BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	Review of Freedom of Information Act
	)	
Freedom of Information Act Request for Satellite Construction Contract filed by Pegasus Development Corporation	)	FOIA File No. 2005-512
	)	
	)	File No. SAT-LOA-20031119-00336
	)	
	)	DA 05-2450

To: The Secretary
The General Counsel

OPPOSITION TO APPLICATION FOR REVIEW

Pegasus Development Corporation ("Pegasus") hereby submits this Opposition to the Application for Review filed by Highcast Network, Inc. ("Highcast") in the above-captioned Freedom of Information Act ("FOIA") proceeding.[1] Highcast seeks Commission review of the *Order* by the International Bureau ("Bureau") granting in part and denying in part Highcast's FOIA request to review, without restriction, an unredacted copy of Pegasus' satellite construction contract. Highcast argues that the Bureau erred in its determination that the vast majority of the redacted portions of Pegasus' satellite contract warrant confidential treatment. According to Highcast, Pegasus did not seek confidential treatment for the exhibits accompanying the satellite contract and failed to identify or reference the exhibits preventing Highcast from raising arguments about their unavailability. Further, Highcast contends that the publicly available information is insufficient for it to provide informed comments on Pegasus'

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[1] *See In the Matter of Freedom of Information Act Request for Satellite Construction Contract filed by Pegasus Development Corporation*, DA 04-2450, FOIA File No. 2005-512 (September 13, 2005) ("*Order*").

milestone compliance, and that the issuance of a protective order effectively denies Highcast the ability to review Pegasus' satellite contract. For these reasons, Highcast argues that the Commission should reverse the Bureau decision and make Pegasus' satellite contract available for public inspection.

As an initial matter, Highcast's Application for Review is untimely and should be dismissed. In any event, Highcast's arguments are without merit, and the Commission should deny the Application for Review, if it elects to reach the merits. Pegasus' request for confidential treatment expressly included the exhibits accompanying the satellite contract. Accordingly, Highcast's argument that Pegasus did not seek confidential treatment for the exhibits is simply wrong. Moreover, those exhibits were also directly identified and referenced in the table of contents in the publicly available version of the satellite contract. Thus, Highcast's purported unawareness of those exhibits is its own fault and not a basis for reversing the Bureau decision.

With respect to its other arguments, Highcast fails to provide any legitimate justification why the Commission should deviate from well-established precedent holding that satellite construction contracts contain commercially sensitive, confidential information and that interested parties seeking review of such material for legitimate FCC purposes must abide by the requirements of a protective order. In fact, Highcast itself originally cited this precedent as a basis for its FOIA request. For these reasons, the Commission should reject Highcast's Application for Review.

Background

On January 31, 2005, Pegasus submitted certain contractual documents with the Commission to demonstrate its compliance with its construction commencement milestone for its licensed Ka-band system at 87°W. *See* Letter to Marlene Dortch from Bruce Jacobs (January 31, 2005) ("Request for Confidential Treatment"). Pegasus stated explicitly that the documents included a "satellite construction contract and accompanying exhibits executed between Pegasus and Space Systems/Loral, Inc., as amended (the 'Contractual Documents')." *Id.* at 1. Pegasus also stated that it was "requesting confidential treatment of its Contractual Documents, and [was] submitting a redacted version of the Contractual Documents with this filing for the public record and a non-redacted, confidential version of the Contractual Documents under separate cover to Mr. Thomas Tycz, Chief of the Satellite Division of the International Bureau." *Id.*

The confidential version contained a copy of the satellite construction contract and accompanying exhibits. The public version contained a copy of the satellite construction contract with commercially sensitive information redacted. It did not include Exhibits A through F (i.e. the statement of work, technical satellite specifications, program test plan, program quality assurance plan, program management plan, and payment plan and termination liability amounts). Consistent with the FOIA and the Commission's implementing rules, Pegasus provided a detailed discussion in the Request for Confidential Treatment explaining why the materials that were not publicly filed warranted confidential treatment. *See generally*, Request for Confidential Treatment.

Approximately six months later, Highcast, through the law firm of Halpern & Levy, P.C., submitted a FOIA request to review the redacted version of the Contractual Documents. *See* Letter to Managing Directory from Mark Halpern (July 14, 2005) ("FOIA Request"). In support of its request, Highcast cited various decisions in which the Bureau permitted satellite applicants with a legitimate interest in ensuring a licensee's compliance with FCC rules to review confidential satellite contracts pursuant to a protective order.[2] Highcast did not, however, identify any specific reason why it needed to review the redacted material, other than an apparent abstract interest in ensuring that Pegasus had met its license milestone. *See id.* at 2-3. Pegasus objected to Highcast's FOIA Request, noting that Highcast is a corporation controlled by a former employee of Pegasus who, as in individual, is in litigation with Pegasus regarding the termination of his employment and that FCC precedent established that FOIA proceedings were not appropriate venues for resolving private disputes regarding non-FCC related matters. *See* Letter to Managing Director from Bruce Jacobs, at 1 (July 22, 2005). Pegasus nonetheless stated that it would not object to Highcast's review of the confidential submission under a protective order. *Id.* at 2.

In its Reply, Highcast indicated that its assessment of Pegasus' milestone compliance was necessary to resolve a business dispute regarding an alleged venture between the two parties. Letter to Managing Director from Mark Halpern, at 2 (August 9, 2005) ("In October 2004, [Pegasus] terminated the entire staff of personnel engaged in pursuing development of [its] Ka band licenses and, shortly thereafter, defaulted on its obligations to Highcast."). Highcast also argued that it "has a direct interest in [Pegasus'] milestone compliance. 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

[2] *See* FOIA Request, at 3 nn. 6-8 (citing *In the Matter of PanAmSat Corporation*, FOIA No. 2002-124, DA 02-609 (March 15, 2002); *In the Matter of GE American Communications, Inc.*, DA 01-173 (January 25, 2001); *VisionStar, Incorporated Transfer of Control Application*, FOIA Request No. 21-220 (August 8, 2001); *In the Matter of Motorola, Inc. and Teledesic, LLC*, DA 01-2231 (September 25, 2001)).

