

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

Application of)
)
)
GENERAL MOTORS CORPORATION AND)
HUGHES ELECTRONICS CORPORATION,)
)
Transferors,) MB Docket No 03-124
)
and)
)
THE NEWS CORPORATION LIMITED,)
)
Transferee,)
)
For Authority to Transfer Control)

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

Richard E. Wiley
Lawrence W. Secrest, III
Todd M. Stansbury
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
202-719-7000

William M. Wiltshire
Scott Blake Harris
Michael D. Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
202-730-1300
*Counsel for The News Corporation
Limited*

Gary M. Epstein
James H. Barker
John P. Janka
LATHAM & WATKINS
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
202-637-2200
*Counsel for General Motors Corporation and
The DIRECTV Group, Inc. (f/k/a Hughes
Electronics Corporation)*

March 19, 2004

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY.....	2
II. THE PEGASUS PETITION PRESENTS NO NEW EVIDENCE THAT WARRANTS RECONSIDERATION OF THE <i>NEWS/HUGHES ORDER</i>.....	5
A. DIRECTV’s Arrangements With Telesat Have Been Fully Disclosed to The Commission and Should be Evaluated in Pending Public Proceedings.....	5
B. DIRECTV’s Arrangements With Telesat Serve The Public Interest and Provide No Substantive Basis for Reconsideration.	9
C. Pegasus’s Allegations of Market Power, Based on Erroneous Facts and Market Definitions, Do Not Merit Reconsideration.	12
D. The Proposed Relocation of DIRECTV 3, and DIRECTV’s Continued Improvements to Its Service to Hawaii, Are the Subject of Separate Pending Proceedings, Are Not Transaction-Specific, and Provide No Basis for Reconsideration.	14
III. NHMC’s ARGUMENTS HAVE BEEN FULLY ADDRESSED IN THE <i>NEWS/HUGHES ORDER</i> AND RUN COUNTER TO ESTABLISHED COMMISSION PRECEDENT.....	15
IV. CONCLUSION	20
EXHIBIT A: CHRONOLOGY	

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

_____))
Application of))
))
GENERAL MOTORS CORPORATION AND))
HUGHES ELECTRONICS CORPORATION,))
))
Transferors,) MB Docket No 03-124
))
and))
))
THE NEWS CORPORATION LIMITED,))
))
Transferee,))
))
For Authority to Transfer Control))
_____))

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

General Motors Corporation (“GM”), The DIRECTV Group, Inc., f/k/a Hughes Electronics Corporation (“Hughes”), and The News Corporation Limited (“News Corp.”) (collectively, the “Parties”) submit this Consolidated Opposition to Petitions for Reconsideration filed in the above-captioned proceeding.¹ Only two entities have sought reconsideration of the *News/Hughes Order* – Pegasus Development Corporation (“Pegasus”) and the National Hispanic Media Coalition (“NHMC”).² As discussed more fully below, none of the issues raised warrants reconsideration, and accordingly the Commission should deny both petitions.

¹ In this proceeding, the Commission authorized a transfer of control of Hughes. *See General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited*, 19 FCC Rcd. 486 (2004) (“*News/Hughes Order*” or “*Order*”).

² *See Pegasus Development Corporation, Petition for Reconsideration* (filed Feb. 13, 2004) (“*Pegasus Petition*”); *National Hispanic Media Coalition, Petition for Reconsideration* (filed Feb. 13, 2004) (“*N HMC Petition*”).

I. INTRODUCTION AND SUMMARY

The Commission deems reconsideration appropriate only “where the petition either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner’s last opportunity to present such matters.”³ Neither petitioner comes close to making such a showing.

Pegasus. Pegasus’s principal basis for reconsideration concerns two transactions between DIRECTV Enterprises LLC (“DIRECTV”) and Telesat Canada (“Telesat”). In one, Telesat proposes to use the DIRECTV 3 satellite to replace lost capacity on its Nimiq 2 satellite for Canadian DTH service. In the other, Telesat proposes to allow DIRECTV to use capacity from the DIRECTV 5 satellite operating at a recently authorized Canadian orbital slot until Telesat is prepared to launch its own satellite. These two transactions are the subject of two separate Commission proceedings, and Pegasus has either demonstrated awareness of or actively participated in both of them.

Pegasus nonetheless claims that it has “new evidence” regarding the two Telesat transactions – evidence that assertedly warrants Commission action not in *those* proceedings but in this one. This evidence, moreover, purportedly shows a “pattern of deception” by DIRECTV involving “hidden arrangements”⁴ between DIRECTV and Telesat, a “lack of candor”⁵ in failing to disclose them, and (for good measure) “duplicity regarding reasons for satellite movements.”⁶

Pegasus’s “new evidence,” however, in no way supports its rather startling claims of candor violations. *Every single fact* cited by Pegasus regarding DIRECTV 3 was disclosed

³ *GTE Corporation and Bell Atlantic Corporation*, Order on Reconsideration, 18 FCC Rcd. 24871, 24873 (2003).

⁴ Pegasus Petition at i.

⁵ *Id.* at 14.

