BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
In The Matter Of Amendment Of Parts Of	)	**ET Docket No. 98-206**
The Commission's Rules To Permit Operation	)	
Of NGSO FSS Systems Co-Frequency With	)	
GSOAnd Terrestrial Systems In The Ku Band	)	
Frequency Range	)	
	)	
To: The Commission	)	

Reply Comments of the National Rural Telecommunications Cooperative

1. The National Rural Telecommunications Cooperative ("NRTC") is pleased to submit these Reply Comments responsive to the comments filed in the above captioned proceeding.[1] NRTC urges the Commission to proceed cautiously in implementing the Multichannel Video and Data Distribution Service ("MVDDS") in the 12.2 – 12. 7 GHz band. As evidenced by the seven Petitions for Reconsideration currently pending in this proceeding, the viability of the MVDDS within the 12 GHz band is still subject to a host of questions.[2] In considering the introduction of MVDDS in this band, the interests of the millions of consumers currently receiving service from Direct Broadcast Satellite ("DBS") licensees operating on the same frequencies must remain paramount. Accordingly, prior to implementing a new MVDDS service in this band, the Commission must first resolve the interference and other issues that remain outstanding.[3]

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[1] See, *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;* ET Docket No. 98-206; FCC 00-418, Federal Register, Volume 66, Number 16, pgs. 7607-7613, (Released January 24, 2001) ("the Order").

[2] See, Petitions for Reconsideration have been filed by EchoStar Satellite Corporation, Hughes Communications, Inc., DIRECTV, Inc., SkyBridge L.L.C., Satellite Broadcasting and Communication Association, The Boeing Company, PanAmSat Corporation.

[3] Many of the parties filing Petitions for Reconsideration question whether three ubiquitous services (i.e. DBS, MVDDS, NGSO FSS) can in fact be safely deployed in the 12.2 – 12.7 GHz band. Additionally, DBS Petitioners (i.e. EchoStar, DIRECTV) maintain that harmful interference will in fact occur to DBS providers and consumers.

2. In the event that the Commission determines that MVDDS may be safely established as a new service, NRTC encourages the Commission to recognize the importance and public interest benefits of ensuring equal access to this spectrum for all interested parties. As described in its initial Comments in this proceeding, NRTC urges the Commission to open a Filing Window, accept competing applications and hold an auction before authorizing any licensees to provide terrestrial MVDDS service in the 12.2-12.7 GHz DBS band.[4]

3. Numerous parties filed Comments regarding the Order authorizing MVDDS operations within the DBS band. In response, NRTC will address the Comments filed by Northpoint Technology, Ltd. and Broadwave USA, Inc. (collectively "NorthPoint"), Pegasus Broadband Corporation ("Pegasus"), DIRECTV, Inc. ("DIRECTV"), AT&T Corporation ("AT&T"), the Satellite Broadcasting and Communications Association ("SBCA"), the Boeing Company ("Boeing") and Satellite Receivers, Ltd. ("SRL").

I. THE COMMISSION SHOULD OPEN A FILING WINDOW, ACCEPT COMPETING APPLICATIONS AND HOLD AN AUCTION.

4. Not surprisingly, Northpoint, Pegasus and SRL appear to be opposed to the opening of a new, unambiguous Filing Window. Neither the facts nor the law provide any reasonable support for their arguments. Of particular concern to NRTC are the arguments that: 1) only the three pending applications can be "valid;" 2) the ORBIT Act prohibits the auctioning of 12.2 – 12.7 GHz spectrum; and 3) Northpoint is entitled to some form of "Pioneer's Preference."

5. NRTC urges the Commission to see through each of these flawed arguments and acknowledge the strong consensus in the comments for establishing an unambiguous Filing

[4] See, *Comments of the National Rural Telecommunications Cooperative*, Docket No. 98-206, RM-9147, RM-9245; FCC 00-418 (Filed March 12, 2001).

