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September 21, 2001

VIA HAND DELIVERY

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SEP 21 2001

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Communication in ET Docket No. 98-206; RM-9147; RM-9245; 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; Requests of Broadwave USA et al. (DA 99-494), PDC Broadband Corporation (DA 00-1841), and Satellite Receivers, Ltd. (DA 00-2134) for Waiver of Part 101 Rules.

Dear Ms. Salas:

On September 20, 2001, Sophia Collier and Antoinette Cook Bush of Northpoint Technology, Ltd. ("Northpoint"); Thomas Hazlett of the American Enterprise Institute ("AEI"), and Michael Kellogg, of this firm met on behalf of Northpoint with Commissioner Kathleen Abernathy.

Also on September 20, 2001, Ms. Collier and Ms. Bush of Northpoint, Dr. Hazlett of AEI, and Peter Huber of this firm met on behalf of Northpoint with Commissioner Kevin Martin and the following members of his staff: Monica Desai; Catherine Bohigian, and Rob Swanson.

Later that day, the same Northpoint representatives met with Commissioner Michael Copps and his legal advisor Paul Margie.

In all three meetings Northpoint urged the Commission to grant the pending applications of Northpoint's Broadwave USA affiliates to provide terrestrial service in the 12.2-12.7 GHz band. Northpoint observed that it has created the bandwidth it seeks to use and that

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the public interest benefits of licensing Northpoint quickly – including, among other things, increased competition in the markets for the video programming distribution and broadband Internet access – are tremendous. Northpoint also argued that, as policy matter, auctioning licenses for terrestrial service would be an inappropriate tax on or appropriation of Northpoint’s innovation and would discourage the development of other new technologies to harvest additional bandwidth out of already allocated spectrum.

Northpoint also noted that, as a legal matter, the Commission lacks authority to auction off licenses for terrestrial service in the 12.2-12.7 GHz band. First, Northpoint reiterated its position that the ORBIT Act prohibits auctions in spectrum used for the provision of international or global satellite communications services, including the 12.2-12.7 GHz band. Northpoint argued that the recent decision in *National Public Radio v. FCC*, 354 F.3d 226 (D.C. Cir. 2001) (“*NPR*”), supports its reading of the ORBIT Act. In *NPR*, the D.C. Circuit struck down Commission rules requiring noncommercial educational broadcasters (“NCEs”) to bid at auction for certain licenses. The court reasoned that the rules in question were inconsistent with the plain meaning of 47 U.S.C. § 309(j)(2), which prohibits the auctioning of licenses issued to NCEs. The court explained that because the denial of authority is based on the nature of the station that ultimately receives the license, not on the part of the spectrum in which the station operates, nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in commercial spectrum. The ORBIT Act represents the converse situation, in which the denial of auction authority is based on the part of the spectrum in which the applicant seeks to operate, and not on the nature of the applicant that ultimately receives the license.

In addition to the ORBIT Act prohibition, Northpoint pointed out that auctions are possible only in the presence of mutually exclusive, bona fide applications. Northpoint noted that in the case of terrestrial services in the 12.2-12.7 GHz band, there can be no mutual exclusivity because, among other reasons, (1) only Northpoint and its affiliates filed applications before the cut-off date established by the Commission’s call for satellite applications; (2) only Northpoint successfully completed the independent technical demonstration required by Section 1012(a) of the Local TV Act; and (3) it is too late to accept competing applications, in view of the deadlines for Commission action set in the Rural Local Broadcast Signal Act, the Local TV Act, and the Satellite Home Viewer Improvement Act.

Northpoint also discussed some of the legal issues associated with patents granted by the U.S. Patent and Trademark Office to Northpoint. Northpoint holds multiple patents on systems for providing terrestrial service without causing harmful interference to satellite services operating on the same frequencies. Among other things, Northpoint’s patents cover the use of directionality or power control to enable ubiquitous terrestrial/satellite spectrum sharing, and those patents give Northpoint the right to exclude others from using its patented technology. Northpoint expressed its firm resolve to prevent the infringement of its patents.

Northpoint is also concerned that proposed Commission regulations might require terrestrial licensees in the 12.2-12.7 GHz band to operate systems encompassed within the claims of Northpoint's patents. Instead of adopting such rules, which would place the Commission in irreconcilable conflict with the U.S. Patent and Trademark Office, Northpoint proposes that the Commission decline to establish a new "MVDDS service" in the 12.2-12.7 GHz band and simply grant such waivers of existing rules as may be necessary to allow Northpoint to establish terrestrial broadcast video service in the band.

