

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

DIRECTV Enterprises, LLC
Request for Special Temporary
Authority to Relocate DIRECTV 3 to
82° W.L. and To Conduct Telemetry,
Tracking and Command ("TTAC")
Operations for an Interim Period

File No. SAT-STA-20030903-00300

Received

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Policy Branch
International Bureau

To the International Bureau:

**RESPONSE OF TELESAT CANADA TO COMMENTS WITH RESPECT TO
INFORMATION FILED PURSUANT TO PROTECTIVE ORDER**

Telesat Canada ("Telesat"), by its attorneys, hereby responds to comments filed by EchoStar Satellite LLC ("EchoStar") and Pegasus Development Corporation ("Pegasus") allegedly based on confidential information provided pursuant to protective order in the above-referenced proceeding.¹ These comments do not support further Commission delay in approving the relocation of DIRECTV 3 to a Canadian orbital location, where it will be used as a back-up and to provide service solely in Canada. Now that this supplemental pleading cycle is complete, and all parties have had the opportunity to review the confidential information submitted by DIRECTV, the Commission should promptly conclude its review and grant DIRECTV's long-pending request for special temporary authority ("STA") to relocate DIRECTV 3 to 82° W.L. Any such grant can be issued without prejudice to any subsequent action on the also pending

¹ The comments largely reiterate prior concerns that could have been, and in many cases were, addressed prior to the release of the confidential information. Indeed, Telesat's response to these comments contains no confidential information.

request for STA to relocate DIRECTV 5 to 72.5° W.L. and to provide service into the U.S. from that location.²

I. **THE BUREAU SHOULD PROMPTLY GRANT STA FOR THE RELOCATION OF DIRECTV 3 TO A CANADIAN ORBITAL LOCATION**

The comments filed do not raise any issues that would warrant further delay in granting STA for the relocation of DIRECTV 3 to a Canadian orbital location. As Telesat has noted previously, the relocation of DIRECTV 3 to 82° W.L. (and ultimately to 91° W.L.) will provide back-up and additional capacity in Canada only.³ Bell ExpressVu, Telesat's BSS customer, has contracted for all of the available frequencies at 82° W.L. and 91° W.L., albeit some frequencies are not currently being used because of an anomaly on the Nimiq 2 satellite. The co-location of DIRECTV 3 will allow Telesat to restore service to Bell ExpressVu across all of the available frequencies, improve the power performance by enabling high-power operations, and provide emergency back-up as contemplated by long standing inter-Governmental agreements. As also previously noted, Bell ExpressVu has publicly stated that it needs all the available frequencies at those orbital locations for its Canadian service.

Pegasus', and to a lesser extent EchoStar's, desire to create a regulatory link between the pending requests for STA to relocate DIRECTV 3 and DIRECTV 5 to Canadian orbital locations fundamentally misconstrues DIRECTV's commercial arrangements with Telesat.⁴ The

² See *DIRECTV Enterprises, LLC, Request for Special Temporary Authority to Relocate DIRECTV 5 to 72.5° W.L. and To Conduct Telemetry, Tracking and Command ("TTAC") Operations for an Interim Period*, File No. SAT-STA-20040107-00002 (filed Jan. 7, 2004).

³ See, e.g., *Opposition of Telesat Canada*, File No. SAT-STA-20030903-00300 (filed Nov. 12, 2003); Letter from Bert W. Rein, counsel to Telesat Canada, to Marlene H. Dortch, Secretary, FCC (dated Mar. 15, 2004).

⁴ See *Pegasus Development Corporation, Reply and Supplemental Comments*, MB Docket No. 03-124, FCC 03-330, SAT-STA-20040107-00002, STA-STA-20030903-0030 at 10 (filed Apr. 5, 2004) ("*Pegasus Supplemental Comments*"). Although, Pegasus' counsel filed its entire pleading as a confidential document, the pleading in fact contains extensive public information.

DIRECTV 3 and DIRECTV 5 arrangements anticipate two separate transactions. The relocation of DIRECTV 3 to 82° W.L. (and ultimately 91° W.L.) will proceed following acquisition of the necessary regulatory approvals even if regulatory approvals are never obtained for the relocation of DIRECTV 5 to 72.5° W.L. Thus there is nothing in the arrangements between DIRECTV and Telesat that would limit the realization of the benefits for the relocation of DIRECTV 3 even if the DIRECTV 5 STA remains pending. To the contrary, as noted above, given the immediate need for back up capacity and to enhance service at 91° W.L., the FCC should promptly grant the DIRECTV 3 STA request, with a condition that the grant is without prejudice to any FCC action on DIRECTV 5.⁵

Pegasus further claims that DIRECTV and Telesat have somehow locked up all the Canadian BSS orbital capacity and thus foreclosed competitive entry by Pegasus or others that seek to provide service to the United States from Canadian BSS orbital locations.⁶ This is patently false. There is nothing in the DIRECTV-Telesat arrangement that restricts other U.S. service providers from accessing capacity on the Nimiq satellites at the 82° W.L. and 91° W.L. positions, or any other Canadian BSS positions. However, as has been made clear in this and

EchoStar Satellite LLC, Comments, File Nos. SAT-STA-20030903-00300 and SAT-STA-20040107-00002 at 4 (filed Apr. 5, 2004) ("*EchoStar Comments*").

