



February 25, 2002

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Notification of Ex Parte Communication in ET Docket 98-206; RM-9147; RM-9245--
ADDENDUM**

Dear Mr. Caton:

Attached is a service list for the *ex parte* presentation that the Satellite Broadcasting and Communications Association (SBCA) filed today in response to an *ex parte* letter of Northpoint Technology on February 4, 2002. It was erroneously omitted from the earlier filing.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Joy O'Brien".

Joy O'Brien
SBCA

Enc.



February 25, 2002

Monica Shah Desai
Office of Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notification of Ex Parte Communication in ET Docket 98-206; RM-9147; RM-9245

Dear Ms. Desai:

I write today on behalf of the Satellite Broadcasting and Communications Association (SBCA) in response to a February 4, 2002 *ex parte* letter from Mr. J.C. Rozendaal, counsel representing Northpoint Technology, Ltd. and Broadwave USA, Inc. (collectively, "Northpoint"). Mr. Rozendaal's *ex parte* was filed in response to an *ex parte* letter filed with the Commission by SBCA on January 28, 2002 that answered a specific question from Commission staff regarding the amount of money paid in auctions for spectrum by operators of terrestrial wireless cable services.

In his *ex parte* Mr. Rozendaal subjects SBCA to a rather bitter round of public name-calling. However, the material attached to the name-calling reveals that being called a hypocrite by Mr. Rozendaal is best compared to being called ugly by a frog. Mr. Rozendaal, despite being a big city lawyer with a large Washington firm, appears to have applied the first principal taught to small town trial lawyers – "When the facts are against you, argue the law. When the law is against you, argue the facts. When both the law and the facts are against you, attack the other side."

The law and the facts are decidedly against Northpoint.

Northpoint is not entitled to free publicly-owned spectrum.

The providers of DBS service have proven, and the Congressionally-mandated independent MITRE report has confirmed, that Northpoint's proposed terrestrial wireless cable system would cause significant interference to DBS consumers. If, in spite of this proven interference, the Commission were to decide to allow terrestrial sharing of the DBS band, there is no legal or public policy justification for the Commission to bypass the normal statutorily-mandated auction process and prefer Northpoint to its wireless cable and DBS competitors with a gift of publicly-owned spectrum.

In arguing that the Commission should grant it free terrestrial use of the DBS spectrum, Northpoint continues its effort to misrepresent the plain meaning of the Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT Act”).¹ The ORBIT Act states that “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 ORBIT Act does not exempt domestic satellite services such as DBS from the normal auction process and it most certainly does not exempt a non-satellite provided domestic point-to-multipoint terrestrial wireless cable services like Northpoint’s. Services against which Northpoint hopes to compete, such as domestic wireless cable systems (functionally identical to the system that Northpoint is proposing) and domestic DBS service, are subject to the Commission’s normal competitive bidding procedures.

Other wireless cable systems (including Local Multipoint Distribution Service (LMDS), Multipoint/Multichannel Distribution Service (MMDS), Wireless Communications Service and 39 GHz) have invested over \$1.6 billion at auction for spectrum. As SBCA and the DBS providers have detailed in earlier filings, DBS has paid over \$734.8 million to purchase spectrum at auction and in the aftermarket. Moreover, DBS service providers have thus far collectively invested over \$7 billion to bring DBS service to over 47 million viewers providing what the Commission has called “the principal competitor to cable television service.”² This investment includes the acquisition of spectrum as well as money spent to build, insure, launch and operate DBS satellites, ground systems, uplink facilities and call centers. This investment has been made in reasonable reliance on the Commission’s Orders facilitating an interference-free environment in which to operate their systems.

In late 2001, Northpoint staged a frantic and ultimately futile effort to persuade Congress to force the Commission to award Northpoint the terrestrial use of the DBS band without auction. The Bush Administration opposed this spectrum grab and issued a Statement of Administration Policy that read, in part, “such a provision would interfere with the efficient allocation of Federal spectrum licenses, provide a windfall to certain users, and reduce Federal revenues.”³

Northpoint is not entitled to a “preference.”

Northpoint next argues that the Commission should use some previously unidentified and extra-legal preference similar to the old “pioneer’s preference” to grant it free publicly-owned spectrum. Unfortunately for Northpoint, Congress in 1997 prohibited the Commission from providing this type of preference.⁴

¹ Pub. L. No. 106-553 (2000).