In the meeting with Commissioner Martin and his staff, the issue of on-site mitigation at DBS customer premises was discussed. Northpoint expressed its view that the decision whether to allow on-site mitigation in any given case ought to rest exclusively with the individual DBS customer. Northpoint noted that no on-site mitigation was needed in any of Northpoint's experimental tests, nor were there any complaints of interference from DBS customers during those tests. Northpoint also stated that it is not seeking access to DBS customer lists.

In the meeting with Commissioner Copps and his legal advisor, Northpoint discussed why its proposed terrestrial service would not cause harmful interference with existing and planned satellite services in the 12.2-12.7 GHz band.

The excerpts from the ORBIT Act and the Local TV Act attached hereto at tab A were distributed at all three meetings. In addition, at the meetings with Commissioner Abernathy and Commissioner Copps, copies of Northpoint's ex parte filing dated September 19, 2001 (describing meetings with representatives of the Office of the General Counsel and with Peter Tenhula, Senior Legal Advisor to the Chairman) were distributed. At the meeting with Commissioner Martin and his staff, the two pages at tab B were distributed.

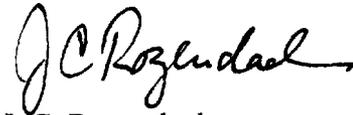
At the meeting with Commissioner Copps and his legal advisor, the single page at tab C was distributed together with a packet of materials with 7 tabs containing excerpts of previous filings in ET Docket 98-206 and copies of certain patents owned by Northpoint. This packet of materials was previously filed as an attachment to Northpoint's ex parte filing dated August 8, 2001 (describing meetings with legal advisors to the Commissioners and with representatives of the Wireless Telecommunications Bureau). Also distributed at this meeting was a copy of a recent study by EARN (Equal Airwaves Right Now) of the capability of proposed satellite television spot beams to provide local television to American communities. The EARN study was filed with the Commission as an attachment to the September 12, 2001, ex parte letter from Peter Pitts, Executive Director of EARN, to Magalie Roman Salas in CS Docket 01-129.

Eighteen copies of this letter and its attachments are enclosed – two for inclusion in each of the above-referenced files.

Please contact me if you have any questions.

Ms. Magalie Roman Salas
September 21, 2001
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Yours sincerely,

A handwritten signature in black ink, appearing to read "J.C. Rozendaal". The signature is fluid and cursive, with a long horizontal stroke at the end.

J. C. Rozendaal

*Counsel for Northpoint
Technology, Ltd*

attachments

cc: meeting participants



A

PUBLIC LAW 106-180—MAR. 17, 2000

OPEN-MARKET REORGANIZATION FOR THE
BETTERMENT OF INTERNATIONAL
TELECOMMUNICATIONS ACT

301; section 302; section 401; section 402; section 403; and section 404.

“SEC. 646. REPORTS TO CONGRESS.

47 USC 765e.

“(a) **ANNUAL REPORTS.**—The President and the Commission shall report to the Committees on Commerce and International Relations of the House of Representatives and the Committees on Commerce, Science, and Transportation and Foreign Relations of the Senate within 90 calendar days of the enactment of this title, and not less than annually thereafter, on the progress made to achieve the objectives and carry out the purposes and provisions of this title. Such reports shall be made available immediately to the public.

President.
Deadline.
Public
information.

“(b) **CONTENTS OF REPORTS.**—The reports submitted pursuant to subsection (a) shall include the following:

“(1) Progress with respect to each objective since the most recent preceding report.

“(2) Views of the Parties with respect to privatization.

“(3) Views of industry and consumers on privatization.

“(4) Impact privatization has had on United States industry, United States jobs, and United States industry’s access to the global marketplace.

“SEC. 647. SATELLITE AUCTIONS.

47 USC 765f.

“Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services. The President shall oppose in the International Telecommunication Union and in other bilateral and multilateral fora any assignment by competitive bidding of orbital locations or spectrum used for the provision of such services.

President.

“SEC. 648. EXCLUSIVITY ARRANGEMENTS.

47 USC 765g.

“(a) **IN GENERAL.**—No satellite operator shall acquire or enjoy the exclusive right of handling telecommunications to or from the United States, its territories or possessions, and any other country or territory by reason of any concession, contract, understanding, or working arrangement to which the satellite operator or any persons or companies controlling or controlled by the operator are parties.

