

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
Application of
Motorola Inc. and Teledesic, LLC
for Consent to Assignment of Authority to Launch
and Operate the Millennium Geostationary Fixed-
Satellite Service System
Request of
Teledesic LLC
for Exemption from the Cut-Off Rule for Pending
Applications for Authority to Launch and Operate
Geostationary and Non-Geostationary Fixed
Satellite Systems
File No. SAT-ASG-20010109-00005

DISCLOSURE ORDER AND ORDER ADOPTING PROTECTIVE ORDER

Adopted: September 24, 2001

Released: September 25, 2001

By the Deputy Chief, Satellite and Radiocommunication Division:

1. By letter dated June 7, 2001, the Chief of the International Bureau's Satellite Radiocommunication Division directed Motorola, Inc. and Teledesic LLC ("Applicants") to provide information relevant to issues raised in petitions to deny their application for consent for assignment of license and Teledesic LLC's associated request for exemption from the major-amendment cut-off rule. In particular, the letter instructed the Applicants to provide a complete description of all consideration received by Motorola from Teledesic LLC in exchange for options to acquire Motorola's license for a geostationary-orbit, Ka-Band satellite constellation and Motorola's pending applications for additional satellite licenses. The letter also directed the Applicants to provide copies of the pertinent contracts and detail Motorola's expenses incurred for prosecution of relevant applications and implementation of the license.

2. The Applicants filed a joint response on June 15, consisting of a letter providing the requested information and copies of thirteen contractual and corporate documents. The Applicants also filed a request for confidential treatment, asking that their response letter and nine of the thirteen attachments be withheld from public inspection. They stated that those documents contained business plans and other information of a kind that would not ordinarily be released to the public, including agreements specifying terms on which Motorola and Teledesic LLC were to collaborate on development of an integrated broadband satellite system and Motorola was to become Teledesic LLC's prime contractor for satellite construction. The Applicants contended that because the terms of the agreements with Motorola included concessions that would not normally be found in a satellite-construction contract, public disclosure of those terms would be "severely prejudicial" to Teledesic LLC in its efforts to negotiate a satellite construction contract to replace the since-cancelled construction contract with Motorola.

3. Hughes Communications, Inc., Pacific Century Group, Inc., Pegasus Development Corporation, TRW, Inc., @contact, Inc., and CAI Data Systems, Inc. (“Opponents”), who had previously filed petitions to deny the assignment application and/or the request for cut-off exemption, filed a Joint Opposition to the request for confidential treatment. They argued that the Applicants had failed to explain how competitive harm could result from disclosure of the information specifically requested in the staff’s letter of June 7 and therefore urged the Bureau to deny confidential treatment of such information. In the alternative, the Opponents requested that any relevant information found eligible for confidential treatment be disclosed to interested parties under a protective order.

4. In reply, the Applicants maintain that the issues raised in the petitions to deny could be resolved on the basis of information already available to the public and hence that the Opponents have no need to examine the documents in question. The Applicants therefore contend that they should not be required to disclose any of those documents to the Opponents, even under a protective order. In the alternative, the Applicants argue that if disclosure were to be compelled subject to a protective order, the protective order should include the following restrictions, among others: 1) access shall be limited to outside counsel for parties to the proceeding; 2) the Applicants may file an objection to any person’s request for access to the documents and will not be required to grant the request unless and until the Commission overrules the objection; 3) examination of the documents shall occur at the offices of Teledesic LLC’s outside counsel; 4) the Applicants may designate documents deemed especially sensitive as unavailable for copying, and no copy shall be made of any document so designated except by order of the Commission; 5) pleadings subsequently submitted by other parties for placement in the Commission’s public files shall be temporarily withheld from public scrutiny to afford an opportunity for Applicants’ counsel to ascertain whether all confidential information has been redacted and shall be further withheld pending resolution of any ensuing dispute over the sufficiency of redaction; 6) all documents disclosing confidential information, except copies of pleadings prepared for other parties, shall be handed over to the Applicants at the conclusion of the proceeding. The Applicants, accordingly, submitted a Proposed Protective Order including these provisions.

5. The Opponents argue against adopting any of the Applicants’ proposed restrictions. They stress that no such restrictions are included in the Model Protective Order that the Commission approved for routine use in its 1998 policy statement on treatment of confidential information¹ and contend that the Applicants have shown no justification for imposing the restrictions.