[Pegasus] not proceed with developing it) or allying with another Ka band licensee or applicant are among the most likely options." *Id.*

On August 25, 2005, again through its outside counsel, Highcast filed an unauthorized letter with the Commission requesting that, if the Bureau were to permit Highcast to review the unredacted Contractual Documents pursuant to a protective order, it should clarify explicitly that its President, Mr. John Hane, would be permitted to review the confidential materials. *See* Letter to Managing Director from Mark Halpern (August 25, 2005). Despite Highcast's prior statement that it was considering filing a satellite application or allying with another Ka-band licensee or applicant, Highcast denied that it was a competitor or potential competitor to Pegasus. *Id.* at 2, 5.

Pegasus responded to Highcast's filing urging the Bureau to dismiss it as unauthorized and procedurally improper. *See* Letter to Managing Director from Bruce Jacobs, at 1 (August 30, 2005). Additionally, Pegasus explained that a determination regarding whether Mr. Hane should be permitted to review the confidential materials would be premature and in no way relevant in assessing the confidentiality of the redacted provisions of the Contractual Documents. *Id.* at 1-2. Pegasus also noted that Highcast had stated that it was a potential competitor to Pegasus and that Mr. Hane, as the principal owner and sole employee of Highcast, would necessarily engage in competitive decision-making and, accordingly, should be prohibited from reviewing the confidential, commercially sensitive materials. *Id.*

On September 13, 2005, the Bureau released an order addressing the Request for Confidential Treatment and the FOIA Request. *See Order*, DA 05-2450 (September 13, 2005). The Bureau concluded that with the exception of a single one-page exhibit, half of which the Bureau determined was confidential, all of the redacted information submitted by Pegasus, amounting to approximately 400 pages, warranted confidential treatment. *See Order*, at ¶ 8. As the Bureau stated, with respect to the main body of the contract, "Pegasus only redacted payment terms, terms regarding the distribution of risk and liability between the satellite license and manufacturer, intellectual property rights, and costs in the event of termination." *Order*, at 4. The Bureau further noted that "[t]he majority of [the attachments and exhibits] are the epitome of information that is closely held and customarily guarded from competitors, i.e. proprietary technical information." *Id.*

Concurrently, the Bureau issued a protective order permitting Highcast under certain terms and conditions to review the confidential and competitively sensitive information. *See generally, In the Matter of Freedom of Information Act Request for Satellite Construction Contract filed by Pegasus Development Corporation*, DA 05-2449 (September 13, 2005) ("*Protective Order*"). Among the restrictions was the limitation that only outside counsel of record or in-house counsel "not involved in competitive decision-making" be permitted to review the confidential material. *Id.* at ¶ 2.

On October 13, 2005, Highcast filed an Application for Review of the Bureau order which granted in part and denied in part Highcast's FOIA Request. *See* Application for Review (October 13, 2005).[3] As a procedural matter, Highcast argued that the Bureau erred in treating the exhibits submitted with the Contractual Documents as subject to the Request for Confidential Treatment, because the exhibits allegedly "were not identified or even referenced in Pegasus' request for confidential treatment." *Id.* at 6. Highcast also argued that public disclosure of

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[3] On October 14, 2005, Mr. Hane submitted an Acknowledgement of Confidentiality pursuant to the *Protective Order*. Because of Mr. Hane's ongoing litigation with Pegasus regarding other matters and his status as President of Highcast, Pegasus objected to Mr. Hane's review of the confidential materials. The resolution of that dispute is pending before the Bureau.

Pegasus' satellite contract is necessary in order for Highcast to provide informed comments on Pegasus' milestone compliance. *Id.* at 5. According to Highcast, the public version provides insufficient information and the issuance of a protective order effectively denies Highcast the ability to review the contract because its President, who is arguably a competitive decision-maker, is potentially prohibited under the *Protective Order* from reviewing the confidential material.[4] Although Highcast had stated in the FOIA proceeding that its outside counsel would be reviewing the confidential materials,[5] it later argued that its outside counsel had no meaningful expertise in FCC proceedings and that it would be costly for Highcast to obtain new counsel or properly educate its present outside counsel.[6]

Discussion

As an initial matter, the Application for Review, which was filed on October 13, 2005, was untimely. Pursuant to the Commission's rules, "[i]f the request for inspection of records submitted to the Commission in confidence under . . . § 0.459 is partially granted and partially denied, . . . the person who filed the request for inspection of those records may file an application for review within the 10 working days after the date of the written ruling."[7]

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[4] *See* Application for Review, at 2-3.

[5] *See* attached Exhibit 1, at 4-5 (providing email correspondences between the parties and FCC staff).

[6] *See* Letter to Managing Director from Mark Halpern, at 5 (August 25, 2005).

[7] 47 C.F.R. § 0.461(i)(2); *see, e.g.,* Freedom of Information Act Request Control No. 95-187, 10 FCC Rcd 13462 (1995) (parties to FOIA decision granting in part and denying in part a request for inspection have ten working days to file applications for review); *Policies and Rules Concerning Operator Service Providers; Stuart A. Whitaker On Request for Inspection of Records*, 6 FCC Rcd 5058, at ¶ 24 (1991) (same).