“(b) **EXCEPTION.**—In enforcing the provisions of this section, the Commission—

“(1) shall not require the termination of existing satellite telecommunications services under contract with, or tariff commitment to, such satellite operator; but

“(2) may require the termination of new services only to the country that has provided the exclusive right to handle telecommunications, if the Commission determines the public interest, convenience, and necessity so requires.

PUBLIC LAW 106-553—DEC. 21, 2000

FEDERAL FUNDING, FISCAL YEAR 2001

***Public Law 106-553**
106th Congress

An Act

Dec. 21, 2000
 [H.R. 4942]

Making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 2001, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Incorporation by
 reference.

SECTION 1. (a) The provisions of the following bills of the 106th Congress are hereby enacted into law:

Repealed.

(1) H.R. 5547, as introduced on October 25, 2000.

(2) H.R. 5548, as introduced on October 25, 2000.

Publication.
 1 USC 112 note.

(b) In publishing this Act in slip form and in the United States Statutes at Large pursuant to section 112 of title 1, United States Code, the Archivist of the United States shall include after the date of approval at the end appendixes setting forth the texts of the bills referred to in subsection (a) of this section.

Approved December 21, 2000.

LEGISLATIVE HISTORY—H.R. 4942 (S. 3041):

HOUSE REPORTS: Nos. 106-786 (Comm. on Appropriations) and 106-1005 (Comm. of Conferences).

SENATE REPORTS: No. 106-409 accompanying S. 3041 (Comm. on Appropriations).

CONGRESSIONAL RECORD, Vol. 146 (2000):

July 26, Sept. 14, considered and passed House.

Sept. 27, considered and passed Senate, amended, in lieu of S. 3041.

Oct. 26, House agreed to conference report.

Oct. 27, Senate agreed to conference report.

*ENDNOTE: The following appendixes were added pursuant to the provisions of section 1 of this Act. Appendix A was repealed and deemed never to have been enacted by section 406 of Public Law 106-554 (114 Stat. 2763A-189).

(2) **NONSERVED AREA.**—The term “nonserved area” means any area that—

(A) is outside the grade B contour (as determined using standards employed by the Federal Communications Commission) of the local television broadcast signals serving a particular designated market area; and

(B) does not have access to such signals by any commercial, for profit, multichannel video provider.

(3) **UNDERSERVED AREA.**—The term “underserved area” means any area that—

(A) is outside the grade A contour (as determined using standards employed by the Federal Communications Commission) of the local television broadcast signals serving a particular designated market area; and

(B) has access to local television broadcast signals from not more than one commercial, for-profit multichannel video provider.

(4) **COMMON TERMS.**—Except as provided in paragraphs (1) through (3), any term used in this Act that is defined in the Communications Act of 1934 (47 U.S.C. 151 et seq.) has the meaning given that term in the Communications Act of 1934.

SEC. 1011. AUTHORIZATIONS OF APPROPRIATIONS.

(a) **COST OF LOAN GUARANTEES.**—For the cost of the loans guaranteed under this Act, including the cost of modifying the loans, as defined in section 502 of the Congressional Budget Act of 1974 (2 U.S.C. 661(a)), there are authorized to be appropriated for fiscal years 2001 through 2006, such amounts as may be necessary.

(b) **COST OF ADMINISTRATION.**—There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act, other than to cover costs under subsection (a).

(c) **AVAILABILITY.**—Any amounts appropriated pursuant to the authorizations of appropriations in subsections (a) and (b) shall remain available until expended.

SEC. 1012. PREVENTION OF INTERFERENCE TO DIRECT BROADCAST SATELLITE SERVICES.

(a) **TESTING FOR HARMFUL INTERFERENCE.**—The Federal Communications Commission shall provide for an independent technical demonstration of any terrestrial service technology proposed by any entity that has filed an application to provide terrestrial service in the direct broadcast satellite frequency band to determine whether the terrestrial service technology proposed to be provided by that entity will cause harmful interference to any direct broadcast satellite service.

(b) **TECHNICAL DEMONSTRATION.**—In order to satisfy the requirement of subsection (a) for any pending application, the Commission shall select an engineering firm or other qualified entity independent of any interested party based on a recommendation made by the Institute of Electrical and Electronics Engineers (IEEE), or a similar independent professional organization, to perform the technical demonstration or analysis. The 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.

(c) DEFINITIONS.—As used in this section:

(1) DIRECT BROADCAST SATELLITE FREQUENCY BAND.—The term “direct broadcast satellite frequency band” means the band of frequencies at 12.2 to 12.7 gigahertz.