⁶ *Id.* at ii, 18.

promptly and completely to the Commission well in advance of the Commission's decision in the *News/Hughes Order*. Moreover, Pegasus clearly knew about the proposed use of DIRECTV 3, and could have commented in the News/Hughes proceeding on that basis, as others did. That Pegasus voluntarily chose *not* to present its allegations to the Commission *then* plainly bars Pegasus *now* from seeking reconsideration after-the-fact.

Nor can Pegasus justify reconsideration on the basis that it had no opportunity to discuss the DIRECTV 5 transaction in this proceeding. Prior to the *Order*, there was simply nothing to discuss. Telesat did not even have rights to the relevant Canadian orbital location until two days before the *Order* was issued.⁷ Moreover, the transaction remains subject to Commission review and approval, and is one that a number of parties (including Pegasus) are actively discussing in its own proceeding. Its only possible relevance to *this* proceeding is that – if approved by the Commission – the transaction will help DIRECTV to fulfill the Commission's local service mandate. At most, this concerns how the *News/Hughes Order* will be implemented. It has no bearing on the legitimacy or correctness of the *Order* itself, and thus cannot possibly serve as a basis for reconsideration. (In this regard, Pegasus's claims that capacity resulting from the Telesat transactions somehow should "not count" for purposes of this condition are frivolous. Pegasus's concerns with *how* DIRECTV intends to satisfy its conditional authorization provide no reason to revisit the *Order* that adopted those conditions in the first place.)

In any event, even were the Commission to accept Pegasus's belated invitation to consider the Telesat transactions here, Pegasus has provided absolutely no basis for

⁷ Indeed, Pegasus is keenly aware of this fact because Pegasus itself was one of two other competing applicants with Telesat for that slot in allocation proceedings before Industry Canada. See Pegasus Development Corporation, Response to Industry Canada's Call for Expressions of Interest in Broadcasting Satellite Orbital Positions (DGRB-002-03) (Sept. 15, 2003), available at [http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwapj/Pegasus_031106.pdf/\\$FILE/Pegasus_031106.pdf](http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwapj/Pegasus_031106.pdf/$FILE/Pegasus_031106.pdf).

reconsideration. To the contrary, as DIRECTV has argued in more appropriate fora, the Telesat transactions will greatly serve the public interest – not least by allowing DIRECTV to increase local-into-local service. This is entirely consistent with the Parties’ statements and undertakings in this proceeding.

Pegasus’s claims of candor violations with respect to other issues are equally insubstantial. Pegasus, for example, argues that DIRECTV has been “dissembling regarding its failure to provide certain core programming to Hawaii”⁸ because a satellite dealer was able to receive DIRECTV signals in Hawaii in early February. Ignoring for the moment the fact that the Commission dismissed allegations regarding DIRECTV’s service to Hawaii in the *News/Hughes Order* as more properly addressed in another Commission proceeding, the truth of the situation is not the sinister scenario Pegasus would suggest. DIRECTV has recently been re-ordering the way its service is carried on its satellites, which will allow additional channels to be received in Hawaii. This accommodation – the result of a long and ongoing dialogue between DIRECTV and the State of Hawaii – represents a step forward in the public interest, not a reason to overturn the *News/Hughes Order*.

NHMC. NHMC’s arguments were addressed fully in the Commission’s 228-page *Order* and – given that they run counter to long-standing Commission precedent – were rejected. In the end, therefore, NHMC’s arguments simply reflect its continuing disagreement with the Commission’s conclusions. Rehashing rejected arguments, without more, provides an insufficient basis for reconsideration.

⁸ *Id.* at ii, 18.

II. THE PEGASUS PETITION PRESENTS NO NEW EVIDENCE THAT WARRANTS RECONSIDERATION OF THE *NEWS/HUGHES ORDER*.

A. DIRECTV's Arrangements With Telesat Have Been Fully Disclosed to The Commission and Should be Evaluated in Pending Public Proceedings.

By way of background, Pegasus's principal basis for reconsideration concerns two transactions between DIRECTV and Telesat. One – the “DIRECTV 3 transaction” – involves Canada's 82° W.L. BSS orbital location. Telesat currently provides BSS service from that location using the Nimiq 2 satellite, but that satellite has experienced an anomaly reducing the number of transponders on which it can operate. DIRECTV has thus agreed (subject to regulatory approval) to move its DIRECTV 3 satellite from a storage orbit to 82° W.L. and to lease the satellite to Telesat. Telesat will use DIRECTV 3 to address the Nimiq 2 anomaly, ensuring continuity of service to its Canadian customers.⁹

The second – the “DIRECTV 5 transaction” – involves Canada's 72.5° W.L. BSS orbital location. Telesat recently received approval to provide Canadian BSS service from this location, but has no satellite immediately available to provide such service. In order to aid Telesat's development of that orbital position, DIRECTV has agreed (again, subject to regulatory approval) to make its DIRECTV 5 satellite available to Telesat.¹⁰ In exchange, Telesat will allow DIRECTV to use this satellite's transponder capacity to provide U.S. service until as late as December 31, 2008. This transaction will bring otherwise fallow spectrum into use immediately, and will also help DIRECTV to provide local-into-local service in 130 DMAs by the end of the year.