Highcast's Application for Review should have been filed on September 27, 2005, but it was not. Thus, notwithstanding the Bureau's misspecification in the *Order* regarding the filing deadline, the Application for Review should be dismissed.[8]

Highcast's argument that Pegasus did not seek confidential treatment for the exhibits to the satellite contract is flatly rebutted by the express language of Pegasus' Request for Confidential Treatment. That letter specifically stated that the confidential version of the Contractual Documents contained a "satellite construction contract and <u>accompanying exhibits</u>"[9] and indicated that Pegasus sought confidential treatment for all the information in the unredacted filing that was not submitted in the public version.[10] Moreover, contrary to Highcast's claim to the contrary, the exhibits were, in fact, prominently identified and referenced in the table of contents in the publicly available, redacted satellite contract. *See* attached Exhibit 2 (providing a copy of the table of contents of the redacted filing). Thus, Highcast's alleged unawareness of those exhibits and resulting "inability" to advance arguments for release of those documents are

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[8] *See, e.g., Texas Media Group, Inc.,* 5 FCC Rcd 2851, 2852 (1990) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff."), *aff'd sub nom. Malkan FM Associates v. FCC,* 935 F.2d 1313 (D.C. Cir. 1991).

[9] Request for Confidential Treatment, at 1 (emphasis added).

[10] *See* Request for Confidential Treatment, at 2 (The non-redacted version of the Contractual Documents "<u>should be withheld from public inspection and should not be placed in the public files</u>. The redacted materials attached herein contain non-confidential portions of the Contractual Documents and may be made available for public inspection.") (emphasis in original).

simply products of its own oversight and, accordingly, are not legitimate bases for challenging the Bureau's decision.[11]

To the extent that Highcast contends that Pegasus was required to list the specific exhibits in the Request for Confidential Treatment, Highcast cites no precedent for such an exacting requirement. In fact, a review of the cases and associated filings cited by Highcast itself in its FOIA Request indicates that FCC licensees and applicants historically have not specified the exhibits or attachments associated with the main documents for which they sought confidential treatment, and the FCC has not indicated that their failure to do so was improper.[12]

Highcast's argument that public disclosure of Pegasus' satellite contract is necessary for Highcast to provide informed comments on Pegasus' milestone compliance ignores well-established precedent that satellite construction contracts contain commercially sensitive, confidential material, and that to the extent that interested parties seek review of such information in any FCC proceeding, they must agree to review of that material pursuant to a

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[11] The six exhibits total approximately 400 pages in length. Of that material, the Bureau concluded that only half of a single page should have been disclosed. *See Order*, at ¶ 8. Accordingly, it would have been wasteful for Pegasus simply to have included blank, redacted pages for its exhibits in its public filing.

[12] *See* attached Exhibit 3, Letter to William Caton from Joseph Godles, at 1 (February 8, 2002) ("PanAmSat Corporation . . . hereby submits an executed Ka-band Contract <u>and Exhibits</u> verifying that construction has commenced on its first Ka-band satellite.") (emphasis added); Request for Confidential Treatment, SAT-T/C-20001215-00163, at 1 (June 7, 2001) ("VisionStar . . . and EchoStar . . . respectfully request that the attached response to the Commission's International Bureau <u>and attachments appended thereto</u> (the "Response") be afforded confidential treatment and not be placed in the Commission's public files.") (emphasis added); Letter to Thomas Tycz from Karis Hastings, at 1 (March 20, 2000) ("As you requested, attached is a copy of the construction contract between GE American Communications, Inc. . . . and Harris Corporation relating to construction of the GE*Star Ka-band satellite system (the 'Contract').").

protective order.[13] Ironically, Highcast itself originally cited the Bureau's long-standing precedent as the very basis for its review of the Contractual Documents (see FOIA Request, at 3 nn. 6-7) and had at one point agreed verbally to review of the documents pursuant to a protective order (see attached email correspondence in Exhibit 1).

Highcast offers no legitimate reason to warrant deviating from this precedent. Highcast has argued in the FOIA proceeding that it would be too costly for it to obtain knowledgeable FCC counsel to analyze the satellite contracts, and that its President, Mr. Hane, could provide such analysis cost effectively, but is potentially prohibited from doing so under the terms of the *Protective Order*.[14] However, that attempt to distinguish this case from Bureau precedent must fail. Protective orders carefully balance the need for the public to be able to provide meaningful comment on proceedings before the FCC and the legitimate interests of FCC licensees or applicants to have confidential, commercially sensitive materials protected from public disclosure.[15] The fact that Highcast has voluntarily chosen outside counsel unfamiliar with FCC practice cannot override Pegasus' legitimate interest in preventing the public disclosure of its confidential satellite contract. Any contrary conclusion would establish a dangerous loophole, permitting parties to readily circumvent the protections provided by the FOIA and the Commission's implementing regulations.

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[13] *See supra* note 3. Even if, as Highcast alleges, "[t]he Bureau could not make a reasonable determination as to milestone compliance based on the information in the public file," that claim has no bearing on the confidentiality of the Contractual Documents. Application for Review, at 5.

[14] *See* Application for Review, at 3; *see also* Letter to Managing Director from Mark Halpern, at 2 (August 9, 2005).

[15] *See Protective Order*, at 2.

Conclusion

For the reasons stated above, Pegasus requests that the Commission dismiss or deny Highcast's Application for Review.

Respectfully submitted,

Pegasus Development Corporation

By: ______________________

Bruce D. Jacobs
Tony Lin
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Its Attorneys

Dated: October 27, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Application for Review was sent by first-class mail, postage prepaid, or hand delivery (*) on October 27, 2005 to the following:

Sam Feder*
Acting General Counsel
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Andrea Kelly*
Chief, Satellite Division Policy Branch
International Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

John K. Hane
Highcast Network, Inc.
4938 Hampden Lane #167
Bethesda, Maryland 20814

Renee Williams

Renee Williams

Exhibit 1

Tony Lin
08/19/2005 09:39 AM

To: john@highcast.net
Subject: RE: Freedom of Information Act Request for satellite construction documents filed by Pegasus Development Corp.

