

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

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

**OPPOSITION OF ECHOSTAR SATELLITE CORPORATION
AND MOTION TO STRIKE**

No party has petitioned for denial of the above-captioned Application filed by EchoStar Satellite Corporation (“EchoStar”) to authorize the launch of EchoStar’s first spot beam satellite, EchoStar 7. The Commission should grant promptly the application for that satellite, which is vital to EchoStar’s efforts to provide local broadcast programming to as many markets as possible *and* comply with the significant carriage requirements that become effective January 1, 2002. The Commission should disregard and strike from the record the only two pleadings filed in this proceeding – the Petition of Northpoint Technology, Ltd. and Broadwave USA, Inc. to Stay Proceedings Pending Disclosure and Analysis of Data Regarding Planned Signals (“Northpoint Petition”); and the comments of the National Association of Broadcasters (“NAB”). These pleadings are both meritless and should be rejected.

Northpoint has no standing under the Communications Act to oppose or request action that would delay the processing of the Application. Indeed, Northpoint’s purported concern with electrical interference from EchoStar’s proposed satellite contradicts its own representations to the Commission that its service will not cause harmful interference to Direct

Broadcast Satellite (“DBS”) providers. In addition to this substantive weakness, Northpoint cannot procedurally salvage its standing by styling its pleading as a stay petition rather than a petition to deny. No matter how labeled, its pleading remains an unlawful “strike” petition.¹

Similarly, without requesting denial of the application, the NAB tries to piece together a “lack of candor” from the fact that one of EchoStar 7’s spot beams is directed to Mexico City.² In an effort to connect unrelated dots, the NAB invents an inconsistency between the Mexico City spot beam and the satellite industry association’s assertions in court litigation that the must-carry rules will prevent local-into-local service in mid-sized markets. NAB’s assertions are wrong on the technology and the law.

EchoStar has carefully designed its satellite, and is constructing it at great expense, to maximize spectrum reuse for service *to the United States*. EchoStar placed one spot beam over Mexico City because it could not feasibly accommodate another spot beam over the U.S. without increasing the risk of harmful self-interference.³ In any event, the Commission has explicitly authorized and indeed encouraged service to other countries from U.S. DBS slots, making NAB’s intimations of illegality absurd.

¹ The Commission has defined “strike” pleadings as those submitted for the purpose of obstruction, delay, and similar improper purposes. *See Grengo, Inc.*, 28 FCC 2d 166 (1971); *Radio Carrollton*, 69 FCC 2d 1139 (1978), *clarified*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff’d mem. sub. nom.*, *Faulkner Radio, Inc. v. FCC*, No. 70-1749 (D.C. Cir. Oct. 15, 1980).

² *See* Letter from Henry L. Baumann and Benjamin F.P. Ivins, National Association of Broadcasters, to Magalie Roman Salas, FCC (dated Sept. 24, 2001) (“NAB Letter”).

³ Regions to be served by spot beams include not only those described in the EchoStar 7 application, but those that will be served by EchoStar’s entire satellite system, including a second spot beam satellite, EchoStar 8.

NAB's "comments," received by EchoStar from members of the press, also violate the Commission's ex parte rules. By serving a copy of this Opposition on the Commission's Office of General Counsel, EchoStar requests that the Commission take appropriate action against this violation.⁴

I. NORTHPOINT IS NOT A PARTY-IN-INTEREST WITH STANDING TO OPPOSE OR REQUEST ACTION TO DELAY CONSIDERATION OF THE APPLICATION

Under Section 309(d)(1) of the Communications Act, only "parties in interest" may oppose or seek other relief in connection with applications for licenses. *See* 47 U.S.C. § 309 (d)(1). Courts and the Commission have long made clear that standing under that provision is limited to parties alleging economic injury or electrical interference, as well as members of the consuming public. *See, e.g., FCC v. Sanders Bros. Radio*, 309 U.S. 470 (1940); *NBC v. FCC (KOA)*, 132 F.2d 545 (D.C. Cir, 1942), *aff'd*, 319 U.S. 239 (1943); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

While Northpoint makes no assertion that it fits into any of these categories, it seeks to delay consideration of the Application because of "insufficient information to evaluate the precise strength and other characteristics of the planned signal beams at any particular location." Northpoint Petition at 1. The only possible ground of standing that is discernible

⁴ *See* 47 C.F.R. § 1.214 ("Any party to a proceeding ... who has substantial reason to believe that any violation of ... [the ex parte rules] ... has been committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.").

from that request is a concern with electrical interference.⁵ Such a concern, however, is impossible to reconcile with Northpoint's repeated representations to the Commission that it stands ready to operate in the DBS band on a no interference basis.⁶ The Commission's decision to authorize terrestrial services in the band was likewise based on the "no interference" nature of any such operation. By definition, licensees of secondary services must accept, and therefore cannot protest, interference from primary services,⁷ leaving Northpoint with no leg to stand on in this proceeding.