⁵ In addition, if the FCC gives credence to allegations of U.S. service from DIRECTV 3, which would require further regulatory approval, the FCC could impose a condition or otherwise limit the scope of the STA to permit only service to Canada. See *EchoStar Comments* at 4 (expressing concern that Section 4.4 of the DIRECTV and Telesat Satellite Relocation and Lease Agreement does not foreclose the possibility of U.S. service). Although EchoStar redacted this concern from its public version, Section 4.4 has been released to the public. See Letter from J. Barker, counsel for DIRECTV Enterprises LLC to T. Tycz, FCC at attached Dec. 23, 2003 Telesat Canada and DIRECTV Enterprises, LLC Satellite Relocation & Lease Agreement at 5, ¶ 4.4 (filed Mar. 15, 2004).

⁶ *Pegasus Supplemental Comments* at 11-14.

other proceedings,⁷ all of the available capacity at the 82° W.L. and 91° W.L. orbital locations is already committed to and used by Bell ExpressVu. The co-location of DIRECTV 3 with a Nimiq satellite in either of these orbital locations will not result in any additional frequencies becoming available for service to the United States. Because there is no previously uncommitted capacity or new capacity made available under the DIRECTV 3 arrangement, there can be no foreclosure of any U.S. service provider. In any event, additional Canadian BSS capacity still exists. Industry Canada currently has issued a further call for expression of interest due May 14, 2004 for BSS capacity in the 12 GHz band at 129° W.L. and 138° W.L., which offer coverage of the United States, including Alaska/Hawaii.⁸ In addition, several Canadian orbital locations with 17 GHz BSS frequencies will become available in the future.

Furthermore, EchoStar suggests that the FCC should commence an amorphous general rulemaking regarding the scarcity of Canadian frequencies for U.S. operators.⁹ Any such

⁷ See *In the Matter of Pegasus Development Corporation*, DA 04-909, ¶ 12 (rel. Mar. 31, 2003) (“*Pegasus Order*”) (acknowledging that granting Pegasus authority to access the Nimiq 1 and Nimiq 2 satellites “does not guarantee successful deployment of the proposed DBS system” because Telesat indicated that it “has sold all capacity on the Nimiq 1 and Nimiq 2 satellites to Bell Express Vu, a Canadian DTH service provider, and that Bell ExpressVu ‘needs all capacity available at the 82° W.L. and 91° W.L. orbital locations’”); *In the Matter of Digital Broadband Applications Corp.*, Order, 18 FCC Rcd 9455 (2003) (“*DBAC Order*”).

⁸ Indeed, Telesat would consider partners other than DIRECTV for development of these orbital locations to the extent that such arrangements make commercial sense and contribute to a proposal that would meet all of Industry Canada’s licensing conditions.

⁹ *EchoStar Comments* at 3. Such rulemaking is very likely unnecessary because the *DISCO II* framework is already in place to cover that situation. *Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd 24094 (1997), *recon. denied*, 16 FCC Rcd 19794 (2001). In fact, the Bureau has already twice authorized the use of Canadian BSS orbital locations for service to the U.S. See *DBAC Order*; *Pegasus Order*. In addition, the Canadian BSS orbital positions are already part of ITU Region 2 BSS Plan and thus do not raise the same issues as “reduced orbital spacing”, which may be the subject of a future rulemaking. See *Public Notice, International Bureau Seeks Comment On Proposals to Permit Reduced Orbital Spacing Between U.S. Direct Broadcast Satellites*, Report No. SPB-196, DA 03-3903 (Dec. 16, 2003).

rulemaking would have no relevance to the DIRECTV 3 STA request because it does not seek service to the United States.

The remainder of Pegasus' pleading is dedicated to complaining about its access to confidential material rather than raising any substantive concerns about DIRECTV's pending STA request. The relevant regulatory agencies, the FCC and Industry Canada, however, have always had full visibility into the arrangements. Other parties were also given sufficient details to understand the nature and scope of arrangements but the details were kept confidential from competitors, which is a normal business practice exercised by all.¹⁰ In any event, Pegasus' counsel has now reviewed all of the confidential materials and, quite tellingly, has failed to identify any issue warranting delay in granting the pending DIRECTV 3 STA request.

II. CONCLUSION

In sum, none of the "red herrings" raised by Pegasus and EchoStar provide any reason to delay grant of the pending DIRECTV 3 STA. Accordingly, Telesat respectfully requests that the Bureau promptly grant DIRECTV STA to relocate DIRECTV 3 to a Canadian orbital location to provide urgently needed back-up capacity and service restoral.

RESPECTFULLY SUBMITTED,
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April 12, 2004

¹⁰ By way of example, Pegasus heavily redacted its own proposal to Industry Canada. See Opposition and Reply Comments of DIRECTV Enterprises, LLC, File No. SAT-STA-20040107-00002 (Mar. 3, 2004), Exhibit A (heavily redacted Pegasus Response to Industry Canada's Call for Expressions of Interest in Broadcasting Satellite Orbital Positions (DGRB-002-03)).

CERTIFICATE OF SERVICE

I, Christopher E. Ryan, a legal assistant at the law firm of Wiley Rein & Fielding, LLP, do hereby certify that copies of the foregoing **Response of Telesat Canada** were served by first-class mail, postage prepaid on this 12th day of April 2004 to the following:

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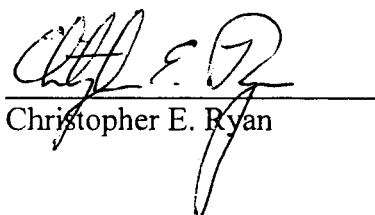
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