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April 10, 2001

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W., The Portals  
TW-A325  
Washington, D.C. 20554

RE: ET Docket No. 98-206/RM-9147; RM-9245;  
DA 99-494; DA 00-1841; DA 00-2134  
Applications of Broadwave Albany, L.L.C. et al., PDC  
Broadband Corporation, and Satellite Receivers, Ltd. to  
Provide a Fixed Service in the 12.2-12.7 GHz Band  
Ex-Parte Submission of Northpoint Technology, Ltd.

Dear Ms. Salas:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is written to notify you that, on April 9, 2001, Sophia Collier and Antoinette Cook Bush of Northpoint Technology, Ltd. ("Northpoint") and the undersigned met with Kathleen O'Brien Ham, Deputy Chief, Wireless Telecommunications Bureau ("WTB") and Jennifer Burton, Diane Conley, Nese Guendelsberger, Ramona Melson and Jamison Prime of the WTB. Northpoint discussed its Petition for Partial Reconsideration of the WTB's order, released January 17, 2001, regarding compliance with the *ex parte* rules of the Federal Communications Commission ("FCC"). Specifically, Northpoint stated that:

1. No admonishment was necessary because Northpoint's interpretation of the WTB's public notice was reasonable.
2. A number of other parties also did not include the DA number on all of their *ex parte* filings. Accordingly, if Northpoint is admonished, such other parties should be admonished as well.

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Ms. Magalie Roman Salas  
April 10, 2001  
Page 2

3. A party cannot file *ex parte* notices electronically using a DA number nor can a party search the WTB's electronic database pursuant to a DA number.
4. The FCC has sanctioned serious violations of its rules with only an admonishment. Accordingly, admonishing Northpoint for its reasonable interpretation of the WTB's public notice is inequitable.

Northpoint also advised the WTB staff that Pegasus Broadband Corporation provided the MITRE Corporation with certain documents, but has failed to file copies of such documents with the FCC or provide copies of such documents to Northpoint, as required by the FCC's *ex parte* rules.

Northpoint provided the WTB staff with (i) a copy of its Petition for Partial Reconsideration and, specifically, a copy of page 3 of such pleading; (ii) a copy of the FCC's decision regarding a violation of the protective order in the AOL Time Warner proceeding; (iii) a copy of its April 2, 2001 *ex parte* filing; (iv) of copy of its April 3, 2001 *ex parte* filing; and (v) a copy of the March 23, 2001 letter from Rebecca Dorch, Deputy Chief, Office of Engineering and Technology. Copies of the foregoing also are attached hereto.

An original and twelve (12) copies of this letter and the attachments hereto are submitted for inclusion in the public record for the above-captioned proceedings. Please direct any questions regarding this matter to the undersigned.

Sincerely,

A handwritten signature in black ink that reads "Stacy R. Robinson" followed by a stylized flourish that appears to be "DWR".

Stacy R. Robinson  
Counsel for Northpoint Technology, Ltd.

Enclosures

cc: Kathleen O'Brien Ham, Deputy Chief, WTB  
Jennifer Burton, WTB  
Diane Conley, WTB  
Nese Guendelsberger, WTB  
Ramona Melson, WTB  
Jamison Prime, WTB  
Shellie Blakeney, WTB  
International Transcription Services, Inc.

*Before the*  
**Federal Communications Commission**  
*Washington, D.C. 20554*

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**FEB 16 2001**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )  
 )  
Broadwave Albany, L.L.C. *et. al.* )  
Applications for Licenses to Provide )  
Terrestrial Services in the 12.2 - 12.7 GHz Band )  
 )  
To: Wireless Telecommunications Bureau )

**PETITION OF  
NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVEUSA  
FOR PARTIAL RECONSIDERATION**

Northpoint Technology, Ltd. and BroadwaveUSA for itself and on behalf of the Broadwave Affiliates (collectively herein, "Northpoint"), pursuant to Section 1.106 of the rules of the Federal Communications Commission (the "Commission"), 47 C.F.R. §1.106, respectfully submit this petition for partial reconsideration of the Memorandum Opinion and Order in the above-captioned proceeding.<sup>1</sup>

**I. Background**

On January 8, 1999, the Broadwave Affiliates submitted applications for licenses to provide terrestrial services in the 12.2-12.7 GHz band (the "Ku Band"), which sought waivers of certain technical requirements of Part 101 of the Commis-

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<sup>1</sup> Broadwave Albany, L.L.C. et al., Application for Licenses to Provide New Terrestrial Services in the 12.2-12.7 GHz Band, DA 01-109, Memorandum Opinion and Order (Wireless Tel. Bur., rel. Jan.17, 2001) (the "Order").

sion's rules. On March 11, 1999, the Wireless Telecommunications Bureau (the "Bureau") issued a public notice requesting comments on the waiver requests, and designated this case as permit-but-disclose "because of the policy implications of the waivers and the potential impact of this proceeding on other proceedings, as well as, persons not parties to the waiver requests . . . ."2

In the public notice, the Bureau set dates for the submission of comments and replies, directing specifically that any comments should reference the DA number of the public notice:

Interested parties may file comments on Broadwave's waiver requests no later than April 12, 1999. Parties interested in submitting reply comments must do so no later than April 22, 1999. All *comments* should reference Broadwave's Waiver Requests and DA 99-494 . . . 3

Northpoint filed reply comments, which referenced DA 99-494, as the Commission requested.4

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<sup>2</sup> Wireless Telecommunications Bureau Seeks Comment on Broadwave Albany, L.L.C., et al. Requests for Waiver of Part 101 Rules, DA 99-494. Public Notice, (rel. March 11, 1999) ("Broadwave Public Notice").

<sup>3</sup> Id. at 2 (emphasis added).

