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September 21, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Counter TW-A325
Washington, DC 20554

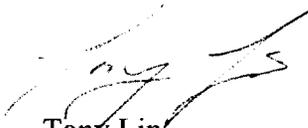
Re: **Written *Ex Parte* Reply of Pegasus Broadband Corporation
ET Docket No. 98-206, RM-9147, RM-9245, DA 99-494, DA 00-1841,
and DA 00-2134**

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, Pegasus Broadband Corporation, by its attorneys, hereby submits this letter and a copy of its September 21, 2000 written *ex parte* reply to the Chairman, Commissioners, and several members of the Commission staff. The reply requests that the Commission consider Pegasus' timely filed application in any proceeding to determine the grant of licenses to provide terrestrial service in the Ku band.

An original and twelve copies of this letter, the written reply, and the service list are submitted for inclusion in the public record. Please direct any questions concerning this submission to the undersigned.

Very truly yours,



Tony Lin
Counsel for Pegasus Broadband Corporation

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

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In the Matter of

Amendment of Parts 2 and 25 of the)	
Commission's Rules to Permit Operation)	
Of NGSO FSS Systems Co-Frequency with)	
GSO and Terrestrial Systems in the Ku-)	ET Docket No. 98-206
Band Frequency Range)	RM-9147
and)	RM-9245
Amendment of the Commission's Rules)	DA 99-494
To Authorize Subsidiary Terrestrial Use)	DA 00-1841
Of the 12.2-12.7 GHz Band by Direct)	DA 00-2134
Broadcast Satellite Licensees and Their)	
Affiliates)	

RESPONSE TO EX PARTE SUBMISSION OF
NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVEUSA

Kathryn R. Schmeltzer
Bruce D. Jacobs
Tony Lin
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037-1128
(202) 663-8000

Counsel for Pegasus Broadband Corporation

Dated: September 21, 2000

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**RESPONSE TO EX PARTE SUBMISSION OF
NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVEUSA**

Pegasus Broadband Corporation ("Pegasus"), by its attorneys, hereby submits this written response to the August 29, 2000 written *ex parte* submission ("Northpoint Submission") of Northpoint Technology, Ltd. and BroadwaveUSA (collectively, "Northpoint") in the above referenced proceedings. Northpoint brazenly urges the Commission to ignore Pegasus' mutually exclusive application and grant its own applications without a hearing or any further process. As discussed below, Northpoint has utterly failed to justify why its extraordinary request, which violates the Commission's rules, the Communications Act, as amended, and basic principles of due process, should be granted.

Discussion

Northpoint offers the following reasons for grant of its applications¹ without consideration of the mutually exclusive Pegasus Application:²

- the Pegasus Application was not timely filed within the cut-off window established explicitly for satellite operations in the Ku band;
- the SHVIA requires immediate final action on the Northpoint Applications;
- Northpoint's role in the spectrum allocation process entitles it to licenses to provide terrestrial service; and
- the public interest is served by the immediate grant of the Northpoint Applications without consideration of the Pegasus Application.³

As discussed below, none of these purported reasons is legally sound or sufficient to justify the extreme action proposed. Additionally, the Commission should not address the merits of the Northpoint Applications until it has determined whether Northpoint has violated the Commission's *ex parte* rules.

I. THE PEGASUS APPLICATION WAS TIMELY FILED

Even though the Pegasus Application⁴ proposes to use the Ku band to provide virtually identical services as the Northpoint Applications in the same geographic markets, Northpoint

¹ See *Broadwave Albany, L.L.C. et al., Application for License to Provide a New Terrestrial Transport Service in the 12.2-12.7 GHz Band* (filed Jan. 8, 1999) (collectively, "Northpoint Applications").

² See *PDC Broadband Corporation, Application for Licenses to Provide Terrestrial Services in the 12.2-12.7 GHz Band* (April 18, 2000) ("Pegasus Application").

