

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

RECEIVED

JAN 24 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

_____)
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

TO: Cable Services Bureau

**PEGASUS COMMUNICATIONS CORPORATION'S REPLY
IN SUPPORT OF ITS PETITION TO SUSPEND THE PLEADING CYCLE**

Pegasus Communications Corporation ("Pegasus"), pursuant to Section 1.45 of the Federal Communications Commission's (the "Commission" or "FCC") Rules, 47 C.F.R. § 1.45, hereby replies to the Opposition of the transfer applicants to Pegasus' petition to suspend the pleading cycle in this proceeding ("Suspension Petition").¹

Pegasus filed the Suspension Petition for only one reason – to urge the Bureau to make certain that this proceeding is evaluated on as complete a record as possible. Currently, as

¹ This reply is authorized and timely filed under Subsection 1.45(c). However, if the Bureau deems that Subsection 1.45(d) is applicable, Pegasus respectfully requests that this reply be accepted in light of the new issue regarding an alleged abuse of process and request for sanctions raised in the transfer applicants' Opposition.

No. of Copies rec'd 0+4
List ABCDE

explained in the Suspension Petition, the record is materially incomplete. EchoStar's disproportionate Opposition to the Suspension Petition causes us to think that we have struck a nerve in suggesting that there is reason to seek more information about the Vivendi deal, and to reiterate our request that the Bureau require full disclosure of the terms of the deal.

In the consolidated application, the transfer applicants vigorously and repeatedly proclaimed that they lacked any vertical integration plans and that the Commission should consider the absence of vertical relationships with programmers to be a principal pro-competitive benefit of the proposed merger. Notwithstanding those proclamations, only days after the application was filed, EchoStar announced its "strategic alliance" with Vivendi. This "strategic alliance" undermined a central tenet of the transfer applicants' justification of why the proposed merger of the nation's only two facilities-based DBS providers with full CONUS coverage is purportedly in the public interest.² Moreover, as the transfer applicants concede in their Opposition, they have not provided the Commission with the key documents that describe the EchoStar/Vivendi "strategic alliance."

It is particularly important that the key documents be provided to the Commission, because this proceeding is the only forum in which interested parties will be able to evaluate this information, inasmuch as documents produced to the federal antitrust authorities in connection with Hart-Scott-Rodino filings are not available for inspection. Thus, if the Vivendi documents are not made a part of the record *in this proceeding*, it will be impossible to measure the impact

² Now, the transfer applicants assert that the Vivendi transaction foreshadows a benefit that will flow to consumers – the capacity for new programs and interactive services developed by Vivendi. *See* Opposition at 4. This cannot be reconciled with their claim that the absence of vertical integration is a pro-competitive benefit of the merger. The transfer applicants cannot have it both ways.

of the “alliance” on a range issues including development of and access to new services, set-top box and associated middleware technology, and programming distribution.

In an obvious effort to distract the Bureau from the real issue presented by the Suspension Petition – *i.e.*, the transfer applicants’ failure to provide the key documents describing the Vivendi “alliance,” even subject to a protective order³ – the transfer applicants make the unfounded assertion that Pegasus’ good-faith petition amounts to an “abuse of process.” As explained below, that contention is utterly without merit and should be disregarded.⁴ Instead, the Bureau should focus on the transfer applicants’ continued intransigence with respect to the EchoStar/Vivendi documents, and grant the relief requested in the Suspension Petition.

1. The Transfer Applicants Concede That They Have Failed To Provide The Key Documents Describing The EchoStar/Vivendi “Strategic Alliance”

The transfer applicants do not dispute the most important fact raised in the Suspension Petition – that they have not provided to the FCC the key documents describing the EchoStar/Vivendi “strategic alliance.”⁵ Rather, much of the Opposition is devoted to

³ See *In re EchoStar Communications Corp., General Motors Corp., and Hughes Communications Corp.*, Order Adopting a Protective Order, CS Dkt. No. 01-348, DA 02-27 (rel. Jan. 9, 2002) (“Protective Order”).