<sup>4</sup> "Reply Comments of Northpoint Technology Ltd. and its Broadwave Affiliates," filed April 22, 1999.

The notice, however, did not impose any similar requirement with respect to inclusion of the DA number on *ex parte* filings.<sup>5</sup> After the issuance of the public notice, Northpoint advocated the interests of the Broadwave Affiliates before the Commission, conscientiously filing six copies of its written and oral *ex parte* presentations with the Commission secretary in the related rule making proceeding involving the Broadwave applications and satellite proposals for use of the Ku Band. Neither Northpoint, however, nor the other parties filing *ex parte* notices, included the DA number on all their *ex parte* submissions.<sup>6</sup>

On April 18, 2000, Pegasus Broadband Corporation ("Pegasus") filed an application to provide terrestrial services in the Ku Band that was virtually identical to

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<sup>5</sup> Broadwave Public Notice at 2.

<sup>6</sup> SkyBridge, LLC, EchoStar Satellite Corporation (except when filing jointly with DIRECTV, Inc.), The Boeing Company, and the National Rural Telecommunications Cooperative ("NRTC") did not include the DA number on their *ex parte* notices. Even Pegasus and DIRECTV did not always include the DA number on their submissions (see the joint letter dated February 28, 2000 and filed March 3, 2000 referenced below). See, e.g., *Ex Parte* Communication of Sky Bridge, L.L.C., Satellite Broadcasting and Communications Association, The Boeing Company, DIRECTV, Inc., EchoStar Communications Corporation, Galaxy Latin America, LLC, GE Americom, Loral Space and Communications, PanAmSat Corporation, and Pegasus Communications Corporation, ET Docket No. 98-206, RM-9147, and RM-9245, filed March 3, 2000; *Ex Parte* Presentation of EchoStar Satellite Corporation, File No. 0094-EX-ST-1999, ET Docket. No. 98-206, RM-9147; RM-9245, filed October 29, 1999; *Ex Parte* Presentation of The Boeing Company, ET Docket No. 98-206, RM-9147, RM-9245, filed February 8, 2000; *Ex Parte* Presentation of NRTC, ET Docket No. 98-206, filed October 19, 2000.

the applications of the Broadwave Affiliates. On August 14, 2000, the Bureau issued a public notice recognizing that the Pegasus application sought waivers of the Commission's rules and thus would be restricted for *ex parte* purposes, but finding that it would be in the public interest to treat the case as a "permit-but-disclose" proceeding. In that Public Notice, the Bureau directed that "[a]ll written *ex parte* presentations and all written disclosures of oral *ex parte* presentations should reference [Pegasus]'s Waiver Requests and DA 00-XXX . . . ."<sup>7</sup>

On August 21, 2000, Pegasus filed a petition to dismiss or deny the Broadwave applications, alleging that Northpoint violated the Commission's *ex parte* rules.<sup>8</sup> Pegasus claimed, in part, that Northpoint's meetings with the Commission regarding the Broadwave applications violated the *ex parte* rules because "only the waiver requests and not the applications were made permit-but-disclose."<sup>9</sup> In the Order, the Bureau rejected Pegasus's allegations and confirmed that "Northpoint's actions in meeting with Commission officials on an *ex parte* basis regarding its applications and filing notices

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<sup>7</sup> Wireless Telecommunications Bureau Sets Permit-but-Disclose Status for PDC Broadband Corporation Requests for Waiver of Part 101 Rules, DA 00-1841, Public Notice (rel. August 14, 2000) ("Pegasus Public Notice") Prior to August 14, 2000, Northpoint made reference to the Pegasus application to the Commission only in formal written filings that were served on Pegasus's attorneys.

<sup>8</sup> "Petition to Dismiss or Deny," filed by Pegasus on Aug. 21, 2000 with respect to the Applications of Broadwave Albany, L.L.C. et al. to Provide New Terrestrial Services in the 12.2-12.7 GHz Band (the "Pegasus Petition").

<sup>9</sup> Order at ¶ 10.

pursuant to 47 C.F.R. §1.1206 were consistent with the *ex parte* rules.”<sup>10</sup> In particular, the Bureau indicated that the public notice stated that “it would be in the public interest to treat this case as a permit-but-disclose proceeding under the *ex parte* rules.”<sup>11</sup> The Bureau concluded that although the use of the word “case” in the public notice “is subject to some ambiguity, we believe that, in context, Northpoint reasonably concluded that the term included the applications as well as the waiver requests.”<sup>12</sup> The Bureau, therefore, denied the Pegasus Petition.<sup>13</sup>

The Order, nonetheless, suggested that Northpoint did not fully comply with the Commission’s *ex parte* rules because, according to the Bureau, “Northpoint should have filed copies of those notices that related specifically to Broadwave’s applications for inclusion in both the rule making and application files.”<sup>14</sup> The Order, however, does not explain how Northpoint could have filed its *ex parte* notices in the “applications files,” given that the applications had not yet been accepted for filing. Northpoint submits that it did fully comply with the Commission’s *ex parte* rules by filing copies of its *ex parte*

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<sup>10</sup> Id. at ¶ 15.

<sup>11</sup> Id. at ¶ 11 (emphasis in original).

<sup>12</sup> Id. at ¶ 12.

<sup>13</sup> Id. at ¶ 16.

<sup>14</sup> Id. at ¶ 15. The Bureau did note, though, that “Northpoint’s conduct manifests no intent to prejudice Pegasus, and no showing has been made of prejudice to Pegasus, which was aware of the rulemaking docket.” Id.

notices in the rule making docket, and respectfully requests that the Bureau reconsider that portion of its decision which makes a determination to the contrary.