³ See generally, *Northpoint Submission*.

contends there is no mutually exclusivity.⁵ Northpoint wishfully asserts that the SkyBridge Cut-Off Notice was the relevant cut-off for terrestrial applications in the Ku band, even though by its express terms the notice applied only to applications for certain satellite earth stations or space stations.⁶ Northpoint's creative reading of the SkyBridge Cut-Off Notice also ignores basic principles of the Communications Act, which require the Commission to provide public notice of an application deadline that clearly informs potentially interested parties of the approaching deadline and its scope.⁷ Because of the explicit language of the SkyBridge Cut-Off Notice, "a

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⁴ From a procedural standpoint, the Pegasus Application and waiver requests were placed on a public notice virtually identical to that of the Northpoint Applications. *See Public Notice*, DA 00-1841 (August 14, 2000); *Public Notice*, DA 99-494 (March 11, 1999).

⁵ *See Northpoint Submission*, at 7-8. Northpoint also suggests that they have resolved all mutual exclusivity issues with NGSO FSS and DBS operators. *See Northpoint Submission*, at 6, 11, and 13. However, a cursory review of recent *ex parte* filings by SkyBridge, DBS operators, and Northpoint itself indicates that such a statement is disingenuous at best. *See, e.g., Report of Interference Impact on DBS Systems from Northpoint Transmitter Operating at Oxon Hill, MD* (filed July 25, 2000) (Northpoint technology will cause unacceptable interference to DBS systems); *Letter to Magalie Salas from Northpoint Technology Ltd.* (filed July 11, 2000) (objecting to SkyBridge's spectrum sharing proposal); *Comments of SkyBridge L.L.C. on "Ex Parte Submission of Northpoint Technology, Ltd. and BroadwaveUSA"*, ET Docket No. 98-206, RM-9147, RM-9245, DA 00-1841 (filed September 18, 2000).

⁶ The Skybridge Cut-Off Notice states:

In this Public Notice the Bureau invites entities wishing to implement NGSO FSS systems in [certain frequencies] to do so by filing such requests Requests may take one of three forms: (1) application for a space station license; (2) application for an earth station license that will communicate with a non-U.S. licensed satellite; (3) letter of intent to use a non-U.S. licensed satellite to provide service in the United States.

FCC Public Notice: Cut-Off Established for Additional Applications and Letter of Intent in the 12.75-13.25 GHz, 13.75-14.5 GHz and 10.7-12.7 GHz Frequency Bands, Report No. SPB-141 (November 2, 1998) ("SkyBridge Cut-Off Notice).

⁷ *See McElroy Electronics Corporation v. FCC*, 86 F.3d 248 (D.C. Cir. 1996); *see also Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961) ("[T]he Commission may not ... give

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reasonably diligent interested party” would not have been “on notice that its rights were at stake.”⁸

II. THE SATELLITE HOME VIEWER IMPROVEMENT ACT DOES NOT MANDATE THAT THE COMMISSION IGNORE MUTUALLY EXCLUSIVE APPLICATIONS

The critical part of Section 2002 of the Satellite Home Viewer Improvement Act (“SHVIA”) provides that the Commission shall “make a determination regarding licenses or other authorizations for facilities that will utilize, for delivering local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets, spectrum otherwise used for commercial use.” Pub L. No. 106-113, 113 Stat. 1501, Appendix I, §2002. Assuming arguendo that the SHVIA requires a final determination on the Northpoint Applications, it does not require that the Commission ignore its own rules or basic notions of due process by granting the Northpoint Applications without proper consideration of other mutually exclusive applications. In fact, the legislative history indicates that Congress contemplated a competitive process for the right to provide service under Section 2002 of the SHVIA.

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public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut off by the public notice.”); *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“The dismissal of an application, we have held, is a sufficiently grave sanction to trigger this duty to provide clear notice.”) (citations omitted).

⁸ *McElroy*, at 257. Similarly, the Ku-band NPRM, which Northpoint relies on as evidence that the SkyBridge Application established a cut-off window for terrestrial applications, clearly identifies the notice as a cut-off only for competing satellite applications. *See Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku band Frequency Range, Notice of Proposed Rulemaking*, ET Docket No. 98-206, RM-9147, RM-9245, FCC 98-310, at 5 n.8 (November 24, 1998) (“Ku-band NPRM”).