⁹ See Letter from James R. Butterworth to Jennifer Gilsenan, File No. SAT-STA-20030903-00300 (Sept 3, 2003) (“DIRECTV 3 STA”).

¹⁰ See Application for Special Temporary Authority, File No. SAT-STA-20040107-00002 (Jan. 7, 2004) (“DIRECTV 5 STA”).

Pegasus alleges that these two transactions were negotiated months before the merger was approved but the terms were “kept secret until just after the merger was consummated.”¹¹ This assertion has no basis in fact. As set forth in Exhibit A, attached hereto, DIRECTV has promptly disclosed to the Commission every relevant fact or document surrounding DIRECTV’s arrangements with Telesat. This process was begun *months* in advance of the Commission’s approval of the *News/Hughes Order*. DIRECTV and Telesat did, as Pegasus claims, request confidential treatment for certain documentation as proprietary and competitively sensitive. But it is absurd for Pegasus to suggest that the invocation of confidentiality procedures – expressly provided for in Commission rules and Freedom of Information Act exemptions – should be viewed as a violation of DIRECTV’s “obligation for candor to the Commission.”¹² Indeed, by Pegasus’s logic, *every* Commission licensee requesting confidential treatment for its proprietary and competitively sensitive documentation would lack candor. But this is not the law. DIRECTV has been completely candid with the Commission – to whom the duty of candor is owed – with respect to every aspect of its arrangements with Telesat.

Moreover, DIRECTV and Telesat at all times made appropriate information related to the DIRECTV 3 transaction available *even to Pegasus*. Pegasus was clearly aware of the DIRECTV 3 transaction well before issuance of the *Order*, and at one point even suggested that those arrangements might be relevant to this proceeding.¹³ At least one other party was aware of the

¹¹ Pegasus Petition at i.

¹² *Id.* at 15.

¹³ Pegasus, Motion to Designate Proceedings As “Permit-But-Disclose,” File Nos. SES-LIC-20030605-00844, SES-LFS-20031124-01689, SAT-STA-20030903-00300 (filed Dec. 8, 2003), at 2 (requesting that the DIRECTV 3 STA proceeding be designated as “permit-but-disclose,” in part because it allegedly was “relevant to the pending application” of the Parties for approval of the News/Hughes transaction). This Motion is attached as Exhibit B

DIRECTV-Telesat arrangements as well, and raised concerns about them in this docket.¹⁴ But Pegasus chose not to do so. Indeed, Pegasus's *total* participation in this proceeding was limited to a few *ex parte* letters on other subjects.¹⁵ Pegasus's arguments concerning the DIRECTV 3 transaction must therefore be dismissed on procedural grounds alone. To the extent that Pegasus's extremely limited *ex parte* participation in this proceeding provides a valid basis for Pegasus to petition for reconsideration of the *News/Hughes Order*,¹⁶ there are no "circumstances which have changed since [Pegasus's] last opportunity to present such matters," and no facts "unknown to [Pegasus] until after [Pegasus's] last opportunity to present such matters which

¹⁴ Comments of Digital Broadband Applications Corp., File No. SAT-STA-20030903-00300; MB Docket No. 03-124 (Oct. 27, 2003) (requesting that a number of conditions be imposed on the STA to address concerns similar in substance to Pegasus's current allegations).

¹⁵ Pegasus declined to file comments or reply comments in connection with the News/Hughes transaction. The entire extent of Pegasus's participation in this proceeding appears to be limited to four *ex parte* visits (one in May, one in September, and two in December) to discuss with various Commission personnel several specific concerns about the News/Hughes transaction. *See News/Hughes Order* at Appendix A (List of Commenters, which does not list Pegasus as a party to the proceeding); MB Docket No. 03-124, *Ex Parte* Letter to Marlene H. Dortch, Secretary, from Kathleen M.H. Wallman, Consultant to Pegasus Communications (Dec. 16, 2003); MB Docket No. 03-124, *Ex Parte* Letter to Marlene H. Dortch, Secretary, from Kathleen M.H. Wallman, Consultant to Pegasus Communications (Dec. 10, 2003); MB Docket No. 03-124, *Ex Parte* Letter to Marlene H. Dortch, Secretary, from Kathleen M.H. Wallman, Consultant to Pegasus Communications (Sept. 30, 2003); MB Docket No. 03-124, *Ex Parte* Letter to Marlene H. Dortch, Secretary, from Kathleen M.H. Wallman, Consultant to Pegasus Communications (May 29, 2003).