**II. Northpoint Fully Complied with the Commission's *Ex Parte* Rules.**

Northpoint properly filed its *ex parte* notices only in the rule making proceeding. As Northpoint indicated in its opposition to the Pegasus Petition, the Bureau never opened a separate application proceeding with respect to the Broadwave applications and waiver requests.<sup>15</sup> Neither in the Broadwave Public Notice nor in the Order does the Bureau explain or define what it means by the "application proceeding." Because the Bureau indicated in the Broadwave Public Notice that comments on the waiver requests should include the notice's DA number and indicated in the Pegasus Public Notice that *ex parte* notices in that proceeding should include the notice's DA number, Northpoint assumes that the holding of the Order is that Northpoint should have referenced the DA number of the Broadwave Public Notice in its *ex parte* filings. The "DA" number, however, is merely a designation the Commission gives to identify

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<sup>15</sup> "Opposition of Northpoint Technology, Ltd. and BroadwaveUSA to Petition to Dismiss or Deny" of Pegasus, filed September 6, 2000, at 11-12.

documents released by its staff under "delegated authority."<sup>16</sup> The issuance of a public notice with a "DA" number does not create or constitute a separate proceeding.<sup>17</sup>

Given the lack of notice to Northpoint and the other parties as to the appropriate references for *ex parte* filings with respect to the Broadwave applications, Northpoint submits that the Bureau's admonition of Northpoint is unsupported. While the public notice seeking comment on Northpoint's waiver requests directed parties filing comments to reference the notice's "DA" number, it did not direct *ex parte* disclosures to reference that number.<sup>18</sup> As noted above, most of the parties filing *ex parte* notices with respect to the Broadwave applications did not include the DA number in their submissions.

In the Order, the Bureau stated that there was "no basis for Northpoint's attempted distinction between comments and *ex parte* filings . . . ."<sup>19</sup> The Bureau, however, itself recognized just such a distinction when Pegasus filed its waiver request. In the public notice classifying the status of Pegasus's waiver requests as permit-but-

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<sup>16</sup> See <http://www.fcc.gov/resources.html> (visited February 15, 2001) and <http://www.fcc.gov/search/indxhlp.html> (visited February 15, 2001).

<sup>17</sup> Thus, for example, the "DA" number on the original public notice seeking comment on the Broadwave waiver requests (99-494) is different from the "DA" number identifying the Order (01-109).

<sup>18</sup> Broadwave Public Notice at 2.

<sup>19</sup> Order at ¶ 15, n.18.

disclose, the Bureau specifically required all *ex parte* disclosures to reference that notice's DA number.<sup>20</sup> Clearly, then, when the Bureau desires that *ex parte* disclosures include DA numbers, it specifically directs parties to include them. Because the Bureau chose not to direct Northpoint to include a DA number in its *ex parte* disclosures, it should not have admonished Northpoint for its failure to do so.

Moreover, as stated above, the Bureau found that the public notice was ambiguous, but concluded that Northpoint "reasonably understood" that the Bureau had classified the Broadwave applications as permit-but-disclose.<sup>21</sup> Yet with respect to the ministerial issue of the proper references to include on the *ex parte* notices, the Bureau admonished Northpoint, even though, as the Bureau acknowledged, Northpoint did appropriately file its *ex parte* notices in the rule making file.<sup>22</sup> Given the ambiguities of the public notice and the Bureau's conclusion that "no showing has been made of prejudice to Pegasus, which was aware of the rulemaking docket,"<sup>23</sup> Northpoint submits that the Bureau should clarify its intentions on a going forward basis and not admonish Northpoint or any other party.

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<sup>20</sup> Pegasus Public Notice at 2.

<sup>21</sup> Order at ¶¶ 11 -12.

<sup>22</sup> Id. at ¶ 15.

<sup>23</sup> Id. at ¶ 15.

**III. Conclusion**

Accordingly, Northpoint respectfully requests that the Bureau partially reconsider its Order and determine that Northpoint was in full compliance with the *ex parte* rules. In addition, Northpoint asks that the Bureau clarify on a going-forward basis the proceedings in which Northpoint should file future *ex parte* disclosures.

NORTHPOINT TECHNOLOGY, LTD.  
BROADWAVEUSA



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By John C. Quale  
David H. Pawlik  
Stacy R. Robinson

Skadden, Arps, Slate, Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, D.C. 20005-2111  
202-371-7000

Their attorneys.

Dated: February 16, 2001

**CERTIFICATE OF SERVICE**

I, Clark S. Taylor, hereby certify that a copy of the foregoing Petition of Northpoint Technology, Ltd. and BroadwaveUSA for Partial Reconsideration, this 16th day of February, 2001, has been delivered via courier and first class U.S. mail (\*) to the following:

Peter Tenhula  
Office of Chairman Powell  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-204F  
Washington, D.C. 20554

Adam Krinsky  
Office of Commissioner Tristani  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 6-C767  
Washington, D.C. 20554

Mark Schneider  
Office of Commissioner Ness  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-B115  
Washington, D.C. 20554

Bryan Tramont  
Office of Commissioner Furchtgott-Roth  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 8-A302  
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Donald Abelson, Chief  
International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 6-A302  
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Thomas Sugrue, Chief  
Wireless Telecommunications Bureau  
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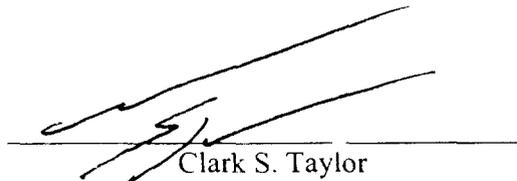
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Clark S. Taylor

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Citation: **2001 FCC Lexis 580**

*2001 FCC LEXIS 580, \**

In the Matter of Applications of America Online, Inc. And Time Warner Inc. For Transfers of Control

CS Docket No. 00-30

FEDERAL COMMUNICATIONS COMMISSION

2001 FCC LEXIS 580

**RELEASE-NUMBER:** DA 01-214

January 26, 2001 Released; Adopted January 26, 2001

**ACTION:** [\*1] MEMORANDUM OPINION AND ORDER

**JUDGES:**

By the Deputy Chief, Cable Services Bureau

**OPINIONBY:** ISMAIL

**OPINION:**

1. In this memorandum opinion and order we consider the facts and circumstances surrounding the violation of the protective order in this proceeding by personnel of The Walt Disney Company and the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered. For the reasons set forth below, we admonish the parties for their breach of the protective order. We find, however, that the interim sanctions already imposed are sufficient to vindicate the integrity of the Commission's processes, and we impose no additional sanctions.