In a hearing before the Subcommittee on Telecommunications, Trade and Consumer Protection, Congressman Tauzin, in addressing the President and CEO of Northpoint, noted:

Ms. Collier, if you are applying for use of this spectrum simply to complement the DBS signal with local channels, that may be one thing in terms of your not having to pay for that spectrum. But if you are going to use the DBS spectrum to fully compete against DBS, who has to pay for their spectrum, should not [you] be required to also bid in that spectrum or pay for it at the same rate as DBS? What I am asking is, if you become a full-blown competitor rather than a tie-in to the DBS competitor, is it fair for the FCC to allow you to use that spectrum without any charge? Is that fair competition? Well, I think you got my drift. We are concerned not only that we have competition, but that we have as much fair competition, so that all of you can compete for service and prices and terms on an equal basis for consumers' dollars.

Hearing before the Subcommittee on Telecommunications, Trade and Consumer Protection, Serial No. 106-6, at 99-100 (Feb. 24, 1999) (emphasis added).

III. NORTHPOINT'S ROLE IN THE SPECTRUM ALLOCATION PROCESS DOES NOT ENTITLE IT TO ANY LICENSE

Northpoint errs in claiming that its negotiations with NGSO satellite applicants justifies the exclusion of any other mutually exclusive application, including that of Pegasus.⁹

Participation in a rulemaking proceeding, including engaging in theoretical discussions about coordinating spectrum that is not yet even licensed, does not provide any procedural advantage to the participant in the subsequent licensing process. Whatever service rules are established through rulemaking and coordination will necessarily apply to all licensees.

⁹ On August 25, 2000 Satellite Receivers, Ltd. filed a similar terrestrial application and stated that its proposed services are mutually exclusive with that of Northpoint and Pegasus. *See Satellite Receivers, Ltd., Application for Licenses to Provide Terrestrial Television Broadcast and Data Services in the 12.2-12.7 GHz Band in Illinois, Indiana, Iowa, Michigan, Minnesota, and Wisconsin* (filed August 25, 2000).

In any event, those negotiations have been inconclusive, and there is nothing to suggest that the results of such negotiations would be limited to Northpoint.¹⁰ Similarly, while Northpoint claims that it has unique technology, it has completely failed to establish that its “technology,” which is nothing more than a directional transmitter, is a prerequisite to the provision of terrestrial service. *See Northpoint Submission*, at 12. Rather, if the Commission concludes that terrestrial service should be authorized to operate in the Ku band, it will adopt rules for protecting the other services that any and all licensees will be required to meet.

IV. THE PUBLIC INTEREST IS NOT SERVED BY DISREGARD OF MUTUALLY EXCLUSIVE APPLICATIONS

Northpoint provides an exhaustive list of public interest benefits in support of the immediate grant of its applications. Even assuming that such benefits are unique to Northpoint, which they assuredly are not, Northpoint ignores the fact that no alleged benefits are sufficient to warrant the arbitrary disregard of other mutually exclusive applications. A timely filed applicant has a fundamental right to fair consideration of its application under the Commission’s rules, the Communications Act, as amended, and basic principles of due process.¹¹

V. BEFORE ADDRESSING THE MERITS OF THE NORTHPOINT APPLICATIONS, THE COMMISSION SHOULD ASSESS NORTHPOINT’S FITNESS TO BE A COMMISSION LICENSEE

As Pegasus demonstrated in its *Petition to Dismiss or Deny*, Northpoint has repeatedly and intentionally engaged in *ex parte* presentations in violation of the Commission’s rules. *See generally, Petition to Dismiss or Deny*, DA 99-494 (filed August 21, 2000). Such actions jeopardize the integrity of the Commission’s decision-making processes and raises serious

¹⁰ *Letter to Magalie Salas from Northpoint Technology Ltd.* (filed July 11, 2000) (objecting to SkyBridge’s spectrum sharing proposal).

¹¹ *See e.g.*, 47 C.F.R. §101.45; 47 U.S.C. §309(j).

questions as to Northpoint's qualifications to be a Commission licensee. The severity and intensity of Northpoint's violations warrant Commission action on the matters raised in the Petition to Dismiss or Deny prior to assessing the merits of the Northpoint Applications.

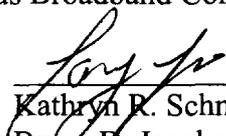
CONCLUSION

Wherefore, for the reasons stated above, Pegasus Broadband Corporation urges the Commission to deny Northpoint's request to grant promptly its applications and to take action otherwise consistent with the comments expressed above.

