

Hearing Date: June 29, 2005  
Time: 1:00 p.m.  
Place: Portland  
Response Deadline: June 24, 2005

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MAINE**

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

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**CROSS MOTION OF KB PRIME MEDIA LLC TO COMPEL  
ASSUMPTION OR REJECTION OF OPTION AGREEMENT  
AND CERTAIN RELATED AGREEMENTS BETWEEN PEGASUS  
SATELLITE COMMUNICATIONS, INC. AND KB PRIME MEDIA LLC**

KB Prime Media LLC (“KB”), by and through its undersigned counsel, hereby files this Cross Motion to Compel Assumption or Rejection of Option Agreement and Certain Related Agreements Between Pegasus Satellite Communications, Inc. and KB (the “**Cross Motion**”) and in support thereof, states:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The relief sought in the Motion is predicated on section 365 of Title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

## BACKGROUND

3. 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

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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> As of December 31, 2004, the outstanding balance of the Butcher Note approximated \$6,351,723, and that of the Turner Note approximated \$95,845.

by Wachovia to 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

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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.

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.

4. 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 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

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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.

Agreement and four Amendments referred to above are collectively hereinafter referred to as the Option Agreement.

5. 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 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.

6. 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.

7. There are presently are six television stations that KB is in various stages of developing under the terms of the Option Agreement. Three stations – WSWB-TV (Channel 38), Scranton, Pennsylvania; WPME (Channel 35), Lewiston, Maine; and Channel 24 in Tallahassee, Florida – are FCC licensed, up and operating. A construction permit has been issued for Channel 42 in Hammond, Louisiana. Applications for broadcast television licenses are pending 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 various asset purchase agreements are substantially similar.

8. 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

9. On April 13, 2005, Pegasus filed its Motion for Order Authorizing the Assumption or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases (the “**Assumption Motion**”),<sup>5</sup> which seeks to assume the Option Agreement and certain other executory contracts (collectively, the “**Contracts**”) between KB and Pegasus,<sup>6</sup> as well as literally hundreds of contracts and leases between Pegasus and other parties. The Assumption Motion was filed on the eve of Pegasus’ April 14, 2005 confirmation hearing to give Pegasus and/or a prospective Purchaser of its Broadcast Assets more time to decide whether to assume the executory contracts and unexpired leases listed in the Assumption Motion. *See* Assumption Motion ¶ 17. Pegasus’ Plan provides for the rejection of any executory contracts and unexpired leases

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<sup>5</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed in the Assumption Motion.

<sup>6</sup> Specifically, the Assumption Motion requests authorization for the assumption of: (1) the Option Agreement; (2) the KB Scranton Agreement; (3) the KB Lewiston Agreement; (4) the KB Hammond Agreement; (5) the Lease Agreement (WPME) dated February 1, 2001; (6) the Time Brokerage Agreement (WPME) dated January 29, 1996; (7) the Joint Sales Agreement (WTLF-DT) dated March 31, 2003; (8) the Lease Agreement (WOLF) dated October 11, 1998; (9) the Lease and Administrative Services Agreement (WTLF-DT) dated March 31, 2003; and (10) the Time Brokerage Agreement (WSWB) dated June 26, 1997.

not previously assumed or the subject of a pending assumption motion on the Confirmation Date. *See* Assumption Motion ¶ 18.

10. On May 25, 2005, Pegasus filed its 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 “**Lewiston/Scranton Assumption Motion**”), requesting authorization to assume the KB Lewiston and KB Scranton Agreements, and to assign the KB Scranton Agreement to Mystic Television of Scranton, LLC (“**Mystic**”). On June 10, 2005, the Court authorized Pegasus to assume the KB Scranton and KB Lewiston Agreements.

#### **RELIEF REQUESTED**

11. Pursuant to 11 U.S.C. § 365(d)(2):

In a case under chapter ... 11 ... of this title, the trustee may assume or reject an executory contract ... of the debtor at any time before confirmation of a plan but the court, on request of any party to such contract ..., may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. § 365(d)(2). Accordingly, 11 U.S.C. § 365(d)(2) generally requires a debtor to decide whether to assume or reject any executory contracts prior to conformation of its plan. *See Public Service Co. of New Hampshire v. New Hampshire Elec. Coop., Inc. (In re Public Serv. Co. of New Hampshire)*, 884 F.2d 11, 14 (1<sup>st</sup> Cir. 1989) (“Ordinarily, the debtor need not commit itself to assumption or rejection of such a contract until a



reorganization plan is confirmed.”). Here, where Pegasus’ Plan has already been confirmed, it should not be permitted to intentionally delay its commitment to either assuming or rejecting the Contracts.

12. While the Assumption Motion appears to request authorization to assume the Contracts, Pegasus may intend the Assumption Motion to serve more of a “placeholder” function to buy more time for Pegasus and/or a prospective Purchaser to decide which of the hundreds of listed executory contracts and unexpired leases to assume or reject. For example, the KB Lewiston and KB Scranton Agreements were already the subject of the Assumption Motion when Pegasus filed the separate, subsequent Lewiston/Scranton Assumption Motion. This duplication lends credence to the possibility that the Assumption Motion may have merely been intended as a placeholder that Pegasus may seek to postpone from time to time as it determines what to do with the hundreds of contracts and leases listed therein. Accordingly, although the Assumption Motion is scheduled for hearing on June 29, 2005, KB files this Cross Motion out of concern that Pegasus may seek to postpone the hearing on the Assumption Motion and/or a final decision on whether to assume or reject the Contracts. By this Cross Motion, KB seeks to compel Pegasus to decide now whether to assume or reject the Contracts.

13. In accordance with 11 U.S.C. § 365(d)(2), KB seeks to compel Pegasus to immediately assume the Contracts as requested in the Assumption Motion, or to reject them, such that an order authorizing either assumption or rejection can be entered and the Contracts are not kept in limbo. A prompt decision either way is essential to KB because, if Pegasus does not intend to assume the Contracts and to purchase the broadcast

television stations under the terms set forth therein, there will be no sale proceeds generated with which to pay the Notes when they come due in April 2006. KB wants to ensure that Pegasus promptly prosecutes the Assumption Motion rather than using it to obtain an open-ended extension of time within which to make a decision. If Pegasus does not intend to assume the Contracts, KB must know immediately so that it can market the broadcast stations to other buyers in an effort to sell the stations, and generate sufficient proceeds to repay the Notes prior to their April 2006 due date. Because the market for this type of assets is fairly limited, a prompt decision is necessary to give KB enough time to appropriately market the stations.

14. Nothing in this Cross Motion is intended to be a consent to the assumption of the Contracts under the terms set forth in the Assumption Motion. KB reserves the right to object to the Assumption Motion on or before the June 22, 2005 response deadline applicable in connection therewith.

### **CONCLUSION**

For all the reasons set forth above, KB respectfully requests that this Court enter an order in substantially the form attached hereto compelling Pegasus to decide whether to assume or reject the Contracts within ten (10) days, and granting such other and further relief as is just.

Dated at Portland, Maine this 14th day of June, 2005.

Respectfully submitted,

PERKINS, THOMPSON, HINCKLEY &  
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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 Cross Motion of KB Prime Media LLC to Compel Assumption or Rejection of Option Agreement and Certain Related Agreements Between Pegasus Satellite Communications, Inc. and KB Prime Media LLC, the Notice of Hearing and Notice of Response Date, **this** Certificate of Service, all dated June 14, 2005, and the proposed Order 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 14th day of June, 2005.

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