Northpoint's attempted participation in this proceeding is telling, however, as it may allow a glimpse into Northpoint's true plans. Northpoint's purported concern with electrical interference from EchoStar's satellite suggests strongly that Northpoint's ostensible "no interference" proposal is in reality a Trojan Horse that would allow Northpoint to gain effective

⁵ Section 309(d)(1) of the Communications Act as well as Commission Rule 25.154 (a)(4) require Northpoint to support the specific factual assertions in its Petition by an affidavit. *See* 47 U.S.C. § 309(d)(1) and 47 C.F.R. § 25.154 (a)(4). The fact that Northpoint failed to comply with the statute and the rule is all the more reason why Northpoint's Petition warrants no consideration by the Commission.

⁶ *See, e.g.,* Reply Comments of Northpoint Technology, Ltd. and Broadwave USA, Inc. on MITRE Corporation Report, ET Docket No. 98-206 (dated May 23, 2001), at 18 (as a proposed secondary service, Northpoint "confirms" and "honors" the primary status of DBS services); *see also* *In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2 – 12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2 – 12.7 GHz Band*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 98-206, 16 FCC Rcd. 4096, ¶ 263 (2000) (noting that Northpoint "asserted that its proposed service would be on a secondary, non-interfering basis to DBS services").

⁷ The Commission's rules prohibit a secondary service from "claim[ing] protection from harmful interference" from primary services. 47 C.F.R. § 2.105(c)(2)(ii).

co-primary status with the DBS services, to the huge detriment of DBS consumers. Just as it would like to “mitigate” interference by requiring DBS subscribers to cover their dishes with aluminum foil, Northpoint would like to be able to protest against interference from a new DBS satellite. These are hallmarks of a service that is not secondary except in name.

Apparently realizing that it was overreaching, Northpoint recently decided to withdraw its petition to deny DIRECTV’s spot beam satellite application. Northpoint has now chosen to style its pleading in this proceeding as something else – a “stay” petition, even though there is no order to be stayed, and even though Northpoint does not try to show irreparable injury, substantial likelihood of success, or any other component of the required stay showing.⁸ But Northpoint cannot salvage its standing through the tactics of re-labeling its opposition, and the Commission should strike Northpoint’s Petition. In the alternative, should the Commission find that Northpoint has standing to proceed on the basis of electrical interference, the Commission should take official notice of the existence of such electrical interference in its consideration of Northpoint’s request to use the 12 GHz band.

Independent of the foregoing, Northpoint’s professed reason to delay Commission action now is moot. EchoStar has provided the Commission and Northpoint with the GXT files that are the asserted ground for its Petition.

⁸ See *In the Matter of the Application of AA&T Wireless Services*, 15 FCC Rcd. 5902 (Wireless Telecommunications Bur. 2000), ¶ 6 (to obtain a stay of administrative action a party must show that it will suffer irreparable harm if the stay is not granted, it is likely to prevail on the merits of its appeal, the grant of a stay will not harm other interested parties, and that the grant would serve the public interest) (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit Sys. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)).

II. THE PUBLIC INTEREST ARGUMENTS OF NORTHPOINT AND NAB ARE BASED ON THEIR MISUNDERSTANDING OF ECHOSTAR 7's TECHNOLOGICAL LIMITATIONS AND THE LAW

Northpoint and NAB “question” whether EchoStar’s proposal to direct a spot beam outside the United States is consistent with the public interest, in light of the fact that many smaller U.S. television markets cannot receive local television signals via DBS. Both Northpoint and NAB erroneously assume that, in essence, EchoStar’s proposal would “waste” scarce spectrum by choosing to serve a foreign market instead of U.S. markets. This assumption is wrong. In fact, EchoStar has decided to place a spot beam over Mexico City because the satellite’s complex architecture, designed to maximize service to the entire United States, including Hawaii and Alaska, could not feasibly accommodate an additional spot beam over any part of the continental United States.