¹⁶ The Commission's rules governing the filing of petitions for reconsideration require either party status or an explanation as to why it was not possible to participate in earlier stages of the proceeding. 47 C.F.R. § 1.106(b)(1). It is not at all clear that Pegasus's very limited participation in the News/Hughes proceeding (and its failure ever to have served the Parties in the proceeding) accorded it full party status, and Pegasus certainly has not explained why it has "laid in wait" to raise its current allegations with respect to the DIRECTV 3 transaction, which is precisely what the Commission's rules seek to avoid.

could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.”¹⁷

Nor is Pegasus’s rhetoric with respect to the DIRECTV 5 transaction any more availing. That transaction is contingent upon (among other things) three regulatory approvals: (1) Industry Canada’s authorization of Telesat to use the 72.5° W.L. slot; (2) the Commission’s authorization of DIRECTV to relocate the DIRECTV 5 satellite to that slot; and (3) the Commission’s authorization to provide DBS service in the United States from that slot. Until December 17, 2003 – the date Industry Canada granted the *first* of these three authorizations (and only two days before the Commission adopted the *News/Hughes Order*) – there was simply nothing to report. Prior to that point, DIRECTV was not even in a position to seek authorization from the Commission to relocate DIRECTV 5 and to communicate with that satellite using blanket-licensed earth stations, as such applications would have been deemed premature.¹⁸ The DIRECTV 5 satellite has not moved to or begun operations at the 72.5° W.L. orbital location, DIRECTV’s STA requests remain pending, and a number of parties have exercised their rights to express their views on these proposals. In fact, Pegasus has raised the same issues there that it seeks to inject here. While DIRECTV strongly believes that the DIRECTV 5 transaction offers an optimal solution for meeting its commitment to provide local-into-local services into 30 additional DMAs this year, approval of that transaction was not made a precondition to the Parties’ commitments in the News/Hughes transfer of control proceeding.¹⁹ Today, the

¹⁷ 47 C.F.R. § 1.106(c)(1), (b)(2)(i)-(ii).

¹⁸ *See, e.g., TelQuest Ventures, LLC*, 16 FCC Rcd. 15026 (2001) (dismissing application for blanket earth station license to communicate with as-yet unlicensed Canadian DBS satellite).

¹⁹ The Parties note that any of the possibilities mentioned for achieving additional capacity – such as Ka-band or standard Ku-band FSS – would have required some further

transaction remains what it was prior to consummation of the News/Hughes transaction – a proposed arrangement subject to regulatory approval.

The pending application proceedings are the appropriate fora for parties to raise and the Commission to consider the public interest implications of the proposal. A proposed transaction that is still subject to regulatory scrutiny and approval is hardly a basis for reconsideration in *this* proceeding.

B. DIRECTV’s Arrangements With Telesat Serve The Public Interest and Provide No Substantive Basis for Reconsideration.

Ignoring for the moment the procedural deficiencies of its petition, Pegasus has no basis on the merits for characterizing DIRECTV’s current arrangements with Telesat as “anticompetitive,”²⁰ or for suggesting that the arrangements sweep more broadly than in fact is the case.

With respect to the DIRECTV 3 transaction, Pegasus suggests that DIRECTV has somehow “foreclosed the use of 82°W by potential competitors.”²¹ The facts prove otherwise. DIRECTV plainly has no control over the process by which the Canadian government assigns Canadian BSS frequencies to its licensees, and DIRECTV possesses no license or equivalent authorization from the Canadian regulator to operate a BSS satellite from 82° W.L. (or any other Canadian orbital position) that would enable it to function effectively as a “gatekeeper” of Canadian BSS spectrum in any event (as Pegasus implies). And, as DIRECTV has explained in the DIRECTV 3 STA proceeding, DIRECTV’s lease of a spacecraft to aid Telesat in restoring a failed satellite and providing purely Canadian BSS service by definition means that the capacity

application to the Commission to, for example, obtain blanket earth station authorizations and/or modify space station parameters.

²⁰ Pegasus Petition at 15.

²¹ *Id.* at 16.

will not be deployed in competition with any Pegasus U.S. operations.²² If anything, the use of DIRECTV 3 for Canadian service may free up capacity on Telesat's Nimiq 1 or Nimiq 2 satellites for service in the U.S. – which potentially could be to Pegasus's benefit. Moreover, the terms of the DIRECTV 3 lease with Telesat do not affect any future arrangement (or lack thereof) between Pegasus and Telesat with respect to other satellites that Telesat controls or may control at the 82° W.L. or 91° W.L. locations.²³

As for Pegasus's allegations regarding the DIRECTV 5 transaction, it is once again difficult to follow Pegasus's logic in describing the arrangement as “a blatantly anticompetitive act,”²⁴ or in attacking DIRECTV's plan to use the capacity at that location to expand greatly the number of markets in which it will offer satellite-delivered local channels. DIRECTV's arrangement with Telesat is a “win-win” from the standpoint of U.S. and Canadian consumers. By drifting its DIRECTV 5 satellite into the 72.5° W.L. location, DIRECTV will provide Telesat with the ability to implement its recent approval from Industry Canada, the Canadian spectrum licensing authority, to develop and operate a BSS space station at Canada's BSS orbital position at 72.5° W.L.,²⁵ and the Canadian administration with the ability to bring that location into use

²² *Opposition of DIRECTV Enterprises, LLC*, File No. SAT 20030903-00300; MB Docket No. 03-124 (Nov. 12, 2003), at 6-9.

