

Hearing Date: June 10, 2005  
Time: 10:30 a.m.  
Place: Portland  
Response Deadline: June 7, 2005  
Time: 4:00 p.m.

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE**

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In re:	:	Chapter 11
	:	
PEGASUS SATELLITE TELEVISION, INC., et al.,	:	Case No. 04-20878
	:	
	:	(Jointly Administered)
Debtors.	:	

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**RESPONSE AND OBJECTION BY KB PRIME MEDIA LLC TO THE MOTIONS OF THE REORGANIZED DEBTORS AND THE LIQUIDATING TRUSTEE FOR ORDERS AUTHORIZING (I) THE ASSUMPTION OF CERTAIN ASSET PURCHASE AGREEMENTS BETWEEN PEGASUS SATELLITE COMMUNICATIONS, INC. AND KB PRIME MEDIA LLC DATED AS OF FEBRUARY 17, 2004 AND MARCH 15, 2004; (II) THE ASSIGNMENT OF THE KB SCRANTON AGREEMENT TO MYSTIC TELEVISION OF SCRANTON, LLC AND (III) GRANTING RELATED RELIEF REGARDING THE PAYMENT AND APPLICATION OF THE PURCHASE PRICE AND (IV) GRANTING SUCH OTHER RELIEF AS IS JUST AND PROPER**

KB Prime Media LLC (“**KB**”) by and through its undersigned counsel, hereby files this Response and Objection to the Motions of the Reorganized Debtors and Liquidating Trustee for Orders Authorizing (i) the Assumption of Certain Asset Purchase Agreements Between Pegasus Satellite Communications, Inc. and KB Prime Media LLC Dated as of February 17, 2004 and March 15, 2004; (ii) the Assignment of the KB Scranton Agreement to Mystic Television of Scranton, LLC and (iii) Granting Related Relief Regarding the Payment and Application of the Purchase Price and (iv) Granting Such Other Relief as is Just and Proper (the “**Assumption Motions**”) and in support thereof states the following:

## BACKGROUND

1. KB is a Delaware limited liability company which is in the business of applying for construction permits for new television broadcast stations to operate in various markets pursuant to necessary FCC licenses, permits and authorizations. In order to fund KB's business operations in compliance with applicable FCC rules and regulations, a financial arrangement was reached between KB and others<sup>1</sup> and Pegasus Communications Corporation ("**Pegasus**"), one of the debtors in the instant Chapter 11 proceedings. The financial arrangement operated as follows:

a. An individual by the name of W.W. Keen Butcher ("**Butcher**") and an individual by the name of Guyon W. Turner ("**Turner**") (interest holders of KB) would borrow money from Wachovia Bank ("**Wachovia**"). To evidence their respective obligations to repay the loans made to them by Wachovia, Butcher and Turner executed promissory notes payable to the order of Wachovia in the respective face amounts of \$8,500,000 (the "**Butcher Note**") and \$250,000 (the "**Turner Note**," and collectively with the Butcher Note, the "**Notes**").<sup>2</sup>

b. Butcher and Turner would loan the proceeds of the loans they obtained from Wachovia to KB in return for which KB became obligated to repay said loans to Butcher and Turner. KB would use the proceeds of the Notes in connection with the development of broadcast television stations.

c. In order for Butcher and Turner to obtain said loans, Pegasus agreed to pledge with Wachovia a sum equal to 105% over the amount of funds loaned by Wachovia to

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<sup>1</sup> The other parties to the agreement include W.W. Keen Butcher; Guyon W. Turner; KB Communications Corporation, a Delaware corporation; and Channel 24 Corporation, a Delaware corporation (collectively with KB, the "**KB Parties**").

<sup>2</sup> The outstanding balance of the Butcher Note as of December 31, 2004 was approximately \$6,351,723 and of the Turner Note approximately \$95,845.

