

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

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 02-145
Competition in the Market for the)	
Delivery of Video Programming)	
)	

REPLY COMMENTS OF NORTHPOINT TECHNOLOGY

Northpoint files these Reply Comments in response to the Commission’s Notice of Inquiry in the *Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*. Northpoint will limit its response to two of the most relevant questions presented in the Notice: (1) the comparison of “video distribution alternatives available to consumers and the extent to which consumers have choice for video programming distributors and delivery systems”; (2) “... and information that will allow us to evaluate the status of competition in the video marketplace, prospects for new entrants to that market and the effect on the cable television industry and on consumers.” *Video Competition Report* at ¶1.

I. Consumers do not have choice in video programming distribution or delivery systems.

Unfortunately, the resounding answer to the first inquiry is that not much has changed. Consumers do not have greater choice among video programming distributors and delivery technologies and may in fact have less choice. In its *Seventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, the Commission found that out of 33,000 cable community units nationwide, only 330 or one percent have been certified as having effective competition, which the FCC has defined as meaning that consumers have a choice of more than one multi-video program

distributor (MVPD).¹ The numbers have not changed significantly since the release of the *Seventh Annual Report*.

Almost nine years after the passage of the 1992 Cable Act (“the Act”), Americans still have limited choice for video programming services. Consolidation brought on by recent mega-mergers has allowed cable to flourish and expand its monopoly prowess. Although DBS has increased its market share to 18 percent, it does not compete head to head with cable. Cable still maintains a 78 percent market share.² Furthermore, DBS prices vary little from cable prices, which according to the most recent competition report have exceeded the rate of inflation three fold since the ‘96 Act.³

Most importantly, if the proposed DirecTV and EchoStar merger is consummated, consumers will have even less choice. At best, urban and suburban Americans will be subjected to a duopoly, i.e., the satellite monopolist and the local cable monopolist. Many rural Americans, however, who are not passed by a cable provider, will be left with no choice other than the behemoth EchoStar. The National Indian Telecommunications Association in a letter dated March 12, 2001 to the Commission stated:

Commission approval of the Broadwave application is the only realistic course of action that will enable tribal communities and other low-income, high-cost communities to receive digital audio, video, and data services in the near future.

II. What are the prospects for new entrants given existing market and regulatory conditions?

Once viewed as potential viable competitors, alternative providers such as MMDS, SMTV and OVS, now suffer diminishing market share. Due to the downturn in the economy, continued market consolidation and cable clustering, their very existence is threatened. Not too long ago RCN an overbuilder launched its services with great fanfare and then appeared to pose a real threat to cable. Now, reportedly it is in financial trouble and instead of increasing deployment is selling off systems. The Eighth Annual Competition Report found that MMDS has decreased by 14.7 percent, SMATV has not grown and LECS have abandoned video programming.⁴

Northpoint stands poised to provide consumers choice -- right now. Northpoint has a patented digital terrestrial wireless technology that it can deploy ubiquitously and at low cost to consumers. It can provide head-to-head competition to cable incumbents everywhere by offering local television channels on a must carry basis in all markets,

¹ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132 (rel. Jan 2, 2001) (“*Seventh Annual Report*”) at ¶138.

² April 2002 *Report on Industry Prices* at ¶ 4.

³ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992-Development of Competition and Diversity in Video Programming Distribution: Section 628 (c) (5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, FCC02-176(June28, 2002) (Program Access Order), at ¶ 65.

⁴ *RCN Cuts Deal for N.J. Systems*, Multichannel News, August 28, 2002.

regardless of size, something the DBS operators have been either reluctant or unable to do in three-quarters of the nation's television markets.

However, consumers cannot choose Northpoint because there remains one last, unnecessary barrier to entry – the lack of prompt and non-discriminatory licensing by the Commission. Given the clear need to provide consumers additional competition, it is critical for the Commission to adopt regulations that further, rather than retard, the entry of new entrants.

Northpoint commends the Commission on its decision extending the program access rules, which will ensure that continued access to programming for new competitors. Northpoint also commends the Commission for confirming that its innovative terrestrial technology can indeed share spectrum with satellites in the Ku band without causing harmful interference.⁵

Unfortunately, the Commission's decision to allocate MVDDS licenses through an auction process creates a substantial, if not insurmountable, barrier to entry that may jeopardize the prospect for any genuine party to deploy MVDDS. The Commission is not subjecting the satellite applicants seeking the same spectrum in the Ku Band to an auction, nor did the Commission use auctions when it recently awarded nationwide licenses in the Ka Band to DBS companies. This disparate treatment grants the incumbents a competitive advantage, allowing them to further entrench their market dominance, much to the disadvantage of consumers.

