Date of Hearing: January 10, 2005
Time: 1:00 p.m.
Place: Portland

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 |
| | ) | |
| Debtors. | ) | (Jointly Administered) |
| | ) | |

**SECOND OPPOSITION OF DAVIDSON KEMPNER PARTNERS TO MOTION FOR ORDER PURSUANT TO 11 U.S.C. § 1121(D) FURTHER EXTENDING DEBTORS' EXCLUSIVE PERIODS IN WHICH TO FILE A CHAPTER 11 PLAN AND SOLICIT ACCEPTANCES THERETO WITH INCORPORATED NARRATIVE REPORT UNDER D. ME. LBR 3016-2**

Davidson Kempner Partners and certain of its affiliates, ("DK") file this Second Opposition (the "Objection") to the Debtors' Motion for Order Pursuant to 11 U.S.C. § 1121(d) Further Extending Debtors' Exclusive Periods in Which to File a Chapter 11 Plan and Solicit Acceptances Thereto with Incorporated Narrative Report Under D. Me. LBR 3016-2 (the "Motion")[1] which was filed by Pegasus Satellite Television, Inc. and its affiliated debtors and debtors in possession in the above-referenced chapter 11 cases (collectively, the "Debtors"), and respectfully represents as follows:

1. DK is a creditor of Pegasus Satellite Communications, Inc. ("PSC"), one of the debtors in the above-referenced chapter 11 cases. On November 18, 2004, DK filed its first Opposition (the " Initial Objection") to the Motion. On December 1, 2004, the Bankruptcy Court entered the Second Order Pursuant to 11 U.S.C. § 1121(d) Extending Debtors' Exclusive Periods In Which To File a Chapter 11 Plan and to Solicit Acceptances Thereto, dated December 1, 2004 (the "Extension Order"), which was the result of a compromise between the Debtors and DK, in which DK agreed to withdraw the Initial Objection, without prejudice, in exchange for

[1] All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Extension Motion.

DK retaining certain rights to object to further extensions of the Exclusive Periods as described therein and below.

2. The fourth decretal paragraph of the Extension Order provides that "on December 31, 2004, the Filing Exclusivity will automatically be extended to and including January 31, 2005 . . . unless . . . DK Partners notifies the Debtors in writing on or before December 21, 2004 that . . . DK Partners opposes the further extension of the Exclusive Periods (a "Notice of Non-Extension") in which case, . . . DK Partners shall have until January 5, 2005 to file an objection" to the Motion and a further hearing will be held on the Motion "on January 10, 2005."

3. In connection with the above, on December 21, 2004, DK filed its Notice of Non-Extension to the Motion.

4. On January 4, 2005, the Debtors provided both DK and the Creditors' Committee until January 7, 2005 at 2:00 p.m. to file the Objection.

5. For the foregoing reasons, DK respectfully requests that this Court consider the Objection at the hearing scheduled on the Motion for January 10, 2005.

**BACKGROUND**

6. The facts of the chapter 11 cases have not changed materially since DK filed the Initial Objection. The Debtors have ceased their business operations, and on August 27, 2004, the Debtors "consummated the sale of substantially all of the assets of the Debtors' DBS business." Extension Motion at 5. The Debtors' broadcast television business assets, which "comprise substantially all of the Debtors' remaining assets" are still subject to an agreement in principle to be sold to Pegasus Communications Corporation ("PCC"), the non-Debtor parent of the Debtors. Id.

7. As stated before, in these liquidating cases, the preparation and filing of a plan of distribution in accordance with the absolute priority rule is not conditioned on the final resolution of any issues arising from the sale of the Debtors' broadcast television business. The proceeds of that sale, when completed, will simply be distributed to the Debtors' unsecured

creditors, because the Debtors have already voluntarily repaid virtually all of their other secured debt, in excess of $500 million, effectively leaving the unsecured creditors as the most interested and most affected party in connection with the resolution of these chapter 11 cases. The Debtors simply do not need another extension of exclusivity for their chapter 11 cases to be completed. Under these circumstances, and as more fully set forth below, the current exclusivity period should be allowed to terminate without any further extension.

8. Finally, the Debtors stated in their Motion that they are close to resolving certain outstanding employee-related issues, closing the sale of the broadcast television assets and intend to file a Plan shortly thereafter. The Debtors' failure to file a plan of reorganization that, as more fully described below is straightforward and uncomplicated, indicates that the Debtors do not have a plan that they are prepared to file.