(2) DIRECT BROADCAST SATELLITE SERVICE.—The term “direct broadcast satellite service” means any direct broadcast satellite system operating in the direct broadcast satellite frequency band.

TITLE XI—ENCOURAGING IMMIGRANT FAMILY REUNIFICATION

SEC. 1101. SHORT TITLE.

This title may be cited as—

- (1) the “Legal Immigration Family Equity Act”; or
- (2) the “LIFE Act”.

SEC. 1102. NONIMMIGRANT STATUS FOR SPOUSES AND CHILDREN OF PERMANENT RESIDENTS AWAITING THE AVAILABILITY OF AN IMMIGRANT VISA; PROVISIONS AFFECTING SUBSEQUENT ADJUSTMENT OF STATUS FOR SUCH NON-IMMIGRANTS.

(a) IN GENERAL.—Section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) is amended—

- (1) in subparagraph (T), by striking “or” at the end;
- (2) in subparagraph (U), by striking the period at the end and inserting “; or”; and
- (3) by adding at the end the following:

“(V) subject to section 214(o), an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 203(d)) of a petition to accord a status under section 203(a)(2)(A) that was filed with the Attorney General under section 204 on or before the date of the enactment of the Legal Immigration Family Equity Act, if—

“(i) such petition has been pending for 3 years or more; or

“(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and—

“(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 203(a)(2)(A); or

“(II) the alien’s application for an immigrant visa, or the alien’s application for adjustment of status under section 245, pursuant to the approval of such petition, remains pending.

(b) PROVISIONS AFFECTING NONIMMIGRANT STATUS.—Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended by adding at the end the following:

“(o)(1) In the case of a nonimmigrant described in section 101(a)(15)(V)—

“(A) the Attorney General shall authorize the alien to engage in employment in the United States during the period of authorized admission and shall provide the alien with an ‘employment authorized’ endorsement or other appropriate document signifying authorization of employment; and

The DBS Industry Record Prior to Northpoint's Washington Tests

Fourteen DBS filings and other communications opposed testing:

“Echostar has thousands of subscribers in the Washington D.C. area. There are far too many DBS subscribers in this area that would be placed at risk of receiving harmful interference from Northpoint’s operations.” - *Emergency Petition for a Cease and Desist Order, Echostar (July 26, 1999)*

“DirecTV vigorously objects to DCE [transmitting] at the expense of tens of thousands of Washington, D.C.-area DBS subscribers who are likely to experience some form of harmful interference from DCE’s testing.” - *Letter to Dale Hatfield from Counsel for DirecTV (March 25, 1999)*

“With tens of thousands of subscribers in the vicinity of the proposed test sites, *interference is unavoidable* - it is only a question of how much. - *Ex Parte Filing, (Briefing to the Commission) DirecTV, (23 June 1999)*

strength exceeds the level necessary for a subscriber to receive the DBS signal. This could lengthen an outage that would have occurred without the interfering signal being present or cause an outage if the receiver is already at the threshold without the interfering signal being present. However, in many cases the reflector dish, terrain, or various structures would shield the backlobes, thus mitigating or eliminating the interference from the MVDDS transmitter. Tests conducted in the 12.2-12.7 GHz band by Northpoint under an experimental authorization confirm that the MVDDS could operate without excessively impacting DBS subscribers.⁴⁶⁵ Northpoint has also filed extensive technical studies to demonstrate that any impact on DBS operations would be minimal and could be mitigated using existing engineering techniques.

215. As mentioned above, DIRECTV and EchoStar conducted their own joint experimental testing to determine whether DBS subscribers would suffer significant availability losses due to new MVDDS operations, and concluded that they would. For example, DIRECTV and EchoStar contend that the increase in unavailability due to a Northpoint transmitter located in Oxon Hill, MD would range from 7.2-122.4%.⁴⁶⁶ However, we note that throughout Northpoint's and DIRECTV/EchoStar's experimental tests, there were no reported DBS outages attributable to the tests. We would expect this result because the level of the potentially interfering terrestrial signal, as proposed by Northpoint, could result in loss-of-picture only if the DBS signal was exposed to a significant rain event sufficient to attenuate the DBS signal close to the threshold at any DBS receiver; i.e., the cliff-effect, and the receiver is aligned in such a fashion to be susceptible to the interfering signal. Further, our engineering staff has thoroughly analyzed the extensive *ex parte* filings, experimental reports, and technical showings filed in the proceeding and finds that harmful interference between MVDDS and DBS operations can be avoided through engineering techniques and regulatory safeguards. We do not find that further independent testing, as suggested by DIRECTV and EchoStar, would yield any further useful information and would only further delay a decision in this proceeding. We note that neither DIRECTV nor EchoStar has identified any specific additional tests that would produce relevant new data. The arguments concerning interference have instead centered on the proper application and interpretation of test results. We find that there is an ample record to analyze the interference scenario between MVDDS and DBS operations.

