

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

In the Matter of)
)
General Motors Corporation and Hughes) MB Docket No. 03-124
Electronics Corporation, Transferors)
) FCC 03-330
And)
)
The News Corporation Limited, Transferee,)
)
For Authority to Transfer Control)

PETITION FOR RECONSIDERATION

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Summary

Since control of DIRECTV was transferred to News Corp. important new facts have emerged – facts that were concealed from review and which are so significant that they undermine the legitimacy of the record. The available evidence strongly suggests that DIRECTV has engaged in a pattern of deception that has had the effect of reducing or eliminating opportunities for competition, delaying and denying service to Hawaii, and delaying or denying local broadcast channels to smaller, predominantly rural markets. News Corp. is likely to have been aware of at least some of this deception.

The new evidence involves the extensive arrangements (the full scope of which is still undisclosed) between DIRECTV and BCE subsidiaries Telesat and Bell ExpressVu, arrangements that were negotiated months before the merger was approved but kept secret until just after the merger was consummated. Together, DIRECTV and Telesat control frequencies at all six of the licensed high-power BSS slots capable of serving all of CONUS (119°W, 110°W, 101°W, 91°W, 82°W, and 72.5°W), and they control *all* of the frequencies at four of those six slots. The arrangements between Telesat and DIRECTV govern access to the most valuable underutilized BSS spectrum over North America – more full-CONUS BSS spectrum than DIRECTV uses today. Both the existence and the scope of these arrangements were hidden, and thus, not considered by the public or the Commission as part of the merger review record.

Ironically, DIRECTV and News now claim that they relied on the capacity secured in these agreements (and denied to potential competitors) to support the key public interest benefit they proposed – more local television markets served and more high definition service. They claim this reliance despite the fact that the Commission has said that it will not permit incumbent

U.S. DBS operators, such as DIRECTV, to entering into such arrangements with foreign-licensed satellite operators.

Pegasus does not know how full consideration of the deals between Telesat and DIRECTV might have affected the outcome of the 3-2 merger approval, but it is certain that both DIRECTV and News Corp. recognized both the materiality of the arrangements and their potential volatility in the merger review. Consider the circumstances: in May 2003, the International Bureau for the first time allowed the use of Canadian satellites for direct-to-home service in the United States by creating a narrow exception for new entrants. Canada's BSS assignments are relatively undeveloped, so this decision opened the door to potentially significant new competition in the U.S. market. Within three months of the Commission's groundbreaking decision, however, DIRECTV had reached agreements with Telesat that effectively preempted the introduction of competitive service using high-power Canadian BSS assignments. Now that the merger has been consummated, DIRECTV has revealed that it is seeking Commission consent to use Canadian spectrum to serve the United States and that the deal with Telesat was reached well before the merger was approved.

The Telesat arrangements also raise certain issues that were not considered in the merger but which may be material in light of the deception discussed above. In particular, this includes DIRECTV's unauthorized movement of DIRECTV 3 from storage orbit to 82°W to satisfy its agreement with Telesat, DIRECTV's failure to provide information demonstrating why DIRECTV 3 no longer represents an unacceptable risk of collision to other satellites in the geosynchronous arc, and DIRECTV's dissembling regarding its failure to provide certain core programming to Hawaii.

Through its due diligence work, the negotiation of conditions regarding local broadcast markets and HDTV service expansion, and disclosures DIRECTV would have made in due course regarding the location and health of DIRECTV's satellites, News Corp. must have been aware of all material facts related to the agreements with Telesat, the duplicity regarding reasons for satellite movements, and that DIRECTV was mischaracterizing its ability to serve Hawaii. As a party to the merger application, News had a duty to disclose these facts.

Denial of DIRECTV's request is not a remedy, since DIRECTV has blocked competition whether or not it is allowed to access Canadian satellites itself. Given the critical information missing from the record in this proceeding, the Commission must reconsider its decision. Only after the record has been fully developed, beginning with a full disclosure of the facts by DIRECTV and News Corp., should the Commission act on the merger application.

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PETITION FOR RECONSIDERATION

Pegasus Development Corporation (“Pegasus”) hereby files this Petition for Reconsideration of the Commission order approving the transfer of control of Hughes Electronics Corporation (“Hughes”), including its subsidiary DIRECTV Enterprises, LLC (“DIRECTV”), from General Motors Corporation (“GM”) to News Corporation Limited (“News Corp.”).¹

Background

Pegasus Development Corporation. Affiliates of Pegasus currently provide direct broadcast satellite (“DBS”) services, via the DIRECTV platform, to approximately 1.2 million rural households in 41 states.² These affiliates comprise the third largest DBS provider in the

¹ See *In the Matter of General Motors Corporation et al.*, FCC 03-330 (January 14, 2004) (“*Merger Order*”); see also Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control, MB Docket No. 03-124 (May 2, 2003) (“*Application*”). Collectively, Hughes and News Corp. are referred to as the “Applicants.”

² Pegasus participated in the merger proceeding at issue and expressed concerns that after the merger News Corp. could anticompetitively raise rates for critical Fox programming. To ensure that News Corp. could not pursue such a strategy, Pegasus suggested imposing disclosure requirements and other constraints as conditions to the merger. See, e.g., Letter to Marlene H.

United States, and accordingly, Pegasus is well positioned to introduce new competition.