²³ *See id.* at 8. On the other hand, it would be utterly irrational for DIRECTV to aid Telesat in a fashion that could injure DIRECTV competitively by allowing Telesat to lease capacity on DIRECTV's *own* satellite for use in the United States by DIRECTV's U.S. MVPD competitors. Thus, DIRECTV has an express approval right over any proposed use of DIRECTV 3 by Telesat or its customers for U.S. service. *See* File No. SAT-STA-20030903-00300, Letter to Marlene Dortch, Secretary, FCC from James H. Barker, counsel to DIRECTV (Feb. 19, 2004) (and attachments).

²⁴ Pegasus Petition at 16.

²⁵ *See* Letter to Mr. Ted Ignacy, Vice President-Finance and Treasurer, Telesat Canada, from Jan Skora, Director General, Radiocommunications and Broadcasting Regulatory

by the International Telecommunications Union (“ITU”) deadline of July 2005, so that Canada’s international priority to the use of that orbital spectrum resource can be preserved. For its part, as explained in DIRECTV’s pending applications regarding this arrangement,²⁶ until as late as December 31, 2008, DIRECTV will gain the ability to utilize the satellite capacity of DIRECTV 5 at 72.5° W.L. to dramatically enhance its DBS service to U.S. consumers.

These are both substantial public interest benefits. And they are totally consistent with the Parties’ representations to the Commission during the News/Hughes proceeding. Prior to the consummation of the News/Hughes transaction, DIRECTV had announced plans to offer satellite-delivered local broadcast channels in a total of 100 DMAs upon the successful launch and positioning of the DIRECTV 7S spot-beam satellite at 119° W.L.²⁷ During the course of the News/Hughes proceeding, the Parties committed to offer local-into-local in 30 additional DMAs by the end of 2004. In doing so, the Parties noted explicitly that they would need to obtain additional capacity, which could include “capacity on foreign satellites authorized to serve the U.S.”²⁸ In part based on the Parties’ commitments, the Commission required, “as a condition of our license transfer approval, that, by year end 2004, [the Parties] provide local channel service in an additional 30 DMAs beyond what had been previously funded, projected or planned by

Branch, Industry Canada (Dec. 17, 2003) (“Telesat 72.5 Authorization”). The Telesat 72.5 Authorization is attached as Exhibit D.

²⁶ See DIRECTV 5 STA Application; DIRECTV 5 Downlink Application.

²⁷ DIRECTV’s application to launch and operate the DIRECTV 7S satellite is presently pending before the Commission. See *DIRECTV Enterprises, LLC, Application to Launch and Operate DIRECTV 7S*, File No. SAT-LOA-20030611-00115, Call Sign S2455. Upon Commission approval of this application, the satellite will be launched in the first quarter of 2004.

²⁸ Letter from News Corp. to Marlene H. Dortch, Secretary, FCC (Sept. 22, 2003), at 3.

Hughes/DIRECTV.”²⁹ The DIRECTV 5 transaction represents the best way to fulfill this requirement.

Consequently, Pegasus’s suggestion that capacity at 72.5° W.L. is “not ‘over and above’ what DIRECTV projected or planned prior to the merger,” and that services from this location therefore “should [not] count towards [the] merger obligation,”³⁰ is both inapposite and erroneous. It is inapposite to a petition for reconsideration because it goes to *implementation* of the *News/Hughes Order*, rather than any alleged inadequacy of that order. It is erroneous because, as evidenced by the chronology at Exhibit A, it is clear that the Parties *could not have relied* upon DIRECTV’s negotiations with Telesat concerning the 72.5° W.L. location during the pendency of the News/Hughes transaction as anything more than a possible source of capacity.

In any event, DIRECTV has elsewhere described how increased local channel service from 72.5° W.L. will promote the dual policy goals of localism and competition in the multichannel video programming distribution (“MVPD”) marketplace. To the extent Pegasus disagrees with this assessment, it should so argue in that proceeding. It has surely provided no good reason for Commission action here.

C. Pegasus’s Allegations of Market Power, Based on Erroneous Facts and Market Definitions, Do Not Merit Reconsideration.

Pegasus argues that the Commission’s assessment of “Hughes’ market power” in the “FSS and DBS market” was incomplete by failing to consider the arrangements between DIRECTV and Telesat.³¹ These muddled contentions also provide no basis for reconsideration.

²⁹ *News/Hughes Order* at ¶ 334.

³⁰ Pegasus Petition at 17.

³¹ *Id.* at 17.