Respectfully submitted,

Pegasus Broadband Corporation

By


Kathryn R. Schmeltzer
Bruce D. Jacobs
Tony Lin

SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037-1128

Counsel for Pegasus Broadband Corporation

Dated: September 21, 2000

CERTIFICATE OF SERVICE

I, Angela Dortch, hereby certify that a copy of the foregoing Ex Parte Submission of Pegasus Broadband Corporation, this 21st day of September 2000, has been delivered via courier and first class U.S. mail (*) to the following:

Commissioner Susan Ness
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115H
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204C
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302C
Washington, DC 20554

Commissioner Harold Furchtgott-Ruth
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302C
Washington, DC 20554

Commissioner William Kennard
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201H
Washington, DC 20554

Kathryn C. Brown
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201E
Washington, DC 20554

Clinton Odom
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C458
Washington, DC 20554

Peter Tenhula
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204F
Washington, DC 20554

Adam Krinsky
Office of Commissioner Tristani
Federal Communications Commission
445 12th Street, S.W., Room 6-C767
Washington, DC 20554

Bryan Tramont
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Mark Schneider
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

Donald Abelson
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C750
Washington, DC 20554

James Burtle
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-A267
Washington, DC 20554

Kimberly Baum
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-B540
Washington, DC 20554

Robert Calaff
Wireless Telecommunications bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C300
Washington, DC 20554

Diane J. Cornell
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C220
Washington, DC 20554

Thomas Derenge
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-A222
Washington, DC 20554

Ari Fitzgerald
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201N
Washington, DC 20554

Bruce Franca
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-C153
Washington, DC 20554

Julie Garcia
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-B554
Washington, DC 20554

Jennifer Gilsean
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A520
Washington, DC 20554

Anna M. Gomez
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A324
Washington, DC 20554

Linda Haller
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C747
Washington, DC 20554

Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C255
Washington, DC 20554

Dale Hatfield
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-C155
Washington, DC 20554

Thomas Stanley
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C460
Washington, DC 20554

Thomas Sugrue
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C252
Washington, DC 20554

Douglas Young
Office of Engineering & Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-A123
Washington, DC 20554

D'Wana Terry
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C321
Washington, DC 20554

Thomas Tycz
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A665
Washington, DC 20554

Julius P. Knapp
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Geraldine Matisse
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Room 7-A123
Washington, DC 20554

Peter Pappas
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C746
Washington, DC 20554

Harold Ng
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A668
Washington, DC 20554

Roderick K. Porter
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-C752
Washington, DC 20554

Ronald T. Repasi
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 6-A505
Washington, DC 20554

Christopher Wright
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C755
Washington, DC 20554

Jane Halprin
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-A500
Washington, DC 20554

Daniel Harrold
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-A633
Washington, DC 20554

Joel Kaufman
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-A662
Washington, DC 20554

Mark Rubin
Office of the Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3C-300
Washington, DC 20554

John C. Quale *
David H. Pawlick
Cheryl L. Hudson
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Nathaniel J. Hardy*
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W. - Suite 200
Washington, D.C. 20036-3101

Gary M. Epstein *
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2505

Mark A. Grannis *
Harris, Wiltshire & Grannis LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036

Craig Holman *
Office of the Group Counsel
Space & Communications Group
P.O. Box 3999, M/S 84-10
Seattle, WA 98124-2499

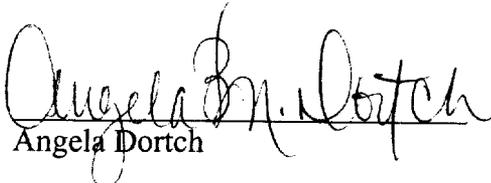
David K. Moskowitz *
Senior Vice President & General Counsel
EchoStar Communications Corporation
5701 South Santa Fe
Littleton, CO 80120

Raul R. Rodriguez *
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, N.W. – Suite 600
Washington, D.C. 20006

Joseph P. Markoski *
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-0407

Philip L. Malet *
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Phillip L. Spector *
Paul, Weiss, Rikfind, Wharton & Garrison
1615 L Street, N.W. – Suite 1300
Washington, DC 20036


Angela Dortch