Pegasus is the only major DBS provider in North America that does not control the satellites that provide its core service.

Since all of the full CONUS BSS frequencies are now licensed to DIRECTV or Echostar Communications Corporation ("Echostar"), Pegasus has long pursued the use of other capacity to complement the core DIRECTV services it provides to its customers. Pegasus' main goal has been to improve its competitiveness by adding local broadcast signals. Pegasus' predominantly rural territories are disproportionately underserved with local broadcast signals, in large part, because DIRECTV chooses the markets in which it will provide local service. The markets that are most important to Pegasus are relatively insignificant to DIRECTV, and the fact that Pegasus shares those markets with DIRECTV dilutes its interest in providing local broadcast signals.

DIRECTV has not cooperated with Pegasus' efforts to bring local broadcast packages to smaller markets. For example, in the summer of 2000, in the wake of the passage of the Satellite Home Viewer Improvement Act ("SHVIA"), Pegasus undertook a major project to bring local integrated local broadcast service to many of the small television markets in which it provides DIRECTV service.³ Based on oral assurances of DIRECTV's cooperation, Pegasus planned a technical architecture for signal collection, negotiated with vendors, sought retransmission consent, leased FSS transponders on a Loral Skynet satellite capable of providing both locals and DIRECTV via a single-dish, and optioned additional transponders to accommodate growth.

Dortch from Kathleen M.H. Wallman (September 30, 2003). As discussed herein, because of the substantial efforts of DIRECTV and Telesat to keep critical documents from public disclosure, Pegasus and other participants, throughout the merger proceeding, were unaware of the extensive arrangements between DIRECTV and Telesat. Accordingly, it is appropriate for the Commission to consider these issues on reconsideration of the order.

³ The markets Pegasus planned to launch first were Burlington, Vermont; Bozeman, Montana; Lexington, Kentucky; Albuquerque, New Mexico; Montgomery, Alabama; Tallahassee, Florida; Springfield, Illinois; Sioux Falls, South Dakota; and Wichita, Kansas.

Pegasus did not propose or require that DIRECTV absorb any costs associated with the service. Nonetheless, Pegasus was forced to shelve the plans when DIRECTV reversed course, stating that it would not cooperate with Pegasus so long as Pegasus and DIRECTV were litigating unrelated contractual matters.⁴

Hughes Electronics Corporation. Hughes, through its subsidiary DIRECTV, is one of only two U.S.-licensed, full-CONUS DBS providers.⁵ DIRECTV serves approximately 11.9 million subscribers, of which 1.6 million subscribe through the National Rural Telecommunications Cooperative (“NRTC”) and Pegasus, from several high-power BSS satellites located at 101°W, 110°W, and 119°W.⁶

Hughes also owns twenty-two satellites operating in the fixed-satellite service (“FSS”) bands, through its subsidiary PanAmSat Licensee Corp. (“PanAmSat”).⁷ Seven of those satellites provide service to the United States.⁸ Additionally, Hughes holds authorizations to operate seven Ka-band FSS satellites, three of which will be capable of providing full-CONUS coverage.⁹ Hughes also has four applications pending for additional DBS satellites.¹⁰

Telesat Canada. Telesat is the primary provider of satellite services to Canada and operates all of the high power BSS satellites with access to the Canadian DTH market. Telesat operates two Canadian-licensed BSS satellites, Nimiq 1 and Nimiq 2, which are located at 91°W

⁴ See attached Exhibit A.

⁵ See *Merger Order*, at ¶ 8. DBS is known internationally as broadcast-satellite service (“BSS”).

⁶ See attached Exhibit B.

⁷ See *Merger Order*, at ¶¶ 8, 253.

⁸ See Attachment H, Application.

⁹ See *id.*

¹⁰ See *id.*

and 82°W, respectively, and which provide full-CONUS coverage.¹¹ It has recently been licensed to operate a third BSS satellite at the 72.5 WL orbital location.¹² Telesat operates the Nimiq satellites primarily for the benefit of Bell ExpressVu, which is a sister corporation under common control by BCE, Inc. Bell ExpressVu is the only high-power DTH service provider in Canada.

The DBAC Order. Until May of 2003, U.S. policy prohibited use of Canadian-licensed satellites for the provision of DTH services in the United States. Canada controls nearly all of the fallow spectrum that is best suited to integrating with the DIRECTV service Pegasus provides. Since passage of the SHVIA, Pegasus has sought in particular to provide local broadcast signals to markets that are not served by DIRECTV. However, because of trade concerns, the Commission for years prohibited use of Canadian-licensed satellites for provision of DTH services to the United States. At one point, as early as 2001, Telesat had been eager to negotiate a lease of capacity if Pegasus could secure Commission approval to provide DBS service using Telesat's satellites.¹³

¹¹ Telesat also owns and operates a fleet of FSS satellites, all of which are on the "permitted space stations list" and thus available to provide FSS service (but not DTH service) into the United States. Two of these satellites provide Canada's only other DTH service to Canada, Star Choice. Telesat has also received approval in principle from Industry Canada for the construction and launch of two additional FSS satellites and has been awarded C-band and Ku-band frequencies at 118.7°W. See Telesat 2002 Annual Report, at 3, attached as Appendix D, Telesat Canada, Application for a Licence to Operate a Space Station and Network at the 72.5°WL BSS Orbital Position, DGRB-002-03 (September 15, 2003), available at <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwGeneratedInterE/sf05999e.html>.

