

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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In the Matter of )  
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Application of EchoStar Satellite Corp. )  
for Authority to Make Minor Modification )  
to Direct Broadcast Satellite Authorization )  
and for Authority to Launch and Operate )  
EchoStar 7 Satellite )  
\_\_\_\_\_ )

File Nos. DBS 88-01;DBS 88-02;  
SAT-MOD-20010810-00071;  
SAT-A/O-20010810-00073

OCT 19 2001

Satellite Policy Branch  
International Bureau

**NOTICE OF WITHDRAWAL OF MOTION TO STAY;  
OPPOSITION TO MOTION TO STRIKE; AND  
REPLY COMMENTS OF NORTHPOINT TECHNOLOGY, LTD.,  
AND BROADWAVE USA, INC.**

On September 24, 2001, Northpoint Technology, Ltd., and Broadwave USA, Inc. (collectively, "Northpoint") requested that the Commission stay the above-captioned proceedings regarding the EchoStar 7 satellite until such time as EchoStar's complete application had been made available for public inspection and comment. Specifically, Northpoint sought access to certain electronic files (containing data regarding the precise signal strength and other characteristics of EchoStar's planned spot beams) that were expressly made a part of EchoStar's application but were not submitted to the Commission or released for public inspection. In response to Northpoint's Petition to Stay, EchoStar has sent the missing materials to the Commission and made a copy available to Northpoint through its counsel. Having now reviewed EchoStar's complete application, Northpoint offers further comments on EchoStar's application in Part A below and hereby withdraws its pending petition to stay these proceedings.



After belatedly submitting to the Commission the electronic data files that were necessary to complete its application, EchoStar filed a motion to “strike from the record” Northpoint’s Petition to Stay. Although Northpoint is now withdrawing its petition, EchoStar’s strange attempt to expunge its tardiness from the record is unfounded and should be rejected, as described in Part B below.

**A. The Commission Should Demand a Better Explanation for the Suspicious Spot Beam Over Mexico City**

EchoStar has the burden of demonstrating to the Commission that the granting of its application will promote the public interest, convenience, and necessity. EchoStar’s application rests on the notion that the EchoStar 7 satellite will carry local TV signals in more markets than was previously possible, in compliance with the must-carry provisions of the Satellite Home Viewer Improvement Act (“SHVIA”). EchoStar says it wants “to provide service that is a closer substitute to cable offerings, as envisioned by Congress.”<sup>1</sup> As Northpoint pointed out in its Petition to Stay, however, it is doubtful in the extreme that Congress intended to improve competition to cable offerings in Mexico at the expense of improving competition to cable offerings in the United States. Yet one of EchoStar’s precious spot beams is aimed squarely at Mexico City rather than at any U.S. television market.

EchoStar’s application itself offers no explanation for EchoStar’s decision not to direct all of its spot beams to locations within the United States. In fact, the main body of the application does not even acknowledge that one of its proposed spot beams would serve Mexico. Only a careful perusal of the technical annex to the application revealed

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<sup>1</sup> EchoStar Application at 2.



that EchoStar would be devoting one of its beams to the largest city in the Western Hemisphere, in Mexico, rather than to a smaller U.S. city.

Serving Mexico City's millions of inhabitants may well be a more lucrative proposition than serving a U.S. market with only a fraction as many potential subscribers, so EchoStar's decision to target Mexico City may make good business sense. Although EchoStar says it has no "immediate" plans to serve Mexico, it does not deny that it is interested in doing so with appropriate legal authorization from the Mexican Government. But promoting the public interest, convenience, and necessity sometime requires paying attention to more than the bottom line. In the instant case, the Commission should require that EchoStar serve some of the 100 million U.S. consumers who cannot get local TV signals via satellite before it devotes scarce transponder resources to foreign consumers.

Although EchoStar's application is silent on the issue, EchoStar's motion to "strike from the record" Northpoint's submission offers the belated excuse that EchoStar cannot direct the Mexico City spot beam to the U.S. without risking harmful interference to other U.S.-oriented spot beams.<sup>2</sup> This newly revealed technical impediment is suspicious for a number of reasons.

First, while EchoStar claims that it cannot direct more than 12 spot beams from EchoStar 7 to the continental United States ("CONUS") for technical reasons, DIRECTV has sought permission to launch a satellite with 25 spot beams, all within the CONUS.

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<sup>2</sup> At least, this is what Northpoint thinks EchoStar was trying to say. But it is sometimes difficult to tell. *See, e.g.*, EchoStar Opposition and Motion to Strike at 7 ("Technologically, the realistic alternative to directing this beam to Mexico would be not to risk harmful interference to a U.S. market or not to have this beam on the satellite at all.")



Second, as noted above, EchoStar may have powerful economic incentives to prefer serving a huge market like Mexico City over a smaller market in the U.S. This suggests that EchoStar may have been less than totally neutral in evaluating its technical options, and it obliges EchoStar to document its technical conclusions in meticulous detail and with scrupulous accuracy.