Window, accepting competing applications and – if necessary – holding an auction. NRTC notes that even those parties *opposed* to the introduction of MVDDS in the 12.2 – 12.7 GHz band, urge the Commission to establish an unambiguous Filing Window should MVDDS ultimately be implemented.[5]

A. THERE ARE NO "VALID" APPLICATIONS ON FILE WITH THE COMMISSION.

6. Northpoint, Pegasus and SRL are incorrect in arguing that their pending applications are somehow "valid." No formal application filing processes have ever been established by the Commission for the MVDDS. Indeed, the MVDDS never existed until it was created by the Commission on January 24, 2001. No party is entitled to any special equities as a result of filing its application long before the Commission even created the service or established application processing requirements.

7. To maximize the public interest benefits of the MVDDS, the Commission should open an unambiguous Filing Window and conduct an auction so that *all* applicants have a full and fair opportunity to participate in the MVDDS and provide new and innovative services to the public. In that manner, all applications—not just the select few filed before any service was even authorized—can be processed in an even-handed, public and open manner, without prejudice or partiality.

1. A Plain Reading of the Public Notice Contradicts Any Claim of an Established and Unambiguous Filing Window.

[5] Boeing, DIRECTV and SBCA, while opposed to the introduction of the MVDDS into the 12.2 – 12.7 GHz band, support the establishment of an unambiguous Filing Window in the event that the Commission's decision is final.

8. Northpoint and the Joint Broadcasters make much of the Commission's 1999 Public Notice announcing a Filing Window for NGSO FSS applicants in the Ku-Band.[6] Northpoint maintains that, "the Ku-Band Public Notice was sufficient to put anyone wishing to use the band *for any reason* on notice that applications were then necessary."[7] Similarly, the Joint Broadcasters assert that the Ku-Band Public Notice "could not be clearer" in establishing a January 8, 1999 Filing Window for any party wishing to share spectrum in the 12.2 – 12. 7 GHz band.[8] Nothing could be further from the truth.

9. The Commission explicitly stated that the Ku-Band Public Notice, "establishes the cut-off date for additional *non-geostationary satellite orbit ("NGSO") fixed-satellite service ("FSS") systems* seeking to operate in the above frequencies."[9] It further established three categories for submitting applications: "(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."[10]

10. The Ku-Band Public Notice could not have been more explicit. Nowhere does it – as Northpoint claims – invite applications to "use the band for any reason." The only reasonable interpretation of the Ku-Band Public Notice is that it affords NGSO FSS applicants – falling into one of the three specific categories – an application deadline of January 8, 1999. Northpoint,

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[6] See, Public Notice, *International Bureau Satellite Policy Branch Information: Cut-off Established for Additional Applications and Letters of Intent in the 12.75 – 13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands*, Report No. SPB-141, 1998 WL 758449 (rel. Nov. 2, 1998) (hereinafter "Ku-Band Public Notice").

[7] See, Northpoint Comments, pg. 17 (emphasis added).

[8] See, Joint Broadcaster Comments, at 6.

[9] See, Public Notice, *International Bureau Satellite Policy Branch Information: Cut-off Established for Additional Applications and Letters of Intent in the 12.75 – 13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands*, Report No. SPB-141, 1998 WL 758449 (rel. Nov. 2, 1998) (emphasis added).

[10] Id. at 2.

SRL and Pegasus do not fall into any of these categories, and as such, their applications should be dismissed as premature and untimely.[11]

11. NRTC concurs with the comments filed by AT&T that "imposing cut-off dates by implication would have pernicious effects on the licensing process. Under such a regime, *every* service interested in spectrum subject to a cut-off notice would be required to file by the deadline or risk being shut out of an application processing round."[12] Further, potential applicants would be forced to do the impossible: foresee the existence of yet-to-be-developed technology in their application to provide a yet-to-be-established telecommunication services. Accordingly, the Commission should ignore the self-serving claims by Northpoint and others and establish a clear, unambiguous and fair Filing Window for all potential MVDDS applicants.

2. The Established Case Law Refutes Any Claim That a Valid Filing Window Was Created.

12. Even if one were to completely ignore the plain wording of the Ku-Band Public Notice, Northpoint's contention regarding the establishment of a valid Filing Window is completely refuted by established case law. As AT&T and DIRECTV note, any notice of a cut-off date must be "reasonably comprehensible to people of good faith."[13] Further, the courts have been explicit in their criteria for establishing any such cut-off date.