## ARGUMENT

### I. THE FACTS OF THESE CHAPTER 11 CASES DO NOT WARRANT A FURTHER EXTENSION OF THE EXCLUSIVITY PERIODS.

9. The Debtors have not established -- and, in fact, cannot establish -- "cause" for such an extension. *See, e.g.*, In re Tony Downs Foods Co., 34 B.R. 405, 407 (Bankr. D. Minn. 1983) ("The burden of establishing cause for enlargement of the period of exclusivity within which to file a plan or reorganization rests upon the moving party."); In re Pine Run Trust, Inc., 67 B.R. 432, 434 (Bankr. E.D.Pa. 1986) (debtors bear burden of demonstrating "good cause" for extending exclusivity periods; extensions should not be granted routinely). The Debtors attempted showing of "cause" is limited to the allegations set forth in paragraphs 29 through 38 of the Extension Motion. As set forth in detail below, the allegations in these paragraphs fall well short of meeting the Debtors' burden under Section 1121(d) of the Bankruptcy Code. *See, e.g.*, In re Ravenna Industries, Inc., 20 B.R. 886, 889 (Bankr. N.D. Ohio 1982) ("the mere recitation of allegations deemed by a debtor to constitute cause for an extension of the exclusive period is insufficient to allow such an extension").

10. The Debtors rely on the four prong test articulated in In re Public Service Co. of New Hampshire, 88 B.R. 521, 537 as the basis for their request. Each of these prongs is addressed below. In summary, a proper reading of Public Service demonstrates additional exclusivity is not appropriate here. Furthermore, denying the Debtors further exclusivity is likely to benefit these estates' most important constituency: the creditors.

11. The first prong of the Public Service test requires consideration of the size and complexity of the Debtors business. The prepetition period or the petition date are not when the complexity of the case is measured under Public Service – complexity is measured at the time at which the extension of exclusivity is sought. Public Service, 521 B.R. at 538. The Debtors' business no longer retains the complexity it had at the start of the chapter 11 cases, and is, compared to Public Service, modest in size. The Debtors themselves note that upon the sale of the DBS business and the resolution of protracted litigation with DIRECTV that presented the greatest impediment to the success of that business, the Debtors effectively sold the entire company.

12. The upcoming sale of the broadcast television business, which comprises a small percentage of the Debtors' petition date value, already has a willing and likely successful bidder: the Debtors' parent, PCC. This bidder, or another buyer, will complete and execute the purchase of the assets regardless of which interested party files a plan for distributing the estates' cash and the proceeds of the estates' few remaining unliquidated assets. The purchaser, of course, is indifferent to the timing of the distribution of the proceeds of its acquisition. Creditors, of course, are not indifferent.

13. The second prong of the Public Service test examines the likelihood of a consensual plan if the debtor retains exclusivity. Because these cases require no more than a relatively simple plan of distribution that complies with the absolute priority rule, this prong of Public Service does not have direct application to the Debtors' request. In fact, because the path to the completion of these cases is straight and clear, there is little, if any risk, that lifting

exclusivity would result in the Court receiving multiple plans with widely divergent ideas for the Debtors' reorganization.

14. The third prong of the Public Service test – the existence of alternate plans which would not be considered if the debtors' exclusivity is extended - is not addressed by the Debtors. Given the posture of these cases, continuing exclusivity will not stifle the development of alternative structures for the Debtors' emergence. Not continuing exclusivity will, however, allow for the most rapid preparation, filing, dissemination and confirmation of a plan distributing the estates' assets. By definition, allowing all parties in interest an opportunity to pursue confirmation of the plan of distribution increases the likelihood such plan will be proposed and confirmed quickly. Speeding distributions to creditors and minimizing administrative expense should, at this juncture, be paramount.

15. The fourth prong of the Public Service test which looks to balance the rights of the debtors and its creditors is also not addressed by the Debtors. This fourth prong provides the most convincing reason to terminate the Debtors' exclusivity. The Debtors intend to liquidate. While the Debtors may file a plan of reorganization at the conclusion of this process, such a plan can provide only for the distribution of the estates' assets to creditors in accordance with their priority and not for the reorganization or rehabilitation of the Debtors' business operations. In fact, upon the consummation of the sale of the broadcast television assets, the Debtors will have disposed of all of their business operations. There is no business to rehabilitate. *See*, In re American Federation of Television and Radio Artists, 30 B.R. 772, 774 (Bankr. S.D.N.Y. 1983) (holding that the debtor's exclusivity periods should not be extended where "[t]he debtor has made no showing that it can successfully reorganize"); In re Perkins, 71 B.R. 294, 300 (W.D.Tenn. 1987) (upholding an extension of the debtor's exclusivity where, *inter alia*, there was a "reasonable probability that, through the plan, the debtor [could] be rehabilitated"). Under these circumstances, an extension of the Debtors' exclusivity is wholly unjustified. Cf. In re General Bearing Corporation, 136 B.R. 361, 365 (Bankr. S.D.N.Y. 1992) (holding that an extension of the debtor's exclusivity periods not warranted where debtor is