¹² See Letter to Ted Ignacy, Vice President-Finance and Treasurer, Telesat Canada, from Jan Skora, Director General, Radiocommunications and Broadcasting Regulatory Branch, Industry Canada (December 17, 2003) ("72.5°W Authorization"), attached as Exhibit 1, Application for Special Temporary Authority, File No. SAT-STA-20040107-00002 (January 7, 2004) ("72.5°W STA Application").

¹³ See Letter from Paul Bush to John Hane (November 26, 2001), attached as Exhibit C.

In May 8, 2003, just days after the Hughes transfer of control application was filed, the competitive environment changed radically and unexpectedly. In a carefully reasoned decision, the International Bureau relaxed the restriction on use of Canadian-licensed satellites, concluding that Digital Broadband Application Corp (“DBAC”), a potential new entrant to the U.S. DBS market, should be allowed to access Canadian-licensed BSS satellites on a non-exclusive basis.¹⁴ The Bureau found that introducing new competition to the highly concentrated DBS market was a compelling public interest reason to grant the application.¹⁵

The implications of *DBAC* were clear, but the precise results were not. The order triggered a flurry of activity. Telesat promptly submitted an application to Industry Canada for the 72.5°W BSS orbital location for which there was previously no demand.¹⁶ Pegasus quickly applied to the Commission for rights to access Nimiq 1 and Nimiq 2 in order to provide local broadcast signals.¹⁷ Pursuant to Telesat’s earlier invitation, Pegasus immediately asked Telesat to sell capacity on Nimiq 1 and Nimiq 2. Telesat was amenable and arranged for a meeting between senior executives of Bell ExpressVu and Pegasus on June 11, 2003. Bell ExpressVu indicated that it might be willing to entertain lease of capacity to Pegasus, but only after conclusion of a deal that was being negotiated to provide backup capacity for the impaired Nimiq 2 satellite.

¹⁴ See *In the Matter of Digital Broadband Applications Corp.*, 18 FCC Rcd 9455 (2003) (“*DBAC*”).

¹⁵ *DBAC*, at ¶¶ 16-18.

¹⁶ See Telesat Canada, Application for a Licence to Operate a Space Station and Network at the 72.5°W BSS Orbital Position, DGRB-002-03 (September 15, 2003) (“Telesat 72.5 Application”), available at <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwGeneratedInterE/sf05999e.html>.

¹⁷ See, e.g., SES-LIC-20030605-00844 (June 5, 2003).

Although Pegasus did not and could not have known at the time, DIRECTV had also jumped into action and was negotiating with Telesat to lock up access to the Canadian BSS spectrum. Those negotiations ultimately resulted in Telesat refusing to negotiate with Pegasus for access to Canadian BSS capacity.

In September 2003, DIRECTV submitted an application for special temporary authority (“STA”) to relocate DIRECTV 3 to 82°W, ostensibly to back up Nimiq 2 and provide service only to Canada.¹⁸ According to DIRECTV and Telesat, the relocation was necessary because Nimiq 2 experienced a power failure, and Telesat had an “immediate need for a temporary replacement satellite with [BSS] capacity.”¹⁹ The STA application did not address the hazard or threat to other satellites from the possible failure of the satellite’s secondary SCP, which DIRECTV had identified a year earlier as the reason it was imperative to relocate DIRECTV 3 to a storage orbit.²⁰ Concurrently, Telesat filed a similar request seeking approval from Industry Canada for the use of DIRECTV 3 at 82°W, and that request was approved two weeks later.²¹

While the STA request was still pending, DIRECTV filed a second STA request seeking approval to execute stationkeeping maneuvers to prevent DIRECTV 3 – which was supposed to still be in a storage orbit pending approval of the STA – from entering Nimiq 2’s stationkeeping

¹⁸ See SAT-STA-20030903-00300, at 2 (September 3, 2003); see Opposition of DirecTV, SAT-STA-20030903-00300, at 2 (November 12, 2003).

¹⁹ Opposition of DirecTV, SAT-STA-20030903-00300, at 2 (November 12, 2003); see also Opposition of Telesat Canada, SAT-STA-20030903-00300, at 1 (November 12, 2003).

²⁰ See SAT-STA-20030903-00300, at 2 (September 3, 2003); see SAT-STA-20020910-00172, at 1-2 (September 10, 2002).

²¹ See Letter to Ted H. Ignacy, Vice President of Telesat Canada, from Jan Skora, Director General Radiocommunications and Broadcasting Regulatory Branch (September 26, 2003), available at <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwGeneratedInterE/sf01374e.html>.

box at 82°W.²² The Bureau approved the second STA request but has not acted on the original request. Rather, it has asked DIRECTV to explain its reversal of position regarding the risk posed by DIRECTV 3.²³

At about the same time that DIRECTV filed its STA request, Telesat filed an Expression of Interest (“EOI”) with Industry Canada confirming its interest in the 72.5°W BSS orbital location.²⁴ Pegasus also expressed its interest in developing any of several Canadian orbital locations, especially 72.5°W, but acknowledged the near impossibility of meeting the June 2005 deadline imposed by Industry Canada.²⁵ In contrast, the redacted version of Telesat’s EOI stated that Telesat would be able to bring into use the BSS frequencies prior to the July 2005 deadline,²⁶ and indicated that it would provide service to the United states²⁷

Shortly after DIRECTV filed its STA revealing that DIRECTV 3 would be used to back up Nimiq 2, Pegasus again contacted Telesat to discuss lease of capacity at 91°W or 82°W and

²² See SAT-STA-20031003-00310 (October 3, 2003); Letter to Thomas Tycz from James Barker (November 21, 2003); Letter to Thomas Tycz from James Barker (December 30, 2003).

