for confidential treatment cannot be assumed to be confidential. Highcast submits that Pegasus failed to establish entitlement to confidential treatment for those documents and that the Bureau erred in effectively waiving that requirement for Pegasus. Highcast respectfully requests that the Bureau's decision as to the confidential nature of documents submitted but not identified by Pegasus should be reversed. Those documents should be made available for public inspection.

⁷ *First Satellite Licensing Reform Order* at ¶ 187.

III. CONCLUSION

For the reasons explained in this Application for Review, Highcast respectfully requests that the Commission reverse the order of the Bureau to the extent identified herein.

Respectfully Submitted,
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