⁴ The Opposition also mischaracterizes Pegasus as a “reseller.” See Opposition at 7. Subsidiaries of Pegasus are distributors that enjoy the exclusive right to provide DIRECTV programming in portions of rural America, and are entitled to receive benefits associated with that status, such as launch fees and advertising revenues. These subsidiaries’ status as distributors of DIRECTV is one of the principal reasons for Pegasus’ vital interest in this proceeding.

⁵ In what can only be described as an exercise in semantics, the transfer applicants maintain that “EchoStar has never ‘refused’ to provide any such material.” Opposition at 2. Even if literally true, it is only because nobody asked them to provide that information until Pegasus filed its Suspension Petition. In any event, as demonstrated by the Opposition, they clearly intend to fight to keep the Vivendi documents out of the hands of the Commission and interested parties.

downplaying the significance of the Vivendi relationship to the pending transfer of control,⁶ and to raising alarmist predictions about how Pegasus' request would require future transfer applicants to disclose all programming agreements. The Bureau should give no more credence to these rationalizations for non-disclosure than to the transfer applicants' continued (and remarkable) assertion that they have no vertical integration strategy.

It is important to recognize that the transfer applicants injected the issue of vertical integration into this proceeding. As noted in the Suspension Petition,⁷ the application repeatedly emphasized the absence of vertical integration as one of the foremost public interest benefits of the proposed transaction in an effort to counteract the significant anti-competitive horizontal effects of the merger. Having prominently raised that issue, it is now incumbent upon the transfer applicants (who, of course, bear the burden of proving by a preponderance of the evidence that the transaction is in the public interest)⁸ to ensure that all relevant information is before the Commission, particularly now that the EchoStar/Vivendi deal apparently was closed on January 22.

In an effort to avoid this inescapable conclusion, the transfer applicants rely on the letter that their counsel filed with the Commission on December 18, 2001,⁹ to claim they "voluntarily

⁶ For example, the transfer applicants note that the federal antitrust authorities granted the EchoStar/Vivendi transaction early antitrust clearance. *See* Opposition at 3. All that means, however, at the most, is that the "alliance" – in a vacuum – was not seen as a violation of the federal antitrust laws. It has no bearing on what impact that relationship, coupled with the pending transfer of control, has on the public interest considerations that the Commission must assess in carrying out its statutory duties in this proceeding.

⁷ *See* Suspension Petition at 4-5.

⁸ *See, e.g., In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd. 14,032, ¶ 22 (2000).

⁹ *See* Letter from transfer Applicants' Counsel to the Commission, dated December 18, 2001.

updated the application to reflect the Vivendi transaction.”¹⁰ However, as explained more fully in the Suspension Petition,¹¹ that letter provided a wholly inadequate description about the nature and extent of the vertical relationship.

Not surprisingly, however, all of the key terms of the relationship have been agreed to by EchoStar and Vivendi. The transfer applicants confirm that “[t]he terms of the commercial agreements between EchoStar and Vivendi”¹² are contained in Annexes to the Investment Agreement that EchoStar filed with the Securities and Exchange Commission on December 20, 2001.¹³ Those Annexes, as the transfer applicants acknowledge,¹⁴ have not been disclosed, nor have the transfer applicants provided a full description of the vertical relationship.

Even in light of their decision to withhold the Annexes, the transfer applicants take the position that “EchoStar has disclosed all material information about the transaction.”¹⁵ How can anyone possibly know if that is true, since what appear to be the most important documents have not been disclosed? What are the new services that EchoStar and Vivendi propose to develop, and will other distributors have access to them? Will the set-top box technology and associated “middleware” including, but not limited to, any personal video recorder features be available to

¹⁰ Opposition at 1.

¹¹ See Suspension Petition at 6-7.