**I. BACKGROUND**

2. This proceeding involves joint applications by America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") to transfer control of various licenses and authorizations to AOL Time Warner, Inc., an entity formed by the merger of AOL and Time Warner. Consideration of these applications has required AOL and Time Warner to submit to the Commission information of a confidential or proprietary nature. Because the Commission sought public comment on the proposed AOL-Time Warner merger, the Commission provided for access to the confidential information submitted [\*2] pursuant to the terms of a protective order. n1

n1 *Applications of America Online, Inc. and Time Warner Inc. For Transfers of Control ("AOL-Time Warner")*, 15 FCC Rcd 6117 (CSB 2000); 15 FCC Rcd 6119 (CSB 2000)(collectively "PO").

3. In accordance with the original terms of the protective order, AOL and Time Warner were required to make the pertinent documents available to the outside counsel of record and in-house counsel actively engaged in the conduct of this proceeding. n2 To be eligible to inspect documents, in-house counsel could not be involved in the competitive decisionmaking processes of their employers. n3 The protective order permitted such counsel to inspect the confidential documents at the offices of AOL's and Time Warner's outside counsel and to purchase copies, except for those documents designated "copying prohibited." n4

n2 PO, 15 FCC Rcd at 6120 P3.

n3 *Id.* at 6120 P3.

n4 *Id.* at 6118 P4, 6120 P3.

4. Counsel receiving access to the documents could disclose them to the following third parties who [\*3] are not involved in the competitive decisionmaking of AOL and Time Warner's competitors: (1) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; (2) Commission officials involved in this proceeding; (3) outside consultants or experts retained for the purpose of assisting counsel in these proceedings; (4) employees of such counsel performing certain clerical functions; and (5) employees of a third party performing one or more of these functions under counsel's supervision. n5

n5 *Id.* at 6120 P3.

5. The protective order further requires all persons seeking access to confidential documents to execute and file an "Acknowledgment of Confidentiality," pledging compliance with the terms of the protective order. n6 It prohibits persons with access to confidential documents from copying them except as necessary for filing with the Commission under seal. n7 Material derived from confidential documents may not be retained following the termination of this proceeding except for two copies of certain filings. n8

n6 *Id.* at 6120 P5. [\*4]

n7 *Id.* at 6120-21 PP4, 7.

n8 *Id.* at 6122 P13.

6. Additionally, the protective order states:

Should a party that has properly obtained access to Confidential Information under this Order violate any of its terms, that party shall immediately notify the Commission and [AOL or Time Warner, as appropriate] of such violation. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violation of this Order.

## II. THE VIOLATION

7. The Walt Disney Company ("Disney") is a commenter in this proceeding and a business competitor of AOL and Time Warner. It is represented in matters related to the AOL-Time Warner Merger by two law firms: Verner, Liipfert, Bernhard, McPherson and Hand, Chartered ("Verner Liipfert"), in connection with the FCC, and Howrey, Simon, Arnold & White ("Howrey Simon"), in connection with related proceedings before the Federal Trade Commission.

8. On September 27, 2000, Verner Liipfert informed the Commission that an attorney [\*5] associated with the firm "inadvertently breached" the protective order. n9 Verner Liipfert stated that five days earlier, on Friday, September 22, the attorney provided two in-house counsel in the Government Relations Group in Disney's Washington, D.C. office with "a very brief e-mail description of a number of confidential documents" covered by the protective order. It further stated that the attorney had acted in the mistaken belief that the in-house counsels had executed the required acknowledgements of confidentiality.

n9 Letter from Lawrence R. Sidman to Magalie Roman Salas (Sept. 27, 2000).

9. Verner Liipfert indicated that within an hour the attorney telephoned the recipients of the e-mail to advise them that the e-mail related to confidential documents, but, in the interim, the e-mail had been retransmitted "to a number of other Disney personnel." Verner Liipfert reported that the recipients of the e-mail were later instructed to disregard it, and still later to delete the e-mail from their files.

10. In response to this disclosure, the Chief, Cable Services Bureau ordered Disney to provide to the FCC a full and detailed explanation of the matter, including an explanation [\*6] of the steps it took to remedy the breach, and an explanation of why the breach was not reported until September 27. n10 Disney was directed to provide AOL with a copy or detailed description of the e-mail, the name of the originator, and the names of the recipients. All recipients of the e-mail were directed to execute affidavits acknowledging that they are prohibited from disclosing the confidential information, and Disney was required to furnish the FCC with these affidavits and an affidavit stating that all copies of the e-mail had been deleted from the Disney e-mail system. Disney and its counsel were precluded from further inspection of confidential records until they submitted, and the Commission approved, measures they would adopt to ensure that no future breaches of the protective order would occur. On November 22, 2000, we terminated the interim bar on inspection in view of the fact that the Parties submitted adequate corrective measures. n11

n10 *AOL-Time Warner*, Order, DA 00-2304 (CSB Oct. 10, 2000).

n11 *AOL-Time Warner*, Order, DA 00-2648 (CSB Nov. 22, 2000).

