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April 5, 2001

**Via Hand Delivery**

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

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APR 5 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: ET Docket No. 98-206  
RM-9147  
RM-9245

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding is a copy the National Association of Broadcasters' Reply Comments.

Respectfully submitted,

Henry J. Baumann  
Benjamin F.P. Ivins  
Ann W. Zuvekas

Counsel for the National Association  
Of Broadcasters

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

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APR 5 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of Parts 2 and 25 of the Commissions' )  
Rules to Permit Operation of NGSO FSS Systems )  
Co-Frequency with GSO and Terrestrial Systems in ) ET Docket No. 98-206  
The Ku-Band Frequency Range; ) RM-9147  
) RM-9245  
Amendment of the Commission's Rules to )  
Authorize Subsidiary Terrestrial Use of the )  
12.2-12.7 GHz Band by Direct Broadcast Satellite )  
Licenses and Their Affiliates; and )  
)  
Applications of Broadwave USA, )  
PDC Broadband Corporation, and )  
Satellite Receivers, Ltd. to Provide )  
A Fixed Service in the 12.2-12.7 GHz Band )

REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS

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April 5, 2001

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## EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) hereby files its reply comments in the above-referenced proceeding. Cable and DBS collectively control 95.4% of all multichannel video programming distribution (“MVPD”) subscribers. While cable and DBS basically built their industries by retransmitting broadcast signals through use of free or sub-market value compulsory licenses, both industries have fought tooth and nail against must carry, carry one carry all, retransmission consent, program exclusivity rules and virtually every other regulatory provision Congress or the FCC has considered to preserve the very free over-the-air broadcast system on which cable and DBS so heavily rely.

Now, like a breath of fresh air, comes Northpoint Technology, Ltd., and its local Broadwave affiliates (collectively, “Northpoint”). Northpoint too wants to retransmit broadcast signals. But it also appears willing voluntarily to undertake the full signal carriage and program exclusivity protection that its larger competitors have so steadfastly resisted. Assuming the fulfillment of these undertakings and that no unacceptable levels of interference will result from Northpoint’s operations, NAB supports its applications and request for a waiver of the rules. Prompt initiation of Northpoint’s plans could: 1) promote much needed competition in the MVPD marketplace to the benefit of both consumers and broadcast stations seeking full value for the retransmission of their signals; and 2) facilitate local into local carriage of all local television stations in the United States into their local markets, including those in rural markets. As a condition of Northpoint’s waiver, it should be required to carry both the analog and digital signals of broadcasters until TV set penetration reached the 85 percent necessary for broadcasters to return their analog portion of the spectrum for re-use, in order to best serve the public interest.

Should the Commission decide not to grant Northpoint's waiver request and proceed with initiating a new terrestrial fixed multichannel video distribution and data service ("MVDDS"), NAB urges that the full panoply of cable carriage, retransmission consent and program exclusivity rules also be applied to MVDDS.

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Satellite Receivers, Ltd. to Provide	)	
A Fixed Service in the 12.2-12.7 GHz Band	)	

TO: The Commission

**Reply Comments of the  
National Association of Broadcasters**

**I. INTRODUCTION**

The National Association of Broadcasters ("NAB")<sup>1</sup> hereby files its reply comments in the above-referenced proceeding. Cable and DBS collectively control 95.4% of all multichannel video programming distribution ("MVPD") subscribers, and "the market for delivery of video programming to households continues to be highly

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations and networks which serves and represents the American broadcast industry.

concentrated and characterized by substantial barriers to entry.”<sup>2</sup> While cable and DBS basically built their industries by retransmitting broadcast signals through use of free or sub-market value compulsory licenses, both industries have fought tooth and nail against must carry, carry one carry all, retransmission consent, program exclusivity rules and virtually every other regulatory provision Congress or the FCC has considered to preserve the very free over-the-air broadcast system on which cable and DBS so heavily rely.

Now, like a breath of fresh air, comes Northpoint Technology, Ltd., and its local Broadwave affiliates (collectively, “Northpoint”). Northpoint too wants to retransmit broadcast signals. But it also appears willing voluntarily to undertake the full signal carriage and program exclusivity protection that its larger competitors have so steadfastly resisted. Assuming the fulfillment of these undertakings and that no unacceptable levels of interference will result from Northpoint’s operations,<sup>3</sup> NAB supports its applications and request for a waiver of the rules. Prompt initiation of Northpoint’s plans could: 1) promote much needed competition in the MVPD marketplace to the benefit of both consumers and broadcast stations seeking full value for the retransmission of their signals; and 2) facilitate local into local carriage of all local television stations in the United States into their local markets, including those in rural markets.

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<sup>2</sup> Seventh Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, § 137 (rel. Jan. 8, 2001) (“*2000 Video Competition Report*”).

