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October 20, 2000

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Permitted Ex Parte Presentation of The Boeing Company
ET Docket No. 98-206; RM-9147; and RM-9245.**

Dear Ms. Salas:

The Boeing Company ("Boeing"), by its attorneys and pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, submits this permitted ex parte presentation to address the question whether the applications filed by affiliates of Northpoint Technology, Ltd. ("Northpoint") affiliates for terrestrial point-to-multipoint ("PTM") stations in the 12.2 -12.7 GHz frequency band ("Ku-band") are acceptable for filing and grant.¹ Boeing also responds to Northpoint's assertions that its proposed network can co-exist with non-geostationary orbit fixed-satellite service ("NGSO FSS") systems in the Ku-band. Northpoint's assertions on both matters cannot survive scrutiny, and should be rejected by the Commission.

The Applications of Northpoint's Affiliates Are Not Ready for Filing or Grant

Northpoint incorrectly asserts that the applications of its BroadwaveUSA affiliates should be accepted for filing and grant by the Commission. Such a demand by Northpoint amounts to a violation of established FCC procedures and of the Congressional mandate that mutually exclusive terrestrial applications be subject to competitive bidding procedures. Despite Northpoint's allegations to the contrary, nothing in the Satellite Home Viewers Improvement Act ("SHVIA") or

¹ See *Ex Parte Submission of Northpoint Technology, Ltd. and BroadwaveUSA* (Aug. 29, 2000) ("*Northpoint Ex Parte Submission*").

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in the ORBIT (Open-Market Reorganization for the Betterment of International Telecommunications”) Act permits Northpoint to violate established FCC procedures and Congressional auction requirements.

Northpoint has consistently confused the status of the Commission’s NPRM to facilitate NGSO FSS operations in the Ku-band and the status of Northpoint’s petition for rulemaking. In fact, these are two separate and distinct proceedings: the former addresses the authorization of NGSO FSS service and *how* that service should be regulated; the latter is a petition for rulemaking for an additional terrestrial service in the Ku-band and *whether that service should be authorized at all*.² The Commission has proposed a concrete regulatory regime facilitating the introduction of NGSO FSS services, and has opened these concrete proposals to public notice and comment. In contrast, the Commission found that it was “premature to make any proposals based on Northpoint’s petition at this time,”³ and merely requested additional information on the technical feasibility of sharing between NGSO FSS systems and terrestrial PTM networks in the Ku-band. Such a preliminary inquiry provides an insufficient basis to grant applications for new terrestrial systems in the Ku-band.

If the Commission does decide, based on the additional information it has received in this proceeding, that it may be possible to authorize an additional terrestrial service in the Ku-band (a decision which Boeing strongly opposes), then the appropriate next step is not to accept the applications of Northpoint’s affiliates for filing and grant, but rather to institute a Further Notice of Proposed Rulemaking (“FNPRM”) to examine the rules and regulations under which this additional terrestrial service will operate. Such a FNPRM is necessary to allow public notice and comment on the concrete rules that will govern the operations of additional terrestrial networks in the Ku-band. Boeing urges that any such FNPRM should propose strong technical limits on the transmissions of terrestrial PTM networks and minimum transmitter spacing requirements in order to reduce harmful interference to primary Ku-band users, such as NGSO FSS systems.

Acceptance and grant of the applications of Northpoint’s affiliates at this time would also violate Congress’ mandate that mutually exclusive terrestrial applications be resolved through competitive bidding. As part of the Balanced Budget Act of 1997, Congress amended Section 309(j) of the Communications Act to provide that, except for licenses for certain public safety noncommercial services and for certain digital television services and noncommercial educational or public broadcast stations, “the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . . if . . . mutually exclusive applications are

² This point is even recognized by an applicant proposing a terrestrial PTM network in the Ku-band. See *PDC Broadband Corporation, Opposition to Motion to Dismiss* at 7 (June 7, 2000).

³ *Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-band Frequency Range and Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, Notice of Proposed Rulemaking, 14 FCC Rcd 1131, 1180-81 (1998).

accepted for any initial license or construction permit.”⁴ Because the applications of Northpoint’s affiliates are mutually exclusive with applications filed by other entities seeking to provide terrestrial PTM service in the Ku-band, Northpoint is wrong to assert that its affiliated applications can be accepted for filing and grant at this time absent an auction process.