insolvent, has not been able to negotiate a restructuring acceptable to its primary secured creditor, has not demonstrated financial wherewithal to propose a confirmable Chapter 11 plan, and cannot show further delay will enhance its prospects). The Debtors' interest in retaining control of a liquidating company is immaterial to the economic interests of the estates' creditors. In fact, the remaining assets of the Debtors are the available cash proceeds of the sale of the DBS business and eventual proceeds of the sale of the broadcast business. The current available cash should be distributed to unsecured creditors as soon as possible since the Debtors have already voluntarily repaid their secured lenders in full from those proceeds. See the Debtors' Stipulation and Order Permitting Payment of Amounts to Senior Secured Lenders, Revolving Lenders and Junior Secured Lenders and Reserving Rights with Respect to Payment of Prepayment Premiums and Default Interest, dated September 17, 2004. The proceeds of the sale of the broadcast television business can be distributed accordingly, upon the realization of that sale, whenever that may be.

## II. GIVEN THE NATURE OF THIS CASE, THE DEBTORS HAVE HAD SUFFICIENT OPPORTUNITY TO PROPOSE A CONSENSUAL PLAN OF REORGANIZATION.

16. The Debtors completed the sale of the DBS assets in late August. At that time they had already contemplated the sale of the broadcast television assets to PCC. Nothing has changed in the three months since August.[2] The Debtors could have used those three months when they operated under their first extension of exclusivity to prepare and file a plan. The Debtors failed to use their continued exclusivity productively. It is now time to allow other interested parties to propose the plan.

[2] In fact, shortly after the sale of the DBS business, the Debtors filed their first Motion to Extend Exclusivity for Filing a Chapter 11 Plan and Disclosure Statement which presented the same "cause" for extending the Debtors' exclusivity as the current Extension Motion does. The Debtors have shown little or no progress with respect to the matters described therein, and present nothing in the Extension Motion to counter the likelihood of a similarly unproductive period of exclusivity now being requested from the Court.

## III. THE DEBTORS HAVE NOT DEMONSTRATED THAT MORE EXCLUSIVITY IS NECESSARY FOR NEGOTIATION OF A CONSENSUAL PLAN OF REORGANIZATION.

17. While claiming that they need additional time to prepare and file a plan of reorganization, the Debtors provide no evidence in the Extension Motion that the sale process is likely to facilitate a consensual plan of reorganization. In these cases, final resolution of any issues arising from the sale of the Debtors' broadcast television business will not alter the relative recoveries of the different creditor classes and any plan that is proposed will have to provide for distributions of the estates' assets in accordance with the absolute priority rule. The mere prospect or possibility that a plan proposed by the Debtors could be a consensual plan of reorganization is not sufficient "cause" for extending the Exclusivity Periods – a debtor must show that its plan will have a greater likelihood of consensual confirmation than a competing plan. As set forth above, only one type of plan can be confirmed in these cases. Accordingly, the risk of a non-consensual confirmation hearing is no greater if the Debtors do not receive another extension of their exclusivity.

## IV. ALLOWING THE EXCLUSIVITY PERIODS TO TERMINATE WILL FACILITATE THE RESOLUTION OF THE CHAPTER 11 CASE.

18. By allowing the Exclusivity Periods to terminate, this Court will open up the plan of reorganization process which will foster creditor democracy and expedite the resolution of the Chapter 11 case. *See, e.g.*, In re Crescent Beach Inn, Inc., 22 B.R. 155, 160 (Bankr. D. Me. 1982) quoting In re Kun, 15 B.R. 852, 853 (Bktcy. D. Ariz. 1981) (Sections 1121(c) and (d) of the Code are intended "to democratize the reorganization process."), In re Mother Hubbard, Inc., 152 B.R. 189, 196 (Bankr. W.D. Mich. 1993) ("Unless there exists some countervailing Code provisions or bankruptcy policy which mandates to the contrary, creditors should be allowed to propose and vote on a competing chapter 11 plan."); In re General Bearing Corp., 136 B.R. at 367 (refusing to extend the exclusivity periods and stating that "the playing

field should be leveled so that all the players, including the debtor, will now have an even chance in proposing a reorganization plan which might be acceptable to the creditors in this case.").

