

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

_____)
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-Band)
Frequency Range;)
)
Amendment of the Commission's Rules to)
Authorize Subsidiary Terrestrial Use of the)
12.2-12.7 GHz Band by Direct Broadcast)
Satellite Licensees and Their Affiliates; and)
)
Applications of Broadwave USA, PDC)
Broadband Corp., and Satellite Receivers,)
Ltd.. to Provide a Fixed Service in the 12.2-)
12.7 GHz Band)
_____)

ET Docket No. 98-206 ✓
RM-9147
RM 9245

To: The Commission

**COMMENTS OF THE
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL**

The Minority Media and Telecommunications Council ("MMTC") respectfully submits the following comments to the Commission's *Further Notice of Proposed Rulemaking*, FCC No. 00-418 (released December 8, 2000) ("*FNPRM*") in the above-referenced docket. MMTC addresses only whether the Commission should grant the applications of Northpoint Technology and its 69 Broadwave affiliates (collectively "Northpoint") for authority to provide multiple channels of video programming and high

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speed internet service using its wireless technology in the 12.2-12.7 GHz band, or whether it should instead subject Northpoint's licenses to auction.¹

MMTC believes that the Commission is bound both by Congressional mandate and common sense to reject auctions for licenses for Northpoint's proposed service in the 12.2-12.7 GHz band and to grant Northpoint's application to provide such a service. Northpoint is the only terrestrial applicant that is ready, willing and able to provide a competitive local broadband video and data service. The lower cost service that it proposes will increase broadband access for minorities and rural residents, and will increase the diversity of voices available to all citizens. Importantly, from MMTC's perspective, grant of Northpoint's applications will give an instant and important boost to minority ownership and employment in the media industry at a time when regulatory policies to promote such ownership and employment are out of favor.

INTRODUCTION AND SUMMARY

What constitutes the Commission's public interest mandate has long been a subject of debate. Since the passage of the Telecommunications Act of 1996 ("1996 Act") and subsequent legislation, however, it is beyond argument that Congress believes that this mandate includes:

- Facilitating competition in telecommunications and video programming, particularly on the local level; and
- Encouraging the *rapid* deployment of new broadband technologies, especially to unserved and underserved communities.

¹Founded in 1986, MMTC is a national organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media and telecommunications industries. MMTC is generally recognized as the nation's leading advocate for minority advancement in communications. MMTC participates in rulemaking proceedings, and monitors relevant legislation and public issues on behalf of its members. In addition, MMTC's association of volunteers, attorneys, engineers, entrepreneurs, broadcasters, cablecasters and scholars provide *pro bono* services to the civil rights community on telecommunications policy issues.

Northpoint's proposal to provide terrestrial video and data service in the 12.2-12.7 GHz band undoubtedly fosters both of these goals. Yet the Commission, after more than a two-year delay in deciding Northpoint's applications, is considering even further delay by proposing to auction the licenses to provide this service. This denies the public of the lower prices and increased choice that competition brings. It also is contrary to the public's First Amendment right to have access to the widest possible diversity of voices.

At its core, the 1996 Act was enacted to move the Commission away from a regulatory model where it protected incumbent service providers. The history books are full of attempts by incumbents to use government regulation or other anticompetitive means to delay or deny the onset of competitive services. Broadcasters convinced the FCC to place draconian regulations on cable TV in the 1970's and early 80's; used FCC processes to delay the onset of digital satellite radio; and convinced Congress to eviscerate low power radio. Similarly, the cable industry refused to provide the DBS industry access to cable programming at fair prices until Congress forced them to do so, and then tried to convince the FCC that DBS providers should be subjected to the full litany of cable regulations, even though the technology was still in its infancy. *See generally*, Comments of the National Cable Television Association in MM Docket 93-25, *Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992: DBS Public Interest Obligations*.