Andrea,

Highcast's contentions are without merit and should be rejected. Pegasus consented to Highcast's review of the confidential satellite contract pursuant to a protective order, under the logical assumption that the order would be consistent with the numerous protective orders issued by the Bureau in similar proceedings. To Pegasus' knowledge, the DirecTV/Pegasus protective order was selected by Bureau staff to be a template for this proceeding simply because it was a recent satellite matter and one in which Pegasus had participated. Thus, contrary to Highcast's belief, the facts of that case are irrelevant and do not serve as a basis for issuing a non-standard protective order in this case.

FCC protective orders have consistently restricted individuals engaged in competitive decision-making from reviewing confidential materials, such as satellite construction contracts. In fact, the numerous cases cited by Highcast in its initial FOIA request confirm this conclusion. Accordingly, contrary to Highcast's assertion, there was no need, much less obligation, for Pegasus to state in advance that it would object to Mr. Hane's review of the confidential documents.

Such a routine provision does not deny Highcast a reasonable opportunity to review the redacted confidential information, as Highcast alleges. Highcast has already engaged outside counsel in the preparation of the FOIA request and has stated no reason why counsel's review would be inadequate.

As to Mr. Hane's role as a "competitive decision-maker," that is an issue not presently before the Bureau and not relevant for purposes of assessing the confidentiality of the redacted provisions of the satellite contract. Even if it were, Highcast's filings make clear that it considers itself a potential competitor to Pegasus, and as the sole officer and employee, Mr. Hane would necessarily engage in competitive decision-making. Additionally, as Pegasus has stated, Mr. Hane, as an individual, is presently in litigation with Pegasus, and his direct or indirect use in other proceedings of material obtained pursuant to a FOIA request in an FCC proceeding would be improper.

If Highcast is not satisfied with the Bureau's reasonable attempt to reach a mutual compromise by issuing an established, non-controversial protective order, Pegasus urges the Bureau to dismiss the FOIA request outright.

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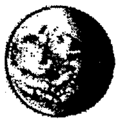
****

"John Hane" <john@highcast.net>



"John Hane"
<john@highcast.net>
08/18/2005 03:33 PM
Please respond to john

To: Andrea.kelly@fcc.gov
cc: "'Angela Wintz'" <angela@halpernlevy.com>, bruce.jacobs@pillsburylaw.com, "'Mark S. Halpern'" <MHalpern@halpernlevy.com>, "'Tony Lin'" <Tony.Lin@pillsburylaw.com>, "'Lisanne L. Mikula'" <Lisanne@halpernlevy.com>
Subject: RE: Freedom of Information Act Request for satellite construction documents filed by Pegasus Development Corp.

Andrea,

Highcast has consented to withdrawing its FOIA request provided it is given a reasonable opportunity to review the redacted information pursuant to a protective order. Pegasus itself volunteered that it did not object to disclosure pursuant to a protective order, and notably, in its July 22 letter making that commitment, it did not state that Mr. Hane should be precluded from review under the terms of such an order even though Pegasus was well aware at the time that Mr. Hane is the only employee of Highcast. To the contrary, as discussed below, Pegasus argued that the contract is not even relevent to Highcast's business.

It is worth noting that at the time of the letter from Pegasus counsel consenting to the protective order procedure neither Highcast nor Pegasus had any way of knowing what the precise terms of a protective order proposed by the IB might be. In our discussion on Monday you proposed use of a protective order that was negotiated among the IB, Pegasus itself and DIRECTV back in 2004. That order reflects the extraordinarily unusual and almost incomprehensivley complex series of legal, business, and policy disputes between DIRECTV and Pegasus, which had already played out for several years in court, before the FCC, and in the day-to-day cutthroat competition of the DBS retail business. The circumstances giving rise to the DIRECTV protective order itself involved DIRECTV's attemtpts to provide services from Canadian - licensed slots via an exemption from the general prohibition against such. Authorization pursuant to that exemption was a rare and prized competitive advantage for those seeking to enter the facilities-based DBS service business, as Pegasus then was. Moreover, the policy, as written, essentially precluded the dominant DBS platforms in the US -- DIRECTV and Echostar -- from qualifying for the exemption..

In the DIRECTV case that serves as the template for the protective order proposed in the current case, DIRECTV was seeking an authorization that would largely eviscerate the value of Pegasus' own authority to provide service into the United States from Canadian satellites or slots. Indeed, Pegasus expressed a concern that the terms of agreement between Telesat and DIRECTV that had been redacted might in fact give DIRECTV the right to preclude use of certain Canadian spectrum or satellites by Pegasus.

The agreement between Telesat and DIRECTV had other ramifications that may have affected Pegasus, though, and in ways that could potentially be far more damaging to Pegasus than the loss of its authorization to provide service from Canadian satellites. DIRECTV and Pegaus were enaged in enormously complex commercial litigation in federal court -- litigation in which the precise slot placement, usage, and expected life of various DIRECTV satellites were the most exceedingly important facts in dispute. The terms of the Telesat-DIRECTV agreement sought would shed light on those facts and, if freely shared with Pegasus counsel in that litigation, might be used for purposes beyond the issues relevant to FCC review of DIRECTV's application. Similarly, if the confidnetial data were to be shared with Pegasus business executives responsible for obtaining satellite capacity for DBS growth they could have potentially used that information in a way to compete more effectively with DIRECTV for the same resources.

In light of the extensive and acrimonious litigation between Pegasus and DIRECTV and the direct competition between the two for access to Canadian orbital resources (as well as US retail DBS customers) the FCC crafted a protective order that strictly limited the number of Pegasus personnel who might be given access to the information.