<sup>3</sup> While the Commission has concluded that Northpoint’s service will not cause harmful interference to those operating in the Broadcast Satellite Service (“BSS”), additional Congressionally mandated tests are currently under way. NAB has not sought to evaluate the evidence relating to the interference issue and presumes for purposes of these Comments that no unacceptable level of interference will be caused by Northpoint’s service.

Should the Commission decide not to grant Northpoint's waiver request and proceed with initiating a new terrestrial fixed multichannel video distribution and data service ("MVDDS"), NAB urges that the full panoply of cable carriage, retransmission consent and program exclusivity rules also be applied to MVDDS.

## **II. NORTHPOINT'S WAIVER REQUEST SHOULD BE GRANTED**

In its Comments, Northpoint makes a strong case that its waiver request should be granted, and that the Commission ought not to initiate a new MVDDS service in which costly and time consuming auctions would be used to decide among potentially competing applicants.

As Northpoint correctly observes, auctions could "postpone for many more years the delivery of local broadcast signals to rural users, and it would delay the emergence of new competitive alternatives to cable."<sup>4</sup> Such delay would be in derogation of the intent of Congress expressed in recently adopted legislation<sup>5</sup> that the Commission should expeditiously:

"take all actions necessary to complete the processing of applications for licenses or other authorizations for facilities that would provide services covered by the . . . [SHVIA] specifically to deliver multi-channel video services including all local broadcast television station signals and broadband services in unserved and underserved local television markets . . ."<sup>6</sup>

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<sup>4</sup> Comments of Northpoint Communications in ET Docket No. 98-206, filed March 12, 2001 ("Northpoint Comments") at 2.

<sup>5</sup> See Rural Local Broadcast Signal Act ("RLBSA"), Pub. L. No. 106-113 (1999); Launching Our Communities' Access to Local Television Act of 2000, Pub. L.

<sup>6</sup> See H.R. Conf. Rep. No. 1005, 106<sup>th</sup> Cong., 2d Sess, 307 (2000).

NAB shares Northpoint's concern that given the DBS industry's self-professed capacity limitations,<sup>7</sup> and announced business plans, many local television markets will be without local into local service from DBS carriers on January 1, 2002.<sup>8</sup> Northpoint asserts that it can provide DBS carriers with another, cheaper alternative for providing local into local service in all markets because its "technology can meet must carry requirements in all markets, and satellite operators could contract to use it to fulfill their own must carry obligations."<sup>9</sup> But, to meet the January 1, 2002, date by which Congress hoped local into local could be deployed widely, Northpoint must start deploying its system and implementing its business plan *now*. It simply cannot wait for the initiation of the whole new service, the promulgation of new rules for that service, and the market by market auction process the Commission has proposed.

Northpoint's goal of actually establishing a service that would provide local into local service to every station in every market by January 1, 2002 should be given every encouragement to pursue that goal and, at the very least, the Commission ought not to create any impediments to achieving it.

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<sup>7</sup> As the Commission is well aware, the DBS industry has challenged the constitutionality of Section 1008 of the SHVIA. At issue in that case are the bona fides of many of the claims by satellite carriers with respect to their present and future capacity to devote to the carriage of local stations into their market. Nothing in NAB's comments here are intended to concede the legitimacy of the DBS industry's capacity claims.

<sup>8</sup> The DBS firms currently serve about 35 to 40% of the 210 total DMAs in the United States.

<sup>9</sup> Northpoint Comments at 29.

A crucial element in NAB's support of Northpoint's application and waiver proposal is its commitment<sup>10</sup> *voluntarily* to assume all obligations imposed on cable operators relating to the retransmission of broadcast signals including, but not limited to, carriage, retransmission consent and program exclusivity rules.<sup>11</sup> Northpoint's laudatory voluntary undertaking of these obligations as part of its waiver request has distinct advantages over promulgating an entire new service under which the Commission then promulgates rules imposing these obligations. If experience teaches one lesson, it is that invariably some party will want to claim all of the advantages that such rules would provide in authorizing the retransmission of broadcast signals, while not wanting to assume any of the obligations the rules would impose, thereby resulting in yet another costly and protracted challenge to such rules. Any Commission grant of Northpoint's waiver petition should expressly be conditioned on its assuming such obligations.

In the context of the carriage of broadcasters' analog and digital signals during the transition of the former to the latter, Northpoint's responsibilities, generally speaking, should be the same as that of the cable industry, the satellite industry and the broadcast industry --- facilitate the American public's transition to digital television.