On the FSS side, there is not now and could never have been a basis for the Commission to make “Telesat’s FSS resources . . . attributable to Hughes”³² because, as the Commission is aware, there is no arrangement between DIRECTV and Telesat that pertains to FSS capacity.³³

As for DBS, Pegasus’s cryptic assertions that Telesat “competes indirectly in the DBS market with DIRECTV,” which therefore means that “the Commission’s underlying analysis in approving the merger was necessarily flawed and must be reconsidered,” are similarly flawed. First, Pegasus presumes the existence of a DBS-only market that the Commission has never employed. In evaluating horizontal consolidation issues affecting DBS, both the Commission and the Department of Justice consistently have defined the relevant product market to include all MVPDs, not just DBS operators. In fact, the Commission used the MVPD market for its analysis in this proceeding.³⁴ Second, Pegasus does not explain on what basis it believes “in light of *DBAC*” that Telesat is a “competitor” of DIRECTV,³⁵ or why that point is relevant to the Commission’s analysis in the *News/Hughes Order*. The Commission expressly found that the *News/Hughes* transaction presented no horizontal concentration issues.³⁶ The fact that DIRECTV was negotiating certain arrangements with Telesat during the pendency of the *News/Hughes* transaction (which DIRECTV fully disclosed to the agency and which *DBAC* addressed) does not alter that fact or affect the Commission’s analysis of the competitive effects of the *News/Hughes* transaction.

³² *Id.*

³³ To the extent that Pegasus has included the allegation in an attempt to induce public disclosure of the types of capacity covered by DIRECTV’s arrangements with Telesat, DIRECTV hereby represents for the record that there is no FSS capacity implicated in these arrangements.

³⁴ *See, e.g., News/Hughes Order* at ¶ 53 & n. 186.

³⁵ Pegasus Petition at 17.

³⁶ *News/Hughes Order* at ¶ 75.

D. The Proposed Relocation of DIRECTV 3, and DIRECTV’s Continued Improvements to Its Service to Hawaii, Are the Subject of Separate Pending Proceedings, Are Not Transaction-Specific, and Provide No Basis for Reconsideration.

Part II of the Pegasus Petition consists of two short paragraphs arguing that “[r]econsideration of the merger provides an appropriate forum for investigation of other related issues on which Hughes has apparently deceived or misled the Commission.”³⁷ Pegasus specifically cites as a basis for this proposition (i) DIRECTV’s alleged failure to address “satellite safety concerns” in proposing the relocation of the DIRECTV 3 satellite to 82° W.L., (ii) DIRECTV’s movement of that satellite without FCC approval, and (iii) DIRECTV’s “apparent deception regarding its ability to serve Hawaii,” given evidence that “DIRECTV illuminates Hawaii with certain core programming.”³⁸

Once again, Pegasus provides no basis for its reckless assertions that DIRECTV has “deceived or misled” the Commission about either DIRECTV 3 or DIRECTV’s DBS service to Hawaii. The circumstances surrounding the proposed relocation of the DIRECTV 3 satellite, the status of the satellite’s secondary signal control processor, and its present position have been fully disclosed and briefed in the DIRECTV 3 STA proceeding – all prior to issuance of the *News/Hughes Order*.³⁹

Similarly, DIRECTV has kept the Commission apprised of its dialogue with officials of the State of Hawaii regarding improvements to DIRECTV’s DBS service to Hawaii. After

³⁷ Pegasus Petition at 18.

³⁸ *Id.*

³⁹ *See, e.g.*, File No. SAT-STA-20030903-00300, Letter from Gary M. Epstein, Counsel to DIRECTV, to Thomas S. Tycz (Oct. 9, 2003); File No. SAT-STA-20030903-00300, Letter from Thomas S. Tycz, Chief, Satellite Division, International Bureau, to James H. Barker, Counsel to DIRECTV (Dec. 8, 2003); File No. SAT-STA-20030903-00300, Letter from James H. Barker, Counsel to DIRECTV, to Thomas S. Tycz (Dec. 18, 2003). These letters are provided at Exhibit E.

meeting directly with officials of the State in October 2003, DIRECTV has committed to provide its complete Total Choice® package to customers on the islands by the second quarter of 2004.⁴⁰ It should also come as no surprise that the operational changes associated with those services are being tested prior to commercial launch in the State. Thus, the “evidence” of additional channel offerings that Pegasus argues is a smoking gun to warrant reconsideration⁴¹ in fact is indicative of imminent, tangible improvements to DIRECTV’s service to Hawaii that are in the public interest. This cannot possibly justify reconsideration of the *News/Hughes Order*.

More fundamentally, both the proposed relocation of DIRECTV 3 and DIRECTV’s Hawaiian service are the subjects of separate proceedings that “are not specific to [the News/Hughes] transaction.”⁴² As such, they are “more appropriately” addressed in those proceedings “focused specifically on those issues,”⁴³ and not on reconsideration here.

III. NHMC’S ARGUMENTS HAVE BEEN FULLY ADDRESSED IN THE NEWS/HUGHES ORDER AND RUN COUNTER TO ESTABLISHED COMMISSION PRECEDENT.

NHMC essentially sets forth three arguments for reconsideration, based upon its assertions that:

- the legal standards governing Commission review were allegedly not clear enough;
- the *ex parte* status of this proceeding allegedly resulted in a “political decision” prior to substantive review; and
- the record in the proceeding allegedly did not support the result.

⁴⁰ See Letter to Mark E. Rechtenwald, Director of Commerce and Consumer Affairs, State of Hawaii, from Stephanie Campbell, Senior Vice President, Programming, DIRECTV (Jan. 23, 2004). This letter is attached as Exhibit F.