²³ See Letter to James Barker from Thomas Tycz (December 8, 2003).

²⁴ See Telesat 72.5°W Application. In response to Telesat’s May 2003 request for 72.5°W, Industry Canada issued in July 2003 a public notice requesting that any party interested in seeking Canadian DBS orbital locations, including 72.5°W, submit an expression of interest (“EOI”). See Industry Canada, Call for Interest in Broadcasting Satellite Orbital Positions, DGRB-002-03 (July 9, 2003), available at <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwGeneratedInterE/sf05999e.html>.

²⁵ See Pegasus Development Corporation, Response to Industry Canada’s Call for Expressions of Interest in Broadcasting Satellite Orbital Positions, DGRB-002-03 (September 15, 2003) available at <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwGeneratedInterE/sf05999e.html>.

²⁶ Telesat 72.5°W Application, at 15, 23.

²⁷ Telesat’s EOI contains a redacted section captioned “Plans for Providing Coverage in Neighbouring Countries” and another section captioned “Major Developments Influencing the Planning for Proposed Facilities,” which contains a redacted, two-page discussion of *DBAC*. See Telesat 72.5°W Application, at 10-11, 24.

cooperative development of 72.5°W. Telesat reversed course and stated that no capacity would be available for lease and refused to entertain discussions regarding cooperation at 72.5°W.

In December 2003, Industry Canada authorized Telesat to develop and operate a BSS satellite at the 72.5°W orbital position.²⁸ Industry Canada provided that Telesat must bring-into-use the frequencies by the July, 2005 ITU deadline but stated that it could do so by using an “interim” existing satellite. *See* Attachment to 72.5°W Authorization, at 2. In an unprecedented action, Industry Canada imposed no obligation for Telesat to provide any service to Canada until 2008, when Telesat is required to launch a replacement satellite. *Id.* After 2008, Telesat may continue to lease all of the capacity for use outside of Canada under certain conditions. *Id.*

On December 19, 2003, the Commission announced the conditional approval, by a 3-2 vote, of the transfer of control of Hughes to News Corp. The order required that by 2004 the Applicants “provide local broadcast channels to subscribers in an additional 30 designated market areas (“DMAs”) beyond what had been previously funded, projected or planned by Hughes/DirecTV.”²⁹

In January 2004, DIRECTV submitted applications requesting authority to relocate DIRECTV 5 from 119°W to 72.5°W and to access the satellite to provide DBS service to the United States.³⁰ The satellite would operate as a “Canadian-flagged satellite,” but DIRECTV would retain title to and ownership of the satellite including the right to use all of the BSS capacity on the satellite. *See* 72.5°W STA Application, at 4. In support of its request, Hughes

²⁸ *See* 72.5°W Authorization.

²⁹ *Merger Order*, at ¶ 210.

³⁰ *See* 72.5°W STA Application; Application for Blanket License for 1,000,000 Receive-only Earth Stations, File No. SES-LFS-20040112-00023 (January 12, 2004). DIRECTV stated it desired to relocate DIRECTV 5 once DIRECTV 7S was successfully launched.

stated that grant of the applications was necessary in order for it to fulfill its public interest obligation to provide local channels or high-definition television services.³¹ Because the relocation of DIRECTV 3 and DIRECTV 5 would be major changes in the operation of Hughes' facilities, it is reasonable to assume that News Corp was fully aware of Hughes' actions.

Hughes - News Corp. merger.

The Merger Application. On May 2, 2003, General Motors and News Corp. filed an application for transfer of control of Hughes from GM to News Corp. A key issue in the proceeding was the extent of DIRECTV's market power and the risk that it could be used anticompetitively in a vertical foreclosure strategy.³² The Commission discussed at length the strategies News Corp. could employ post-merger in order to induce other multi-channel video program distributors to pay higher rates for "must-have" programming.³³ Such strategies would be directly impacted by the degree of market power DIRECTV possesses in the DBS market and the degree of market power Hughes possesses in the FSS market.³⁴

The Applicants did not identify or describe in any filings in the merger proceeding Hughes' arrangements with Telesat. Only in December 2003 and January 2004 did DIRECTV, pursuant to requests from Commission staff in the 82°W STA proceeding, provided copies of its

³¹ See 72.5°W STA Application, at 5-8.

³² See generally *Merger Order*, at ¶¶ 109-212.

³³ See *Merger Order*, ¶¶ 109-212 (News Corp. could temporarily withhold or withdraw programming or threaten to do so in order to induce MVPDs to pay higher rates for "must have" programming).