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<sup>10</sup> Northpoint Comments at 32 (“ . . . Northpoint is eager to assume [must carry obligations] in tailoring services to the individual communities its affiliates will serve.”); Statement of Sophia Collier, Northpoint's President & CEO, *Hearing Before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Comm. On Commerce*, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. 50 (1999) (“We will comply with full must-carry and retransmission consent in the very same manner as the cable companies do.”); Northpoint August 24, 2000, Ex Parte Submission at 22 (“Northpoint's Broadwave affiliates are committed to carry all local broadcast television channels from the first day of operation even in smaller markets.”).

<sup>11</sup> See 47 CFR § 76.51-76.70; 76.92-76.163.

As with analog television, digital broadcasting is an advertising supported medium which depends on access to a mass audience to survive. Currently MVPDs reach 83.8% of all television households.<sup>12</sup> Consumers must be guaranteed that, regardless of which programming provider they choose, they will be able to receive *all* free programming that local broadcasters provide.

Further, the scheme the FCC has adopted for the DTV transition is one premised on broadcast signals being available to consumers *as an incentive* for consumers to purchase DTV sets. To this end, the Commission required an early and mandatory DTV build-out schedule for affiliates of the top thirty television markets (to seed and start the transition), followed by the mandatory DTV build-out by all stations.<sup>13</sup> To date, over 185 stations are currently broadcasting in digital, with 65 stations ahead of their May 1, 2002 build-out deadline.

But the future of free over-the-air television hinges on more than the broadcasters' aggressive build-out schedule. Today there are 225 million analog TV sets in America, 100 million TV households, and 1600 TV stations. With only approximately 26,000 digital receivers presently in consumers' homes, the transition to digital television is in its infancy. The key to a successful transition is rapid consumer adoption of digital technology. And to ensure this adoption, consumers must have the confidence that the digital receivers and set top boxes they purchase will give them uninterrupted access to the free over-the-air programming broadcasters provide.

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<sup>12</sup> *2000 Video Competition Report* at ¶ 137.

<sup>13</sup> *See* Fifth Report and Order in MM Docket No. 870268, 12 FCC Rcd. 12809, 12840-41 (1997).

Accordingly, as a condition of Northpoint's waiver, it should be required to carry both the analog and digital signals of broadcasters until TV set penetration reaches the 85 percent necessary for broadcasters to return their analog portion of the spectrum for re-use, in order to best serve the public interest.

**III. ANY NEW RULES FOR A MVDDS SERVICE SHOULD INCLUDE THE FULL PANOPLY OF RETRANSMISSION CONSENT, SIGNAL CARRIAGE AND PROGRAM EXCLUSIVITY RULES**

For the reasons set forth above, the Commission should not proceed with commencement of a new MVDDS service and should terminate its rulemaking proceeding. Should the Commission nevertheless proceed with its rulemaking, it should apply the full panoply of retransmission consent, signal carriage, and program exclusivity rules to the MVDDS service.

**A. Retransmission Consent.**

With respect to retransmission consent, the Commission's Notice appears to suggest there is some question or Commission discretion as to whether retransmission consent should be applied to MVDDS.<sup>14</sup> There is no such discretion. It is clear that retransmission consent is mandated by the Communications Act. Section 325(b) of the Act states that "[n]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcaster" without its consent. A multichannel video programming distributor is defined as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite

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<sup>14</sup> *Notice* at ¶ 292.

service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.”<sup>15</sup>

Without question, any MVDDS operator that “makes available for purchase, by subscribers or customers, multiple channels of video programming” while retransmitting broadcast signals falls within the definition of a multichannel video program distributor and, statutorily, would be subject to retransmission consent.

### **B. Signal Carriage.**

While there is no statutory requirement that the Commission impose rules requiring MVDDS operators to carry all local television stations to every subscriber within each local service area in which they chose to do business, there are sound competitive and public policy reasons why the Commission should adopt such rules. These reasons have been succinctly and repeatedly articulated by Congress in adopting carriage rules for cable and satellite, and are equally applicable here. They include: 1) protecting and fostering localism and the system of free over-the-air broadcasting for those not served by MVPDs; 2) protecting widespread dissemination of information from a multiplicity of sources; 3) preserving the status quo of intramarket competition among stations in a market that would be upset if MVDDS operators were permitted to “cherry pick” some signals while denying carriage to others; 4) providing a regulatory level playing field among MVPDs. The following excerpt from the Conference Committee Report to the Satellite Home Viewer Improvement Act (SHVIA) encapsulates these on the rationales for carriage rules:

“In passing this legislation, the Conference Committee was guided by several principles. First, the Conference Committee believes that

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<sup>15</sup> See 47 USC §522(13).

promotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.

Second, the Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations . . .

