

January 30, 2004

By Courier

Mr. Thomas S. Tycz
Chief, Satellite Divisions
Federal Communications Commission
445 12th Street, SW
Washington, , DC 20554

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JAN 30 2004

Federal Communication Commission
Bureau / Office

**Re: Response to Satellite Division Request
SES-LIC-20030605-00844, SES-LIC-LFS-20031124-01689,
SES-LIC-20011121-02186, SES-LIC-20020111-00075,
SES-AMD-20030917-01295, and SES-AMD-20030917-01296**

Dear Mr. Tycz:

Pegasus Development Corporation and its affiliate Satellite Access Corporation (collectively "Pegasus") hereby respond to the letters issued by the Satellite Division ("Division") dated January 14, 2004.¹ In the letters, the Division asks that Pegasus "confirm, in writing, that it will have access to the Nimiq 1 and Nimiq 2 satellites (e.g., by submitting a copy of a capacity lease agreement with Telesat or Bell ExpressVu) ... in order to provide the service described in the Applications."² Pegasus does not currently have an agreement for the use of capacity on Nimiq 1 and Nimiq 2. The absence of such an agreement, however, is not an impediment to grant of Pegasus' earth station applications.

The Commission's regulations do not require that an earth station applicant seeking authority to access a non-U.S. licensed satellite obtain rights to such access prior to grant of the earth station license.³ The International Bureau's decision in the *DBAC*

¹ See Letter to Scott Blank, Pegasus Development Corporation, from Thomas S. Tycz (January 14, 2004); Letter to John K. Hane, Vice President of Satellite Access Corporation, from Thomas S. Tycz (January 14, 2004). On January 29, 2004, Commission staff verbally granted Pegasus' request to file its response on January 30, 2004.

² See, e.g., Letter to John K. Hane, Vice President of Satellite Access Corporation, from Thomas S. Tycz, at 1 (January 14, 2004).

³ The regulations require only that an earth station applicant demonstrate that U.S. satellite

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case supports this interpretation of the rules.⁴ In the *DBAC Order*, the Bureau granted an application that was essentially identical to that of Pegasus, without any inquiry into the existence of a contract for capacity on the Nimiq satellites. In fact, based on a recent filing made by Telesat Canada (“Telesat”), the licensee of the Nimiq satellites, it appears that DBAC may still have no contractual right to capacity on those satellites.⁵ Accordingly, the Division may not dismiss Pegasus’ applications based on a failure to meet a requirement that does not exist.⁶

There is no logical reason for the FCC to have such a condition, and the Division itself identifies none. Both Nimiq 1 and Nimiq 2 have been launched, and accordingly, there can be no concern that spectrum is being warehoused.⁷ Moreover, the FCC does not generally interject itself into the private contractual matters of licensees,⁸ and thus, there is no reason for the FCC to review such a contract.

The fact that Telesat has suggested, in the context of a wholly different proceeding, that at the time of its filing, it did not have capacity for additional service providers does not mandate dismissal of Pegasus’ applications. The market for satellite transponders is fluid, and there is no basis in the record or otherwise to support a conclusion that Pegasus cannot ultimately secure access to the Nimiq satellites. Indeed, absent the legal right to use that capacity for its intended purpose – the provision of local

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operators have effective competitive opportunities to provide analogous services in the relevant foreign countries, that the non-U.S. licensed operator is legally and financially qualified, and that the satellite is operating in accordance with the FCC’s technical rules. *See* 47 C.F.R. § 25.137. Pegasus made these showings in its applications.

⁴ *See In the Matter of Digital Broadband Applications Corp.*, 18 FCC Rcd 9455 (2003) (“*DBAC Order*”).

⁵ *See* Telesat Canada, Opposition to SAT-STA-20030903-00300, at 3 (November 12, 2003) (“Telesat and DBAC never entered into an agreement for capacity on either of the Nimiq satellites.”).

⁶ Even if such a requirement did exist, the FCC may not arbitrarily elect when it should be applied. *See, e.g., Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (FCC must treat similarly situated parties in the same manner).

⁷ Additionally, earth station licenses to access DBS satellites are not mutually exclusive.

⁸ *See, e.g., Listener’s Guild, Inc. v FCC*, 813 F.2d 465 (D.C. Cir. 1987).

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channels into the United States, Pegasus cannot negotiate from a position of strength and, in any event, would be irresponsible in purchasing such capacity. Neither Telesat nor Bell ExpressVu, which has rights to Nimiq capacity, will encumber satellite capacity during negotiations without a demonstration that Pegasus can proceed with a lease. In fact, in a November 2001 letter Telesat confirmed its interest in leasing capacity to Pegasus and explicitly made prior U.S. authorization a condition of negotiations. Citing the prohibition on use of Canadian satellite capacity for the provision of DBS services into the United States, Paul Bush, Vice President of Corporate Development of Telesat, wrote to Pegasus:

Telesat would welcome a review by the FCC of its relevant policies. Should that review prove encouraging, we would be prepared to consider entering into commercial arrangements for providing transmission capacity *to entities properly authorized to provide US subscription services [A] favorable review by the FCC . . . would significantly enhance competition in subscription television services for the benefit of U.S. consumers.* I look forward to reviewing the evolving situation with you and, hopefully, seeking to explore commercial opportunities open to us.⁹

In light of Telesat's understandable interest in having the largest possible base of potential customers for its satellite services, Telesat's recent statement, submitted years after the DBAC application was filed and months after Pegasus' own applications were filed, can be understood and relied upon by the Commission in this proceeding only after the recent agreements between Telesat and DirecTV have been fully disclosed and reviewed.¹⁰ In response to conversations referred to in the November 2001 letter, shortly after the Commission released the *DBAC* decision on May 7, 2003, Pegasus quickly filed its own application for access to the Nimiq satellites and contacted Telesat to inquire about available capacity and terms. In June 2003, Telesat assisted in arranging

⁹ Letter from Paul Bush to John Hane (November 26, 2001) (emphasis added), attached hereto as Exhibit A.