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[11] The Pegasus Application was filed with the Commission on April 18, 2000; SRL's Application was filed with the Commission on August 25, 2000

[12] See, AT&T Comments at 8.

[13] See, AT&T Comments at 4, citing, *McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996) (quoting *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993)); See Also, DIRECTV Comments at 33 – 34.

13. Specifically, the Commission, "may not . . . give public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut off by the public notice."[14] The Ku-Band Public Notice only advised interested NGSO FSS applicants of the pending cut-off date for specific types of applications and thus, other users (e.g. potential MVDDS applicants), were never placed "on notice that [their] rights were at stake."[15] In fact, such users could not possibly have been placed on such notice, since the MVDDS was not even in existence at the time of the public notice was released.

B. THE PROVISIONS OF THE ORBIT ACT DO NOT APPLY TO TERRESTRIAL APPLICATIONS.

14. Northpoint asserts in its Comments that because its technology shares the frequencies in the 12 GHz band that are used for satellite broadcasts, "the ORBIT Act's ban on competitive bidding should apply." They then go on to state that even if it were to be viewed as providing "domestic satellite service[]" the prohibition should still apply because "NGSO-FSS is indisputably an international satellite service."[16] Therein, however, lies the crux of the issue: Northpoint proposes a domestic, terrestrial service; the service is neither international in scope nor based – even remotely – on the use of satellite technology. No amount of linguistic manipulation and interpretive slight-of-hand will change that fact. Accordingly, the provisions of the ORBIT Act simply do not apply.

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[14] See, *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961); See Also, *McElroy Electronics Corporation v. FCC*, 886 F.3d 248 (D.C. Cir. 1996).

[15] *McElroy Electronics*, 886 F.3d at 257.

[16] See, Northpoint comments, at 16, citing to, the Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, § 3, 114 Stat. 48, 57 (2000) (codified at 47 U.S.C. § 765f) ("ORBIT Act").

15. Northpoint attempts to defend an untenable position by engaging in an overly broad reading of the statute. Specifically, Northpoint refers to Section 647 of the ORBIT Act.[17] However, even the most liberal reading of this section makes it clear that the prohibition applies only if the spectrum is being used for the provision of *international or global satellite communications services.* Northpoint's proposed use of the spectrum is neither of these things, and accordingly the ORBIT Act's limitations are not applicable here.

16. Northpoint also asserts that the ORBIT Act's ban on auctions of international satellite spectrum is absolute. Even if the ORBIT Act applied to Northpoint's proposed use of this spectrum, however, the referenced section of the Act has been interpreted as merely "advisory" in nature.[18] The section was viewed as interfering with "the President's constitutional authority to conduct the Nation's foreign affairs."[19]

17. Further, the President went on to state his, "understanding that section 647 does not limit the Federal Communications Commission from assigning, via competitive bidding, domestic satellite service licenses intended to cover only the United States." Thus, the Commission was given the broad authority to – at its discretion – auction domestic satellite spectrum. The Commission also appropriately determined that "the [ORBIT Act] does not prohibit the Commission from auctioning licenses for non-satellite services."[20] As such, the Commission is well within its bounds to auction the domestic, terrestrial use of the spectrum requested by Northpoint.

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[17] Id.

[18] See, *Statement on Signing the Open-Market Reorganization for the Betterment of International Telecommunications Act*, Administration of William J. Clinton, March 17, 2000.

[19] Id.

[20] The Order, at ¶326.

C. THE COMMISSION HAS BANNED THE TYPE OF PIONEER PREFERENCES REQUESTED BY NORTHPOINT.

18. Finally, Northpoint maintains that auctions are inappropriate where innovative new technology permits a new, shared use of already licensed spectrum. By auctioning the spectrum, Northpoint argues that the Commission would somehow be discouraging the development of new and innovative technologies and hindering spectrum efficiency.[21] In short, Northpoint is asking for restoration of the now defunct "Pioneer's Preference."