Butcher and Turner. Thus, Wachovia was always fully secured in an amount of 105% of the combined outstanding obligations of Turner and Butcher to Wachovia.

d. On or about April 14, 1998, Pegasus and the KB Parties entered into a so-called Option Agreement which memorialized the above-referenced financial arrangement.<sup>3</sup>

e. Under the Option Agreement, KB granted Pegasus an exclusive irrevocable option to purchase: (i) all the membership interests of KB and (ii) all or such part of the assets of KB, along with the assumption of all current liabilities of KB relating thereto, that are used or useful in connection with the construction and operation of television stations in specific geographic locations. Upon payment of the Option Price as defined in the Option Agreement, Pegasus may exercise the option at any time, provided that such exercise is consistent with the rules, regulations and policies of the FCC. *See* Option Agreement § 2(a).

f. In order to exercise the option, Pegasus must give Butcher and Turner written notice of the exercise of the option, identifying the membership interests or assets that are to be purchased. *See* Option Agreement § 2(b).

g. The Option Price was a complex calculation utilizing the direct and indirect costs incurred by KB in connection with developing a station facility, less certain revenues and an interest rate applied to the costs. *See* Option Agreement § 3. This complex calculation was performed from time to time by the accountants of KB and provided to Pegasus. The Option Price as computed by the accountants for KB has never been questioned by Pegasus and has been calculated on a consistent basis.

2. The Option Agreement was amended four times. The First Amendment occurred on or about August 19, 1998; the Second Amendment on November 9, 1998; the Third

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<sup>3</sup> KB Communications Corporation and Channel 24 Corporation were subsequently dissolved, such that the only remaining parties to the Option Agreement today are Pegasus, Butcher, Turner and KB.

Amendment on February 27, 2001; and the Fourth Amendment on February 1, 2004. Paragraph 4 of the Fourth Amendment requires Pegasus to provide collateral to Wachovia for borrowings made by Butcher and Turner in an amount not to exceed the sum of: (1) \$200,000 for KB's corporate expenses during any period of twelve consecutive months; (2) capital expenditures; (3) interest on the loans evidenced by the Notes; (4) direct expenses of any station; (5) reasonable legal, accounting and broker fees in connection with the sale of any station; and (6) amounts to buy out a partner or participant in any auction with respect to a station which may have joint ownership. In addition Pegasus was required to continue to pay local marketing agreement fees to KB pursuant to local marketing agreements entered into between Pegasus and KB.

Furthermore, the Option Agreement was modified to provide for termination of the Option Agreement when all of the stations for which KB had obtained an FCC license had been sold pursuant to the Option Agreement and all of the pending stations for which no FCC license had been obtained were legally abandoned and/or withdrawn by KB. In other words, until KB abandons or withdraws any application for licenses, the Option Agreement and the Pegasus' funding obligation thereunder are continuing.<sup>4</sup> The Option Agreement and four Amendments referred to above are collectively hereinafter referred to as the Option Agreement. Attached hereto as Exhibit "A" is a copy of the Option Agreement, as amended.

3. The intent of the parties to the Option Agreement was that, upon the exercise of an option to purchase a broadcast television station, Pegasus would pay KB the Option Price, which would be an amount sufficient to cover the costs associated with the development of the broadcast station to be sold, indirect expenses of KB, and interest expenses, while providing a

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<sup>4</sup> Under the Option Agreement, Pegasus is obliged to pledge collateral to Wachovia, since operating funds were borrowed by Butcher and Turner from Wachovia and loaned to KB. After Pegasus purchased the Notes from Wachovia, Pegasus directly loaned funds to Butcher and Turner, which were then loaned to KB.

net profit to KB in an amount to be calculated as a differential between the interest rate on funds borrowed from Wachovia and the agreed upon rate. Upon the sale of a station, the proceeds would be used to retire and satisfy the indebtedness of Turner and Butcher to Wachovia and estimated income taxes on any capital gains arising from the sale of such broadcast station. It was always the parties' intention that all of the "upside," other than the interest rate differential, from the exercise of the option by Pegasus would belong to Pegasus, and that there would be no risk to KB, Butcher, or Turner. In return, Butcher and Turner were assured a small profit after the payment of their taxes. As stated above, there was always 105% of liquid collateral either in cash or cash equivalents pledged with Wachovia by Pegasus, so that Wachovia would never seek to collect on the Notes from Butcher or Turner. This financial arrangement worked well for years until Pegasus filed for bankruptcy.

4. After Pegasus filed its bankruptcy petition, Wachovia exerted pressure on Butcher and Turner to pay the Notes, and, as a result, unilaterally decided to purchase the Notes from Wachovia. Notwithstanding Pegasus' purchase of the Notes from Wachovia, Pegasus continued to advance funds to Butcher and Turner under the terms of the financial relationship outlined above as Wachovia would have done had the Notes not been purchased.