¹² Opposition at 5.

¹³ See Suspension Petition at 7-8. Indeed, the Annexes must contain a detailed description of the parties’ mutual understanding, inasmuch as Section 4.08(a) of the Investment Agreement provides that if any Annex is not converted into a definitive “Commercial Agreement” by the time of closing, then “the parties agree that the terms of such arrangement [as] set forth in the relevant Annex hereto *represent all essential terms between the parties and shall be binding on the parties* effective as of the Closing Date.” (emphasis added.) See *id.* at 8 n.6.

¹⁴ See Opposition at 5.

¹⁵ Opposition at 5 (emphasis added).

other distributors on an equal and non-discriminatory basis? Will other distributors have access to early release pay-per-view films and, if so, on what schedule?¹⁶ Will Vivendi restrict incentives and other support for new channels or other services to New EchoStar? The only way to know the answers to these and other pertinent questions is for the Bureau to mandate that the Annexes be filed with the Commission and that the transfer applicants provide a full and accurate description of the vertical relationship with Vivendi.

In considering Pegasus' Suspension Petition, the Bureau should not be led astray by the transfer applicants' ominous warnings about the precedent that granting the petition would set. For example, the transfer applicants state that "[r]equiring multi-channel video programming distributors ("MVPD's") to file all their third party programming agreements as part of a merger application would be absurd."¹⁷ That concern is baseless. First, Pegasus does not argue that all distributors should have to file all programming agreements as part of a transfer application. Indeed, Pegasus has not even requested that these transfer applicants be required to file all of their programming agreements.¹⁸ Second, the Opposition's emphasis on programming agreements is misleading. As was made clear in public statements and even in the Investment Agreement's skeletal description of the Annexes, the EchoStar/Vivendi relationship relates to far more than programming.¹⁹ Third, if the transfer applicants are concerned about revealing

¹⁶ See Suspension Petition at 10 n.10 (discussing the pay-per-view aspects of the Vivendi deal).

¹⁷ Opposition at 2. See also *id.* at 5-6 ("Under Pegasus' reasoning, all MVPD distributors (sic) filing a merger application should publicly disclose all of these programming and other commercial agreements as part of their merger application.").

¹⁸ In fact, the Suspension Petition makes no reference to any existing programming agreements between EchoStar and DIRECTV, on the one hand, and program suppliers other than Vivendi, on the other hand.

¹⁹ See Suspension Petition at 6-8, Exhibit 1.

“commercially sensitive information,”²⁰ then the Bureau already has adopted the Protective Order for precisely this reason.²¹ Thus, it would be easy for EchoStar to produce the Annexes and a full description of the relationship with Vivendi while, at the same time, satisfying concerns about confidentiality.

In sum, granting the relief sought in the Suspension Petition will have no adverse repercussions in the future. This is hardly a typical case. Here, the transfer applicants specifically disavowed any vertical integration plans, repeatedly cited that as a key benefit of their merger, and then EchoStar entered into a major vertical relationship with an international programming conglomerate.²² Nevertheless, they still maintain that they have no vertical integration strategy.²³ Under these circumstances, the details of the EchoStar/Vivendi relationship are, under any reasonable interpretation, material to the Commission’s consideration of the transfer application.

²⁰ Opposition at 5.

²¹ See Protective Order. The transfer applicants do not seem to take issue with this notion. See Opposition at 5 (“The Bureau’s recently released protective order in this proceeding expressly is designed to address the examination of such sensitive information.”).

²² The transfer applicants endeavor to disclaim their apparent vertical integration strategy by narrowly defining vertical integration. See Opposition at 6 (“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.”). This construction ignores most components of the EchoStar/Vivendi relationship, and attempts to portray vertical integration as a one-way street.