³⁴ See, e.g., *Merger Order*, ¶ 142 (control of DIRECTV reduces the cost to News Corp. of withdrawing programming from rival MVPDs because end users may switch to DIRECTV as a result of decreased programming by rivals).

contractual arrangement with Telesat at 82°W.³⁵ DIRECTV, however, requested that the Commission withhold all the submitted documents from public inspection and did not place any redacted versions in the public record.³⁶ DIRECTV even sought confidentiality for the justifications it provided for its request.³⁷

During that time, Hughes responded to questions by the Bureau regarding the 82°W STA application, but redacted from public inspection its response to a question, concerning the interpretation of a contractual provision that appeared to be inconsistent with Hughes' stated claim that its operations at 82°W would not include service to the United States.³⁸ Pegasus filed a Freedom of Information Act request to review those materials, but the Commission has not yet acted on that request.³⁹

With respect to the use of 72.5 °W, Hughes submitted no contractual documents regarding its arrangement with Telesat. Telesat's May 2003 application filed with Industry Canada is not publicly available. A version of the Expression of Interest of Telesat is available, but it is heavily redacted.

On September 22, 2003, after the arrangements with Telesat for 72.5°W had apparently been reached, the Applicants submitted an *ex parte* in which they wrote:

DIRECTV has announced that it will provide local-into-local service to approximately 100 DMAs, assuming the successful launch [of DIRECTV 7S]. However, under GM's ownership and imposed capital

³⁵ See Letter to Thomas Tycz from Gary Epstein (October 21, 2003); Letter to Marlene H. Dortch from Gary Epstein (December 17, 2003); Letter to Marlene H. Dortch from Gary Epstein, at 1 (January 13, 2004).

³⁶ See, e.g., Letter to Thomas Tycz from Gary Epstein (October 21, 2003); Letter to Marlene H. Dortch from Gary Epstein (January 14, 2004).

³⁷ See Letter to Thomas Tycz from James Barker (October 21, 2003).

³⁸ See Letter to Marlene H. Dortch from Gary Epstein (December 18, 2003).

³⁹ See Letter to Managing Director from Bruce D. Jacobs (January 27, 2004).

constraints, DIRECTV has been unable to commit to reaching additional markets. At the time they filed the Application, the Parties were examining all available options for delivering local signals in a seamless, integrated offering, with the ultimate goal of providing such service in all 210 DMAs of the United States. At this point News Corp and Hughes can and hereby do commit that, by the end of 2004, DIRECTV will provide consumers [local channels in 30 additional DMAs, 30 additional national channels of HDTV, or some combination locals and HDTV]. * * * [T]he parties will utilize additional bandwidth for DTH transmission, which may include Ku band capacity on FSS satellites, some of Hughes' capacity on its SPACEWAY system, capacity on foreign satellites authorized to serve the U.S., and more. Plans have now progressed to the point where the parties can make [these] firm commitments.⁴⁰

The letter identified a variety of methods by which the Applicants intended to fulfill their commitment to providing local channels or HDTV services. Only in January 2004 did DIRECTV indicate that it intended to satisfy this commitment by using the Canadian BSS resources at 72.5°W.⁴¹

The Merger Order. The Commission announced its approval of the merger in December 2003.⁴² Based on the record, the Commission identified several competitive concerns⁴³ and imposed a number of post-merger constraints in an attempt to reduce the risk of vertical anticompetitive behavior.⁴⁴

⁴⁰ Letter to Marlene H. Dortch from William Wiltshire *et al.*, at 3 (September 22, 2003) (citations omitted) ("September Letter").

⁴¹ See 72.5°W STA Application.

⁴² See Public Notice, FCC 03-328 (December 19, 2003).

⁴³ See *supra* note 33.

⁴⁴ See *generally Merger Order*, at ¶¶ 107-09 (prohibiting discrimination against unaffiliated programming services in the selection, price, terms or conditions of carriage), 172-79 (establishing commercial arbitration procedures and collective bargaining rights for small and medium-sized MVPDs with regard to carriage of regional sports programming), 220-26 (establishing, *inter alia*, commercial arbitration procedures and collective bargaining rights for small and medium-sized MVPDs with regard to carriage of broadcast programming).

With respect to the FSS market, the Commission found no competitive concerns. The Commission acknowledged that “Hughes controls a significant share of the FSS capacity” but concluded that because there is sufficient excess capacity from other FSS providers, including specifically Telesat, the post-merger entity could not “degrade the quality of the FSS service provided to rivals, restrict supply, or raise the price of FSS ... to gain additional share (and earn additional profits) in the video programming market.”⁴⁵

To ensure the Applicants’ commitment to their stated public interest benefits resulting from the merger, the Commission imposed the requirement, which was based on the record regarding the provision of local channels and HDTV, to provide such services “in an additional 30 DMAs beyond what had been previously funded, projected or planned by Hughes/DirecTV.”⁴⁶

Other matters. Certain other matters now appear material to consideration of the transfer of control in light of the undisclosed relationship DIRECTV developed with Telesat. Just as Hughes worked to undermine the public interest benefits anticipated by *DBAC*, DIRECTV has repeatedly ignored important public interest obligations in pursuit of relatively minor and attenuated private competitive interests.

As a DBS provider, DIRECTV is obligated under the Commission’s rules to provide service to Alaska and Hawaii comparable to that provided in the contiguous 48 states to the extent that doing so is technically feasible.⁴⁷ Since 1999, DIRECTV has provided only limited service to Hawaii and virtually none of the most popular channels citing, among other things, its

⁴⁵ *Merger Order*, at ¶¶ 256-57.