The Commission's proposal to auction the terrestrial licenses places another page in that tired history book. Once the victimized new kid on the block, the DBS industry has adopted the mantle of powerful incumbent and is seeking to use the Commission to forestall a less expensive, serious competitor. The Commission should just say "no" to this anticompetitive effort and permit Northpoint to commence service expeditiously.

The benefits of the Northpoint service are particularly important to the minority constituencies that MMTC represents. Minority communities are often the last to have access to affordable broadband services, but Northpoint will provide such an option. Equally as important, grant of the application would significantly increase minority and female ownership of telecommunications properties in the United States.

**THE COMMISSION SHOULD REJECT THE AUCTION PROPOSAL
AND GRANT NORTHPOINT'S WAIVER APPLICATIONS**

The Commission asks whether Northpoint's license applications should be accepted for filing and granted or whether the licenses should be subject to auction under 47 USC §309(j). *FNPRM* at ¶¶ 325-328. MMTC urges that because auctions would further delay low cost broadband video and data services to the public, and particularly to unserved and underserved communities, such auctions are contrary to specific Congressional mandates and the public interest.²

**A. Auctions Would Delay MVPD Competition and the Rapid Deployment of
Broadband Services in Violation of the Telecommunications Act of 1996.**

The 1996 Act radically altered the regulatory regime under which the Commission had operated for more than sixty years. During that time, the Commission both regulated incumbent monopolists and insulated them from competition. By contrast, the purpose of the 1996 Act was to:

promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Telecommunications Act of 1996, Pub.L. No. 04-104, 110 Stat 56 (1996), preamble.

Thus, the Commission was tasked with two core duties:

² MMTC concurs with Northpoint that Congress did not intend Section 309(j) to apply to a mere *technology* that simply uses already licensed spectrum to provide services. See Northpoint Comments at 5-11. To apply the auction statute thusly will deter innovation and efficient use of the spectrum.

- Promoting competition for the public benefit; and
- Encouraging the rapid deployment of new advanced technologies.

In doing so, Congress intended that the Commission refrain both from overregulating and from protecting incumbent service providers, as it had in the past.

It can scarcely be argued that Northpoint's service will not fulfill the goals of competition in the Multichannel Video Programming Distributor ("MVPD") market and rapid deployment of advanced broadband technologies. Yet urged on by incumbent DBS licensees, the Commission is considering auctioning the licenses for this new, innovative, terrestrial service. Such an auction will further postpone the onset of a service that has already been delayed by Commission inaction for over two years. Protectionism and procrastination of this type is completely contrary to the letter and the spirit of the 1996 Act and to the public interest in competition, universal access to new technologies and diversity of voices.

1. Northpoint's Service Will Bring Badly Needed MVPD Competition to Local Markets.

The Commission has recently documented that competition in the MVPD market, while growing somewhat at the national level, is virtually nonexistent at the *local* level. *See generally, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1 (released January 8, 2001) ("*2000 Competition Report*"). Of the over 33,000 community units served by cable operators nationwide, a mere 330, or just *one percent*, have been certified by the FCC as having a choice of more than one MVPD. *2000 Competition Report* at ¶138.

The result of this lack of competition is two-fold. First, viewers have fewer choices among MVPD providers. Second, prices for service are high. The Commission found that

where there was effective competition in local communities, incumbent cable providers lowered prices, added channels without charging more, improved customer service, and added new services such as interactive TV. *2000 Competition Report* at ¶9. But the Commission also found that overall cable prices increased faster than the rate of inflation from June 1999 to June 2000 because there is a lack of local competition. *Id.*³

Grant of Northpoint's applications would bring instant MVPD competition to all 210 DMAs in the United States. Because Northpoint's video and data services are less expensive, the effect on prices in American communities will be dramatic - - more choice for viewers and Internet users, and a reduction in prices offered both by Northpoint and by incumbent service providers.