¹⁰ See Application for Special Temporary Authority, File No. SAT-STA-20030903-00300 (September 3, 2003) (requesting authority to move DirecTV 3 to 82°W and stating that its use would be restricted to Canada); Application for Special Temporary Authority, File No. SAT-STA-20040107-00002 (January 7, 2004) (requesting authority to move DirecTV 5 to 72.5°W and proposing that DirecTV would use all of the satellite capacity until 2008).

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a meeting between senior executives of Pegasus and senior executives of Bell ExpressVu to discuss accessing Nimiq capacity for purposes of providing local stations. In an unexpected reversal, Telesat terminated all discussions regarding Pegasus' use of Nimiq capacity in late summer 2003, shortly before DirecTV filed its first application evidencing an arrangement with Telesat.¹¹ DirecTV has actively sought to prevent disclosure of contractual documents relevant to its arrangement with Telesat.¹² The Commission cannot deny Pegasus' applications based on assertions of contractual provisions that are withheld from review by Pegasus and other interested parties and which appear to advance anticompetitive goals. The Commission should require the immediate release of all pertinent agreements between Telesat and DirecTV.

In the *DBAC Order*, the Bureau emphasized the importance of increasing competitive entry in the highly concentrated DBS market through the use of foreign-licensed satellites and preventing incumbent DBS operators from entering into such arrangements.¹³ Prior to reaching its recent agreements with DirecTV, Telesat itself acknowledged that Canadian satellite capacity could enhance DBS competition in the United States. Grant of Pegasus' applications would facilitate that goal by increasing the likelihood that a new entrant will be positioned to negotiate an agreement that would allow it to provide local broadcast stations to unserved and underserved areas using Canadian satellite resources. In contrast, any decision to dismiss the applications, particularly without full disclosure and review of the arrangement between DirecTV and Telesat, would thwart the competitive goal of *DBAC*.

¹¹ See Application for Special Temporary Authority, File No. SAT-STA-20030903-00300 (September 3, 2003).

¹² See, e.g., Letter to Thomas Tycz from Gary Epstein (October 21, 2003) (requesting confidential treatment of documents regarding the DirecTV and Telesat arrangement); Letter to Marlene H. Dortch from Gary Epstein (January 14, 2004) (requesting confidential treatment of revised documents); see also Letter to Managing Director from Bruce D. Jacobs (January 27, 2004) (requesting release of the relevant information under the Freedom of Information Act).

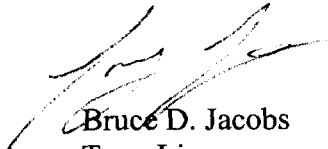
¹³ See *DBAC Order*, at ¶¶ 16-17.

ShawPittman LLP

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Accordingly, the Division should terminate this unwarranted inquiry, release all pertinent agreements between Telesat and DirecTV, and expeditiously grant Pegasus' earth station applications.

Very truly yours,



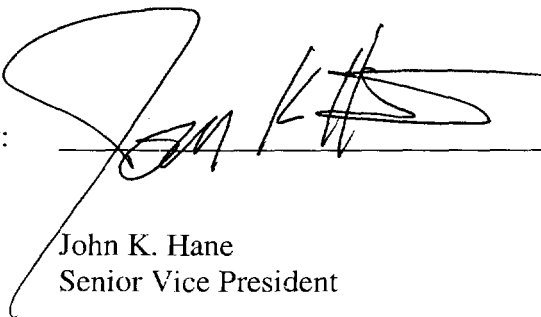
Bruce D. Jacobs
Tony Lin

cc: Arthur Lechtman

Document #: 1377412 v.1

Certification

On behalf of Pegasus Development Corporation, I hereby certify, under penalty of perjury, I have reviewed the foregoing letter and that it is complete and accurate to the best of my knowledge.

By:  _____
John K. Hane
Senior Vice President

January 29, 2004

EXHIBIT A



Telesat Canada
1601 Telesat Court
Gloucester, Ontario
K1B 5P4

Paul D. Bush
Vice President, Corporate Development

November 26, 2001

Mr. John Hane
Pegasus
1255 23rd Street
Washington, DC 20037
USA

Dear John:

This letter confirms Telesat's interest in investigating possible business models which would permit the use of transmission capacity from satellites deployed at Canadian orbital slots for the delivery of subscription television services to U.S. consumers. Telesat has always believed that the reliability, quality and value of its satellite transmission services would be favorable received in the competitive market. Accordingly, Telesat has been a strong supporter of the 1997 WTO Agreement, which liberalized market access in basic telecommunications services, including a number of satellite services. Canada, as a party to the WTO Agreement, has met its commitment by authorizing access to the Canadian market by close to 50 non-Canadian satellites.

As you are aware, the U.S. reservation to the WTO Agreement and prior policies of the FCC have precluded Telesat from offering satellite transmission services to authorized U.S. subscription television services operators. As a supporter of open competition in the use of satellite facilities on both sides of the border, Telesat would welcome a review by the FCC of its relevant policies. Should that review prove encouraging, we would be prepared to consider entering into commercial arrangements for providing transmission capacity to entities properly authorized to provide U.S. subscription services.

I hope that your interest will help prompt a favorable review by the FCC, a development, which we believe, would significantly enhance competition in subscription television services to the benefit of U.S. consumers. I look forward to reviewing the evolving situation with you and, hopefully, seeking to explore the commercial opportunities open to us.

Yours sincerely,

Paul D. Bush