⁴⁶ *Merger Order*, at ¶ 334.

⁴⁷ See 47 C.F.R. § 25.148(c); *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, at ¶ 72 (2002).

inability to do so with its current fleet of satellites.⁴⁸ In April 2003, DIRECTV claimed that it was not providing comparable service to Hawaii because of the potential adverse consequences in a litigation proceeding with NRTC and Pegasus.⁴⁹

Recently discovered evidence contradicts these statements. Apparently, one of the DIRECTV satellites at 101°W.L. already illuminates Hawaii with many of the popular programming channels that are important to providing comparable service.⁵⁰ It is not just “technically feasible” to provide such programming to Hawaii: the programming is actually available today on an operational satellite, but Hughes has chosen not to offer that service to residents of Hawaii. Pegasus came across this evidence as the result of a satellite equipment distributor’s discovery that a satellite dish authorized to receive basic DirecTV service in the continental United States also could receive such service when pointed at 101°W from Hawaii.⁵¹ It is reasonable to assume that, as the prospective buyer, News Corp. would be aware of Hughes programming obligations and the programming and coverage provided by each of the DBS satellites.

⁴⁸ See Petition for Administrative Sanctions of the State of Hawaii, MB Docket No. 03-82, at 5-6 (February 6, 2003); Letter to Marlene H. Dortch from Jack Richards, MB docket No. 03-82 *et al.*, at 2 (July 10, 2003).

⁴⁹ See Opposition of DirecTV, Inc., MB Docket No. 03-82, at 12-13 (April 24, 2003). NRTC has since settled its litigation with DIRECTV.

⁵⁰ See Declaration of William Barker, attached as Exhibit D.

⁵¹ See *id.*

Discussion

I. THE APPLICANTS HAVE CONCEALED THE SCOPE OF THE ARRANGEMENTS WITH TELESAT AND PREVENTED A FAIR REVIEW OF THE MERGER APPLICATION

A. The Applicants evidenced a lack of candor in not revealing the existence of and continuing to withhold information concerning the arrangements between DIRECTV and Telesat

The Applicants' decision to withhold relevant information from the Commission is contrary to the Commission's longstanding policy that requires truthfulness and candor by all licensees in dealings with the Commission.⁵² The evidence strongly suggests that DIRECTV, potentially as early as May 2003 when Telesat filed its application to use 72.5°W, had arranged with Telesat to use Canadian orbital resources to provide service to the United States.⁵³ By September 2003, Telesat had stated that it had made arrangements with a customer to bring the 72.5°W orbital location into use before the ITU 2005 coordination deadline and indicated it would provide service into the United States. We now know that Telesat's partner was DIRECTV but that fact was concealed until after the merger was consummated.⁵⁴ At that same time, DIRECTV had requested Commission authority to relocate DIRECTV 3 to 82°W pursuant to an arrangement with Telesat.

Throughout this period, DIRECTV actively sought to avoid public disclosure of the documents evidencing its arrangement with Telesat and even made the extraordinary request that its justifications for confidential treatment be withheld from disclosure.⁵⁵ The "complete"

⁵² See, e.g., *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986).

⁵³ See generally Telesat 72.5°W Application.

⁵⁴ See *id.*

⁵⁵ 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

version of DIRECTV's arrangement with Telesat at 82°W was only recently filed with the Bureau in the associated STA proceeding and was not referenced, much less considered, in the *Merger Order*. DIRECTV did not disclose any aspect of its arrangement with Telesat at 72.5°W until the Commission had already approved the merger, and DIRECTV has still not publicly provided any documents regarding that arrangement.

The Commission has stated that a licensee's obligation for candor to the Commission is critical to the proper functioning of the Commission's processes.⁵⁶ Accordingly, for this reason alone, the Commission should reconsider its decision, pending full and public disclosure of the arrangements between DIRECTV and Telesat and a review of the Applicants' candor to the Commission.⁵⁷

B. The arrangements between DIRECTV and Telesat are anticompetitive

The limited information available indicates that the disclosed arrangements are anticompetitive. Other than the two incumbent U.S. licensees, Telesat, through Bell ExpressVu, is the only other facilities-based BSS operator capable of high-power, full-CONUS coverage. The Bureau only recently authorized access to Canadian BSS resources, and DIRECTV has already intervened to deny such access to potential new entrants.

Pursuant to undisclosed agreements with Telesat, DIRECTV has the right to use all of the BSS spectrum available from the operation of DIRECTV 5 at 72.5°W until 2008, when the

Marlene H. Dortch from Gary Epstein (January 14, 2004) (requesting confidential treatment of revised documents).

⁵⁶ See *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (“[T]he Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.”), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).

⁵⁷ Given the magnitude of the changes to the operation of Hughes' satellite facilities, News Corp. can be presumed to have known about the arrangements.

satellite is scheduled to be replaced. After that time, DIRECTV may be able to continue to lease all of the available capacity of the replacement satellite.⁵⁸ Such use by DIRECTV forecloses use of Canadian orbital resources by potential DBS competitors.