In fact, however – and this is a third cause for concern – EchoStar’s excuse is presented in a purely conclusory fashion. EchoStar apparently expects the Commission to take EchoStar’s word for the fact that some insurmountable but unspecified technical difficulty prevents the Mexico City beam from being aimed at U.S. territory. There is no technical annex to support this remarkable conclusion, and no description of which beams might suffer from interference.

Finally, EchoStar indicates that the threatened interference may not be simply with EchoStar 7’s spot beams but also with “those of the forthcoming EchoStar 8 and other satellites in our system.”<sup>3</sup> To Northpoint’s knowledge, the EchoStar 8 application has not yet been filed (not to mention the applications for the other unspecified satellites to which EchoStar refers), making it impossible for the Commission or anyone else independently to evaluate the merits of EchoStar’s convenient technical impediment.

Under the circumstances, EchoStar’s late-found technical problem is frankly unbelievable. Before allowing EchoStar to shirk on service to U.S. consumers in unserved or underserved local TV markets, the Commission should undertake a searching inquiry to determine whether additional domestic service is, in fact, feasible.

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<sup>3</sup> EchoStar Opposition and Motion to Strike at 7.

**B. Northpoint's Petition to Stay Was Well Founded and Successful**

The gravamen of EchoStar's opposition to Northpoint's petition is that Northpoint lacks standing as a "party in interest" under Section 309(d)(1) of the Communications Act to file a petition to deny EchoStar's application. Even assuming *arguendo* that Northpoint would lack standing to file a petition to deny EchoStar's application, it by no means follows that Northpoint would lack standing to *comment upon* EchoStar's application. Indeed, the Commission's rules contemplate the filing of "comments" on satellite applications as well as the filing of "petitions to deny" and "petitions for other forms of relief." *See, e.g.*, 47 C.F.R. § 25.154(a); *see also id.* § 25.154(b) (discussing "informal objections" to satellite applications).

The Commission has an independent statutory duty to determine whether granting EchoStar's application would serve the public interest, convenience, and necessity. 47 U.S.C. § 309(a). In fulfilling this duty, the Commission is obliged to consider not only the application itself but also "such other matters as the Commission may officially notice," including comments from the public. *Id.* The purpose of Northpoint's stay petition was to encourage the Commission not to take action on an incomplete application.<sup>4</sup>

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<sup>4</sup> Northpoint filed a similar petition with regard to the DIRECTV 4S satellite, and Northpoint withdrew the petition once the complete application had been made available for public comment. *See* Northpoint Technology, Ltd., and Broadwave USA, Inc., Notice of Withdrawal of Petition to Stay Proceedings, *Application of DIRECTV Enterprises, Inc., for Authority to Launch and Operate DIRECTV 4S (USABBS-13)*, File No. S2430; SAT-LOA-20010518-00045 (FCC Filed Sept. 14, 2001). EchoStar erroneously describes Northpoint's petition in the DIRECTV proceedings as a petition to deny; in fact, it was merely a petition to stay and had the simple goal of suggesting that the Commission not take action on an application before the complete application had been made available for public inspection (as required by, among other things, the Commission's own rules, *see, e.g.*, 47 C.F.R. § 0.453(a)(2)(iv)(A)).



Northpoint has never claimed and does not now claim that it is entitled to protection from interference caused by DBS operations. To the contrary, Northpoint has repeatedly recognized that terrestrial service in the 12.2-12.7 GHz band, which Northpoint proposes to provide, must not cause harmful interference to DBS operations. In fact, Northpoint's obligation not to cause harmful interference to DBS operations provides a very good reason for Northpoint to want to get as much information as possible about EchoStar's proposed spot beams, so that Northpoint can optimize deployment of its terrestrial transmitters taking EchoStar's proposed service into account. Far from seeking to undermine EchoStar's primary status in the 12.2-12.7 GHz band, Northpoint's interest in EchoStar's spot beams honors EchoStar's primary status.

Northpoint's stay petition in these proceedings was thus lawful and proper – and, moreover, successful in achieving the objective of opening EchoStar's full application to public inspection. Under the Commission's rules, the granting of a request to withdraw a pleading does not authorize the removal of the pleading from the Commission's records. *See* 47 C.F.R. § 1.8. Northpoint's petition and accompanying comments should therefore remain part of the record of these proceedings.

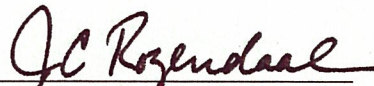
Respectfully submitted,

NORTHPOINT TECHNOLOGY, LTD.  
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October 15, 2001

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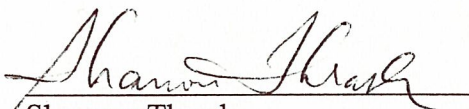
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