Although the Commission has not accepted any terrestrial PTM applications for filing and has not set a cut off date for such applications, it nevertheless appears certain that the applications of Northpoint’s affiliates will be mutually exclusive with the applications of other entities. For example, PDC Broadband Corporation (“PDC”) has filed an application to provide data, voice, and video services in the Ku-band using a terrestrial PTM network that would employ technology similar to that proposed by Northpoint.⁵ Even though Boeing takes no position at this time on the merits of the PDC application, PDC has flatly stated that its application and the applications of Northpoint’s affiliates are mutually exclusive.⁶

Northpoint does not deny PDC statements, but seeks to dismiss PDC’s application because it was filed outside of a supposed cut off date for Ku-band terrestrial PTM networks.⁷ Such an argument is inconsistent with the plain language of the Commission’s public notice, which establishes a cut off date only as regards to NGSO FSS systems.⁸ The notice makes no mention of terrestrial PTM networks, and does not provide sufficient notice of a cut off date for terrestrial PTM applicants. As a result, there appear to be mutually exclusive applications for terrestrial PTM networks in the Ku-band that preclude Northpoint’s assertion that its applications are acceptable for filing and grant, absent an auction.

Neither the SHVIA nor the ORBIT Act provides an exception to this result. Northpoint asserts that Section 2002(a) of the SHVIA mandates the immediate grant of the applications of its affiliates.⁹ Section 2002(a) directs the Commission to “make a determination” regarding “licenses or other authorizations for facilities” used by entities to distribute local television signals to direct

⁴ Balanced Budget Act of 1997, § 3002(a)(1), *codified at* 47 U.S.C. § 309(j).

⁵ See *PDC Broadband Corporation, Application for Licenses to Provide Terrestrial Services in the 12.2-12.7 GHz Band* (April 8, 2000).

⁶ See *Pegasus Broadband Corporation, Response to Ex Parte Submission of Northpoint Technology, Ltd. and BroadwaveUSA* at 1-2, 5 (Sep. 21, 2000).

⁷ See *Northpoint Ex Parte Submission* at 7; see also *Northpoint Technology, Ltd., Motion to Dismiss PDC Broadband Corporation Application to Provide Terrestrial Services in the 12.2-12.7 GHz Band* (May 23, 2000).

⁸ See *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 (Nov. 2, 1998). (inviting “competing NGSO FSS applications” to file requests for space station licenses, satellite earth station licenses, or letters of intent to use a non-U.S. licensed satellite to provide service in the United States).

⁹ See *Northpoint Ex Parte Submission* at 17-20.

broadcast satellite (“DBS”) subscribers in the 12.2-12.7 GHz band prior to the expiration of the one-year statutory period on November 29, 2000.¹⁰ Northpoint argues that the requirement “to make a decision” means that the Commission must grant its affiliates licenses prior to statutory deadline.¹¹ This argument is without merit.

First, such immediate grant of Northpoint’s applications would conflict with the Congressional requirement that mutually exclusive applications be resolved through competitive bidding processes. If Congress had intended Section 2002(a) to negate its competitive bidding requirements, it would have done so explicitly and clearly.¹² Accordingly, the Commission cannot ignore the Congressional competitive bidding requirement when determining what action, if any, to take on Northpoint’s petition and its affiliated applications. Second, Section 2002(a) simply calls for the FCC to make a “determination” regarding certain applications.¹³ The Commission can meet this requirement by simply dismissing all current terrestrial Ku-band applications and initiating an auction proceeding to grant licenses to terrestrial PTM networks. Such a course of action would be a “determination” consistent with the requirements of Section 2002(a), while at the same time would observe the mandate of Section 309(j).

The ORBIT Act does not shield Northpoint from the requirement to resolve mutually exclusive applications by auction. Congress enacted Section 647 of the ORBIT Act in order to provide an exemption for global satellite systems from the broad auction requirement of Section 309(j). Section 647 prohibits the use of auctions for “any spectrum used for global satellite

¹⁰ Pub. L. No. 106-113, 113 Stat. 1501, Appendix I, § 2002(a) (Nov. 29, 1999).

¹¹ See *Northpoint Ex Parte Submission* at 18-19.

¹² Furthermore, immediate grant of Northpoint’s license would violate Section 2002(b)(2) of the SHVIA, which directs the FCC to ensure that entities covered under Section 2002(a) do not cause harmful interference to the primary users of the Ku-band. This protection applies to both current and prospective primary users of the Ku-band. See *145 Cong. Rec.* at S15014 (daily ed. Nov. 19, 1999) (statement of Sen. Gorton, clarifying that “Section 2002(b)(2) requires the FCC to prevent harmful interference not only with those who have been designated as primary users on the date of enactment of this Act, but also with prospective primary users of the Ku-band.”); see also *Letter from Bruce A. Olcott, Counsel for The Boeing Company, to Magalie Roman Salas, Secretary, Federal Communications Commission* (Feb. 8, 2000). Because grant of Northpoint’s applications would cause harmful interference to primary users of the Ku-band, such as NGSO FSS systems, Section 2002(b)(2) prohibits the immediate grant of Northpoint’s applications in their current form.

