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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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January 18, 2002

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

**Re: In re Consolidated Application of EchoStar Communications Corporation,
General Motors Corporation, Hughes Electronics Corporation, Transferors,
and EchoStar Communications Corporation, Transferee, for Authority to
Transfer Control, CS Docket No. 01-348**

Dear Ms. Salas:

Enclosed for filing please find a corrected Opposition of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation to a Petition filed by Pegasus Communications Corporation in the above-captioned proceeding.

Specifically, the attached revised Opposition reflects a correction to a misstatement on page 3 of the version filed yesterday. I would appreciate your replacing yesterday's filing with this revised version. Please call the undersigned if you have questions about this submission.

Very truly yours,



Pantelis Michalopoulos
Counsel for EchoStar Communications Corporation

Enclosure

cc: Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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)
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General Motors Corporation,)
Hughes Electronics Corporation,)
)
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and)
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EchoStar Communications Corporation,)
)
Transferee,)
)
For Authority to Transfer Control.)
_____)

CS Docket No. 01-348

**OPPOSITION OF ECHOSTAR COMMUNICATIONS CORPORATION,
GENERAL MOTORS CORPORATION AND
HUGHES ELECTRONICS CORPORATION**

EchoStar Communications Corporation (“EchoStar”), General Motors Corporation (“GM”) and Hughes Electronics Corporation (“Hughes”) (collectively the “Applicants”) file this Opposition to a Petition to Suspend the Pleading Cycle (“Petition”) filed by Pegasus Communications Corporation (“Pegasus”) in this proceeding. In the guise of a request for additional information, Pegasus seeks to bog down this proceeding in needless procedural delay. EchoStar, GM, and Hughes filed a merger application half a foot thick and many hundreds of pages long, and voluntarily updated the application to reflect the Vivendi transaction. This is hardly the lack of a “complete record” that Pegasus asserts. As the Cable Services Bureau correctly concluded in placing the application on public notice, all material facts

regarding the Vivendi transaction have been disclosed. EchoStar has never “refused” to provide any such material. Requiring multi-channel video programming distributors (“MVPD”s) to file all their third party programming agreements as part of a merger application would be absurd. The Commission has not required this before and should not do so at Pegasus’s behest.

Pegasus characterizes the merger application correctly in one respect: the Applicants believe that the merger will contribute to programming diversity. As the Applicants pointed out in their letter updating the application, the Vivendi transaction underscores this point and foreshadows the pro-competitive benefits of the EchoStar-Hughes merger. If Pegasus disagrees with this substantive point, it may so argue in the merger proceeding and has all the information it needs to express that disagreement in the pleading cycle established by the Commission.

Pegasus’ Petition reveals its true motive – delay – and the lengths to which it will go to achieve its dilatory objectives. Pegasus does not explain, for example, why its Petition was filed more than *three weeks* after the date that the transfer of control application was placed on public notice by the Commission. And its attempt to create a new procedural maneuver, a “suspension of pleadings” pleading cycle, is nothing short of an abuse of process.

I. THE VIVENDI AGREEMENT ONLY TANGENTIALLY RELATES TO THIS MERGER PROCEEDING

Pegasus’s Petition relates to the recent agreement between EchoStar and Vivendi executed on December 14, 2001 and already the subject of a December 18, 2001 submission by the Applicants in this proceeding.¹ The transaction contemplates a minority investment by

¹ Letter from Pantelis Michalopoulos, et al., Counsel for EchoStar Communications Corporation and Gary M. Epstein, et al., Counsel for General Motors Corporation and Hughes
(Continued ...)

Vivendi in EchoStar and certain programming agreements, none of which is subject to the Commission's prior approval. In fact, the transaction has been reviewed by the Department of Justice ("DOJ") and granted early antitrust clearance by DOJ and the Federal Trade Commission because it does not pose any competitive issues, indicating that DOJ itself did not view the two transactions as sufficiently connected to warrant unified review. In any event, if Pegasus truly had any fear that it will be harmed by the agreement, it could certainly have presented its views to the antitrust agencies.

Moreover, when it was signed, the Vivendi agreement did not effect any change to the merger application requiring an amendment of the application under Section 1.65 of the Commission Rules, 47 C.F.R. § 1.65. In the spirit of full and timely disclosure, the Applicants nevertheless filed a Section 1.65 letter describing the transaction. Even upon closing, the transaction will entail only very minor changes to the application -- the addition of a minority shareholder in EchoStar and one new member of EchoStar's Board of Directors. Under Section 1.65, the Applicants must report these changes "promptly, and in any event within 30 days," of the change. *See* 47 C.F.R. § 1.65. Here, the relevant change is the consummation of the Vivendi transaction. The 30-day clock under that rule does not start running until the transaction is ready to be consummated.² Contrary to Pegasus's claim, therefore, there has been no failure to report

Electronics Corporation, to Magalie Roman Salas, Secretary, FCC (dated Dec. 18, 2001) ("December 18 Letter").