### III. SUBMISSIONS OF THE PARTIES

11. In their Joint Response, n12 Disney and Verner Liipfert [\*7] ("the Parties") provide further details regarding the unauthorized disclosure. The Parties state that the disclosure was made by an associate who had been with Verner Liipfert for approximately 20 months. They indicate that the associate executed an acknowledgement of confidentiality on September 5 and, thereafter, inspected documents at the offices of Wiley, Rein & Fielding, AOL's outside counsel. The associate took notes on the documents but did not obtain copies. The Parties further indicate that, on the morning of September 22, the associate sent an e-mail regarding the documents to four individuals: a partner at Verner Liipfert, a partner at Howrey Simon, and two of Disney's vice presidents. Both of Disney's vice presidents had previously been involved with the AOL/Time Warner proceeding. The two law firm partners had executed acknowledgements of confidentiality, and were authorized to review confidential information. Disney's vice-presidents, both of Disney's Office of Government Relations in Washington, D.C., had not executed acknowledgements and were not authorized to review confidential information. The Parties assert that Disney had anticipated that the two vice presidents [\*8] would execute acknowledgements, and that based on the associate's conversations with them, and on his understanding of their responsibilities, the associate mistakenly believed that they had.

n12 Joint Response of The Walt Disney Co. and Verner, Liipfert, Bernhard, McPherson and Hand, Chartered ("Joint response") (Oct. 13, 2000).

12. The e-mail, marked "Privileged & Confidential" and "Attorney-Client Communication," indicates that it was sent at approximately 11:00 a.m., September 22. The subject line reads: "Important AOL Docs at Wiley Rein." n13 The body of the e-mail begins:

There are hundreds of confidential AOL documents (contracts, marketing materials, internal memos and white papers) at Wiley Rein. I recommend that the Howrey antitrust folks review at least some of these materials, especially the

ones briefly described below because they speak to our claim that AOL/TW intends to discriminate against unaffiliated companies. The contact person at Wiley Rein for review of the documents . . . .

The e-mail thereupon provides brief summaries of 12 items, quoting portions of some of them.

n13 We are disclosing in this memorandum opinion and order some portions of the e-mail that do not include confidential information. All other portions of the e-mail remain confidential. **[\*9]**

13. According to the Parties, one of the vice presidents, Preston Padden was attending a convention in San Francisco when he received the e-mail at approximately eight a.m. Pacific Time. Padden states in an affidavit that he skimmed the e-mail after breakfast but did not realize that he was restricted from reading it. He claims that, while he was aware of the protective order, he believed that it dealt only with the documents themselves. Padden relates that he composed and transmitted a reply e-mail thanking the associate for his great work. n14 As was his usual practice, he specified that a list of 11 Disney officials, including the staff of the Government Relations Office, should receive courtesy copies of his reply message (including the attached text of the original message). The recipients of the reply message included Disney's President and CEO, its Vice Chairman of the Board of Directors, its Executive Vice President and General Counsel, its Senior Vice President, and the Executive Vice President of ABC (a Disney subsidiary).

n14 The e-mail reads: "Great job []. Let's follow up!" *See supra* note 1.

14. The Parties state that when Verner Liipfert received Padden's reply, **[\*10]** sometime before noon, Eastern Time, n15 they realized that there was a problem and called Padden's Washington office and spoke to his secretary. The Parties further state that the associate then e-mailed Padden and told him that the original e-mail was confidential and should not have been retransmitted. Padden indicates that he then e-mailed the various recipients of his reply message, telling them that the e-mail they received was confidential and should be disregarded. n16

n15 The e-mail indicates that it was sent at approximately 11:50 a.m. *See supra* note 1.

n16 Disney provides an affidavit stating that the other vice-president read Padden's second e-mail stating that the information contained in the earlier e-mails was confidential before reading either the e-mail from outside counsel or from Padden, and deleted the e-mails without having reviewed their contents.

15. The Parties relate that the Verner Liipfert partner, Lawrence R. Sidman, was mostly out of his office on Friday September 22 and planned to catch a flight out of town that day. Accordingly, the associate did not discuss the situation at length with Sidman. However, when Sidman briefly appeared at the **[\*11]** office during the day, the associate reportedly informed him that there was "a problem with the protective order." n17 Sidman purportedly instructed the associate to ascertain the facts and consult with senior communications counsel and litigation counsel, which the associate did.

n17 Joint Response at 11.

16. No further action occurred until Monday September 25, when Sidman returned to the office. The Parties indicate that Sidman and the associate then discussed the situation and decided that it was necessary to speak to Padden to fully determine the facts. However, Padden, who returned to Washington on Saturday September 23, had, in the meantime,

traveled to Colorado to deal with a family emergency. Sidman and the associate were not able to speak to Padden until Tuesday September 26, when they briefly discussed the need to delete the e-mail from the relevant computer systems and to notify the Commission of the violation. As noted above, Verner Liipfert notified the Commission the next day, September 27, and notified AOL the same day. According to an affidavit by Disney's Chief Information Officer, the e-mail has been deleted from Disney's computer systems. All of the recipients **[\*12]** of the e-mails have executed affidavits acknowledging the confidentiality of the e-mail and declaring that they have not disclosed or used any information contained therein.

17. The Parties report that they have issued directives regarding compliance with protective orders. The main provisions of Verner Liipfert's policy are as follows:

- (a) Reminds personnel of the need to maintain absolute confidentiality.
- (b) States that confidentiality must be protected until any doubts are resolved. The responsibility for resolving doubts lies with the "billing" or "responsible" attorney.
- (c) Prohibits access to confidential documents without compliance with protective orders.
- (d) Provides that confidential material must be maintained in separate, secured files.
- (e) Provides that confidential files must contain a list of persons authorized to have access.
- (f) Prohibits discussion of confidential material without ensuring that participants are authorized.
- (g) Provides that confidential materials may not be transmitted by e-mail, but only by clearly marked hardcopy.
- (h) Requires attorneys to maintain a log of access to confidential materials.
- (j) States that breaches of confidentiality **[\*13]** must be immediately reported to the responsible attorney and the Chair of the Communications Practice Group.
- (k) Provides that the Chair of the Communications Group will clarify any questions.

