

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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| _____ )                                      |                      |
| In the Matter of )                           |                      |
| )  |                      |
| Auction of Multichannel Video Distribution ) | Report No. AUC-03-53 |
| And Data Service Licenses )                  | (Auction No. 53)     |
| )  |                      |
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**COMMENTS OF  
NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVE USA, INC.,  
REGARDING AUCTION PROCEDURES**

Northpoint Technology, Ltd., and Broadwave USA, Inc. (collectively, “Northpoint”) hereby respond to the Public Notice dated January 30, 2003 (DA 03-286) of the Commission’s Wireless Telecommunications Bureau (“WTB”) seeking comment on auction procedures to be followed in the auction of licenses to provide Multichannel Video Distribution and Data Service (“MVDDS”).

Northpoint offers two comments regarding the procedures for Auction 53. *First*, that any entity that files an application for an MVDDS license must undergo the independent technical demonstration required by 47 U.S.C. § 1110. Currently, Northpoint is the only entity to have done so, but the Commission may not allow other applicants to ride piggy-back on Northpoint’s successful demonstration of its patented technology. *Second*, it is vitally important for the viability of MVDDS that licenses be issued on the basis of Designated Market Areas (“DMAs”) rather than Component Economic Areas (“CEAs”).

**I. Any Applicant For An MVDDS License Is Statutorily Required To Provide An Independent Technical Demonstration of Its Ability To Operate Without Causing Harmful Interference To DBS**

Congress has ordered a concrete and technology-specific demonstration that each MVDDS applicant can operate without causing harmful interference to DBS.

Specifically, 47 U.S.C. § 1110(a), which is entitled “Testing for harmful interference,” provides as follows:

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.

(emphasis added). By its plain terms, this statute requires an independent technical demonstration of *each applicant’s* proposed technology. This makes good sense, since the only way to know for sure whether a given company’s particular technology can avoid harmful interference is to test it individually. Congress clearly wanted to ensure that no entity would begin operating in the 12 GHz spectrum without first demonstrating its own ability to do so without causing harmful interference to co-frequency satellite operations.

When the FCC arranged for the required independent technical demonstration to be conducted by the MITRE Corporation (“MITRE”), Northpoint was the *only* entity to provide technology for testing. Indeed, the operating parameters for MVDDS have been framed, line by line, around Northpoint’s patented technology, as documented in (among other places) the MITRE Report.

In the *Second Report and Order* the Commission suggested that other entities would be excused from the testing requirement of 47 U.S.C. § 1110 so long as they

agreed to operate within the parameters established by the Commission in its rules – the very parameters derived from the MITRE report and based entirely on Northpoint’s technology.<sup>1</sup> This proposal to allow other applicants to piggy-back on Northpoint’s spectacular test results is flatly contrary to law. On its face, the above-quoted statutory text requires each applicant to come forward with non-interfering technology, not for the Commission to tell applicants what technology to use – and certainly not for the Commission to tell applicants to use *another company’s* patented and proprietary technology.

If the Commission allows entities to apply for MVDDS licenses without completing the statutorily required tests, it risks a fiasco, for the entire licensing process will inevitably come under judicial scrutiny. After judicial review, if the Commission has failed to comply with the unambiguous statutory requirement that each applicant’s technology undergo independent testing, then the entire licensing process may have to be re-done, possibly spawning a flurry of lawsuits *à la* NextWave and certainly delaying the provision of service to the public for years.

Northpoint has long made it clear that it does not seek to be the exclusive provider of terrestrial services in the 12 GHz band. Others may create and use their own technologies, if they are able to do so without infringing Northpoint’s patent rights in the process. But Northpoint’s patents give Northpoint the exclusive rights to the technology claimed in the patents. Northpoint has often expressed concern that the Commission might, either intentionally or inadvertently, so enshrine Northpoint’s technology into its MVDDS regulations or other regulatory requirements that third parties would be *obliged*

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<sup>1</sup> *Second Report and Order*, 17 FCC Rcd at 9704, ¶¶ 235-236.

to infringe in order to make use of their FCC licenses.<sup>2</sup> That result would be against Northpoint’s wishes and contrary longstanding FCC policy. *See, e.g.*, Second Report and Order, *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 14 FCC Rcd 10954, 10984, ¶ 66 (1999) (“no manufacturer or carrier is required to employ any specific patented technology”); *see generally*, Public Notice, *Revised Patent Procedures of the Federal Communications Commission* (Dec. 1961), *reprinted*, 3 FCC 2d 26 (1966). Partly to avoid this problem, Northpoint has repeatedly advocated that the Commission should refrain from creating an MVDDS service and should instead authorize deployment of terrestrial operations in the 12 GHz band on a case-by-case basis using its waiver authority.<sup>3</sup>

At present, the FCC holds no license to use Northpoint’s technology for any purpose. Although Northpoint at one time granted the FCC a temporary license to use the Northpoint technology, that license was expressly limited to use “solely in connection with the applications of Northpoint’s Broadwave USA affiliates”—and it has, in any case, long since expired.<sup>4</sup> The Commission should refuse to encourage or require infringement of Northpoint’s duly issued patent rights through the terms of the service rules it adopts, and the wireless licenses issued pursuant to those rules.