The need for competition in the MVPD market has become more heightened in the past ten days. The D.C. Circuit's recent decision in *Time Warner Entertainment v. FCC*, No. 94-1035 slip op. (D.C. Cir. March 2, 2001), rejected as unconstitutional the two major structural safeguards constraining the cable monopoly. Thus, until the courts decide otherwise, promoting competition of the kind that Northpoint proposes is one of the few tools the Commission will have available to it to prevent monopolization of the MVPD market and to ensure the public's First Amendment right to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 US 1, 20 (1945).

³ According to the Commission, cable rates increased 4.8%, while the Consumer Price Index rose just 3.2%. *Id.*

2. *Northpoint's Service Will Help to Fulfill Congress' Mandate that Broadband Services Be Deployed Expeditiously, Particularly in Unserved and Underserved Urban and Rural Areas.*

While Congress made clear at the outset that one of the core goals of the 1996 Act was the "rapid deployment of new telecommunications technologies," it added two provisions to the Act to ensure that the Commission did not simply pay lip service to this goal.

The first provision, Section 706 of the 1996 Act, requires the Commission to:

encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 USC § 157 note.

"Advanced telecommunications capability" is defined

without regard to any transmission, media, or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

Id.

The concern with rapid deployment of new broadband technologies was especially acute in rural and underserved areas. For that reason, Congress also included a provision in the 1996 Act that established the Telecommunications Development Fund, which was intended, among other things, to "support universal service and promote delivery of telecommunications services to underserved rural and urban areas." 47 U.S.C. §614(a)(3).

The delays that auctions would produce would run contrary to the mandate of Section 706 of the Act, which requires both "regulatory forbearance" and measures that promote "competition in the *local* communications market." 47 U.S.C. §154 note (emphasis added).

These delays would also run contrary to Congress' express intent in 47 U.S.C. §614 to ensure universal access to underserved urban and rural communities.⁴

Northpoint has repeatedly demonstrated that it is ready, willing, and able to deploy advanced broadband video and data services expeditiously to every Designate Market Area ("DMA") in the United States, including those in underserved rural and urban areas. *See Ex Parte* Submission of Northpoint Technology, Ltd. and BroadwaveUSA (filed August 29, 2000) at 17. In fact, it has had the ability to serve many of these communities for over seven years. On the other hand, the two other applicants for a license in the 12.2-12.7 GHz band, having applied for a license 5 years after Northpoint introduced its technology, have not demonstrated that they have the technical ability to provide service. *See* PDC Broadband Corp. Application for Licenses to Provide Terrestrial Services in the 12.2-12.7 GHz Band (filed April 18, 2000); Satellite Receivers, Ltd. Application 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 April 25, 2000). The Commission should reject these thinly veiled attempts at delay.

B. Auctions Would Exacerbate the Commission's Failure to Meet A Statutory Deadline Intended to Ensure Access to Local Television Services in Unserved or Underserved Communities.

While the 1996 Act contained specific mandates to ensure that the Commission encouraged the rapid deployment of advanced telecommunications services, Congress recently passed the Rural Local Broadcast Signal Act (RLBSA), Pub L. No. 106-113,

⁴Given that many minorities reside in these areas, any Commission failure to expeditiously grant Northpoint's applications would also run afoul of the Commission's mandate to

make available, without discrimination on the basis of race, color, religion, national origin or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,...

47 U.S.C §151.

§1000(a)(9). [App.I, Title II], 113 Stat. 1501, 1536-1501A-544 (1999), to ensure that unserved and underserved communities had access to the most basic of services - local broadcast television.

In the RLBSA, Congress set a strict deadline for the FCC to complete certain actions to ensure local broadcast signal access to unserved and underserved communities. The Act states that

No later than one year after the date of the enactment of this Act, the Federal Communications Commission shall take all actions necessary to make a determination regarding licenses or other authorizations for facilities that will utilize, for delivering local broadcast station signals to satellite television subscribers in unserved and underserved local television markets, spectrum otherwise used for commercial use.

RLBSA §2002(a).