² *See In the Matter of Applications of Nextel Communications, Inc.*, 10 FCC Rcd. 3361, 3368 (1995) (applicant need not "notify the Commission of a proposed transaction that is still being negotiated."; even letter of intent standing alone was "not information of 'decisional significance' to the Commission. . . ."), *recon. denied*, 10 FCC Rcd. 10450 (1995).

these changes and, in fact, the Applicants have disclosed facts well in advance of their legal obligation to do so.

The Vivendi deal is not a “substantial change” relating to a matter of “decisional significance” for the merger application. There is no change in the real parties in interest behind the application, as there is no transfer of control over either Applicant. The transaction does not even result in a new application by EchoStar for any additional Commission license. In fact, the Commission’s treatment of subsequent applications filed by parties proposing to merge illustrates why Pegasus’s “suspension” idea is so unsound. It is standard Commission practice to include subsequently requested and received licenses in the Commission’s consideration of a merger application. The Applicants’ only obligation is to update the record under Section 1.65 when they receive such licenses. This is precisely because business must go on during the pendency of a merger proceeding, and such proceedings cannot freeze and start over every time one applicant enters into an agreement, especially when, as here, the agreement is completely unregulated by the Commission and has already been cleared by the appropriate antitrust agency.

II. ALL MATERIAL INFORMATION HAS BEEN DISCLOSED REGARDING THE VIVENDI TRANSACTION

The Vivendi transaction, even if tangential, is relevant to the merger proceeding, as the Applicants volunteered by filing early their update letter. The transaction helps EchoStar secure a portion of the financing required for the merger and foreshadows some of the benefits that will flow to consumers from the merger – reducing duplicative use of spectrum will increase capacity for new, creative programs and interactive applications of the kind that Vivendi has agreed to develop. Other parties may certainly disagree with the Applicants’ view that the Vivendi transaction is relevant because it foreshadows the pro-competitive benefits of the

merger. But this is a disagreement on substance. Every party with a legitimate interest is free to raise these views on the merits (or the concerns about discrimination that are gratuitously raised by Pegasus) in its comments on the merger proceeding. Such views, however, do not warrant the creation of a new “pleadings suspension” pleading cycle, as attempted by Pegasus. The Bureau correctly judged the application to be sufficient for filing. A disagreement with a substantive argument in the application does not merit a reversal of that decision.

Pegasus argues that EchoStar withheld certain agreements with Vivendi from disclosure, and complains that this has deprived it of an ability to fully evaluate the merger application. Whatever undisclosed relevance such programming agreements have to Pegasus, EchoStar has disclosed all material information about the transaction. The terms of the commercial agreements between EchoStar and Vivendi (Annexes I through IV to the Investment Agreement) have not been publicly disclosed because they contain commercially sensitive information that is typically not disclosed publicly by any distributor. The Bureau’s recently released protective order in this proceeding expressly is designed to address the examination of such sensitive information.³ Contrary to Pegasus’s claim, this practice of not including proprietary information in an application does not raise the “obvious question” that the company has something to hide any more than it does for any other multichannel video programming distributor. Under Pegasus’s reasoning, all MVPD distributors filing a merger application should publicly disclose all of these programming and other commercial agreements as part of their

³ See *In the Matter of EchoStar Communications Corp.*, Order Adopting Protective Order, CS Docket No. 01-348 (rel. Jan. 9, 2002), at ¶ 2 (“[t]he Commission anticipates that it may seek documents in this proceeding from the Applicants and others that are or that may become parties in this proceeding... that contain proprietary or confidential information....”).

merger application. This is an absurd result, and the Commission should not entertain Pegasus's Petition.

III. THE APPLICANTS HAVE NO VERTICAL INTEGRATION STRATEGY

Finally, Pegasus tries to depict the deal with Vivendi as inconsistent with the Applicants' statements that the new EchoStar will not pursue a "strategy of vertical integration." There is no inconsistency. EchoStar did not, nor does it currently have, a strategy of acquiring interests in programmers with the purpose of influencing the management decisions for any programming service. The agreement with Vivendi does not change this and nothing in EchoStar's Form 8-K disclosure or the press release of Vivendi indicates the existence of any such strategy. Despite Pegasus's efforts at strained interpretation, the fact that an alliance is "strategic" and the fact that it is described by Vivendi as a "multidimensional transaction" do not amount to a *vertical integration* strategy on the part of EchoStar.⁴

The deal with Vivendi contemplates an investment by Vivendi in EchoStar, not the other way around. For that reason, Vivendi's "plan to acquire USA networks," cited by Pegasus, is irrelevant. While EchoStar after some time will have the option to buy 10% of certain new programming services to be developed by Vivendi, this would be a non-controlling minority interest and does not amount to a vertical integration strategy. Even if EchoStar were to exercise its option, it would have absolutely no influence in the management of these programming services – no minority shareholder rights or Board participation of any kind.