5. There are presently are six television stations that KB is in various stages of developing under the terms of the Option Agreement. Two of these stations – WSWB-TV (Channel 38), Scranton, Pennsylvania, and WPME (Channel 35), Lewiston, Maine – are FCC licensed, up and operating, and are the subject of the Assumption Motion. In addition, Channel 24 in Tallahassee, Florida is an operating broadcast station (but not the subject of the Assumption Motions), and a construction permit has been issued for Channel 42 in Hammond, Louisiana. Applications for broadcast television licenses are in various stages of development in

Tupelo, Mississippi and Gainesville, Florida. Pegasus has entered into the following Asset Purchase Agreements with KB: (i) Asset Purchase Agreement dated as of April 7, 2004 for television station construction permit BPCDT-19960920LW for Channel 42 in Hammond, Louisiana (the “**KB Hammond Agreement**”); (ii) Asset Purchase Agreement dated as of February 17, 2004 for television station WPME (Channel 35), Lewiston, Maine (the “**KB Lewiston Agreement**”); and (iii) Asset Purchase Agreement dated as of March 15, 2004 for television station WSWB-TV (Channel 38), Scranton, Pennsylvania (the “**KB Scranton Agreement**”). The terms and conditions of the KB Scranton Agreement are substantially identical to the KB Lewiston Agreement.

6. In the Assumption Motions, Pegasus requests authorization to assume the KB Lewiston and KB Scranton Agreements, and to assign the KB Scranton Agreement to Mystic Television of Scranton, LLC (“**Mystic**”).

7. The following chart sets forth the six broadcast television stations, applications or licenses, as applicable and the estimated Option Price as of June 30, 2005, calculated in accordance with the terms of the Option Agreement:

<u>Broadcast License Location</u>	<u>Estimated Option Price As Of June 30, 2005</u>
WSWB-TV, Scranton, Pennsylvania	\$2,195,785
Channel 24, Tallahassee, Florida	\$3,666,050
Hammond, Louisiana Construction Permit	\$1,588,099
Tupelo, Mississippi	\$114,369
Gainesville, Florida	\$97,714
WPME-TV, Lewiston, Maine	<u>\$3,970,118</u>
Total:	\$11,640,465

**OBJECTIONS TO THE ASSUMPTION MOTIONS**

8. KB objects to Pegasus’ request for authority to assume the KB Lewiston and KB Scranton Agreements, and to thereafter assign the KB Scranton Agreement, for the following specific reasons: (a) the Option Agreement, KB Lewiston Agreement, and the KB Scranton Agreement constitute one integrated contract that must be assumed in its entirety; (b) Pegasus impermissibly seeks to avoid certain obligations under the KB Lewiston and the KB Scranton Agreements, while enjoying the benefits thereof; (c) Pegasus has committed incurable defaults under the KB Lewiston Agreement, which preclude assumption absent KB’s consent; and (d) the KB Lewiston Assumption Motion fails to provide adequate assurance that certain other defaults under the Option Agreement and the KB Lewiston Agreement will be cured.

**A. The Option Agreement, the KB Lewiston Agreement, and the KB Scranton Agreement Constitute One Integrated Contract**

9. Multiple contracts “which are essentially inseparable can be, and should be, viewed as a single, indivisible agreement between the parties” for purposes of 11 U.S.C. § 365. *See In re Karafakis*, 162 B.R. 719, 725 (Bankr. E.D. Pa. 1993). *See also Braniff, Inc. v. GPA Group PLC (In re Braniff)*, 118 B.R. 819 (Bankr. M.D. Fla. 1989) (“Multiple contract documents

may form one uniform agreement.”). Here, the Option Agreement, the KB Lewiston Agreement, and the KB Scranton Agreement constitute one integrated contract. “[W]here an executory contract contains several agreements, the debtor may not choose to reject some agreements within the contract and not others.” *In re Mirant Corp.*, 318 B.R. 100, 104 (N.D. Tex. 2004). In determining whether documents constitute one agreement, bankruptcy courts must look to state law. *See Karafakis*, 162 B.R. at 725. Here, Pennsylvania law governs.<sup>5</sup> The KB Lewiston Agreement and the KB Scranton Agreement specifically refer to the Option Agreement for a computation of the purchase price. There is no mechanism for determining or calculating the purchase price unless the Option Agreement is assumed. Under similar circumstances – where “it is readily apparent that one agreement is of no utility without the other” – courts applying Pennsylvania law have found that a single, integrated agreement exists for purposes of 11 U.S.C. § 365. *See Karfakis*, 162 B.R. at 725. Although the agreements were entered into at different times, this factor is “clearly not dispositive” of whether there is one integrated transaction, especially given the fact that the parties to the agreements are the same. *See Bridgeport Jai Alai, Inc. v. Autotote Sys., Inc. (In re Bridgeport Jai Alai, Inc.)*, 215 B.R. 651, 658 (Bankr. D. Conn. 1997). Accordingly, the Option Agreement and the KB Lewiston and KB Scranton Agreements are an integrated series of transactions relating to the financial structure outlined above. Pegasus may not obtain the benefit of the KB Lewiston and KB Scranton Agreements without also assuming all of its obligations under the Option Agreement.