The present case could hardly be less like the Pegasus/DIRECTV case. As previously noted, Highcast and Pegasus are not in litigation with each other. More important, though, is Pegasus's own admission that Highcast *is not* a competitor: ""Pegasus' satellite construction contract . . . is not germane to Highcast's business * * * Highcast is not a Ka-band satellite applicant and has no real reason for seeking review of the confidential filing." See Letter from Bruce Jacobs dated July 22, 2005. Pegasus should be required to provide some explanation of what sort of "competitive decisionmaking" Mr. Hane is engaged in that might jeopardize any of Pegasus' legitimate interests in the confidentiality of the information.

Highcast has a single employee -- me -- who serves as President and in-house counsel. If I cannot review the confidential information, then Highcast cannot do a meaningful job of assessing Pegasus' compliance with its first milestone. The protective order strictly limits the purposes for which the disclosed information can be used. I am an experienced communications attorney who first practiced before the FCC in 1987. My credentials are well known to the International Bureau. Violation of the protective order would put at risk my ability to practice before the FCC. Absent Pegasus' ability to articulate some competitve harm that might reasonably occur from my review of the document subject to the strictures of the protective order then Highcast submits that Pegasus is not entitled to block my review thereunder.

It is Highcast's desire to achieve a reasonable resolution to this as quickly and efficiently as possible. We stand ready and willing to adjust the terms of the protective order -- and to do so expeditiously -- to meet the legitimate interests of both parties. However, Highcast opposes International Bureau action accepting Pegasus' assertion of milestone compliance before Highcast has had a reasonable opportunity to review the redacted information and submit informed comments.

Best regards,

-John

-----Original Message-----
From: Tony Lin [mailto:Tony.Lin@pillsburylaw.com]
Sent: Thursday, August 18, 2005 1:37 PM
To: john@highcast.net
Cc: Andrea.kelly@fcc.gov; 'Angela Wintz'; bruce.jacobs@pillsburylaw.com; 'Mark S. Halpern'
Subject: Re: Freedom of Information Act Request for satellite construction documents filed by Pegasus Development Corp.

Andrea,

Pegasus would oppose the review of the confidential information by John Hane, who is the President of Highcast and is engaged in competitive decision-making.

****

Tony Lin
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****

"John Hane" <john@highcast.net>

"John Hane" <john@highcast.net>

08/17/2005 02:46 PM

Please respond to john

To: Andrea.kelly@fcc.gov
cc: tony.lin@pillsburylaw.com, "'Mark S. Halpern'" <MHalpern@halpernlevy.com>, "'Angela Wintz'" <angela@halpernlevy.com>, bruce.jacobs@pillsburylaw.com
Subject: Freedom of Information Act Request for satellite construction documents filed by Pegasus Development Corp

Andrea,

Pursuant to our conversations on Monday and earlier this afternoon, it is the understanding of Highcast Network Inc. ("Highcast") that the International Bureau will permit Highcast to review unredacted versions of the documents submitted by Pegasus Development Corp. ("Pegasus") to the FCC in connection with its performance milestones for its 87 WL Ka band license. Highcast's review would be subject to a protective order to be issued by the International Bureau and conditioned on each reviewing person executing an acknowledgement of confidentiality. Highcast further understands that Mark Halpern and Lisanne Mikula of Halpern and Levy, outside counsel to Highcast, and John Hane, in-house counsel to and President of

Highcast, will be
eligible to review the unredacted documents subject to the terms of the
protective order and upon execution of the acknowledgement of
confidentiality.

We understand that the protective order review procedure is conditioned on
Highcast withdrawing its pending FOIA request without prejudice to
re-filing. The protective order procedure seems to be a reasonable and
efficient option; accordingly, Highcast withdraws its July 14, 2005 FOIA
request.

Regards,

John

s/John K. Hane
+1 202.258.0224

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No virus found in this outgoing message.
Checked by AVG Anti-Virus.
Version: 7.0.338 / Virus Database: 267.10.11/74 - Release Date: 8/17/2005

(See attached file: Hane John.vcf)

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No virus found in this incoming message

Checked by AVG Anti-Virus.
Version: 7.0.338 / Virus Database: 267.10.12/75 - Release Date: 8/17/2005

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No virus found in this outgoing message
Checked by AVG Anti-Virus.
Version: 7.0.338 / Virus Database: 267.10.12/75 - Release Date: 8/17/2005

Exhibit 2

FINAL
REDACTED

TABLE OF CONTENTS
SATELLITE PURCHASE CONTRACT FOR ON-GROUND DELIVERY

Exhibit 3

ORIGINAL

LAW OFFICES

GOLDBERG, GODLES, WIENER & WRIGHT

1229 NINETEENTH STREET, N.W.

WASHINGTON, D.C. 20036-2413

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THOMAS G. GHERARDI, P.C.
COUNSEL

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RECEIVED

FEB - 8 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 8, 2002

FOR INTERNAL USE ONLY

BY HAND DELIVERY

CONFIDENTIAL TREATMENT REQUESTED

William Caton, Secretary
Federal Communications Commission
The Portals Building
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Submission of Executed Ka-band Contract

REQUEST THAT MATERIALS BE WITHHELD FROM PUBLIC INSPECTION

Dear Mr. Caton:

Pursuant to the Commission's January 28, 2002 request, PanAmSat Corporation (PanAmSat), by its Attorneys, hereby submits an executed Ka-band Contract and Exhibits verifying that construction has commenced on its first Ka-band satellite.[1] The Contract and Exhibits show that the contract is non-contingent, that there are no significant delays between the execution of the Contract and the actual commencement of construction, that there are no conditions precedent to construction, and that the Ka-band satellite will be built within the time frame specified in PanAmSat's license.[2]

Due to their highly proprietary nature, PanAmSat requests that portions of the attached Contract and Exhibits be withheld from public inspection and not placed in the Commission's

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[1] Letter from Thomas S. Tycz to Joseph A. Godles, Esq., Request of PanAmSat Corporation to Submit Executed Contract, IBFS Nos. SAT-LOA-19950929-00130/131; SAT-LOA-1995029-00204/00208, January 28, 2002. The Contract and Exhibits submitted to the Secretary include one non-redacted and three redacted versions. The only signed version of the Contract and Exhibits is the non-redacted version submitted to the Secretary.