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<sup>2</sup> *See, e.g.*, Ex parte letter from J.C. Rozendaal (representing Northpoint) to Magalie Roman Salas, Secretary, FCC, ET Docket 98-206, at 2 (FCC filed Sept. 19, 2001); Ex parte Letter from Walter E. Hanley, Jr. (representing Northpoint) to Jane E. Mago, General Counsel, FCC, ET Docket 98-206, at 1-2 (FCC filed Sept. 19, 2001); Ex parte letter from Michael K. Kellogg (representing Northpoint) to Jane E. Mago, General Counsel, FCC, ET Docket 98-206, at 2-3 (FCC filed Oct. 12, 2001).

<sup>3</sup> *See, e.g.*, Comments of Northpoint Technology, Ltd., ET Docket 98-206, at 31 (FCC filed Mar. 12, 2001); Reply Comments of Northpoint Technology, Ltd., ET Docket 98-206, at 7-8 (FCC filed Apr. 5, 2001).

<sup>4</sup> License Agreement between Northpoint Technology, Ltd. and the Federal Communications Commission at 1, ¶ (1) (eff. Feb. 6, 2001).

## **II. It Is Vitally Important That the Commission Issue DMA-Based Licenses**

The WTB notes in its Public Notice that the Commission is considering whether to use Nielsen's Designated Market Areas ("DMA") rather than the Commerce Department's Component Economic Areas ("CEAs") as the geographic licensing areas for MVDDS licenses. Accordingly, the WTB has sought comment on appropriate auction procedures to be applied to an auction of either CEA licenses or DMA licenses.<sup>5</sup>

Because Northpoint continues to regard the proposed auction as an unwise and illegitimate attempt by the Commission to appropriate the benefits of Northpoint's patented invention, Northpoint refrains from comment on reserve prices or minimum opening bids. However, regardless of whether MVDDS licenses are issued by auction or otherwise, Northpoint believes it is absolutely essential to the success of this new service that licenses be issued on the basis of DMAs rather than CEAs.

As its name implies, one important potential application of "Multichannel Video Distribution and Data Service" is to distribute multichannel video programming in competition with cable and satellite television services. MVDDS is particularly well suited to providing local television broadcast signals together with other video programming to customers in unserved and underserved areas. The choice of DMAs is crucial because cable systems generally have a royalty-free statutory copyright license to retransmit local TV programming within the DMA of the station being rebroadcast.<sup>6</sup> For purposes of this statutory copyright license, cable systems are defined to include wireless

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<sup>5</sup> See Public Notice at 2.

<sup>6</sup> See generally 17 U.S.C. § 111; 37 C.F.R. § 201.17 (establishing royalty-free copyright linked to cable must-carry area); cf. also 47 C.F.R. §§ 76.55(e) (establishing Nielsen DMAs as default must-carry area).

systems like MVDDS.<sup>7</sup> By contrast, retransmission outside the DMA requires payment of a license fee that is almost always so high as to make the retransmission uneconomical. Cable companies are obliged to retransmit local signals within each DMA,<sup>8</sup> so it is essential that would-be wireless competitors to cable do so as well – and that they be able to do so in an economically viable manner. In effect, this requires that terrestrial wireless operators organize their systems based on DMAs in order to compete effectively. The use of Component Economic Areas (“CEAs”) rather than DMAs as the geographic units for MVDDS licenses would severely undermine the ability of terrestrial wireless operators in the 12 GHz band to compete with incumbent cable TV and DBS operators by restricting access to the royalty-free copyright and making it more difficult, both technically and economically, to ensure that local TV service is available to MVDDS customers. If Auction 53 is to proceed at all, it absolutely should proceed on the basis of DMAs rather than CEAs.

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

Respectfully submitted,

/s/ J.C. Rozendaal

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J.C. Rozendaal  
Kellogg, Huber, Hansen,  
Todd & Evans, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900

*Counsel for Northpoint Technology, Ltd.  
and Broadwave USA, Inc.*

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<sup>7</sup> See 17 U.S.C. § 111(f) (defining “cable system” to include systems transmitting programming “by wires, cables, microwave, or other communications channels”).

<sup>8</sup> See 47 C.F.R. §§ 76.55(e).