18. The main provisions of Disney's policy are as follows:

- (a) Supervisors must ensure that all individuals working on a matter are familiar with the terms of any protective orders.
- (b) Employees working on a matter must read and maintain a copy of any protective orders.
- (c) Permits access to confidential materials only upon compliance with all confidentiality requirements.
- (d) Confidential material must be maintained in separate, secure files.
- (e) Prohibits exchange of confidential material with outside consultants or counsel

unless their authorization is verified.

(f) All confidential material must be disposed of on termination of the work involving it.

19. The Parties contend that the foregoing establishes that no further action should be taken against them. They urge that the breach of the protective order resulted from an inadvertent error and that immediate corrective action was taken. They further assert that the offending e-mail was disregarded [ILLEGIBLE TEXT] deleted from [\*14] the relevant computer systems and that no improper use was made of any [ILLEGIBLE TEXT] material. They do not consider the material contained in the e-mail competitively sensitive. In [ILLEGIBLE TEXT] no harm has been done to AOL and their stringent new policies will prevent a future [ILLEGIBLE TEXT] problem.

20. AOL responds that the conduct of Verner Liipfert and Disney has been deficient. According to AOL, the associate failed to confirm that the Disney Vice Presidents to whom he sent the e-mail were authorized to receive confidential material, and no basis has been shown for the associate's asserted reasonable, good faith belief that they were authorized. AOL questions whether Padden could have been unaware that he was barred from receiving such an e-mail or transmitting it to others. AOL asserts that there was no justification for delaying the reporting of the violation from September 22 to September 27 for "further factfinding and consultation." AOL also criticizes the September 27 notification for not listing the individuals involved in the breach.

21. AOL suggests that the parties had a motive to delay reporting the violation, since they could anticipate that the Commission [\*15] would respond by curtailing access to confidential material. In this regard, they allege that, on September 22, counsel from Howrey Simon called the Wiley Rein legal assistant mentioned in the e-mail to arrange for the inspection of documents. Some inspection occurred on the morning of September 27, before AOL was informed of the violation. In AOL's view, this sequence of events undermined the enforcement of the protective order.

22. AOL argues that the violation of the protective order could lead to competitive and financial harm and will undermine public confidence in the Commission policies regarding confidentiality. AOL urges the Commission to incorporate further provisions in the protective order and to reexamine its policies regarding confidentiality generally. With respect to Verner Liipfert and Disney, AOL asks that the Commission request further information as to their actions between the time of the violation and its disclosure. Additionally, AOL asks the Commission to determine appropriate sanctions to restore the integrity of the proceeding.

23. The Parties reply that AOL has failed to allege either serious misconduct on the part of their principals or harm to AOL. They [\*16] assert that AOL has pointed to no reason to doubt the associate's reasonable belief that Padden was authorized to receive confidential information. Similarly, they assert that there is no reason to doubt that Padden in quickly scanning his voluminous e-mail did not realize that he was dealing with material within the scope of the protective order or that his retransmission did not reflect an intent to disseminate confidential material to Disney's executives.

24. The Parties also assert that the five-day delay reflected no nefarious intent, but only the intervention of the weekend and the unavailability of Padden and Sidman at crucial times. In this regard, they submit that the requirement of "immediate" disclosure does not preclude reasonable, nonprejudicial delay for factfinding and consultation. Moreover, they categorically deny that Howrey Simon's inspection of documents on September 27 played any role in the timing of notification.

25. Additionally, the Parties maintain that AOL has demonstrated no harm from the unauthorized disclosure in view of the facts that the offending e-mail has been deleted from

Disney's computer system and that no use or further dissemination of the e-mail [\*17] occurred. They further assert that AOL has provided no specific basis for finding that the brief summaries of documents contained in the e-mail contained any intelligence of a sensitive or detrimental nature. In any event, they assert that the policies instituted at Disney and Verner Liipfert will prevent any future disclosures.

26. In view of the foregoing, Disney and Verner Liipfert urge that there is no basis to impose additional sanctions against them. They find no precedent for the disqualification of a party based on an inadvertent, isolated, and harmless disclosure of confidential information.

#### **IV. DISCUSSION**

27. We conclude based on the evidence before us that no additional sanctions, such as forfeiture or other measures, against Disney or Verner Liipfert or against the individuals involved are warranted. We note that the interim measures we adopted in our October 10 Order have already had the effect of preventing Disney and its counsel from gaining access to confidential materials in this proceeding for a significant period of time. This is a substantial penalty that reinforces our commitment to strict enforcement of protective orders. We also strongly admonish Verner [\*18] Liipfert, Disney, and their principals that their actions have not reflected the standard of conduct the Commission expects of parties in our proceedings. As we have stated:

Protection of commercially sensitive materials submitted by parties pursuant to protective orders and confidentiality agreements is a very serious matter requiring vigilance by Commission staff as well as all parties gaining access to such information. Unauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the party submitting that information. Such disclosure could also undermine public confidence in the effectiveness and integrity of the Commission's processes, and have a chilling effect on the willingness of parties to provide us with information needed to fulfill our regulatory duties [Footnote omitted.] n18

The evidence before us leads us to conclude that principals of Verner Liipfert and Disney were not sufficiently diligent in complying with the Protective Order. It does not, however, give us reason to believe either that those concerned deliberately violated the order or that there is a substantial risk of future violations by Disney or Verner [\*19] Liipfert.

n18 Craig O. McCaw, 9 FCC Rcd 5836, 5924 P163 (1994).