[2] *See PanAmSat Licensee Corp., Application for Authority to Construct, Launch, and Operate a Ka-band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58° W.L. and 125° W.L.*, Memorandum Opinion and Order, 15 FCC Rcd 18720 (Int'l Bur. 2000) *aff'd*, 16 FCC Rcd. 11534 (2001).

public files,[3] pursuant to Section 552(b)(4) of the U.S. Code and Sections 0.457(d) and 0.459 of the Commission Rules.[4] In general, the attached Contract and Exhibits contain material that qualify as commercial, financial, and technical information that "would customarily be guarded from competitors" regardless of whether or not such materials are protected from disclosure by a privilege.[5] The Contract and Exhibits is precisely the type of information that, if disclosed, could be of value to competitors and detrimental to PanAmSat.[6] Thus, PanAmSat's narrowly focused request attempts to prevent any material harm.

Specifically, the Contracts and Exhibits contain sensitive information that if disclosed could place PanAmSat at a competitive disadvantage. It includes specific information regarding costs, schedules regarding delivery and construction, technical specifications, price and payment terms, as well as assumptions of the Ka-band market by PanAmSat. PanAmSat would be placed at a significant disadvantage if the detailed terms of their agreement were revealed to the numerous competing service providers who stand to benefit competitively from any such knowledge. For example, our competitors could use this information to market services to our customers or negotiate more advantageous agreements. Further, with respect to technical characteristics and performance requirements, disclosure would allow competitors to obtain, at no charge, detailed proprietary technical information developed and paid for by PanAmSat. Moreover, the Contracts and Exhibits include standard provisions from PanAmSat procurement agreements relating to distribution of risk and liability, indemnification, intellectual property rights, and other commercial arrangements, which are customarily guarded from competitors and would give competitors an advantage in negotiations if disclosed. The Commission has recognized that these competitive risks justify denying or restricting access to contracts and other documents in this context.[7]

In support of this request, and pursuant to section 0.459(b) of the Commission's rules, PanAmSat establishes the following:[8]

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[3] To assist the Commission, PanAmSat is providing a redacted Contract and Exhibits that may be placed in the public file. The specific portions to be withheld include redacted portions of the Execution Copy and Exhibits A, B, C, D, E, F, G1, G2, H and I.

[4] 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d); 47 C.F.R. § 0.459.

[5] *See* 47 C.F.R. § 0.457(d); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir 19923) ("*Critical Mass*") ("W]e conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 [to the FOIA] if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.").

[6] The Contract and Exhibits prominently state that the information contained is proprietary and/or may not be disclosed without permission.

[7] *See Critical Mass.*

[8] 47 C.F.R. § 0.459(b).

1. The specific information for which confidential treatment is sought is contained in the attachments hereto and includes specific information regarding price and payment terms, construction schedule, related business plan with associated cost structure and incentives, unique terms negotiated, and proprietary technical information concerning PanAmSat.[9]

2. As noted above, the information is being submitted in response to a specific request of the International Bureau in connection with implementation of milestones for PanAmSat Ka-band satellite authorization, IBFS Nos. SAT-LOA-19950929-00130/131; SAT-LOA-1995029-00204/00208.

3. The Contract and Exhibits contain extremely sensitive commercial, financial, and technical information that would customarily be withheld from competitors. For example, the information consists of the price terms, payment schedules, and construction milestones agreed upon by PanAmSat and its satellite contractor. PanAmSat would be severely prejudiced in its ability to compete if this information, as well as proprietary technical information concerning its satellite, were released to competitors. Indeed, the contract states that the information it contains is proprietary also to PanAmSat's contractor, Orbital Sciences Corporation ("Orbital Sciences") and may not be disclosed without is permission.[10] Public disclosure of the confidential terms would materially impair the value of the Agreement and is likely to cause substantial harm to the competitive position of PanAmSat.

4. The information for which non-disclosure is sought pertains to the construction of satellites. PanAmSat faces fierce competition from companies similarly operating satellites. Such companies stand to benefit competitively from any knowledge of the cost, price, and technical information in the attached Contract and Exhibits. For example, disclosure would enable competitors to use such information to gain terms more favorable in their negotiations with contractors as well as market services to our customers. Further, PanAmSat's business relationship with its contracting entities would likely be damaged to the point where it would be unwilling to enter into agreements and thus damage its competitive position.

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[9] The redacted copy of the Contract and Exhibits is useful for indicating the specific portions for which confidential treatment is sought.

[10] *See* Article 23 of Contract, "Disclosure and Use of Information by the Parties," at 44-45.

5. Disclosure of the information for which non-disclosure is sought could result in substantial harm to PanAmSat by revealing to their competitors, the satellite construction industry and the public the agreed-upon price and payment terms, insurance coverage levels, and construction deadlines for its satellite systems, as well as the technical specifications of its satellite. PanAmSat's competitors would likely use this information to unfairly compete by developing new service offerings.[11] Moreover, PanAmSat would be prejudiced in any future negotiation regarding satellite construction if pricing information were available to other satellite construction companies.

6. PanAmSat takes significant protective measures to ensure that the information contained in the Contract and Exhibits is not disclosed to the public. Specifically, the Contract and Exhibits are located in a secure and confidential location at PanAmSat's facilities.