216. We note that the record in this proceeding demonstrates a variety of techniques that an MVDDS operator may use to protect DBS operations from harmful interference caused by MVDDS operations. Specifically, an MVDDS operator may employ all or some of the following techniques: 1) careful site selection of their transmitters to avoid large concentrations of DBS receive antennas within 1-3 kilometers of the transmitters; 2) beam shaping through customized MVDDS antennas or tilting the beams of their transmitters to avoid DBS receive antennas; 3) adjusting the height of their transmitters; 4) reducing the power of their transmitters during periods of DBS fading due to rain; 5) more accurately pointing DBS receive antennas toward the intended satellite at their expense and with the permission of the DBS subscriber; 6) relocating DBS receive antennas at their expense and with the permission of the DBS subscriber; 7) replacing smaller DBS receive antennas with larger DBS receive antennas at their expense and with the permission of the DBS subscriber; 8) shielding DBS receive antennas from their transmitters at their expense and with the permission of the DBS subscriber; 9) employing planar DBS antennas⁴⁶⁷ at their expense and with the permission of the DBS subscriber; and 10) using multiple

⁴⁶⁵ Northpoint was granted an experimental license under the name Diversified Communication Engineering, Inc. in July 1997. It has conducted tests of its technology in Texas and in the Washington, DC metropolitan area to demonstrate that its proposed service can operate without causing harmful interference to incumbent DBS operations.

⁴⁶⁶ See DIRECTV and EchoStar *ex parte* filing of July 25, 2000.

⁴⁶⁷ Planar antennas are flat antennas that eliminate backlobe interference.



C



**MITRE REPORT SUPPORTS COMMISSION DECISION TO AUTHORIZE
TERRESTRIAL SERVICE IN 12.2-12.7 GHz BAND**

THE COMMISSION'S ORDER	MITRE'S SUPPORT	NORTHPOINT'S RECORD
Unanimous decision to authorize terrestrial services	"Sharing is feasible"	
"In some instances spectrum sharing may result in interference...we note the record in this proceeding demonstrated a variety of techniques" to prevent harmful interference	"Sharing poses a significant interference threat, however, a wide variety of mitigation techniques exist" that can "reduce or eliminate" potential interference	"Northpoint's technology contemplates a wide variety of techniques to ensure that terrestrial transmitters do not interfere with DBS reception" Reply Comments 5/5/98
Specific Ways to Avoid Interference		
Placing transmit locations in areas where there is a low concentration of DBS dishes	Placing transmitters outside of populated areas	"Placement of the Northpoint transmitter in uninhabited areas" Reply Comments 5/5/98
Beam shaping and beam tilt	Multiple antenna beams and beam tilt	"Vertical , " Horizontal" plane discrimination and "beam tilt" (Id.) NP Patents 5,761,605 and 6,169,878
Adjusting height of transmitters	Increasing antenna height	Use of antenna height to prevent harmful interference Comments 3/99
Reducing power during periods of rain	Real time power control	NP patent 6,208,834
More accurately pointing DBS dishes	No MITRE comment	"Repositioning poorly pointed dishes" Comments 3/99
Relocating DBS dishes with the permission of the DBS customer and at the expense of the terrestrial provider	Relocating DBS dishes; "natural shielding"	"Relocating DBS dishes" Comments 3/99
Replacing DBS dishes with larger dishes	DBS antenna replacement	"Replacing the standard DBS antenna" Comments 3/99
Shielding DBS antennas	Clip on shielding for DBS antennas	"Installation of shielding" Comments 3/99
Flat panel antennas	DBS antenna replacement	"... planar array technology proved..." Northpoint filing 7/31/00
Multiple transit antennas with customized beam patterns and lower power	Multiple antenna beams and beam tilt	Note reference in NP patent 6,169,878, claim 1 and claims 3 - 14 and 20 describing a "plurality" of transmitters.

CERTIFICATE OF SERVICE

I, Shannon Thrash, hereby certify that on this 21st day of September, 2001, copies of the foregoing, were served by hand delivery* and/or first class United States mail, postage prepaid, on the following:

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