⁴¹ See Pegasus Petition at 18 and Exhibit D thereto (Declaration of William Barker).

⁴² *News/Hughes Order* at ¶ 306 (declining to address issues related to service to Hawaii in this transfer of control proceeding).

⁴³ *Id.*

Consequently, NHMC argues that the Commission should have designated the Application for a hearing.

NHMC's arguments were addressed fully in the Commission's 228-page *Order* and – given that they run counter to long-standing Commission precedent – they were rejected. In the end, therefore, NHMC's arguments simply reflect its continuing disagreement with the Commission's conclusions. Rehashing rejected arguments, without more, is insufficient reason for reconsideration.

NHMC first suggests that, because the FCC's media ownership rules were not yet in place when the Application was filed, “the public was not properly on notice before the fact as to the legal standards to be applied,”⁴⁴ and that “[t]here was no standard, published or otherwise, guiding the Commission . . . as to the multiple ownership implications of the . . . merger.”⁴⁵ NHMC thus claims that its “rights to fair notice and comment under the Administrative Procedure Act . . . were abridged by the procedures in this case.”⁴⁶

But there is a very clear legal standard governing this transaction – the public interest standard set forth in Section 309 of the Communications Act.⁴⁷ The Commission has elaborated on this standard quite extensively in transfer proceedings over the years,⁴⁸ and discussed it at length in the *Order* itself:

⁴⁴ NHMC Petition at ii (emphasis omitted).

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 3.

⁴⁷ See 47 U.S.C. § 310(d) (stating that “no . . . station license . . . shall be transferred . . . to any person except upon application to the Commission that the public interest, convenience, and necessity will be served thereby”).

⁴⁸ See, e.g., *Comcast Corporation, AT&T Corp., and AT&T Comcast Corporation*, 17 FCC Rcd. 23246, 23255 (2002); *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd.

The Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of licenses from GM to News Corp. will serve the public interest, convenience, and necessity. The public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. [The Commission’s] public interest evaluation under Section 310(d) necessarily encompasses the “broad aims of the Communications Act,” which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services. To apply [the] public interest test, then, [it] must determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy. That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.⁴⁹

This is the same legal standard that has existed for many years, and it is certainly clear enough for APA purposes. As for NHMC’s claim that a potential change in the Commission’s media ownership rules somehow rendered this standard unclear, NHMC has already raised – and the Commission has already considered and rejected – this precise argument in this proceeding.⁵⁰ NHMC has presented no reason why the Commission should change its mind now.

NHMC next suggests that, by treating this proceeding as “permit but disclose” under its *ex parte* rules, the Commission “ensured that the decision rendered in this case would be a quasi-political decision, instead of a dispassionate ‘quasi-judicial’ decision based on the facts on the

6547, 6547 (2001); *MediaOne Group, Inc. and AT&T Corp.*, 15 FCC Rcd. 9816, 9821 (2000). *See also* 47 U.S.C. § 310(d).

⁴⁹ *News/Hughes Order* at ¶¶15-17 (citations omitted).

⁵⁰ *See id.* at ¶ 312 (noting that “all commenters have had, and continue to have, available what are now the current media ownership rules at the deadlines for initial and reply comments on the proposed transaction,” that “interested parties, including NHMC, were able to file comments addressing the impact of the current media ownership rules on the proposed transaction in the form of oral or written *ex parte* presentations throughout this up proceeding,” and that the media ownership rules “are part of the Commission’s continuing biennial review process and therefore will be subject to change at least every two years”).

record and the applicable law.”⁵¹ NHMC’s charge of *post hoc* reasoning is starkly at odds with the voluminous record in this proceeding, not to mention the comprehensive staff analysis in the *Order*. Moreover, NHMC fails to support its charge with anything more than citation to the proceeding’s *ex parte* status. To the Parties’ knowledge, practically *all* recent transfer proceedings of any magnitude have been re-classified as permit-but-disclose.⁵² NHMC’s theory would essentially make every such transfer proceeding subject to challenge *per se*, simply because of such re-classification. That is not the law. And contrary to NHMC’s implication, permit-but-disclose status in no way suggests that the Commission will arrive at a “political” decision to approve a proposed transaction.⁵³ NHMC’s claim that that this transaction’s *ex parte* status tainted the Commission’s decision making is neither supported nor credible, and must be rejected.

Lastly,⁵⁴ NHMC claims that the “record in this proceeding does not support the conclusion that a grant of [the] application serves the public interest, convenience, and

⁵¹ NHMC Petition at 9.

⁵² *See, e.g.*, Public Notice, 17 FCC Rcd. 5907 (2002), (designating AT&T/Comcast proceeding as permit-but-disclose); Public Notice, 15 FCC Rcd. 5699 (2000) (designating AOL/Time Warner proceeding as permit-but-disclose); 14 FCC Rcd. 11867 (1999) (designating AT&T/MediaOne proceeding as permit-but disclose).