²³ The transfer applicants state: “Despite Pegasus’ efforts at a 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.” Opposition at 6 (emphasis in original). This assertion is difficult to take seriously. What little is known about the “strategic alliance” certainly suggests a fair degree of vertical integration. In any event, the extent of that integration is impossible to gauge in the absence of all material information.

II. The Suspension Petition, Which Pegasus Filed In Good Faith, Is Not An Abuse Of Process And There Is No Basis For Imposing Sanctions

The transfer applicants also assert that the Suspension Petition is a “strike petition” and an “abuse of process,” and seek the imposition of sanctions against Pegasus.²⁴ This argument is ludicrous, and merely reflects the transfer applicants’ difficulty in articulating a legitimate basis for withholding the Vivendi documents.

As is clear from the foregoing discussion and from the Suspension Petition itself, Pegasus acted in good faith to obtain information that is necessary to complete the record in this proceeding. Pegasus has a direct interest in this proceeding, and believes that the Vivendi transaction is important to assessing the overall impact of the proposed merger. Even the transfer applicants concede, as they must, that the Vivendi transaction is relevant to this proceeding.²⁵ Moreover, the soundness of the Suspension Petition is confirmed by the supporting statement filed by the National Association of Broadcasters.²⁶

The notion that Pegasus acted for the ““primary and substantial purpose of delay””²⁷ is not only untrue, but it also misconstrues the nature of the Suspension Petition. Pegasus has done nothing to slow the pace of this proceeding. As of now, the comment cycle established in the Public Notice remains intact. The only way that will change is if the Bureau grants the relief sought in the Suspension Petition. If that happens, then it will be the Bureau’s judgment – not any “extraordinary step” by Pegasus – that alters the pleading cycle.

²⁴ See Opposition at 2, 8.

²⁵ See Opposition at 4. This concession underscores how preposterous the request for sanctions is. If the Vivendi transaction is relevant, than how can it be an abuse of process to seek to learn more about it?

²⁶ See Statement of National Association of Broadcasters in Support of Pegasus Communications Corporation’s Petition to Suspend Proceedings, filed January 19, 2002.

²⁷ Opposition at 8 (citation omitted).

Pegasus agrees that “[t]he Commission has a duty in protecting the public interest not to ‘allow the administrative process to be obstructed or overwhelmed by captious or purely obstructive protests.’”²⁸ However, as the Commission explained in a case involving a petition to deny a transfer of control, the FCC “‘will not infer the existence of primary purpose to delay from the mere filing of a petition to deny, because a licensee who establishes ‘standing’ has a statutory right to bring to the Commission’s attention public interest questions raised by a competitor’s application and – as already noted – any ‘delay’ in considering a petition to deny is an inseparable part of the statutory scheme.’”²⁹ That is precisely what has happened here. Pegasus, in its Suspension Petition, raised a legitimate issue implicating the public interest about the contradiction between the transfer applicants’ statements and EchoStar’s conduct with respect to vertical integration and, more importantly, asked the Bureau to require that all relevant information be made a part of the record in this proceeding and to suspend the pleading cycle until that happened.³⁰

²⁸ *In re Applications of Stockholders of Viacom International Inc., Transferors, and Viacom Inc., Transferee*, 2 FCC Rcd. 3259, ¶ 8 (quoting *United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966)).

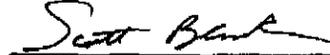
²⁹ *Id.* (quoting *United Church of Christ*, 359 F.2d at 1150-51).

³⁰ One of the factors the Commission considers in ascertaining whether delay is a primary purpose of a petition is “the absence of any reasonable basis for the allegations raised in the petition to deny.” *Id.* There is no reason why the same standard should not be applied to a petition to suspend the pleading cycle. In either the case, the operative question is whether the petitioner’s primary purpose was delay. Here, the answer clearly is no. As discussed above, the primary – and sole – purpose of the Suspension Petition is to ensure a fully developed record *before* the pleading cycle closes.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its Suspension Petition, Pegasus respectfully requests that the Bureau grant the relief sought in the Suspension Petition, and deny the transfer applicants' request for sanctions.