¹³ Nothing in the portion of the Senate Report cited by Northpoint supports the claim that the Commission must immediately grant the applications of Northpoint’s affiliates, rather than follow the requirements of an auction procedure. See *Northpoint Ex Parte Submission* at 19. If Congress had intended to restrict the FCC’s discretion to either immediately granting or immediately denying the licenses at issue, it could have simply stated so in those exact terms. The fact that Congress did not do so, in either the Senate Report or the text of Section 2002(a), but instead used the phrase “make a determination,” indicates that Congress wished to preserve the FCC’s discretion to rely on its regulatory expertise in order to comply with necessary procedural and statutory requirements. In any case, the plain language of Section 2002(a), not the legislative history, is controlling.

communications services.”¹⁴ As acknowledged by Northpoint, the exemption of Section 647 reflects a Congressional decision that submitting satellite spectrum to auction could severely delay or prevent the implementation of global satellite systems.¹⁵ Northpoint, however, makes the unsupported and misrepresentative argument that the exemption of Section 647 extends to terrestrial networks that use the same frequencies as global satellite systems. As pointed out by other commentators, there is nothing in the legislative history of Section 647 that supports Northpoint’s far-fetched extension.¹⁶ Northpoint supports its misapplication of Section 647 by arguing that auctions for terrestrial services could result in the award of licenses to a bidder that cannot co-exist with NGSO FSS operators, and thus would hinder the development of global satellite systems contrary to the purpose of the ORBIT Act.¹⁷ However, such an outcome could be easily avoided by creating service rules for the auctioned service that impose strict technical limitations on terrestrial PTM networks in order to reduce – to the extent possible – harmful interference to global satellite systems.

Northpoint’s Terrestrial Network Will Cause Harmful Interference to NGSO FSS Systems

Despite its repeated assertions to the contrary, Northpoint has failed to demonstrate that its network can operate without causing substantial harmful interference to primary users of the Ku-band. Northpoint itself recognizes that its proposed terrestrial network would create “mitigation” or “exclusion zones” in which NGSO FSS systems would be unable to serve their customers.¹⁸ Analysis indicates that these exclusion zones would be of such a magnitude that NGSO FSS systems, such as Boeing’s, would be effectively precluded from serving any community where Northpoint operates.¹⁹ Although Northpoint claims that NGSO FSS systems can mitigate this

¹⁴ Pub. L. 106-180, § 647 (Mar. 17, 2000).

¹⁵ See *Northpoint Ex Parte Submission* at 17.

¹⁶ See *SkyBridge Comments on Northpoint Ex Parte Submission* at 10.

¹⁷ See *Northpoint Ex Parte Submission* at 17.

¹⁸ See, e.g., *Letter from David H. Pawlik, Counsel for Northpoint Technology, Ltd., to the Hon. William E. Kennard, Chairman, Federal Communications Commission* (July 6, 2000) (recognizing that Northpoint’s terrestrial network would create mitigation or exclusion zones in some portions of the 11.7-12.7 GHz band); *Letter from Antoinette Cook Bush, Counsel for Northpoint Technology, Ltd., to the Hon. William E. Kennard, Chairman, Federal Communications Commission* (Mar. 22, 2000) (acknowledging the fact that Northpoint’s terrestrial network would cause mitigation or exclusion zones for NGSO FSS systems, even while disputing the extent of such exclusion zones); *Comments of Northpoint Technology, Ltd.*, ET Docket No. 98-206, at 28 & Technical Annex at 32 (Mar. 2, 1999) (conceding that Northpoint’s exclusion or mitigation zones would result in the “loss of a significant portion of the service area” for certain NGSO FSS systems).

¹⁹ See, e.g., *Letter from Bruce A. Olcott, Counsel for The Boeing Company, to Magalie Roman Salas, Secretary, Federal Communications Commission* (May 1, 2000); *Letter from David A. Nall, Counsel for The Boeing Company, to Magalie Roman Salas, Federal Communications Commission* (Feb. 22, 2000); *Letter from Bruce A. Olcott, Counsel for The Boeing Company, to Magalie Roman Salas, Federal Communications Commission* (Feb. 21, 2000); *Letter from David A. Nall, Counsel for The Boeing Company, to Magalie Roman Salas, Federal Communications Commission* (Feb. 16,

harmful interference, Boeing has demonstrated that the mitigation techniques proposed by Northpoint will not work or are prohibitively expensive.²⁰