6. We do not agree with the Applicants that all material information is already disclosed in the public file. We, therefore, deny their request for nondisclosure to parties who have filed petitions to deny the license-assignment application and/or cut-off exemption. The Commission’s *Confidentiality Policy Statement* does not recognize any justification for denying petitioners to deny an application access to material submitted in support of the application. On the contrary, the Commission observed, in light of judicial precedent, that petitioners to deny “generally must be afforded access to all information submitted by licensees that bear upon their applications.”² We are therefore ordering the Applicants to disclose the documents in question to petitioners to deny, upon appropriate request.

7. The Commission indicated in the *Policy Statement*, however, that it would consider requests for protective orders limiting disclosure of material submitted in support of license applications.³ We are adopting such a protective order in this instance. The protective order is substantially identical to

¹ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998) (“*Confidentiality Policy Statement*”), Appendix C.

² *Id.*, ¶33 and n.109.

³ *Id.*, ¶34.

protective orders that have been adopted in recent merger proceedings⁴ and includes most of the provisions of the Applicants' Proposed Protective Order. We are not adopting the proposed provision limiting access solely to outside counsel, however, which might hamper effective advocacy. We know of only one instance in which this agency imposed such a restriction in a licensing proceeding, and the decision to include the restriction turned on unusual circumstances not present here.⁵ Instead, we are adopting the eligibility provisions typically included in merger-proceeding protective orders. These provisions will suffice to protect the Applicants' interests. We also decline to adopt proposed restrictions on retention of documents that have not been included in previously-adopted protective orders, as the Applicants have not shown justification for such extraordinary measures. We decline, moreover, to adopt the proposed requirement that unsealed pleadings be temporarily withheld from the public file. We are not convinced that such a procedure would produce any benefit justifying the consequent delay and administrative inconvenience. The available sanctions for violation of the protective order will suffice to ensure compliance with its redaction requirement.

8. Unless otherwise agreed or an objection is raised pursuant to paragraph 5 of the attached Protective Order, the Applicants shall afford access to protected material to outside counsel of record for any party to this proceeding within two business days of receiving an executed Declaration therefrom submitted pursuant to the provisions of that paragraph. Comments on protected material from petitioners to deny must be filed within thirty-five days of the release date of this order, and reply comments must be filed within five business days after the deadline for filing initial comments.

9. Counsel for the Applicants shall notify the Commission immediately of any event occurring prior to issuance of a final decision in this proceeding that moots any stated grounds for their request for confidentiality.

10. This order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Cassandra C. Thomas
Deputy Chief
Satellite and Radiocommunication Division
International Bureau

⁴ See *TCI Satellite Entertainment, Inc. and Primestar, Inc.*, 13 FCC Rcd 10927 (Int'l Bur. 1998); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp. to SBC Communications, Inc.*, 13 FCC Rcd 21,724 (CC Bur. 1998); *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, 15 FCC Rcd 6117 (Cable Bur. 2000); *Voicestream Wireless Corporation, Powertel, Inc., Transferors, and DeutscheTelekom AG, Transferee*, 15 FCC Rcd 24042 (2000); and *GE American Communications, Inc.*, DA 01-173 (rel. Jan. 25, 2001), 2000 WL 867953.

⁵ In that case, the Commission's Cable Services Bureau restricted access to outside counsel after inside counsel for some parties violated the original protective order. See *America Online and Time Warner, Inc.*, 15 FCC Rcd 20481 (2000).

ATTACHMENT A

Before the
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Satellite Systems
File No. SAT-ASG-20010109-00005

PROTECTIVE ORDER

1. On January 10, 2001, Motorola, Inc. and Teledesic LLC ("Applicants") filed an application for consent to assign Motorola's license for launch and operation of a satellite system at the 91° W.L., 87° W.L., 77° W.L. and 75° W.L. orbital locations (FCC File No. SAT-ASG-20010109-00005). In the same pleading, Teledesic also requested exemption from the "cut-off" rule, pursuant to Section 25.116(c)(2) of the Commission's rules, in the event that certain applications were to be amended to designate Teledesic as the applicant instead of Motorola. On June 7, 2001, the International Bureau ("Bureau") directed the Applicants to submit additional information deemed relevant to these matters. The Applicants responded to the Bureau's request on June 15, 2001, at which time they jointly requested that nine documents – their Joint Response to the Bureau's request and eight accompanying documents – be accorded confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4). The International Bureau enters this Protective Order for the purpose of facilitating and expediting review of the documents designated by the Applicants as confidential or proprietary and in order to avert harm to the Applicants' interests. This Protective Order does not constitute a determination as to whether any information is exempt from mandatory disclosure under the Freedom of Information Act ("FOIA") or otherwise.