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<sup>5</sup> The Operating Agreement, the KB Lewiston Agreement, and the KB Scranton Agreement all provide that Pennsylvania law shall govern their interpretation.



**B. Pegasus Impermissibly Seeks to Shed Certain Obligations Under the KB Lewiston and KB Scranton Agreements, While Enjoying the Benefits Thereof**

10. Even if the KB Lewiston and KB Scranton Agreements could be assumed independent of the Option Agreement (which KB maintains they cannot), Pegasus cannot assume the KB Lewiston and KB Scranton Agreements while shirking certain of its obligations thereunder. By the Assumption Motions, Pegasus seeks to impermissibly alter its obligations under the KB Lewiston and KB Scranton Agreements. The KB Lewiston and KB Scranton Agreements require Pegasus to wire-transfer the purchase price in immediately available funds to KB pursuant to wire instructions delivered by KB to Pegasus at least two business days prior to the closing date. *See* KB Lewiston Agreement § 3.1; KB Scranton Agreement § 3.1. Yet, the Assumption Motions request authority for alternative payment arrangements, which are less favorable to KB: Pegasus requests that the purchase price be paid in part by setting off sums which have been borrowed by Turner and Butcher under the Notes, and paying only the “net proceeds to KB for the payment of capital gains taxes.” KB Lewiston Assumption Motion at ¶ 25; KB Scranton Assumption Motion at ¶ 27. Pegasus states that such an arrangement is necessary to avoid the risk paying of for the broadcast stations twice: *i.e.*, once when it purchased the Notes from Wachovia and again at closing. Although KB understands this concern, the law is clear that if one assumes an agreement under 11 U.S.C. § 365, one must assume the agreement as is, *cum onere*. *See, e.g., National Labor Relations Board v. Bildisco*, 465 U.S. 513, 531-32, 79 L.Ed.2d 482, 104 S. Ct. 1188 (1984) (under 11 U.S.C. § 365, the debtor must assume an executory contract in its entirety, including any attendant burdens); *Sharon Steel Corp. v. National Fuel Gas Distribution Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 39 (3d Cir. 1988) (the trustee cannot pick and choose among provisions of an executory

contract, retaining the beneficial and rejecting the burdensome). Here, Pegasus seeks to assume the KB Lewiston and KB Scranton Agreements, but to change various terms that it considers risky or unbeneficial to it.

**C. Pegasus has Committed Incurable Breaches Under the KB Lewiston Agreement**

11. In addition to the contractual obligations Pegasus impermissibly seeks to alter to its benefit, Pegasus has already committed certain incurable breaches of the KB Lewiston Agreement. Section 365(b) requires a debtor to cure any defaults under an executory contract as a prerequisite to assumption. However, “[i]f the debtor has committed . . . an incurable breach, [it] has no continuing rights under the contract,” and assumption is therefore prohibited. *See Good Hope Refineries, Inc. v. Benavides*, 602 F.2d 998, 1003 (1<sup>st</sup> Cir. 1979). Here, closing was required to occur within thirty business days after the later of (1) the satisfaction of all conditions precedent under the KB Lewiston Agreement and (2) the FCC Consent<sup>6</sup> becoming a final order. *See* KB Lewiston Agreement § 5.1. Because closing did not timely occur, defaults exist under the KB Lewiston Agreement that cannot be cured and, therefore, precludes assumption. Under the circumstances, the assumption of the KB Lewiston Agreement cannot be approved.

**D. The Assumption Motions Fail to Provide Adequate Assurance that Certain Other Defaults under the Option Agreement and the KB Lewiston Agreement Will Be Cured**

12. Furthermore, KB is entitled to terminate the KB Lewiston and KB Scranton Agreements if Pegasus is in material breach of any covenant contained therein or “or any other agreement between the parties hereto.” *See* KB Lewiston Agreement § 13.1(a); KB Scranton

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<sup>6</sup> The consummation of the transactions contemplated in the KB Lewiston and KB Scranton Agreements is expressly conditioned on, and is subject to, the prior consent and approval of the FCC (the “**FCC Consent**”). *See* KB Lewiston Agreement ¶ 4.1; KB Scranton Agreement ¶ 4.1.

