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February 16, 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ET Doe. 98-2061

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-B204
Washington, D.C. 20554

Re: License Agreement between the FCC and Northpoint Technology
Ex Parte presentation

On February 15, 2001, Thomas J. Scott, Jr. patent counsel to Pegasus Broadband Corporation, and I met with Rebecca Dorch, Dennis Dorsey, David Senzel, and Sonna Stampone to discuss a proposed license agreement between the Commission and Northpoint Technology, Ltd.

Pegasus described its concern that the acceptance of any license from Northpoint might be prejudicial in the following regards: (i) Northpoint might attempt to use the license as evidence of the validity of its patents or (ii) Northpoint might attempt to limit the discretion of Mitre or the FCC in connection with their activities pursuant to Section 1012 of H.R. 5548, enacted as part of the Omnibus Consolidated Appropriations Act, Pub. L. 106-553, 114 Stat. 2762 (2000). Pegasus indicated that this is a matter of highest priority and concern to the company.

Pegasus stated its position that the activities of Mitre and the FCC do not require a license from Northpoint since those activities are limited to testing interference and therefore do not use any claimed subject matter of the Northpoint patents. Additionally, the MITRE and FCC activities are directed solely to experimental and scientific investigation and are not for any commercial purpose. Such experimental research activities does not constitute infringing activity which require a license from Northpoint in any circumstance. *Geise v. Pierce Chem. Co.*, 19 F. Supp. 2d 33 (D. Mass. 1998); see, generally, *Chisum on Patents*, para. 16.03 [1] [c] and *Bee, Experimental Use as Act of Patent Infringement*, 39 J.Pat.Off.Soc'y 357 (1957), compare *Roche Prods. v. Bolar Pharm. Co.* 733 F. 2d 858 (Fed. Cir. 1984). The burden is on Northpoint and its Broadwave affiliates, which are seeking licenses from the FCC, to demonstrate that any licensing

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agreement is necessary for the Mitre or FCC activities. To the best of Pegasus' understanding, no such showing has been made.

Pegasus requested that the FCC ask for guidance from Department of Justice attorneys skilled in intellectual property matters. FCC staff indicated that such lawyers are available to the Commission. FCC staff did not present any analysis that indicates that a review of the Northpoint patent has been conducted by patent counsel to determine whether a license is needed for Mitre or the FCC to conduct the activities intended under Section 1012.

Pegasus expressed concern that the language of the draft agreement will be used (however inappropriately) to present an argument that the FCC has accepted that its and Mitre's activities may properly be limited in order not to infringe Northpoint's patents. Pegasus expressed concern that exculpatory language in any cover letter from the FCC should be made part of the agreement or at a minimum, made subject to formal agreement by Northpoint, by countersignature. Otherwise, the language may be interpreted to have less force or meaning.

Pegasus asked for a further opportunity to discuss the matter with the Commission, including decisionmakers, before the Commission proceeds with any agreement.

Please direct any questions to the undersigned.

Very truly yours,



Bruce D. Jacobs
Counsel to Pegasus Broadband Corporation

cc: Rebecca Dorch
Dennis Dorsey
David Senzel
Sonna Stampone
John Quale, counsel for Northpoint Technology