28. We are not persuaded by the evidence before us that the associate exercised sufficient diligence in determining whether the two Disney Vice Presidents to whom he sent the e-mail were authorized to receive confidential information. Although the Parties claim that they anticipated that both Vice Presidents would have access to confidential documents, the evidence they proffer indicates only that one would. n19 Beyond that, the parties offer only the assertion that the associate's belief was based on conversations with the two Disney Vice Presidents. n20

n19 Letter from Lawrence R. Sidman to Arthur H. Harding, Esq. (Aug. 17, 2000); Letter from Lawrence R. Sidman to Peter D. Ross, Esq. (Aug. 17, 2000).

n20 Joint Response at 6.

29. On the other hand, we have no reason to doubt that the associate did in fact believe that Padden was authorized. The e-mail indicates that the associate was addressing the desirability of reviewing documents in the context of this proceeding, and Padden replied in

the same vein. There is no suggestion that the associate intended to "leak" information [\*20] for other, ulterior purposes. The only logical conclusion is that he believed he was addressing a person with authorization.

30. Likewise, the evidence does not show that Padden exercised diligence in determining whether he was authorized to view or disseminate the contents of the e-mail. Padden acknowledges that he was aware that a Protective order had been issued in this proceeding. n21 He was not aware, however, that the Protective Order prohibited disclosure not only of the documents themselves, but also "the contents thereof." n22 Nevertheless, Padden's actions do not suggest that he deliberately disseminated confidential information to unauthorized persons. His sole response to the e-mail was to send a reply to the associate thanking him for his "great job." Padden's response gives no indication that he intended that the information be used other than in the legitimate prosecution of the proceeding. We are troubled, however, that Padden, without reflection, sent courtesy copies of the e-mail to top Disney executives. Such action might have caused considerable competitive harm. Again, however, we have no reason to doubt his explanation that he sent courtesy copies of his e-mail [\*21] to Disney management because he customarily copied these individuals. While this action plainly violates the Protective Order, copying these individuals, without any explanation to them, does not suggest an intent to apprise them of information for anticompetitive purposes.

n21 Affidavit of Preston Padden at 1.

n22 PO, 15 FCC Rcd at 6119 P2.

31. We are most troubled by the delay that occurred in reporting to the Commission and to AOL the breach of the Protective Order. We recognize that the term "immediate," at least in some contexts, does not ". . . require instantaneous notice . . . but rather calls for notice within a reasonable length of time under all the facts and circumstances of each particular case." n23 Under the circumstances here, we find it difficult to characterize a period of five days as "immediate." Moreover, the delay in reporting has raised troublesome questions about the conduct of Howrey Simon that could have been avoided altogether if reporting had been more prompt.

n23 Interstate Fire & Casualty Co. v. Burns, 484 P.2d 1257, 1260 (Colo. App. 1971).

32. As AOL observes, because the Parties [\*22] did not report the violation until September 27, they opened themselves to allegations that Howrey Simon's inspection of documents that same day was motivated by an intent to evade the consequences of the violation. We have no direct evidence that Howrey Simon acted in anticipation that the Commission would bar its inspection upon disclosure of the violation, and Howrey Simon's inspection did not explicitly violate the terms of the Protective Order. We believe, however, that the better course would have been for Howrey Simon not to examine the documents until after the violation of the Protective Order had been reported to AOL and the Commission. In the future, we expect that we will explicitly prohibit parties from continuing to inspect confidential documents knowing that a breach of a protective order has occurred at least until they have reported the violation and the other party has had an opportunity to seek relief.

33. Other factors somewhat mitigate the seriousness of the delay. We recognize that the Parties were impaired in responding to the violation by the unavailability of Padden and Sidman at critical times. We agree with the parties that Sidman's participation was needed [\*23] to evaluate whether the material contained in the e-mail violated the Protective Order, since other senior officials were not authorized to inspect the e-mail. It is also understandable that the parties would want to consult with Padden about the circumstances of his retransmission of the e-mail. Additionally, it appears that the Parties relied on the fact that they had already taken corrective action to preclude any further dissemination to or use by unauthorized persons. Moreover, we do not wish to suggest that a party is better off not

reporting at all than reporting imperfectly.

34. In sum, although the evidence before us establishes a significant violation of the protective Order, it does not warrant further action looking toward imposing additional monetary or other sanctions against the Parties here. We find no evidence that the violation was intentional or that it reflects a pattern of noncompliance. n24 The Parties did report the violation within five days and made an effort to mitigate the effects of the improper disclosure. We also find that the policies adopted by the Parties represent a realistic and good faith attempt to avoid future violations. We therefore find that [\*24] the substantial penalty that the parties have already suffered by being barred from inspecting confidential documents during a critical phase of this proceeding is sufficient to vindicate the integrity of the Commission's processes. We will therefore take no further action with respect to this matter.

n24 See *supra* para. 27.

35. As to the suggestion that we modify the Protective Order or our policies regarding confidentiality generally, we have already restricted the scope of the Protective Order in view of the violation here. n25 That action limited inspection to outside counsel only. In the future, we will consider prohibiting parties and their counsel from obtaining access to confidential documents beginning from the time they discover their violation of the protective order until one or two business days after they have notified the Commission and the submitting party of the violation. The additional time would provide an opportunity both for the submitting party to request that further action be taken before the violating party is again permitted access to confidential material, and for the Commission to act.

n25 *AOL--Time Warner*, Order, DA 00-2434 (CSB Oct. 27, 2000). [\*25]

36. We wish to emphasize that we expect the Parties to this case and the public generally to comply strictly with this and other Protective Orders because of the crucial role they play in upholding the integrity of the Commission's processes. In this regard, we strongly encourage the use of internal controls such as those proposed by the Parties here. We further emphasize that we reserve the right to apply the full range of sanctions to any person violating this or other Protective Orders in the future.