That deadline passed on November 29, 2000 without any Commission "determination regarding licenses or other authorizations for facilities" that use commercial spectrum to deliver satellite services to unserved and underserved communities. That the provision was intended to move the Commission to make a final determination (as opposed to commencing this rulemaking) on Northpoint's applications specifically is well documented in the legislative history. *E.g.*, 145 Cong. Rec. H11816-17 (daily ed. November 9, 1999) (statement of Rep. Markey); 145 Cong. Rec. S15023 (daily ed. November 19, 1999) (statement of Sen. Leahy); *see also* 145 Cong. Rec. S15016 (daily ed. November 19, 1999) (statement of Sen. Kerry). As a result, pursuant to the RLBSA, the Commission reported to Congress on January 1, 2001 that it had not met its statutory mandate. RLBSA §2002(c).

Apparently unashamed, the Commission is proposing to exacerbate its already unlawful delay through auctions. The policy result is that unserved and underserved

communities will continue to remain without local television service irrespective of the fact that there is a proposed licensee who is ready to provide that service today.

C. *Expeditious Grant of Northpoint's Application Would Otherwise Be in the Public Interest.*

That the grant of Northpoint's application to provide service in the 12.2-12.7 GHz band is in the public interest because it promotes competition and the deployment of advanced technologies, particularly in unserved and underserved communities, has been discussed in great detail at 7-9, *supra*.

But there are other important reasons why grant of Northpoint's application is in the public interest. Of greatest import to MMTC and its members is the fact that the majority of Northpoint's Broadwave affiliates are minority and female owned. Indeed, women and minorities are 80% of all participants in the 69 Broadwave local license applicant groups. Significantly, women and minorities control or have substantial equity participation in the large majority of the top media markets, including:

- Nine out of the top ten markets
- Eighteen out of the top twenty markets
- Twenty-three out of the top 30 markets⁵

The fact that Northpoint is dedicated to significant participation by minorities and women is particularly significant in this business and regulatory environment. A recent report released by the Department of Commerce revealed that minorities own just 1.9% of all commercial television stations, which represents a decrease from the year before. *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*,

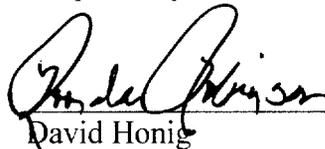
⁵ There is great diversity among these minorities as well. African Americans make up of 38% of all Northpoint participants in the local license applicant groups, Latinos make up 6%, Asian-Americans make up 4%, Native Americans make up 3.4% and women make up 32%.

National Telecommunications and Information Administration, United States Department of Commerce at 45-46 (December 2000). And the courts have made it clear that regulations to promote minority and female ownership and employment in media will not be well received in their chambers. *E.g., MD/DC/DE Broadcasters Association v. FCC*, No. 00-1094, slip op. (D.C. Cir. January 16, 2001). Grant of the Northpoint applications will further the important economic and diversity goals that minority ownership and employment can provide, but without the type of regulation that is currently disfavored.

CONCLUSION

Grant of the Northpoint applications will bring MVPD competition to local markets across the United States, increase access to broadband video and data services, especially for underserved communities, and provide a significant increase in minority and female ownership and employment in media. ***Auctions will do none of those things.*** The choice is clear - the Commission must grant the Northpoint applications without further delay.

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March 12, 2001

Certificate of Service

I, Joyce Isaacs, hereby certify that on this 12th day of March 2001, copies of the foregoing Comments of the Minority Media and Telecommunications Council was served via hand delivery and/or by first-class United States mail, postage prepaid, on the following:

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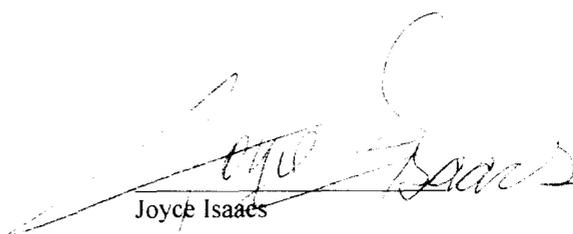
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