As a result, Northpoint appears to have abandoned its claim that its network will not cause harmful interference to NGSO FSS systems. Instead, Northpoint now merely states that its terrestrial network can “co-exist,” and is not mutually exclusive, with the NGSO FSS systems.²¹ To support this assertion, Northpoint cites ex parte letters from NGSO operators Virtual Geosatellite, LLC (“Virtual Geo”) and SkyBridge LLC (“SkyBridge”), which Northpoint claims demonstrate that NGSO FSS systems can co-exist with Northpoint.²² In fact, the cited letters do not support such a claim. SkyBridge has expressly denied that there is any agreement between SkyBridge and Northpoint on the ability to share spectrum in the Ku-band.²³ The “co-existence” proposed by Virtual Geo, on the other hand, is nothing less than a wholesale abandonment of NGSO FSS spectrum to Northpoint in the upper portion of the Ku-band. Although Northpoint has incorrectly claimed that Boeing supports such a segmentation plan,²⁴ Boeing has consistently argued that NGSO FSS systems will need to have unfettered access to the entire 11.7-12.7 GHz band in order to enable sharing between multiple NGSO FSS systems, to comply with technical constraints necessary to protect other Ku-band users from interference, and to ensure affordable rates to consumers.²⁵ The “co-existence” envisioned by Northpoint makes it impossible for NGSO FSS operators to meet these objectives.

... continued.

2000) (“Boeing Feb. 16 Ex Parte Letter”); Letter from Bruce A. Olcott, Counsel for The Boeing Company, to Magalie Roman Salas, Secretary, Federal Communications Commission (Feb. 8, 2000); Letter from Bruce A. Olcott, Counsel for The Boeing Company, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (Dec. 12, 1999); Consolidated Reply of The Boeing Company, File Nos. SAT-AMD-19980630-00056 S2241, et al. (Aug. 16, 1999); Reply Comments of The Boeing Company, ET Docket No. 98-206 (Apr. 4, 1999); Comments of The Boeing Company, ET Docket No. 98-206 (Mar. 2, 1999).

²⁰ See, e.g., Letter from Phillip M. Condit, Chairman & CEO, The Boeing Company, to the Hon. William E. Kennard, Chairman, Federal Communications Commission (Feb. 23, 2000); Boeing Feb. 16 Ex Parte Letter at 3-7.

²¹ Northpoint Ex Parte Submission at 2.

²² See *id.* at 6.

²³ See Comments of SkyBridge L.L.C. on “Ex Parte Submission of Northpoint Technology, Ltd. and BroadwaveUSA” at 9 (Sep. 18, 2000) (“SkyBridge Comments on Northpoint Ex Parte Submission”).

²⁴ See Letter from David H. Pawlik, Counsel for Northpoint Technology, Ltd., to the Hon. William E. Kennard, Chairman, Federal Communications Commission (July 11, 2000).

²⁵ See, e.g., Letter from David A. Nall, Counsel for The Boeing Company, to Magalie Roman Salas, Secretary, Federal Communications Commission (July 18, 2000); Letter from David A. Nall, Counsel to The Boeing Company, to Magalie Roman Salas, Secretary, Federal Communications Commission (June 1, 2000); Letter from Bruce A. Olcott, Counsel for The Boeing Company, to Magalie Roman Salas, Secretary, Federal Communications Commission (Mar. 30, 2000); Boeing Feb. 16 Ex Parte Letter at 6-7.

In sum, the ability of Boeing to implement the benefits of its NGSO FSS system is put in jeopardy by the inclusion of a terrestrial PTM network in spectrum that has been allocated for use by NGSO FSS systems. Boeing will use its NGSO FSS system to provide competition to existing telecommunications service providers and to introduce a wide range of new services that either have not, or cannot, be provided to consumers using existing satellite-based and terrestrial networks. As the Commission and members of Congress have recognized,²⁶ NGSO FSS systems such as Boeing's can bring substantial benefits to the American public and provide a significant opportunity for United States industry to lead in the development of broadband satellite communications services. The inclusion of a terrestrial PTM network, such as Northpoint's, in the 11.7-12.7 GHz band would be disastrous to the viability of Boeing's system and may preclude the implementation of NGSO FSS systems.

For all these reasons, Boeing respectfully urges the Commission to reject the incorrect assertions of Northpoint that its network can co-exist with Boeing's NGSO FSS system, and that the applications of Northpoint's affiliates are ready for immediate filing and grant. Even if the Commission elects to proceed with insertion of terrestrial PTM service in the Ku-band, FCC procedures and Congressional mandates prohibit the grant of Northpoint's applications. At the very least, notice and comment of proposed service rules for such a service must be provided, and Congressional auction requirements must be heeded.

In accordance with Section 1.1206 of the Commission Rules, an original and six copies of this presentation have been submitted for inclusion in the public record. Please do not hesitate to contact the undersigned if you have any questions regarding this presentation.

Respectfully submitted,



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²⁶ See, e.g., 145 Cong. Rec. at S15014 (statement of Sen. Gorton recognizing the "substantial benefits of emerging satellite technologies").

Ms. Magalie Roman Salas

October 20, 2000

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