III. Auctions are a crippling tax on new providers. They serve as a substantial barrier to entry and provide a competitive advantage to the incumbent monopolist. Therefore, the Commission should grant licenses to new terrestrial entrants in the same manner that it has issued, and will issue, licenses to share the exact same spectrum to satellite incumbents and applicants.

All companies sharing spectrum should be treated the same. Ironically, Northpoint and six satellite companies filed for the same spectrum in the Ku Band on the same day. In an unprecedented ruling, the FCC has determined that Northpoint's terrestrial system could share spectrum with each of the satellite applicants and DBS incumbents.⁶ However, rather than license all applicants, Northpoint was singled out for a possible auction. Over 98 percent of the spectrum to be awarded to the applicants will go to huge incumbents such as Hughes, Boeing, Alcatel, and Teledesic—without auction.

Among the DBS incumbents, it should be recalled that all of the original DBS companies (many of which no longer exist because of consolidation) received their initial grant of spectrum licenses without auction—6,000 MHz. For example, DirecTV has never

⁵ See Second Report and Order in FCC 02-116, adopted April 11, 2002, released May 23, 2002.

⁶ See First Report and Order and Further Notice of Proposed Rulemaking in Docket No. 98-206, adopted November 29, 2000; Second Report and Order in Docket No. 98-206, adopted April 11, 2002.

participated in an auction and yet it has licenses at all three full CONUS slots. EchoStar obtained its most recent DBS license in May of 2002 without an auction. Pegasus, a reseller of DirecTV service, obtained five licenses in the Ka Band without auction, which will enable it to provide DBS type service on its own. Ten other satellite companies were similarly awarded nationwide spectrum licenses, without auction, in the Ka Band.

Moreover, there is ample Commission precedent for issuing licenses without auction to terrestrial applicants. In 2001, the FCC's Wireless Bureau granted over 11,000 new ground based services without auction. It cannot be disputed that the FCC awards enormous amounts of spectrum without auctions on a regular basis.

Northpoint does not suggest that the Commission should have required auctions in the above-cited examples. In originally granting DBS and satellite providers spectrum the Commission rightly recognized the importance of aiding the then new entrants in competing against cable. We respectfully submit that without such assistance DBS would not have gained the rapid increase in market share that it enjoys today. Moreover, we also share the satellite industry's general opposition to satellite auctions as a costly and inefficient method of allocating licenses.

Based upon the above recitation of facts, it is clear that the FCC has the authority to license spectrum without auction. There are important policy reasons why the Commission should continue to follow that policy with respect to the Ku Band. While auctions may work in some instances, they can also prevent spectrum from being deployed for use by the public, particularly in rural or economically disadvantaged areas. In 2001 only 32 percent of licenses that the FCC put up for auction were actually sold.⁷

Furthermore, the bankruptcies of over 60 percent of the participants in the most recent fixed wireless auction (39GHZ) serve only to remind us of the economically crippling effect auctions have on new entrants. Auctions unfairly and unwisely tax new entrants just as they invest millions (and billions) to build out their physical infrastructure before they have a single customer.

Lastly, the auction contemplated for MVDDS licenses will allow incumbents to buy up spectrum and warehouse it, thereby removing the ability of new entrants to challenge their present market share. It will be at least 10 years before the Commission could reclaim licenses issued to companies that never had any genuine intention of providing new service to the public. Thus, rather than efficiently issue licenses to the parties most likely to promptly put the spectrum to use; the MVDDS auction is likely to have precisely the opposite result.

Yesterday's new entrants will become tomorrow's monopolist unless competition is allowed to grow and thrive. Treating all providers similarly is the only way to open up competition to today's new entrants, so that consumers can enjoy the benefits that robust

⁷ Of 21,248 licenses tendered for auction 2001, 6,743 were sold and the FCC retained 14,505. (Auction #35, 38, 39, 40, 41, and 42.) This excludes the invalidated reauction of NextWave licenses.

competition brings, e.g., greater diversity in programming, lower price and choice in service provider.

Antoinette C. Bush
Executive Vice President
Northpoint Technology, Ltd.
444 North Capitol Street, N.W.
Suite 645
Washington, DC 20001
(202) 737-5711

Counsel for Northpoint Technology, Ltd.

August 30, 2002