## V. ORDERING CLAUSE

37. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.321, That our inquiry into this matter IS TERMINATED.

Sherille Ismail

Deputy Chief

Cable Services Bureau

Service: LEXSEE®  
Citation: 2001 FCC Lexis 580  
View: Full  
Date/Time: Monday, April 9, 2001 - 5:14 PM EDT

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April 2, 2001 **RECEIVED**

**APR 2 2001**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**VIA HAND DELIVERY**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington D.C. 20554

**EX PARTE**

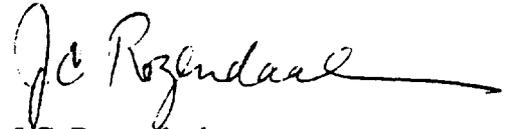
**Re: Notification of Ex Parte Communication in ET Docket No. 98-206, RM-9147, RM-9245, DA 99-494, and Applications of Broadwave USA et al., PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide a fixed service in the 12.2-12.7 GHz Band**

Dear Ms. Salas,

The attached letter was delivered by hand today to Ms. Rebecca Dorch of the Office of Engineering and Technology. Fourteen copies are enclosed herewith – two for inclusion in of the files for each of the above-listed docket, rulemakings, DA and applications – in accordance with 47 C.F.R. § 1.1206(b)

Please contact me if you have any questions.

Yours sincerely,



J.C. Rozendaal

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RICHARD H. STERN, OF COUNSEL

April 2, 2001

**VIA HAND DELIVERY**

**EX PARTE**

Ms. Rebecca Dorch, Deputy Chief  
Office of Engineering and Technology  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Proposed License of "Pegasus Technology," Ex Parte.**

Dear Ms. Dorch:

I write on behalf of Northpoint Technology, Ltd., and its Broadwave USA affiliates (collectively, "Northpoint") in response to the recent proposal by Pegasus Broadband Communications, Inc. ("Pegasus") that the Commission should obtain a license to use certain unspecified proprietary technology allegedly belonging to Pegasus. The Commission has obtained a license from Northpoint in connection with the independent testing of Northpoint's patented technology mandated by section 1012 of H.R. 5548 (enacted on December 21, 2000, as part of Pub. L. 106-553); however, the Commission should reject Pegasus's belated offer of a copycat license for its as yet unidentified technology, for at least three reasons.

*First*, the Commission should decline to accept a license offer this late in the testing process. With regard to pending applications, Congress specifically ordered that the required technical "demonstration shall be concluded within 60 days after the date of enactment of this Act and shall be subject to public notice and comment for not more than 30 days thereafter." H.R. 5548 § 1012(b). The Act was passed on December 21, 2000, so the testing was to have been completed by February 19, 2001. Although the completion of the testing has been delayed somewhat, there is no excuse for Pegasus's decision to wait until three months after the Act was passed – and nearly a month after all testing was supposed to be completed – before proposing that the FCC take a license. Pegasus's deliberate delay appears to be aimed at stringing out the testing process as long as possible, in defiance of Congress's deadline. The Commission should not countenance

Ms. Rebecca Dorch  
April 2 2001  
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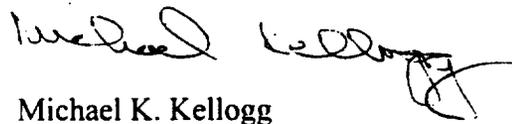
any further delay in the testing process. If Pegasus had a technology that it thought should be licensed, then it should have made both the technology and the license available long before now.

*Second*, the Commission should decline to take a license for an unidentified technology. As noted above, Congress has required that the results of the independent technical demonstration shall be subject to public notice and comment for up to 30 days. Hence, any technology made available for testing must be disclosed to the public as part of the notice and comment process. To the extent that Pegasus plans to make any technology available for testing, it cannot keep its supposedly proprietary "know how" and "trade secrets" secret. Since Pegasus cannot obtain an independent technical demonstration without subjecting its technology to public scrutiny, there is no reason why it ought not to tell the Commission what technology it proposes to license. If, as Northpoint suspects, Pegasus has no proprietary technology distinct from Northpoint's patented technology for providing terrestrial service in the 12.2-12.7 GHz band, then the Commission should find that out sooner rather than later. The Commission should not buy Pegasus's pig in a poke.

*Third*, and relatedly, Northpoint has recently learned that Pegasus made some kind of confidential submission to MITRE for consideration in connection with the statutory requirement for independent testing. As already noted, the very notion of a confidential submission is inconsistent with the statutory requirements that any proposed technology be available for independent *demonstration* and subject to *public notice and comment*, which are to be completed by specific, tight deadlines set forth in the statute. Pegasus's confidential submission also constitutes a violation of the Commission's rules governing *ex parte* communications in these proceedings. At the organizational meeting for MITRE's testing program, attended by representatives of Pegasus, the Commission's representatives made it clear that they expected submissions to MITRE to be in the public record – a position confirmed in a letter you sent to interested parties on March 23, a copy of which is attached hereto. The Commission should refuse to consider any materials submitted in this clandestine manner, in violation of both the statute the Commission's rules. There should be no question of the Commission's taking a license from Pegasus so long as Pegasus remains out of compliance with the Commission's *ex parte* rules. Even if Pegasus should bring itself into compliance, the Commission should reject Pegasus's license offer as too little information, too late.

Please do not hesitate to contact me should you wish to discuss this matter further.

Yours sincerely,

  
Michael K. Kellogg

Ms. Rebecca Dorch

April 2 2001

Page 2

cc: Mr. Peter A. Tenhula, Office of the Chairman  
Mr. Bruce Franca, Office of Engineering and Technology  
Mr. Thomas J. Sugrue, Wireless Telecommunications Bureau  
Ms. Kathleen O'Brien Hamm, Wireless Telecommunications Bureau  
Ms. Magalie Roman Salas, Secretary