² *Seventh Annual Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1, at ¶61 (January 8, 2001).

³ Statement of Administration Policy, Department of Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, FY 2002, issued October 25, 2001.

⁴ 47 U.S.C. 309 (j)(13)(F).

Arguments based upon claims of “Northpoint’s ingenuity” are false.

Beyond the fact that the Congress has prohibited the Commission from granting the type of preference that Northpoint seeks, its claims to have somehow created new spectrum are false. The MITRE report has confirmed what the DBS providers have argued since Northpoint approached them with the first of its many business plans – the idea that Northpoint can reduce interference to DBS consumers by locating its terrestrial transmit towers in the north is false. No matter how loudly counsel may ballyhoo the “fruits of Northpoint’s ingenuity” Northpoint’s “new technology” boils down to “you come from the south, we’ll come from the north.” As Northpoint has explained it, its “technology utilizes the generally southerly orientation of domestic DBS dishes to avoid interference with DBS services.”⁵ The MITRE report found that the basis of Northpoint’s claimed “ingenuity” – the very source of the name “Northpoint” – is simply wrong. In fact, the MITRE study found that the use of towers located in the north actually aggravates the “significant interference threat” posed by allowing Northpoint to operate in the DBS band.

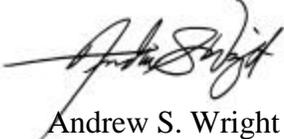
SBCA and the DBS Providers seek to protect consumers from interference.

Once again resorting to *ad hominem* attacks, Northpoint claims that the SBCA’s “chief goal” is to limit competition. Nothing could be further from the truth. Opposition from SBCA and the DBS platform providers to the operation of Northpoint’s proposed service in the DBS spectrum band is based solely on its proven threat of interference to more than 47 million current DBS viewers and to the millions of additional consumers who will be served by DBS in the near future. If the Commission were to license Northpoint or any other Multipoint Video Distribution and Data Service (MVDDS) provider in a spectrum band that would not interfere with the signal received by DBS consumers, we would welcome the competition.

In that spirit of competition, the DBS providers as early as 1999 suggested that the frequency band used for the Cable Antenna Relay Service (“CARS”) would be an excellent alternative for use by Northpoint and other MVDDS providers for their proposed services. As SBCA and the DBS providers have detailed in earlier filings, the CARS spectrum has the same propagation characteristics as the DBS band and the same amount of spectrum is available (500 MHz). In addition, the CARS band is not used to provide a ubiquitous consumer service and is much more sparsely used than the DBS band, which is currently used by millions of consumers. By proactively offering these alternatives to the Commission, the DBS industry has again demonstrated that its opposition to Northpoint’s proposed service is due to proven interference to DBS operations, not a fear of competition.

⁵ Northpoint Petition for Rulemaking (filed March 6, 1998) at 4

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew S. Wright". The signature is fluid and cursive, with a large initial "A" and "S".

Andrew S. Wright
President
SBCA

Cc: Catherine Crutcher Bohigian, Office of Commissioner Martin
Peter Tenhula, Office of the Chairman
Bryan Tramont, Office of Commissioner Abernathy
Paul Margie, Office of Commissioner Copps

CERTIFICATE OF SERVICE

I, Joy O'Brien, hereby certify that on this 25th day of February, 2002, copies of the foregoing were served by electronic mail* and/or first-class United States mail, postage pre-paid, on the following:

William F. Caton*
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

Peter Tenhula, Legal Advisor*
Office of the Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Bryan Tramont, Legal Advisor*
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Paul Margie, Legal Advisor*
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Monica Shah Desai, Legal Advisor*
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Catherine Crutcher Bohigian*
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Antoinette Cook Bush
Northpoint Technology, Ltd.
444 North Capitol Street, N.W.
Suite 645
Washington, D.C. 20001

Tony Lin
David C. Oxenford
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

Nathaniel J. Hardy
Irwin, Campbell & Tannewald, PC
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, D.C. 20036

James H. Barker, III
Latham & Watkins
1001 Pennsylvania Ave., NW
Suite 1300
Washington, D.C. 20004-2505

Pantelis Michalopoulos
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Nancy K. Spooner
Swidler Berlin Shereff Friedman, LLP
The Washington Harbor
3000 K Street N.W.
Suite 300
Washington, D.C. 20007-5116

J.C. Rozendaal
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036-3209

Joy O'Brien

Joy O'Brien