

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

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Federal Communications Commission
Office of Secretary

In the Matter of

Freedom of Information Act Request for
Satellite Construction Contract filed by
Pegasus Development Corporation

)
)
) File No. SAT-LOA-20031119-00336
) FOIA File No. 2005-512
) DA 05-2449

OBJECTION TO ACKNOWLEDGEMENT OF CONFIDENTIALITY

Pegasus Development Corporation ("Pegasus") hereby files this objection to the review by Mr. John Hane of the confidential information submitted by Pegasus in the above-captioned proceeding. Mr. Hane controls and is the sole employee of Highcast Network, Inc. ("Highcast"), which has stated that it is a potential competitor to Pegasus. Accordingly, Mr. Hane is necessarily a "competitive decision-maker," and his personal review of confidentially sensitive material violates the express language of the *Protective Order* issued in this proceeding. See DA 05-2450 (September 13, 2005). Additionally, Mr. Hane is a former employee of Pegasus who is in litigation with Pegasus regarding the termination of his employment, and there are strong, legitimate concerns that his review of confidential sensitive materials would be improper. Under such circumstances, the International Bureau ("Bureau") should deny Mr. Hane's request to review personally the confidential material submitted in this proceeding by Pegasus.

On September 13, 2005, the Bureau released two orders addressing a request for confidential treatment by Pegasus of certain redacted documents submitted as proof of its compliance with its construction commencement milestone and a Freedom of Information Act ("FOIA") request by Highcast regarding that same material. See *Order*, DA 05-2450 (September 13, 2005); *Protective Order*, DA 05-2449 (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 warranted confidential treatment.¹ 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."²

With respect to this confidential and competitively sensitive information, the Bureau issued a protective order permitting Highcast to review that information only under certain terms and conditions. *See Protective Order*, at 4-8. Consistent with Commission precedent,³ among the restrictions is 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.⁴ Mr. Hane purports to be general counsel for Highcast and seeks review of the confidential information. However, his personal review of the documents would violate the restriction of the *Protective Order*.

¹ *See Order*, at 8.

² *Id.* (emphasis added).

³ *See, e.g., In the Matter of PanAmSat Corporation*, FOIA No. 2002-124, DA 02-609 (March 15, 2002); *Letter Order, VisionStar, Incorporated Transfer of Control Application*, FOIA Request No. 21-220 (August 8, 2001); *In the Matter of GE American Communications, Inc.*, DA 01-173 (January 25, 2001).

⁴ *See Protective Order*, at 5.

The Protective Order defines "In-House Counsel" as "the attorney or attorneys employed by . . . a Reviewing Party . . . *provided that*, such counsel are not involved in competitive decision-making, *i.e.*, In-House Counsel's activities, association, and relationship with a client are not such as to involve such counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor"⁵ Highcast itself at one point has stated that it is a potential competitor to Pegasus⁶ – a fact that cannot be easily dismissed in light of Mr. Hane's prior employment for Pegasus as Senior Vice President working, *inter alia*, on satellite deployment, contract negotiations, and related FCC proceedings. As the principal owner and sole employee of Highcast, Mr. Hane would necessarily engage in all decision-making for Highcast, including those that could affect Pegasus on a competitive level.⁷ The fact that Mr. Hane is also purportedly Highcast's general counsel provides no logical basis to warrant an exception to this rule. Any contrary conclusion would establish a dangerous loophole and deny Pegasus basic FOIA protection against disclosure of competitively sensitive materials.

⁵ See Protective Order, at 5.

⁶ Letter to Managing Director from Mark Halpren, at 2 (August 9, 2005) ("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 [Pegasus] not proceed with developing it) or allying with another Ka band licensee or applicant are among the most likely options.") (emphasis added); compare Additional Comments, at 1-2 ("Highcast does not now and has never sought to be operate [sic] a satellite or to provide satellite services directly").

⁷ The Bureau has concluded in at least one FOIA proceeding that the scope of in-house counsel permitted to review confidential satellite contracts should be interpreted narrowly. See *In the Matter of Application of Motorola Inc. and Teledesic, LLC*, File No. SAT-ASG-20010109-00005 (October 26, 2001) (rejecting request for review of satellite contract by in-house counsel of parent company of entity submitting FOIA request).

Moreover, Highcast has already obtained outside counsel in this proceeding and indicated in a prior email that such counsel would be reviewing the confidential material.⁸ Accordingly, there is no concern that Highcast would be denied an opportunity to review the confidential materials.

As an additional matter, as Pegasus stated in its initial Opposition to Highcast's FOIA request, there are genuine concerns regarding the propriety of Mr. Hane's personal review of the confidential material in light of his ongoing employment litigation, as an individual, with Pegasus.⁹ In its FOIA request, Highcast failed to identify any specific reason why it would be interested in the confidential satellite contract, other than an apparent abstract interest in ensuring that licensees comply with FCC regulations.¹⁰ Only when challenged did Highcast assert, *inter alia*, that it was a prospective satellite licensee considering the 87°W orbital location – a position it has since retracted. Under such circumstances, it would be eminently reasonable for the Bureau to prevent Mr. Hane's review of the confidential documents in order to "minimize the potential for inadvertent misuse of such information."¹¹

⁸ See attached Exhibit 1, at 4-5 (providing email correspondences between the parties and the FCC).

⁹ See Letter to Managing Director from Bruce Jacobs, at 1 (July 22, 2005).

¹⁰ See generally Letter to Managing Director from Mark Halpren (July 14, 2005).

¹¹ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, at ¶ 26 (1998) ("Confidential Information Policy Order"); see also *In Re Request of Louis A. Goodman*, 81 FCC 2d 124 (1980) ("The Commission generally has denied requests for inspection . . . where the [confidential] information is to be used for the resolution of essentially private disputes, unrelated to public interest determinations required by the Communications Act"); *McKeon Construction Co.*, 21 RR 2d 919 (1971) (denying FOIA request by entity seeking confidential information of FCC

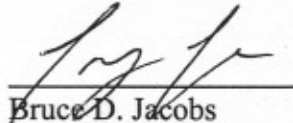
Conclusion

For these reasons, Pegasus requests that the Bureau deny Mr. Hane's request to review personally the confidential information submitted by Pegasus in this proceeding.

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 19, 2005

licensee because such material was sought in non-FCC related litigation and discoverable in that proceeding).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Objection to Acknowledgement of Confidentiality was sent by electronic mail and by first-class mail, postage prepaid, or hand delivery (*) on October 19, 2005 to the following:

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

Mark S. Halpern
Halpern & Levy, P.C.
GSB Building
One Belmont Avenue, Suite 400
Bala Cynwyd, PA 19004

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



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 relevant 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 incomprehensively 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 attempts 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 Pegasus were engaged 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 confidential 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 competitive 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

Pillsbury Winthrop Shaw Pittman LLP

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▼ "John Hane" <john@highcast.net>

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Pleas

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respo

nd 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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Date: 8/17/2005

(See attached file: Hane John.vcf)

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