The proposed provisions are intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources. The Supreme Court has found both to be substantial interests, unrelated to the suppression of free expression. [cite omitted] Providing the proposed license on a market-by-market basis furthers both goals by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage. [cite omitted]

The proposed licenses place satellite carrier in a comparable position to cable systems, competing for the same customers. Applying a must-carry rule in markets which satellite carriers choose to serve benefits consumers and enhances competition with cable by allowing consumers the same range of choice in local programming they receive through cable service . . . The Congress' interest in maintaining free over-the-air television will be undermined if local broadcasters are prevented from reaching viewers by either cable or satellite distribution systems. The Congress' preference for must-carry obligations has already been proven effective, as attested by the appearance of several emerging networks, which often serve underserved market segments. There are no narrower alternatives that would achieve the Congress' goals."<sup>16</sup>

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<sup>16</sup> H.R. Conf. Rep. No. 106-464 at 92, 101 (1999).

NAB strongly urges the Commission, in promulgating rules for any new MVDDS service, to assure that it not hinder Congress' goals of preserving free over-the-air broadcasting.

Small and independent broadcasters without carriage will be left with only their NTSC audience-produced revenue to support both their analog and digital operations and serve the debt on their DTV construction loans for the entire length of the transition. Without carriage by MVPDs including MVDDS, the vigor and existence of local broadcasting, will be at risk.

### **C. Program Exclusivity.**

NAB strongly urges the application of program exclusivity rules such as network nonduplication, syndicated exclusivity, and sports blackout rules<sup>17</sup> to any new MVDDS service.

The success and viability of the U.S. television broadcasting system exists as a result of the partnership between national networks, program syndicators and local television stations. Under this system, local TV stations in markets large and small provide a combination of national TV programming, syndicated programs and local news, weather and public affairs programming.

The continued vitality of this systems depends on local stations enjoying a substantial degree of exclusivity in providing network and syndicated programming to local viewers. Local stations make most of their revenues by selling advertising time during popular network and syndicated programs. During these same programs, local

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<sup>17</sup> See 47 C.F.R. §§ 76.92-76.163; 76.67.

stations run promotional spots designed to attract viewers to local news programs. These spots are a key way that stations build audiences for their news programs.

Protection of stations from importation of duplicative programming into their markets is thoroughly woven into the fabric of our legal system. Since the 1960s, for example, the Commission has adopted and enforced network nonduplication, syndicated exclusivity, and sports blackout rules that bar cable systems from importing duplicative programming from distant stations. Congress acknowledged and supported these rules when it created the cable compulsory license in 1976, and reaffirmed its strong support of those rules in the Telecommunications Act of 1996.

When satellite television appeared on the scene, Congress created a similar set of rules in 1988 to protect the network/affiliate relationship. Congress reaffirmed those rules in 1999 in the Satellite Home Viewer Improvement Act (SHVIA), and directed the Commission to apply syndicated exclusivity and sports blackout rules to satellite carriers as well. Specifically, Congress stated:

“In this context, the broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliate agreements. The licenses granted in this legislation attempt to hew as closely to those arrangements as possible . . . Allowing the importation of distant or out-of-market network stations in derogation of the local stations’ exclusive right – bought and paid for in market-negotiated arrangements – to show the works in question undermines those market arrangements.<sup>18</sup>

U.S. broadcasters have spent years and millions of dollars in litigation against the satellite industry protecting and enforcing laws and regulations designed to protect local stations from incursions by satellite delivered distant signals violating local stations’

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<sup>18</sup> H.R. Conf. Rep. No. 106-464, at 92-93 (1999).

rights to program exclusivity in their markets. Arguments raised against these efforts were that business plans and models had been built in reliance (albeit illegally) on the delivery of distant signals, and subscribers had grown accustomed to viewing them. These harsh and expensive mistakes of the past must not be repeated. False expectations concerning the delivery of distant signals in local markets should not be permitted to sprout either in any MVDDS provider's business plan or in the mind of its subscribers.

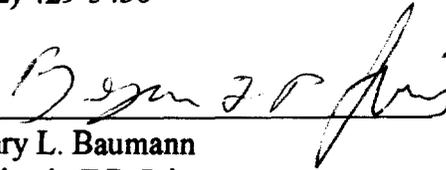
#### **IV. CONCLUSION**

For the reasons set forth herein, NAB urges the Commission to grant Northpoint's license applications and waiver requests conditioned on its compliance with retransmission consent, full signal carriage, and program exclusivity protections.

Should the Commission decide not to grant Northpoint's waiver request and proceed with initiating a new terrestrial fixed multichannel video distribution and data service ("MVDDS"), NAB urges that the full panoply of cable carriage, retransmission consent and program exclusivity rules also be applied to MVDDS.

Respectfully submitted,

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Henry L. Baumann  
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March 27, 2001

## CERTIFICATE OF SERVICE

I, Angela L. Barber, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 5<sup>th</sup> day of April , 2001, by first-class mail, postage prepaid, to the following:

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