Whether as part of the 72.5°W arrangement or separately, DIRECTV also appears to have foreclosed the use of 82°W by potential competitors. Even assuming that DIRECTV will not use DIRECTV 3 to provide service to the United States and that it did not contractually prohibit Telesat from doing so, Telesat has alleged that it lacks BSS capacity to lease spectrum. However, Telesat's own willingness to negotiate with Pegasus up until the point where Telesat apparently reached an agreement with DIRECTV belies its claims of a capacity deficiency.

Having concealed the arrangements throughout the merger proceeding, the Applicants now suggest that the Commission's merger obligations to provide local channels or HDTV services require that the Commission approve the 72.5°W application.⁵⁹ Contrary to those suggestions, the Applicant's independent obligation to provide local channels or HDTV services does not trump the Commission's broad policy goal to promote competition. Hughes' efforts to turn *DBAC* on its head and allow for use of Canadian orbital resources by an incumbent DBS operator can only be seen as a blatantly anticompetitive act. As Hughes itself acknowledged in committing to launch additional locals or HDTV services,⁶⁰ there are other ways to provide local channels or HDTV service that do not require the use of prime orbital resources by incumbent DBS operators. Echostar is providing local signals via leased FSS capacity, and in 2000 Pegasus itself demonstrated a one-dish solution to providing local service to many of the same markets

⁵⁸ See 72.5 Authorization.

⁵⁹ See 72.5°W STA Application, at 6.

⁶⁰ See September Letter, at 3.

DIRECTV has identified for service using a two-dish solution and the 72.5°W slot later in 2004.⁶¹

In any event, it is disingenuous for the Applications to suggest that services from 72.5°W should count towards their merger obligation to provide local channels or HDTV services. This capacity is not “over and above” what DIRECTV projected or planned prior to the merger.

C. The Commission’s assessment of Hughes’ market power in the FSS and DBS market was incomplete

The Commission’s approval of the merger, including the implementation of specific post-merger conditions, was based on an assessment of market power that omitted any consideration of the arrangements between Hughes and Telesat.⁶² Depending on the extent of the arrangements, for instance, Telesat’s FSS resources – which the Commission expressly assumed were not tied to Hughes – could be attributable to Hughes. Accordingly, it may be appropriate for the Commission to implement a merger condition to prevent Hughes from engaging in anticompetitive conduct in the FSS market to harm competitors in the video programming market. Similarly, because Telesat, in light of *DBAC*, competes indirectly in the DBS market with DIRECTV, the Commission’s underlying analysis in approving the merger was necessarily flawed and must be reconsidered. For these reasons, the Commission should reconsider its decision, pending full and public disclosure of the arrangements between Hughes and Telesat.

⁶¹ Ironically, seven of the 30 markets are the same markets in which Pegasus attempted to launch local service in 2000. DIRECTV has not yet announced plans to provide local channels to the other two markets Pegasus sought to launch in 2000.

⁶² See *Merger Order*, ¶¶ 109-258.

II. THE COMMISSION SHOULD INVESTIGATE THE FULL CIRCUMSTANCES OF THE MOVE OF DIRECTV 3 TO 82°W AND DIRECTV'S DENIAL OF SERVICE TO HAWAII

Reconsideration of the merger provides an appropriate forum for investigation of other related issues on which Hughes has apparently deceived or misled the Commission. Hughes had previously represented that DIRECTV 3 represented a "hazard" and "threat" to other satellites at the same orbital location because of the possibility of failure of the satellite's secondary SCP.⁶³ Yet, without addressing any satellite safety concerns, Hughes requested relocating that satellite to 82°W, where Nimiq 2 is also located and then moved the satellite without FCC approval. Even more troubling, DIRECTV, in fact, undertook the move without receiving prior Commission approval.

Additionally, there is DIRECTV's apparent deception regarding its ability to serve Hawaii. The evidence that DIRECTV illuminates Hawaii with certain core programming merits investigation.⁶⁴

⁶³ See, e.g., SAT-STA-20020910-00172 (September 9, 2002).

⁶⁴ See attached Exhibit A.

Conclusion

For the reasons stated above, Pegasus urges the Commission to reconsider its approval of the transfer of control, pending full and public disclosure of the arrangement between Hughes and Telesat.

Respectfully submitted,

By: _____ /s/ _____

Bruce D. Jacobs
Tony Lin
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

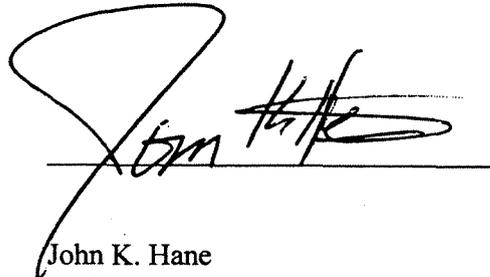
Counsel for Pegasus Development Corporation

Dated: February 13, 2004

Certification

On behalf of Pegasus Development Corporation, I hereby certify, under penalty of perjury, I have reviewed the foregoing Petition for Reconsideration and that the facts stated therein are complete and accurate to the best of my knowledge.

By:

A handwritten signature in black ink, appearing to read "John K. Hane", is written over a horizontal line. The signature is stylized and cursive.

