

SAT-STA-20030903-00300  
DIRECTV Enterprises, LLC  
DIRECTV 3

LATHAM & WATKINS LLP

March 15, 2004  
Managing Director  
Attention: FOIA Officer  
Federal Communications Commission  
445 12th Street, S.W., Room 1-A835  
Washington, DC 20554

S2417 SAT-STA-20040107-00002 IB2004000022  
DIRECTV ENTERPRISES, LLC

Re: DIRECTV, Inc. Response to Pegasus Development Corporation Freedom of Information Act Request

To whom it may concern:

DIRECTV, Inc. ("DIRECTV") is aware that Pegasus Development Corporation ("Pegasus") has filed a Freedom of Information Act request to inspect documents submitted to the Commission by DIRECTV on October 7, 2003, December 17, 2003, December 18, 2003, and January 6, 2004.<sup>1</sup> On February 19, 2004, DIRECTV made available in the public file the unredacted version of the letter requested by Pegasus that was submitted to the Commission on December 18, 2003, and thus does not oppose the release of this particular material. As for DIRECTV's submission to the Commission on January 13, 2004,<sup>2</sup> DIRECTV has now introduced into the record redacted versions of this documentation<sup>3</sup> and thus does not oppose the release of the now-public portions.

DIRECTV renews its request that the documents submitted on October 7, 2003 and December 17, 2003, and the balance of the redacted material from the January 13, 2004 submission, be kept confidential and withheld from public inspection as well as from inspection by Pegasus. These materials contain trade secret and commercial and financial information that is "of a kind that would not customarily be released to the public." Therefore, this information is "confidential" under Exemption 4 of the Freedom of Information Act.<sup>4</sup> As explained below,

<sup>1</sup> Letter from Bruce Jacobs, Counsel to Pegasus, to Managing Director, FCC (Jan. 27, 2004) (the "Pegasus FOIA Request").

<sup>2</sup> The Pegasus FOIA Request erroneously requests documents allegedly submitted to the Commission on January 6, 2004. There were no documents submitted to the Commission on this date. DIRECTV assumes that Pegasus meant the documents submitted on January 13.

<sup>3</sup> Letter from James Barker, Counsel to DIRECTV, to Thomas Tycz, FCC (March 15, 2004).

<sup>4</sup> See 5 U.S.C. § 522(b)(4). The Commission adopted Section 0.457(d) of its rules to implement FOIA Exemption 4. See 47 C.F.R. § 0.457(d)(2) ("If it is shown that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely

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DIRECTV and Telesat would suffer substantial competitive harm if this documentation and the information contained therein were disclosed.<sup>5</sup> Moreover, this information is not decisionally significant to the Commission's public interest determination.

Exemption 4 requires a federal agency to withhold from public disclosure a person's confidential commercial and financial information unless there is an overriding public interest requiring disclosure.<sup>6</sup> *National Parks v. Morton* established a two-prong test for determining if information qualifies for withholding under Exemption 4.<sup>7</sup> The first prong asks whether disclosing the information would impair the government's ability to obtain necessary information in the future. The second prong asks whether the competitive position of the person from whom the information was obtained would be impaired or substantially harmed. If the information meets the requirements of either prong, then it is exempted from disclosure under Exemption 4.<sup>8</sup>

The documents dated October 7, 2003, December 17, 2003, and January 13, 2004 meet the second prong of the test. Under the competitive harm inquiry, information should be withheld if it is typically withheld by a company and risks harming the competitive position of the person whose information has been provided to the agency.<sup>9</sup> As described in the requests for confidential treatment, the Memorandum of Agreement and Exhibits thereto contain competitively sensitive commercial and financial information not normally disclosed to the public. Their disclosure would be damaging to each of DIRECTV and Telesat if made available to the public or to Pegasus, which is both a potential competitor of DIRECTV and a potential lessor of capacity from Telesat. With the unredacted information, Pegasus and other current or potential competitors of DIRECTV could attempt to needlessly disrupt DIRECTV's arrangements with Telesat. Such disclosure would also compromise Telesat's plans by bestowing an unfair advantage on prospective competitors and/or weaken Telesat's negotiating position with potential business partners or customers. For such reasons, the material is in fact subject to a non-disclosure agreement between DIRECTV and Telesat.

In addition, there is no overriding public interest requiring disclosure.<sup>10</sup> The remaining redacted terms are not decisionally significant in the relevant proceeding, which involves the

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available for public inspection." See also *Critical Mass Energy Project v. Nuclear Regulatory Comm'n.*, 975 F.2d 871, 879 (D.C. Cir. 1992) ("*Critical Mass*") (defining "confidential" to apply to information "of a kind that would not customarily be released to the public").

<sup>5</sup> See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) ("*National Parks*").

<sup>6</sup> See 5 U.S.C. § 522(b)(4).

<sup>7</sup> *National Parks*, 498 F.2d at 770.

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* See also *Critical Mass*, 975 F.2d at 879.

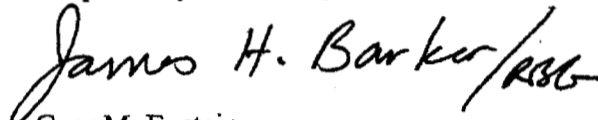
<sup>10</sup> Indeed, the October 7, 2003 and December 17, 2003 documents were superseded by the January 13, 2004 Memorandum of Agreement, and should not be released in any event.

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proposed relocation of DIRECTV 3 to the Canadian orbital position at 82° W.L., as the Pegasus FOIA Request itself acknowledges.<sup>11</sup> The material that DIRECTV has made publicly available provides a sufficient record for the Commission to reach its public interest determination in that proceeding,<sup>12</sup> and for third parties to evaluate meaningfully their interest in the transaction without compromising the remaining, highly sensitive information contained in the documents. Indeed, the unredacted information submitted to the Commission today and previously on February 19, 2004 is directly responsive to Pegasus' request for information regarding whether "DIRECTV's arrangement at [82° W.L.] could have a direct impact on Pegasus' operations."<sup>13</sup> Accordingly, Pegasus has no legitimate interest in reviewing the remaining materials. Any disclosure would thus reward Pegasus for manipulating the regulatory process and allow it to gain access to commercial contracts that could only be used against the legitimate commercial interests of its potential competitors DIRECTV and Telesat.

For the foregoing reasons, consistent with well-established precedent, the Commission should deny Pegasus's FOIA Request, except to the extent that DIRECTV has already made the information available to the public.

Respectfully submitted,



Gary M. Epstein  
James H. Barker  
of LATHAM & WATKINS LLP

Counsel for DIRECTV Enterprises, LLC

cc: Marlene Dortch, Secretary, FCC  
Managing Director, FCC  
Jay Whaley, FCC  
Jennifer Hindin, Esq.  
Bruce Jacobs, Esq.  
Susan Eid, DIRECTV

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<sup>11</sup> Pegasus FOIA Request at 1. Given that Pegasus has missed the deadlines for petitioning against or offering comment on the above-referenced STA, Pegasus also is not formally an interested party in this proceeding with standing to use any of the information it has requested.

<sup>12</sup> Indeed, DIRECTV's request for return of the materials submitted on October 7, 2003 and December 17, 2003 acknowledges that the returned documents will no longer be part of the record and will have no bearing on the Commission's public interest determination.

<sup>13</sup> Pegasus FOIA Request at 1, n.1.