⁴ See Petition at 7. The observation made in a Wall Street Journal article that EchoStar "is following the lead of other large media players determined to meld distribution and content" does not accurately describe EchoStar's strategy. See *id.* at 7, n.5. The Vivendi transaction will not give EchoStar control over any content.

IV. THIS IS A STRIKE PETITION BY A PARTY WITH NO LEGITIMATE INTEREST IN THE PROGRAMMING ISSUES IT RAISES

More than three weeks after the EchoStar/Hughes transfer of control application was placed on public notice, with no explanation for its delay in filing the instant Petition, Pegasus has taken the extraordinary step of requesting suspension of the pleading cycle for EchoStar's proposed merger with Hughes because it would like to know more about this transaction. Pegasus, however, does not give any reasons to support its alleged need for additional information about the Vivendi transaction other than a vague desire to "assess" its "impact" (on whom exactly it is not clear). Pegasus explains only that the transaction would allow the merged entity "to discriminate against programming that competes with Vivendi/USA Networks-supplied programming and also creat[es] incentives for Vivendi/USA Networks to discriminate against other programming distributors."⁵

This concern is unfounded. As the Applicants stated in their December 18, 2001 letter to the Commission, not only are the program carriage agreements non-exclusive, but Vivendi is required to obtain carriage for the new networks to an equal number of subscribers on competing platforms.⁶ Equally important, however, Pegasus has no interests in programming that competes with Vivendi and it is a reseller of service, which means that it does not deal with programmers as a multichannel video program distributor. How then does Pegasus believe it may be prejudiced by the transaction? It doesn't say. Rather, Pegasus tries to use the Vivendi agreement as a hook to delay the Commission's evaluation of the merger.

⁵ See Petition at 9.

⁶ See December 18 Letter at 2.

This is a strike petition pure and simple. It lacks any connection to the substance of either the merger proceeding or the Vivendi agreement, or to Pegasus's interests. Rather, it appears offered "for the primary and substantial purpose of delay."⁷ As the Commission stated: "An agency is not powerless to prevent an abuse of its processes. And in considering challenges to pending applications, 'the commission need [not] allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests.'" *Radio Carrollton*, 69 F.C.C. 2d at 1150 (quoting *United Church of Christ v. FCC*, 359 F.2d 994 at 1005 (D.C. Cir. 1966)).⁸

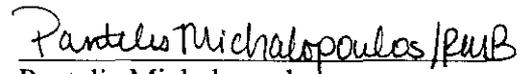
V. CONCLUSION

For the foregoing reasons, the Commission should deny Pegasus's petition and impose appropriate sanctions on Pegasus.

⁷ *Radio Carrollton*, 69 F.C.C. 2d 1139 (1978), *clarified*, 69 F.C.C. 2d 424 (1978), *recon. denied*, 72 F.C.C. 2d 264 (1979), *aff'd mem. sub nom., Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert. denied*, 450 U.S. 1041 (1981). *cf. In Re Application of WWOR-TV, Inc. for Renewal of License of Station WWOR (TV), Secaucus, N.J. and Garden State Broad. Ltd. P'ship for a Constr. Permit Secaucus, N.J.*, 7 FCC Rcd. 636, 638 (1992) (filing of application for purpose of achieving settlement in broadcast license proceeding prohibited), *aff'd sub nom., Garden State Broad. Ltd. P'ship v. FCC*, 996 F.2d 386 (D.C. Cir. 1993).

⁸ See also *C Block Bidders Reminded to Consider Distinction Between Debt and Equity for Foreign Ownership and Broadband PCS Auction Rules*, Public Notice, 1996 LEXIS 1918 (Wireless Telecommunications Bur. rel. Apr. 15, 1996) (noting sanctions for filing frivolous petitions) (citing *Commission Taking Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd. 3030 (1996)).

Respectfully submitted,

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January 17, 2002

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I hereby certify that a copy of the foregoing was served on January 17, 2002, via hand delivery (indicated by *) or Federal Express Overnight Delivery (indicated by **), upon the following:

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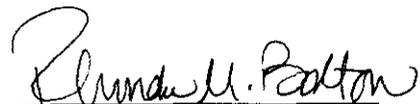
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