⁵³ *See, e.g.*, Public Notice, 16 FCC Rcd. 22631 (2001) (designating EchoStar/Hughes proceeding as permit-but-disclose); *EchoStar Communications Corp, General Motors Corp and Hughes Electronics Corp.*, 17 FCC Rcd. 20559 (2002) (“*EchoStar/Hughes*”) (designating transaction for hearing); Public Notice, 15 FCC Rcd. 832 (2000) (designating Sprint/MCI proceeding as permit-but-disclose); *United States v. WorldCom, Inc. and Sprint Corp.*, No. 1:00-cv-01526-RMU; (D.D.C, filed June 26, 2000) (DOJ Complaint to block Sprint/WorldCom transaction), *available at* <http://www.usdoj.gov/atr/cases/f5000/5051.htm>.

⁵⁴ NHMC lists its claim that “a hearing must be designated” as an independent reason for the Commission to reconsider its decision. *See* NHMC Petition at 11. Hearing designation, however, is a possible outcome of Commission deliberation – not itself a reason for reconsideration. *See* 47 U.S.C. § 309(e) (providing that, if “a substantial and

necessity.”⁵⁵ To support this claim, NHMC lists nine issues that, in its view, warranted denial of the Application.⁵⁶ Each of these issues, however, was raised by parties to this proceeding (including NHMC), each was considered by the Commission, and each is the subject of extensive discussion in the *Order* itself.⁵⁷ NHMC presents no new arguments or facts with respect to any of them. NHMC quite evidently disagrees with the Commission’s judgment on these issues, and on the ultimate determination that the transaction as conditioned would serve the public interest. But its simple recitation of arguments already raised and rejected by the Commission is insufficient to warrant reconsideration.⁵⁸

material question of fact is presented . . . [the Commission] shall formally designate the application for hearing”).

⁵⁵ NHMC Petition at 2.

⁵⁶ *Id.* at 7.

⁵⁷ *See News/Hughes Order* at ¶¶ 352-57 (discussing the transaction’s impact on minority communities); *id.* at ¶¶ 260-273 (discussing the transaction’s impact on viewpoint and program diversity); *id.* at ¶¶ 18-24 (discussing News Corp.’s character qualifications); *id.* at ¶¶ 319-356 (discussing the Parties’ claimed public interest benefits); *id.* at ¶¶ 27-34 (discussing foreign ownership concerns); *id.* at ¶¶ 304-306 (discussing service to Alaska and Hawaii); *id.* at ¶¶ 307-309 (discussing multiple-dish issues); *id.* at ¶¶ 329-34 (discussing local-into-local service); *id.* at ¶¶ 76-252 (discussing potential harms from vertical integration); *id.* at ¶¶ 274-75 (discussing impact of transaction on network-affiliate relations).

⁵⁸ *See, e.g., Lockheed Martin Corp.*, Order on Reconsideration, 18 FCC Rcd. 16605, [¶ 10] (2003) (rejecting arguments where petitioner “has presented no new evidence that would cause [the Commission] to reconsider [its] prior determinations, and admonishing petitioner for “restat[ing] arguments that the Commission previously has ruled upon in this and other proceedings”); *GTE Corporation and Bell Atlantic Corporation*, Order on Reconsideration, 18 FCC Rcd. 24871, ¶ 5 (2003) (stating that “[r]econsideration is only appropriate where the petition either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner’s last opportunity to present such matters”); *AVR, L.P.*, Memorandum Opinion and Order, 16 FCC Rcd. 1247, 1249 (2001) (rejecting petitions for reconsideration where petitioner “essentially repeats the same arguments it relied upon in the comments and reply comments it filed” and “fails to raise new arguments or facts that would warrant reconsideration of [the underlying] order”).

IV. CONCLUSION

For the foregoing reasons, the Commission should deny the Petitions for Reconsideration filed by Pegasus and NHMC.

Respectfully submitted,

The News Corporation Limited

By: /s/ _____
William M. Wiltshire
Scott Blake Harris
Michael D. Nilsson

HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
202-730-1300

Counsel for The News Corporation Limited

**GENERAL MOTORS CORPORATION AND
HUGHES ELECTRONICS CORPORATION**

By: /s/ _____
Gary M. Epstein
James H. Barker
John P. Janka

LATHAM & WATKINS LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
202-637-2200

By: /s/ _____
Richard E. Wiley
Lawrence W. Secrest, III
Todd M. Stansbury

WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
202-719-7000

*Counsel for General Motors Corporation and The
DIRECTV Group, Inc. (f/k/a Hughes Electronics
Corporation)*

Dated: March 19, 2004

CERTIFICATE OF SERVICE

I, Michael Nilsson, hereby certify that I have on this 19th day of March, 2004, caused true and correct copies of the foregoing document to be mailed by first class United States mail, postage prepaid, to the following:

Bruce Jacobs
Tony Lin
Shaw Pittman LLP
2300 N. Street, NW
Washington, DC 20037

*Counsel for Pegasus Development
Corporation*

Dennis J. Kelly
Law Office of Dennis J. Kelly
Post Office Box 41177
Washington, DC 20018

*Counsel for the
National Hispanic Media Coalition*

/s/ Michael Nilsson