7. The Contract and Exhibits for which non-disclosure is sought is not available to the public nor has there been any intended disclosure of this information to third parties. For example, PanAmSat has not issued any press release regarding the confidential information or even the existence of the contract. We note further that the Securities and Exchange Commission ("SEC") has determined that such Contracts and Exhibits are competitively sensitive, while not being material, and therefore does not require it to be filed. Consequently, this information is not available at the SEC either.

8. PanAmSat requests that the Contracts and Exhibits be withheld from disclosure for an indefinite period because it is possible the disclosure could jeopardize PanAmSat's competitive position. In the alternative, PanAmSat would request that these materials be withheld from disclosure for at least a five-year period, with the opportunity to request an extension. After at least this period of time the harmful effects of disclosure will likely be reduced because the Agreement will have terminated by that time. PanAmSat believes that if the Contract and Exhibits were disclosed during the initial five-year period, Orbital Sciences certainly would be forced to offer similar terms to PanAmSat's competitors and the competitive advantage that PanAmSat has secured based on its long-standing relationship with Orbital Sciences would be eroded. Further, maintaining confidentiality is critical with Orbital

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[11] *See In re Application of Mobile Communications Holdings, Inc. for Authority to construct the ELLIPSO Elliptical Orbit Mobile Satellite System*, 100 FCC Rcd. 1547, 1548 (Int'l Bur. 1994) ("[B]uyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations").

Sciences because PanAmSat depends on its continued cooperation over the next five years.

9. PanAmSat also notes that a denial might impair the Commission's ability to obtain this type of information in the future. The ability of a government agency to continually obtain confidential information was among the legislative purposes for developing exemptions from the Freedom of Information Act.[12] The U.S. Court of Appeals for the D.C. Circuit has recognized a "private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis."[13] The Commission should extend a similar recognition to the attached Contract and Exhibits.

Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,

Michael A. McCoin

Joseph A. Godles
Michael A. McCoin
Attorneys for PanAmSat Corporation

Attachment

cc: Thomas S. Tycz
Jennifer Gilsenan
Alyssa Roberts
Deborah Gonzales

[12] *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) ("Where, however, the information is provided to the Government voluntarily, the presumption is that [the Government's] interest will be threatened by disclosure as the the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation").

[13] *Id.*

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RECEIVED

JUN 7 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 7, 2001

NOT FOR PUBLIC INSPECTION

Via HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Room TW – A325
Washington, D.C. 20554

Re: VisionStar, Incorporated Transfer of Control Application
File No. SAT-T/C-20001215-00163

Dear Ms. Salas:

Enclosed for filing are an original and four copies of a Request for Confidentiality and accompanying joint response of VisionStar, Incorporated and EchoStar VisionStar Corporation to the International Bureau's May 30, 2001 request for additional information in connection with its review of the above-referenced transfer of control application.

Also attached is an additional copy of the Request for Confidentiality and joint response, which we ask you to date-stamp and return to our messenger.

Please do not hesitate to contact me if you have any questions regarding this filing.

Sincerely,

Rhonda M. Bolton

Rhonda M. Bolton
Counsel for EchoStar VisionStar Corporation

Enclosures

RECEIVED

JUN 7 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

NOT FOR PUBLIC INSPECTION

In the Matter of	)	
	)	
VisionStar, Incorporated	)	File No. SAT-T/C-20001215-00163
Transfer of Control Application	)	
	)	

<u>REQUEST FOR CONFIDENTIAL TREATMENT</u>

VisionStar, Incorporated ("VisionStar") and EchoStar VisionStar Corporation ("EchoStar"), pursuant to the provisions of Sections 0.457 and 0.459 of the Commission Rules governing submission of confidential materials, 47 C.F.R. §§ 0.457, 0.459, respectfully request that the attached response to the Commission's International Bureau and attachments appended thereto (the "Response") be afforded confidential treatment and not be placed in the Commission's public files. This information is provided in response to a May 30, 2001 letter from Mr. Thomas S. Tycz, Chief of the International Bureau, requesting information from the parties in connection with the above-referenced transfer of control application and inviting the parties to submit the requested information under a request for confidentiality.[1]

The Response and the attachments thereto contain material that qualifies as "commercial or financial information" that "would customarily be guarded from competitors" regardless of whether or not such materials are protected from disclosure by a privilege. *See* 47

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[1] *See* Letter from Thomas S. Tycz, Chief, International Bureau, FCC, to Pantelis Michalopoulos, Counsel for EchoStar VisionStar Corporation (dated May 31, 2001), at 1; Letter from Thomas S. Tycz, Chief, International Bureau, FCC, to Michael R. Gardner, Counsel for VisionStar, Inc. (dated May 31, 2001), at 1.

C.F.R. § 0.457(d); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) ("[W]e conclude that financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.").

Specifically, these materials contain sensitive information that if disclosed could place VisionStar and EchoStar generally at a competitive disadvantage, including specific information regarding VisionStar's costs and the price terms agreed upon with a satellite contractor, sensitive technical information, and specific financing terms agreed upon by VisionStar and EchoStar in effecting EchoStar's investment in VisionStar. Both companies would be placed at a significant disadvantage if the detailed terms of their various negotiations were revealed to the numerous competing service providers, and moreover to the companies fiercely competing for Ka-band licenses in the second processing round who stand to benefit competitively from any knowledge of the cost, price and technical information included in these materials.

In support of this request, and pursuant to 47 C.F.R. § 0.459(b), VisionStar and EchoStar hereby state as follows:

1. The information for which confidential treatment is sought is contained in VisionStar and EchoStar's joint Response to the International Bureau and the attachments appended thereto, which includes specific information regarding VisionStar's costs; the price terms agreed upon with a satellite contractor and proprietary technical information concerning VisionStar's satellite contained in VisionStar's contract with its satellite contractor, Lockheed Martin Corporation, and the discussion of and documents describing work performed on VisionStar's satellite; and specific financing terms agreed upon by VisionStar and EchoStar in effecting EchoStar's investment in VisionStar.

