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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

DANIEL L. BRENNER SENIOR VICE PRESIDENT, LAW & REGULATORY POLICY
1724 MASSACHUSETTS AVE N.W. WASHINGTON, D.C. 20036-1903
TEL: 202.775.3664 FAX: 202.775.3603

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW
TW-A325
Washington, DC 20554

EX PARTE

Re: ET Docket No. 98-206; RM-9147, RM-9245
CS Docket No. 99-250; RM-9257
ET Docket No. 00-258

Dear Ms. Salas:

This letter responds to the recently filed "Petition for Consolidation of Rulemaking Proceedings and for a Declaration That Alternative Spectrum is Suitable for the Proposed 'Multichannel Video Distribution and Data Service'" ("MVDDS") submitted by DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite Corporation ("EchoStar," together the "DBS Operators").

Contending that the use of frequencies by the MVDDS service also used by DBS will interfere with the DBS service, the DBS Operators ask the Commission to place the frequencies for Northpoint's proposed MVDDS service in the band reserved for the Cable Television Relay Service ("CARS") or MMDS. The DBS Operators further seek consolidation of their request with a request by OpTel and associated rulemaking, now several years old, relating to the use of CARS spectrum by so-called "private" cable operators.

In effect, the DBS Operators are resurrecting a "not in my backyard" solution that presents significant procedural and substantive problems for CARS licensees.

We emphasize at the outset that the cable industry has never opposed the entry of facilities-based video competitors, including DBS authorization in the early 1990's and Northpoint's proposed MVDDS service now. But we are concerned that any spectrum "solution" for Northpoint (or the DBS Operators) not result in depriving cable systems and cable networks of needed frequency spectrum.

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Preliminarily, the DBS Operators request procedural actions that are contrary to the Communications Act. They propose that, in lieu of DBS spectrum, CARS spectrum be made available to Northpoint (DBS Operators at 5-8). This proposal runs counter to Section 308 of the Communications Act, 47 U.S.C. §308, which provides that the applicant for spectrum select the spectrum. According to Section 308 (b), in relevant part, "All applications for station licenses ... shall set forth facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station ... *[including] the frequencies and the power desired to be used.*" (emphasis supplied) The choice of frequencies is up to the frequency applicant (in this case, Northpoint), not the DBS Operators.

The DBS Operators' proposal should also be rejected procedurally because it calls for a declaration that alternative MVDDS spectrum is available in the CARS band. Amendment of the Table of Frequency Allocations set forth at Section 2.106 of the Commission's rules, which is a necessary precondition to making CARS spectrum available to Northpoint's MVDDS service, cannot be accomplished without a notice and comment rulemaking. The requested declaration of available spectrum, which is seemingly in the nature of a Request for Declaratory Ruling provided for pursuant to Section 1.2 of the Commission's rules, is inconsistent with basic rulemaking procedures.

Both of these procedural issues point up that Northpoint itself must be satisfied that the frequencies involved are suitable for the intended services; and there is no indication that this is the case.

Besides these procedural issues, the DBS Operators cannot overcome serious substantive objections to their proposal. Despite the DBS Operators' attempt to minimize the importance of CARS frequencies to the cable industry, CARS continues to be critical to cable operations. Cable operators in 2001 had 1700 CARS licenses with most licenses authorizing multiple links. As NCTA explained in 1999:

> cable companies use ... [CARS] ... frequencies for point-to-point and point-to-multipoint video programming transmissions. For example, cable companies use the 12 GHz band where wire-based transmissions are not sufficient such as where signals must be sent from one side of a river or a mountain to the other. While cable systems have been increasingly deploying fiber in place of CARS in recent years, CARS continues to play an important role in providing cable television service to the entire franchised community.

Comments of the National Cable Television Association, CS Docket No. 99-250, Aug. 20, 1999, at 2, *Petition for Rulemaking To Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service,* 14 FCC Rcd 11967 (1999) ("CARS Eligibility Rulemaking").

The DBS Operators contend "... the light use of the CARS band, which may be due to the correspondingly increasing use of fiber optic transmission by cable operators, appears to be one of the factors that led the Commission to commence the CARS rulemaking." (DBS Operators at 7 (citation omitted). This interpretation of the language in the CARS rulemaking notice, we believe, is misleading. The FCC's rulemaking merely asked: "Will cable systems' transition to fiber optics obviate their need for CARS stations thus lessening any potential negative impact and making more spectrum available to other applicants, such as PCOs and other MVPDs?" CARS Eligibility Rulemaking, 14 FCC Rcd 11967, at 11975. The NPRM proposed no tentative conclusion on this matter, and no conclusion has been reached.

As NCTA demonstrated in its comments in that proceeding, the cable industry's continuing requirements for CARS frequencies are genuine, widespread and vital to ongoing operations. They are not, as the DBS Operators' contend, "light." As a result, given the long-standing expectation of use of these frequencies and the public service their use provides in permitting the deployment of nationwide cable service, the cable industry would oppose subordinating its use to any other users.

Use of the CARS band by Northpoint on a secondary service basis is also highly problematical. The Commission has explained that:

> a secondary service is allowed to use the band as long as its operations do not cause interference to any primary designated operations. If a secondary service operation causes interference to a primary service, the secondary service must cease operation [and] a service designated as primary is the only service given priority status to operate in a frequency band.... In addition, secondary users must accept interference from primary users.

CARS Eligibility Rulemaking, 14 FCC Rcd at 11969, n.12. see 47 C.F.R. §2.105.

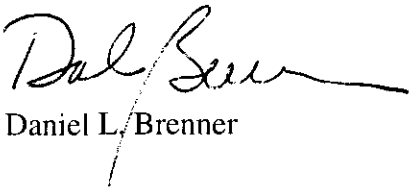
Secondary status frequencies appear to be of reduced commercial value to Northpoint. Northpoint has proposed a competitive video service universally available to residential customers. The service would inevitably interfere with some current cable company CARS use of the band.

Moreover, if a cable company subsequently determined a need for particular CARS frequencies, Northpoint would be bumped off of those frequencies, were they occupying them on a secondary basis. This occurrence could lead to considerable customer disruption and the diminution of Northpoint's service. It would also lead to consumer complaints to the Commission and the involved cable operator, whose current right to operate a backbone service over CARS frequencies would directly affect end users.

It is not difficult to foresee cases arising where the public cannot understand or accept the assertion of primary cable operator service for CARS when it would mean the diminution of Northpoint's service directly to its customer. This situation differs even from other primary/secondary arrangements, such as full and low power stations. There, the low power station may be bumped but new full service to the customer is provided. The FCC would find itself in the middle of such disputes between the CARS use and interruption of off-air customer service.

In conclusion, the DBS Operators' Petition presents significant procedural and substantive problems and should be rejected.

Sincerely,



Daniel L. Brenner

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Peter Tenhula, Sr. Legal Advisor to the Chairman
Susan M. Eid, Legal Advisor to the Chairman
Bryan Tramont, Sr. Legal Advisor to Commissioner Abernathy
Stacy Robinson, Legal Advisor to Commissioner Abernathy
Paul Margie, Legal Advisor to Commissioner Copps
Susanna Zwerling, Legal Advisor to Commissioner Copps
Catherine Bohigian, Legal Advisor to Commissioner Martin
Monica Desai, Legal Advisor to Commissioner Martin