2. Non-Disclosure of Stamped Confidential Documents. Except with the prior written consent of the Applicants, or as hereinafter provided under this Order, neither a Stamped Confidential Document nor the contents thereof may be disclosed by a reviewing party to any person. "Stamped Confidential Document" shall mean any document previously submitted to the Commission in compliance with the June 7, 2001 request that is marked "CONFIDENTIAL" and any copy of any such document that is prominently marked "CONFIDENTIAL – NOT FOR PUBLIC INSPECTION – SUBJECT TO PROTECTIVE ORDER IN FILE NO. SAT-ASG-20010109-00005" to signify that it contains information that the Applicants

contend is entitled to protection under the FOIA and the Commission's implementing rules, unless, on its own motion or in response to a petition, the Commission determines pursuant to Sections 0.459 or 0.461 of its rules that such document is not entitled to confidential treatment. For purposes of this Order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person.

3. *Permissible Disclosure.* Subject to the requirements of paragraph 4, Stamped Confidential Documents may be reviewed by outside counsel of record for the parties in this proceeding and also by such of their in-house counsel who are actively engaged in the conduct of this proceeding and are not involved in competitive decision-making. Counsel is deemed to be involved in competitive decision-making if counsel's activities, association, and relationship with a client include giving advice concerning, or participating in, any of the client's business decisions made in light of similar information about a competitor. Subject to the requirements of paragraph 4, such counsel may disclose Stamped Confidential Documents to: (i) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; (ii) Commission officials involved in this proceeding; (iii) outside consultants or experts retained for the purpose of assisting counsel in this proceeding who do not participate directly in the business decisions of any competitor of either of the Applicants or provide analysis underlying the business decisions of such competitor; (iv) employees of such counsel involved solely in organizing, filing, coding, converting, storing, and/or retrieving data or designing programs for handling data connected with this proceeding; and (v) employees of third-party contractors performing one or more of these functions under counsel's supervision.

4. *Duty to Limit Access and Ensure Compliance.* Persons described in paragraph 3 shall ensure that access to Stamped Confidential Documents is strictly limited as prescribed in this Order. Such persons shall further ensure that Stamped Confidential Documents are used only as provided in this Order and that Stamped Confidential Documents provided pursuant to paragraph 6 are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 7.

5. *Procedures for Obtaining Access to Confidential Documents.* Before reviewing or having access to Stamped Confidential Documents, anyone seeking such access shall execute the Declaration of Confidentiality in the form attached hereto as Appendix B. The executed Declaration shall be filed with the Commission and a copy thereof shall be provided to the Applicants so that it is received by them at least two business days before the Declarant reviews or obtains access to any Stamped Confidential Document. The Applicants may object to disclosure of Stamped Confidential Documents to any such Declarant, provided that they file the objection at the Commission and serve it on counsel representing, retaining, or employing that person within one business day after receiving the person's Declaration. Until such objection is resolved by the Commission or a court of competent jurisdiction, and unless the objection is resolved in favor of the party seeking access, persons subject to such an objection shall not have access to Stamped Confidential Documents. The Applicants shall allow eligible persons to examine the Stamped Confidential Documents at the offices of Teledesic LLC's outside counsel, Harris, Wiltshire & Grannis LLP, 1200 Eighteenth Street, N.W., Washington, D.C. 20036.

6. *Copying.* If, in the judgment of the Applicants, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such document, in any form, shall be made except as authorized by further order of the Commission. Application for relief from this restriction against copying may be made to the Commission with notice to counsel for the Applicants. On request, the Applicants shall provide, at cost, partial or complete copies of Stamped Confidential Documents not marked "Copying Prohibited" to persons reviewing them at the offices of Teledesic LLC's outside counsel pursuant to this Order. Alternatively, the Applicants shall provide, at cost, one complete set of the Stamped Confidential Documents not marked

“Copying Prohibited” to any party to this proceeding within two business days after receiving a request therefor from counsel of record for such party who has submitted an executed declaration. Anyone with custody of Stamped Confidential Documents provided pursuant to this Paragraph shall ensure that access thereto is strictly limited as required by this Order.