Respectfully submitted,



Scott Blank, Esq.
Senior Vice President & General Counsel
PEGASUS COMMUNICATIONS CORP.
225 City Line Avenue, Suite 200
Bala Cynwyd, PA 19004
Tel: 610-934-7098
Fax: 610-934-7072

OF COUNSEL:
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Tel: 202-942-6060
Fax: 202-942-5999

Dated: January 24, 2002

CERTIFICATE OF SERVICE

I, Robert M. Cooper, hereby certify that a true and correct copy of PEGASUS COMMUNICATIONS CORPORATION'S REPLY IN SUPPORT OF ITS PETITION TO SUSPEND THE PLEADING CYCLE was served on the following individuals by hand delivery on this 24th day of January, 2002.

Gary M. Epstein
James H. Barker
Arthur S. Landerholm
LATHAM & WATKINS
555 11th Street, N.W.
Suite 1000
Washington, D.C. 20004

Pantelis Michalopoulos
Philip L. Malet
Rhonda M. Bolton
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

David R. Goodfriend
Director, Legal and Business Affairs
EchoStar Communications Corp.
1233 20th Street, N.W.
Suite 701
Washington, D.C. 20036-2396

Merrill S. Spiegel
Vice President, Government Affairs
DIRECTV, Inc.
555 11th Street, N.W.
Suite 810
Washington, D.C. 20004

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, D.C. 20554

Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, D.C. 20554

Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302
Washington, D.C. 20554

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

W. Kenneth Ferree
Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W. – Room 3-C740
Washington, D.C. 20554

Donald Abelson
Chief
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C750
Washington, D.C. 20554

Catherine Crutcher Bohigian
Legal Advisor to Commissioner Kevin J.
Martin
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, D.C. 20554

Susan M. Eid
Legal Advisor to Chairman Michael K.
Powell
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

Claudia Fox
Chief
Policy and Facilities Branch
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A848
Washington, D.C. 20554

Marcia Glauberman
Assistant Division Chief
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-A738
Washington, D.C. 20554

James Bird
Senior Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C824
Washington, D.C. 20554

Rosalee Chiara
Special Advisor
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A521
Washington, D.C. 20554

Barbara Esbin
Associate Bureau Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C458
Washington, D.C. 20554

Jennifer Gilsenan
Chief
Satellite Policy Branch
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A520
Washington, D.C. 20554

Eloise Gore
Special Assistant
Law and Policy Division
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-A726
Washington, D.C. 20554

Thomas Horan
Legal Advisor
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C736
Washington, D.C. 20554

Fern Jarmulnek
Associate Chief
Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A523
Washington, D.C. 20554

Julius Knapp
Deputy Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-B133
Washington, D.C. 20554

JoAnn Lucanik
Special Counsel
Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C416
Washington, D.C. 20554

Paul Margie
Legal Advisor to Commissioner Michael J.
Copp
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, D.C. 20554

Jackie Ponti
Associate Chief and Chief of Staff
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C747
Washington, D.C. 20554

Ellen Rafferty
Administrative Management Specialist
Office of Bureau Chief
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C862
Washington, D.C. 20554

David Sappington
Chief Economist
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Room 7-C452
Washington, D.C. 20554

Linda Senecal
Management Analyst
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-A734
Washington, D.C. 20554

Royce Dickens Sherlock
Deputy Chief
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-A729
Washington, D.C. 20554

Donald Stockdale
Director of Research
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Room 7-C324
Washington, D.C. 20554

Thomas S. Tycz
Chief
Satellite and Radiocommunication Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A665
Washington, D.C. 20554

Qualex International
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Byran Tramont
Senior Legal Advisor to Commissioner
Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, D.C. 20554

Douglas W. Webbink
Chief Economist
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C730
Washington, D.C. 20554



Robert M. Cooper