Agreement § 13.1(a).<sup>7</sup> Pegasus is in default of the Option Agreement not only because it purports to assume the KB Lewiston and KB Scranton Agreements independent of the interrelated Option Agreement, but also because, instead of providing collateral for advances made by Wachovia under the Notes to Butcher and Turner, Pegasus instead purchased the Notes. By placing itself in full control of any amounts advanced under the Notes, Pegasus completely derogated not only the terms of the Option Agreement, but also FCC rules and regulations regarding control and investment in multiple broadcast stations in any local market area. The financing arrangements set forth in the Option Agreement were carefully constructed to ensure compliance with FCC rules and regulations, and Pegasus' unilateral restructuring of such arrangements potentially violates such rules and regulations. Moreover, Pegasus must be in compliance with all FCC rules and regulations in order to exercise its rights under the Option Agreement. *See* Option Agreement § 2(a). Pegasus has further materially breached the Option Agreement by failing to fund certain expenses which have been requested by KB. These additional defaults must also be cured as a prerequisite to any assumption of the Option Agreement and interrelated KB Lewiston and KB Scranton Agreements, if indeed such assumption is not precluded altogether by the incurable breaches described above.

### **CONCLUSION**

13. By the Assumption Motions, Pegasus intends to “cherry pick” by exercising its rights under the Option Agreement as to only those stations that it can resell at a substantial profit – such as the Lewiston and Scranton Stations – and saddling KB with the less valuable stations and all the liabilities incurred in connection therewith. Pegasus will then –

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<sup>7</sup> Moreover, Paragraph 7 of the Fourth Amendment to the Option Agreement provides for termination of the Option Agreement when all of the television stations have been sold and all pending stations for which no FCC license has been obtained are legally abandoned and/or withdrawn by KB. Accordingly, KB – not Pegasus – has the unilateral right to abandon or withdraw.

impermissibly – attempt to reject the Option Agreement, leaving KB with general unsecured claim while Pegasus walks away with the spoils. Such tactics are clearly impermissible. *See Bildisco*, 465 U.S. at 531-32; *Sharon Steel*, 872 F.2d at 39; *In re Plum Run Service Corp.*, 159 B.R. 496, 498 (Bankr. S.D. Ohio 1993) (it “is simply not the intent of § 365” to “allow a Debtor to pick and choose portions of the contract it consider[s] profitable, while rejecting any burdens considered onerous”). The Option Agreement, funding obligations, and the purchase of all the stations – not just the Lewiston and Scranton stations Pegasus presently seeks to assume – constitute one integrated transaction. As indicated above, the parties’ always intended that Pegasus would receive all the upside, but that KB, Butcher and Turner would run no risk and, in fact, turn a small profit after payment of all taxes. By its Assumption Motions, Pegasus seeks to avoid this underlying intent at KB’s expense, shed certain obligations under the KB Lewiston and KB Scranton Agreements, and avoid curing various defaults under the Option Agreement and KB Lewiston Agreement. Under the circumstances, the Assumption Motions must be denied.

**CONCLUSION**

For all the reasons set forth above, KB Prime Media LLC respectfully requests that this Court deny the Assumption Motions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE FOR ELECTRONIC FILING**

I, Randy J. Creswell, attorney for KB Prime Media LLC, in compliance with Maine Bankruptcy Rule 9042-1, hereby certify that I have caused to be served true and correct copies of the above Response and Objection by KB Prime Media LLC to the Motions of the Reorganized Debtors and the Liquidating Trustee for Orders Authorizing (I) the Assumption of Certain Asset Purchase Agreements Between Pegasus Satellite Communications, Inc. and KB Prime Media LLC Dated as of February 17, 2004 and March 15, 2004; (II) the Assignment of the KB Scranton Agreement to Mystic Television of Scranton, LLC and (III) Granting Related Relief Regarding the Payment and Application of the Purchase Price and (IV) Granting Such Other Relief as is Just and Proper and this Certificate of Service, both dated June 8, 2005, on each of the parties set forth on the Service List below, via First Class U.S. mail, postage fully prepaid, on this date.

All other parties listed on the Notice of Electronic Filing have been served electronically on this date.

Dated at Portland, Maine this 8th day of June, 2005.

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