19. The FCC initiated the Pioneer's Preference rules in 1991 in an attempt to encourage the development of new offerings that "[would] lead to the establishment of a service not currently provided or a substantial enhancement of an existing service."[22] Examples of such enhancements included the "increased capacity in an existing service."[23]

20. The reward for the innovation – as Northpoint is seeking here – was the guarantee of a license in a limited area.[24] The distinction, however, was that in the Commission's original program, the "dispositive grant" would not preclude other entities from providing the service. Instead, it would provide the pioneering entity the advantage of initially applying for a license without facing immediate competition in a select area.[25] The preferential treatment simply created a two-track licensing process: on one track, the pioneering entity would have an advantage of implementing the technology or enhanced service much earlier in a particular

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[21] *Northpoint Comments*, at 7 – 11.

[22] Establishment of Procedures to Provide a Preference, GEN Docket No. 90-217, *Report and Order*, 6 FCC Rcd. 3488, at 3494 (1991), *recon. granted in part, Memorandum Opinion and Order,* 7 FCC Rcd 1808 (1992), *further recon. denied, Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993).

[23] *Id*. An applicant was also required to provide a "demonstration of the technical feasibility of the service or an experimental license" along with the preference request. 47 C.F.R. § 1.402(a).

[24] See, 6 FCC Rcd at 3495.

[25] *See, id.* at 3490.

location. On the second track: competing entities waiting for the Commission to grant their respective license applications in the remaining areas. Those parties on the second track arguably accrued no benefit nor suffered any harm, since the FCC merely required that they compete for licenses as they had always done.

21. The Pioneer's Preference rule was impossibly difficult to administer and was eventually discarded by both Congress and the Commission. The Commission's characterization of the burdens as "significant" was confirmed by the 3.5% success rate of requests: of the 140 applications for preferences only 5 were granted.[26] Accordingly, in 1994, Congress added a sunset provision to the Pioneer's Preference rules, that would have terminated the preference on September 30, 1998.[27] Congress moved up the expiration date to August 5, 1997, through the enactment of the Balanced Budget Act of 1997.[28] In response to the legislation, the Commission issued an Order terminating and dismissing all pending preference requests.[29]

22. At the time that these rules were still effective, the Commission never considered that the reward for innovation would be a monopoly. In fact, in establishing the preference, the FCC made it clear that its intention was to provide separate treatment to the pioneer, "while at the

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[26] *See* Dismissal of All Pending Pioneer's Preference Requests, *Report and Order*, 12 FCC Rcd. 14006 (1997). The recipients were Volunteers in Technical Assistance, *see Report and Order*, 8 FCC Rcd. 1812 (1993); Mobile Telecommunication Technologies Corporation, *see First Report and Order*, 8 FCC Rcd. 7162 (1993); and American Personal Communications, Cox Enterprises, Inc., and Omnipoint Communications, Inc., *see*, *Third Report and Order*, 9 FCC Rcd 1337 (1994).

[27] 47 USC § 309(j)(13(F) (1996).

[28] Public Law 105-33, 111 Stat. 259 (1997).

[29] *See* Note 4 *supra*, 12 FCC Rcd at 14006. Qualcomm Incorporated, which at the time of the 1997 Order had a pending preference request, filed a Petition for Reconsideration which was subsequently denied on the grounds that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." Dismissal of All Pending Pioneer's Preference Requests, ET Docket No. 93-266, 13 FCC Rcd 11485, at 11488 (1998) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, at 273 (1994).

same time not excluding others who also wished to provide the service."[30] Northpoint, however, is seeking not only to reintroduce a rule that has since been disbanded, but to reintroduce it in a manner that would effectively create a government sanctioned monopoly.

II. CONCLUSION.

23. The Commission should not authorize Northpoint or any other entity to provide terrestrial services in the DBS band without first providing all entities with a full, fair and open opportunity to submit competing applications. By establishing an unambiguous Filing Window, accepting competing applications and conducting an auction, the Commission will ensure that all applicants have an opportunity to participate in and pay for the use of this valuable spectrum. In that manner, the Commission will best promote the utilization and development of these frequencies throughout the country.

Respectfully Submitted,

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[30] *See* Note 1 *supra*, 6 FCC Rcd at 3494.

Attached: Certificate of Service

CERTIFICATE OF SERVICE

I, Tammy Hines, do hereby certify that copies of the foregoing **Reply Comments of the National Rural Telecommunications Cooperative** were sent, via electronic filing and First Class Mail (*), this 5th day of April, 2001, to the following:

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