2. The information is being submitted in response to the specific request of the International Bureau for information in connection with its review of the Application for Transfer of Control Over VisionStar, Inc., File No.

SAT-T/C-20001215-00163. The Bureau's request for this information was made in a letter dated May 30, 2001 from Thomas S. Tycz, Chief, International Bureau, to Pantelis Michalopoulos, Counsel for EchoStar VisionStar Corporation, and a letter dated May 30, 2001 from Thomas S. Tycz, Chief, International Bureau, to Michael R. Gardner, Counsel for VisionStar, Inc.

3. This information contains extremely sensitive commercial and financial information that would customarily be kept from competitors. Specifically, the information consists of VisionStar's costs, the price terms agreed upon with a satellite contractor, proprietary technical information concerning VisionStar's satellite, and specific financing terms agreed upon by VisionStar and EchoStar in effecting EchoStar's investment in VisionStar. VisionStar and EchoStar would be severely prejudiced in their ability to compete if specific information regarding VisionStar's costs, the price terms agreed upon with a satellite contractor, proprietary technical information regarding the satellite, and the terms of EchoStar's investment in VisionStar were released to their competitors. Moreover, VisionStar would be prejudiced in any future negotiations regarding construction of satellites if its pricing, technical and insurance-related information were available to satellite construction companies.

Likewise, Lockheed Martin would be severely prejudiced in future contract negotiations if data concerning fees and services contained in its contract with VisionStar were released to competitors.

Finally, the information includes technical exhibits that contain information that is proprietary to Lockheed Martin. These exhibits are irrelevant to the Commission or any third party, whose appropriate focus should be on consideration of the parties' Application for Transfer of Control Over VisionStar, and not on commercially sensitive information that could be beneficial to the competitors of VisionStar, EchoStar and Lockheed Martin.

4. The information for which non-disclosure is sought pertains to Ka-band satellite services. VisionStar and EchoStar, which received their Ka-band licenses in the Commission's first round of license processing, face fierce competition from companies seeking a license in the second processing round. Such companies stand to benefit competitively any knowledge of the cost, price and technical information included in these materials.

5. Disclosure of the information for which non-disclosure is sought could result in substantial harm to VisionStar, EchoStar and Lockheed Martin by revealing to their competitors, the satellite construction industry and the public VisionStar's agreed-upon price terms for its satellite system and agreements for insurance coverage levels. Such information could be used by the competitors of VisionStar and EchoStar to develop competing service offerings. *See In re Application of Mobile Communications*

Holdings, Inc. for Authority to Construct the ELLIPSO Elliptical Orbit Mobile Satellite System, 10 FCC Rcd. 1547, 1548 (Int'l Bur. 1994) ("buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations."). Moreover, VisionStar and EchoStar would be prejudiced in any future negotiations regarding construction of satellites if pricing and insurance-related information were available to satellite construction companies.

6. VisionStar and EchoStar take significant measures to ensure that this information is not disclosed to the public.

7. The attached material for which non-disclosure is sought is not available to the public.

8. VisionStar and EchoStar request that the attached material be withheld from disclosure for an indefinite period. Disclosure of this information at any time could jeopardize the competitive position of VisionStar and EchoStar.

9. Finally, VisionStar and EchoStar note that denying their request that this information be kept confidential would impair the Commission's ability to obtain this type of voluntarily disclosed information in the future. The ability of a government agency to continually obtain confidential information was behind the legislative purpose in developing exemptions from the Freedom of Information Act. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) ("Where, however, the information is provided to the Government voluntarily, the presumption is that [the Government's] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation."). The U.S. Court of Appeals for the D.C. Circuit has recognized a "private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis." *Id.* at 879. The Commission should extend a similar recognition to the enclosed materials.

VisionStar and EchoStar request that the Commission return these materials if their request for confidentiality is denied. *See* 47 C.F.R. § 0.459(e).

Respectfully submitted,

Michael R. Gardner
The Law Offices of Michael R. Gardner, P.C.
1150 Connecticut Avenue, NW
Suite 710
Washington, D.C. 20036
(202) 785-2828

Counsel for VisionStar, Inc.

Pantelis Michalopoulos
Rhonda M. Bolton
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, D.C. 20036
(202) 429-3000

Counsel for EchoStar VisionStar Corp.

Dated: June 7, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Confidential Treatment was served on June 7, 2001, via hand delivery (indicated by *) or first-class United States mail, postage pre-paid, upon the following:

Thomas S. Tycz*
Chief, Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W. – Room 6-A665
Washington, D.C. 20554

Marilyn J. Simon*
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W. – Room 6-A633
Washington, D.C. 20554

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March 20, 2000

BY HAND DELIVERY

CONFIDENTIAL TREATMENT REQUESTED
FOR PORTION OF SUBMISSION

Mr. Thomas S. Tycz
Chief, Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: GE American Communications, Inc.
Ka-Band Satellite Construction Contract

Dear Mr. Tycz:

As you requested, attached is a copy of the construction contract between GE American Communications, Inc. ("GE Americom") and Harris Corporation relating to construction of the GE*Star Ka-band satellite system (the "Contract"). The Contract was entered into on May 29, 1998.[1] Also attached are the portions of GE Americom's June 1998 and June 1999 annual reports to the Commission that address the construction status of the GE*Star system.

GE Americom requests that the Contract be exempted from Freedom of Information Act disclosure requirements, under 5 U.S.C. Section 552(b)(4) and 47 C.F.R. Sections 0.457(d), 0.459. The Contract contains sensitive information regarding the commercial arrangements between the parties, and would not normally be made available for public inspection.

1 In November 1998 the parties suspended work under the Contract pending the resolution of critical regulatory issues.