John K. Hane
Senior Vice President

February 13, 2004

Document #: 1379020 v.5

Exhibit A



Robert M. Hall
Senior Vice President, Business Affairs
and General Counsel

November 10, 2000

By Facsimile and U.S. Mail

Ted S. Lodge
Senior Vice President
Chief Administrative Officer and General Counsel
Pegasus Communications
225 E. City Line Avenue
Suite 200
Bala Cynwyd, PA 19004

Dear Ted:

Mark Pagon is quoted in the November 10, 2000 *Satellite Business News* fax update as stating that DIRECTV has not explained why it is unwilling to proceed with a local channel agreement with Pegasus. I am surprised that he would make that statement since I made DIRECTV's position very clear to you both at our breakfast meeting on September 29, 2000 and during our telephone call on October 19, 2000. On both occasions I told you that while DIRECTV would continue to work diligently with Pegasus to have our existing agreements implemented as efficiently and effectively as possible, DIRECTV is not willing to venture into new arrangements with Pegasus while the current litigation is pending.

Lest there is any misunderstanding, DIRECTV does not believe it is appropriate or wise for us to devote attention to building new business relationships between our companies while Pegasus continues to employ an aggressive litigation strategy against DIRECTV. We remain committed to cooperating in those areas where our current businesses require a joint effort to provide the most competitive and customer-friendly result. However, we have no inclination at this time to expand our relationship with Pegasus while time and resources must be directed to responding to Pegasus' baseless and overreaching litigation claims.

Very truly yours,

Robert M. Hall



SATELLITE BUSINESS NEWS[®]

FAX UPDATE

Vol. 6 No. 124

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DIRECTV: LAWSUIT STOPS PEGASUS PLAN

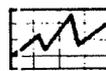
DirecTV has made it clear to Pegasus Communications that it has no interest in helping the company launch a medium-power local-into-local service as long as the litigation between the companies continues, DirecTV spokesman Bob Marsocci said. "We believe it is not prudent to venture into a new arrangement or agreements with Pegasus while current litigation is pending," Marsocci said. "We've made that abundantly clear to Pegasus." As reported, DirecTV is involved in a legal battle with Pegasus and the National Rural Telecommunications over various issues. Pegasus Chairman Mark Pagon's contention in a call with financial analysts last week that DirecTV's reasons for not cooperating were "unexplained" were "patently false," Marsocci said.

DirecTV has no qualms about working with Pegasus in areas where the companies have a "mutual interest" and that involve a "joint effort," Marsocci said. As an example, he pointed to the agreement the companies signed recently that allows Pegasus retailers to sell DirecTV's premium movie channels. Pagon has said Pegasus could launch a financially viable medium-power local-into-local service in 10 to 20 markets where Pegasus already serves a substantial DirecTV subscribers. Meanwhile, DirecTV and Fox Cable Networks Group are working together to deliver regional sports networks, FX, and Fox Sports World to hotels around the country. The agreement lets hotels carry the regional sports network for their area, as well as the other two channels.

WEATHER STALLS 4D-TV SHIPMENTS



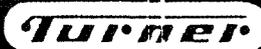
Recent severe weather in the Philippines has caused Motorola to delay shipments of its new 4D-TV digital/analog C-band receivers, said Joe Cornwall, head of Motorola's C-band sales. Motorola's production facility in Manila was put about 10 days behind schedule when it was damaged by a cyclone, he said. Motorola had been slated to produce about 10,000 units by the end of the year, but had only been able to manufacture a few hundred because of the damage to the plant, Cornwall said. The factory can manufacture approximately 350 units per day, he said. To help catch up with backorders, Motorola is working to ship double lots of approximately 1,700 units each, he said.



WEEKLY STOCK WATCH

	11/6	11/7	11/8	11/9	11/10	52-week	
						High	Low
EchoStar	43.938	44.188	42.75	42.75	37.938	81.25	30.75
GMHughes	30.76	30.75	30.00	28.48	28.05	46.66	24.62
Pegasus	35.813	37.813	35.50	30.75	26.75	77.50	22.12
LIAT	7.063	7.438	6.563	6.313	5.813	22.00	4.00
Best Buy	52.00	54.00	52.375	32.063	32.938	88.87	30.50
Circuit City	13.50	13.813	14.25	12.938	12.063	65.18	11.56
Tomson	46.75	44.25	43.50	42.625	39.438	73.25	11.29
Gemstar	69.563	69.875	62.938	66.00	58.125	107.43	33.50
NDS	77.75	77.375	77.125	76.875	76.875	104.87	20.00

TELEVISION THAT NEVER STOPS PRODUCING



A Time Warner Company

Exhibit B

Overview of DirecTV Satellites

82W	101W	110W	119W
DIRECTV 3	DIRECTV 1	DIRECTV 6	DIRECTV 5
	DIRECTV 1R		DIRECTV 7S *
	DIRECTV 2		
	DIRECTV 4S		

* proposed satellite

Exhibit C



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 favorably 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

Exhibit D

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I declare under penalty of perjury, under the laws of the United States of America and under the laws of the State of Hawaii, that the foregoing is true and correct.

DATE: February 9, 2004



WILLIAM BARKER

Certificate of Service

I, Kenneth D. Middleton, a secretary in the law firm of Shaw Pittman LLP, hereby certify that I have on this 13th day of February, 2004, mailed by first class United States mail, postage prepaid, copies of the foregoing "**Petition for Reconsideration**" to the following:

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* By electronic mail