7. *Use of Confidential Information.*

(A) *In Filings in this Proceeding.* Persons who have reviewed Stamped Confidential Documents pursuant to this Order may, in documents they file in this proceeding, refer to information found in Stamped Confidential Documents or derived therefrom (hereinafter, “Confidential Information”) if they comply with the following procedure:

- i. Any portion of a pleading that contains or discloses Confidential Information must be physically segregated from the remainder of the pleading;
- ii. The portions disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;
- iii. Each page of any party's filing that discloses Confidential Information must be clearly marked “Information from Confidential Documents included pursuant to Protective Order, File No. SAT-ASG-20010109-00005”; and
- iv. The portions containing Confidential Information shall be served upon the Secretary of the Commission and the Applicants under seal and shall not be placed in the Commission’s public file. A party filing a pleading containing Confidential Information shall also file a copy of the pleading with the Confidential Information redacted, which shall be placed in the public file. Parties may file courtesy copies of pleadings containing Confidential Information to Commission staff under seal. Persons who are otherwise eligible under paragraph 3 and have signed a Declaration shall be entitled to review unredacted copies of pleadings containing Confidential Information.

(B) *In Other Documents Prepared for this Proceeding.* Notes, internal memoranda and other documents produced by a reviewing person that contain Confidential Information must be prominently marked “CONTAINS CONFIDENTIAL INFORMATION PROTECTED PURSUANT TO PROTECTIVE ORDER, File No. SAT-ASG-20010109-00005” and at the termination of the proceeding shall be dealt with in accordance with the provisions of paragraph 12.

8. *Requests for Additional Disclosure.* Requests for disclosure of Stamped Confidential Documents outside the terms of this Protective Order will be treated in accordance with Sections 0.442 or 0.461 of the Commission’s rules.

9. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by the Applicants of any privilege or entitlement to confidential treatment of such Confidential Information. Persons reviewing these materials pursuant to this Order agree that they shall not assert any such waiver and shall not use Confidential Information to seek disclosure in any other proceeding. Such persons also agree that accidental disclosure of Confidential Information by the Applicants shall not be deemed a waiver of any privilege or entitlement if the Applicants take prompt remedial action.

10. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of Stamped Confidential Documents or other Confidential Information that a person

has obtained under terms of this Protective Order, such person shall promptly notify the Applicants of the subpoena or order. Consistent with the independent authority of any such court or administrative agency, such notification must afford the Applicants a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document or other Confidential Information.

11. *Violations of Protective Order.* Persons obtaining access to Stamped Confidential Documents or Confidential Information under this Order shall use the information only for conduct of this proceeding and any subsequent judicial proceeding arising directly from this proceeding, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings. Should a party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that party shall immediately inform the Commission and the Applicants of the violation. Should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order.

12. *Termination of Proceeding.* The provisions of this Order shall not terminate at the conclusion of this proceeding. Unless otherwise ordered by the Commission or a court of competent jurisdiction, Stamped Confidential Documents and all copies thereof shall be returned to the Applicants within two weeks after conclusion of the proceeding, including any judicial review. No document containing Confidential Information may be retained by any person having access thereto, except that counsel to a party to this proceeding eligible to review such documents pursuant to Paragraph 3 may retain, under the continuing strictures of this Order, two copies of pleadings prepared on behalf of the party that contain Confidential Information. All counsel of record shall certify compliance herewith and shall deliver the certification to counsel for the Applicants not more than three weeks after conclusion of this proceeding.

13. *Effect of Protective Order.* This Protective Order is an order of the Commission and shall be an agreement between the reviewing persons executing a Declaration and the Applicants.

14. *Client Consultation.* Nothing in this order shall prevent counsel from rendering advice to their clients concerning to the conduct of this proceeding and any judicial proceeding arising therefrom, provided that in rendering such advice and otherwise communicating with clients counsel shall not disclose Confidential Documents or Confidential Information.

15. *Authority.* This Protective Order is issued pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i); Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and authority delegated under Section 0.261 of the Commission's rules and is effective upon adoption.

ATTACHMENT B

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Federal Communications Commission
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File No. SAT-ASG-20010109-00005

DECLARATION OF CONFIDENTIALITY

I have read the Protective Order in the above-captioned proceeding and acknowledge that I am bound by it. I will not disclose or use documents designated as Stamped Confidential Documents or Confidential Information obtained therefrom except as allowed by the Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or organization other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge that my access to any information obtained pursuant to the Order is due solely to my capacity as counsel or consultant to a party or other person described in paragraph 3 of the Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Order.

Executed at _____ this _____ day of _____, 2001.

Signature

Title

Employer

Address

Phone Number