19. Once the Debtors' exclusivity has terminated, DK or any other party in interest may propose a plan of distribution that will quickly resolve the chapter 11 cases, or the Debtors may do so first. Allowing the Debtors' exclusivity to terminate will not prejudice or harm the Debtors -- they will still be allowed to formulate and propose their own plan and any competing plan must still satisfy the requirements of Section 1129 of the Bankruptcy Code in order to be confirmed. *See, e.g,* In re Tony Downs Foods Co., 34 B.R. at 408 (Section 1121 intended to allow debtor or creditors to file plan.).

20. The only question that surrounds a plan in these cases is when it will be proposed, not what type of plan it will be. The Bankruptcy Court has the power to make that determination, and should create an environment where such a plan can be quickly prepared, filed and accepted by the creditors, so that a speedy and efficient resolution of the Debtors' estates is obtained, for the benefit of the creditors' ultimate recoveries. *See., e.g.,* In re Sharon Steel Corporation, 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) (noting that the termination of the exclusivity periods may enhance the prospects of a successful reorganization "before it is too late").

## V. THE PENDENCY OF THE SALE OF THE BROADCAST TELEVISION ASSETS DOES NOT CONSTITUTE CAUSE FOR AN EXTENSION OF EXCLUSIVITY

21. The Debtors primarily rely on the pendency of the sale of the broadcast television assets to support extension of exclusivity. That argument stretches the "unresolved contingency" factor far beyond its intended scope. Courts have made clear that exclusivity extensions should not be granted simply because of the existence of some contingency in a debtor's future. See In re Southwest Oil Company of Jourdanton, Inc. 84 B.R. 448, 452 (Bankr. W.D. Tex. 1987); see also In re American Federation, 30 B.R. 772, 774 (Bankr. S.D.N.Y. 1983) (holding that the "pendency of an appeal from an adverse judgment does not constitute 'cause'

for an extension"); In re All Seasons Indus. Inc., 121 B.R 1002, 1005 (Bankr. N.D. Ind. 1990) (holding that pending district court litigation did "not appear to be critical to the debtor's efforts to propose a plan"); In re Dow Corning, 208 B.R. 661, 666 (Bankr. E.D. Mich. 1997) (holding that extension was unnecessary despite pendency of related bankruptcy litigation between debtor and creditors, as such a contingency was "more or less a risk of doing business in bankruptcy"); In re Parker Street Florist & Garden Center, Inc., 31 B.R. 206, 208 (Bankr. D. Mass. 1983) (holding that extension of exclusivity until hearing the results of a pending adversary hearing would "not [e]nsure Section 1121(d) procedural requirements were satisfied"). As one court reasoned, "[litigation] with creditors is not an unusual circumstance, and . . . [is] not in itself sufficient cause to justify an extension of the exclusivity period." See Southwest Oil, 84 B.R. at 452. Thus, the types of unresolved contingencies that are relevant to exclusivity extensions are those that (i) are external to the bankruptcy case itself, see Dow Corning, 208 B.R. at 666; (ii) are initiated by a party other than the debtor; see Southwest Oil, 84 B.R. at 453; and (iii) present significant or unusual circumstances that could impact the future viability of the debtor's enterprise; see In re Manville Forest Products Corp., 31 B.R. 991, 995 (S.D.N.Y. 1983)

22. The mere fact that the sale of the broadcast television assets may not be consummated before the expiration of the current exclusivity period does not constitute cause under Section 1121(d). The sale was initiated by the Debtors, is not external to this case, and does not in any way preclude the Debtors from negotiating a plan of reorganization with its primary creditors. Conveniently, the Debtors now argue that the sale involves complex issues that will take time to resolve before any progress toward reorganization can be made. The Debtor cannot have it both ways.

23. If the Debtors are genuine in their interest to bring this case to a prompt conclusion, they could have proposed a plan that takes into account the possible outcomes of the sale. While it now may be more convenient for the Debtors to know the outcome of the sale before devising its reorganization plan, that does not suffice to show cause for extending exclusivity.

## BACKGROUND

24. For the foregoing reasons, DK respectfully requests that this Court deny the Motion and terminate the Debtors' Exclusive Periods.

Dated: Portland, Maine
January 7, 2005

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CERTIFICATE OF SERVICE

Service of the above Objection to the Debtors' Motion for Extension of Exclusivity has been made through the Court's ECF system on all those registered to receive service through the ECF system.

date: 1/7/05 /s/John P. McVeigh