Spot beam satellite capabilities are constrained by the orbital location of the satellite, the geographic areas to be served by the satellite, and difficulties created by spectrum reuse. Engineering compromises are necessary to develop spot beam designs with the most efficient coverage areas. To take advantage of spectrum reuse, spot beams reusing the same downlink frequencies must be widely separated from each other to prevent interference between the individual beams. So, for example, a spot beam serving New York City cannot reuse the same spectrum to serve Philadelphia; the geographic proximity of the two markets would result in interference between the two beams. Instead, the spectrum for a spot beam serving New York City might be reused to serve a market in another region of the country, as the lack of proximity between the two service areas would alleviate the potential for harmful interference between the spot beams.

EchoStar 7 has fifteen spot beams and was designed to provide spot beam coverage of Alaska and Hawaii. The pattern of remaining beams was designed taking into account, among other things, the constraints created by the desire to serve those two markets and by the need to coordinate EchoStar 7's spot beams with those of the forthcoming EchoStar 8 and other satellites in our system. After accounting for these factors and allocating the available spot beams, one spot beam "slot" was left that could not readily serve a U.S. DMA without risking harmful interference to other U.S. spot beams (either on EchoStar 7 or on EchoStar 8). Rather than leave this spot beam slot unused, EchoStar decided to direct it toward Mexico, where it may be used in the event that it becomes economically and legally feasible for EchoStar to provide DBS service to that country.

Thus, this spot beam is not being "wasted" on a foreign market; rather, it is directed at Mexico because it could not be easily accommodated over any part of the continental United States. Technologically, the realistic alternative to directing this beam to Mexico would be not to risk harmful interference to a U.S. market or to not have this beam on the satellite at all.

Even if it were not for these technical facts, the NAB's attempt to invent a lack of candor from the Mexico spot beam is frivolous on its face.⁹ The NAB tries to manufacture an

⁹ The NAB backhandedly cites (as a "cf." cite) the Cable Services Bureau's opinion in *EchoStar Satellite Corp. v. Young Broadcasting, Inc.* as if that case were analogous here. See NAB Letter at 2. Not only is *Young* inapposite, but the statement cited by NAB was both non-binding dictum and incorrect. In *Young*, the Bureau stated that EchoStar "failed in its duty of candor" by publicly disclosing some information subject to a pending EchoStar request for confidentiality and not immediately modifying its confidentiality request. These Cable Services Bureau statements were dicta: they were not a basis for the Bureau's decision on the confidentiality issue, since the Bureau in fact granted EchoStar's confidentiality request as modified. Nevertheless, the Bureau's statements were as wrong (legally and factually) as they were unnecessary to the Bureau's decision, and EchoStar has already addressed that error. See Letter from Pantelis Michalopoulos, et al., Counsel for EchoStar Satellite Corp., to Magalie Roman Salas, Secretary, FCC, File No. CSR-5655-C (filed Sept. 5, 2001). There was no lack of

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inconsistency between the Mexico spot beam and statements of the Satellite Broadcasting and Communications Association that must-carry will prevent local service to mid-sized markets. In fact, the extraordinarily expensive satellite proposed in the application is proof that EchoStar will go to great lengths to provide service to as many markets as feasible within the constraints of the must-carry requirements.

Of course, the NAB is completely off base in its attempt to cast a specter of illegality over EchoStar's proposal to direct a beam at Mexico.¹⁰ EchoStar has no immediate plans to serve Mexico – indeed it cannot provide such service without authorization from the Mexican government. Nevertheless, service to Mexico would be completely lawful under the Commission's precedent when and if it becomes legally and economically feasible. Indeed, the Commission has unequivocally “encourage[d] international DBS service [from U.S. DBS slots] since it would advance the public interest in a number of ways.”¹¹ In its rush to claim an illegal act, NAB appears to ignore this clear statement by the Commission.

candor in *Young* as a matter of law: EchoStar never had an intent to hide anything, let alone deceive the Bureau (intent to deceive being an “essential element” of a lack of candor showing), and the Bureau did not make such a finding. Furthermore, the Commission has never found lack of candor in cases where some of the information covered by a confidentiality request is public – partial denial of the request is the appropriate consequence in such situations. But even if lack of candor were possible in these circumstances, EchoStar did report the disclosure to the Commission within the time explicitly allowed by the rule cited by the Bureau. See 47 C.F.R. § 76.6(a)(6) (information must be “current and updated as necessary *and in a timely manner at any time before a decision is rendered on the merits of the complaint*”(emphasis added)). Accordingly, the Commission should ignore the NAB's shameful attempt to cast aspersions on EchoStar's candor in this proceeding.

¹⁰ See NAB Letter at 2.

¹¹ *In the Matter of Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to Provide International DBS Service*, 11 FCC Rcd. 2429, 2439 (1996). Moreover, the United States has a bilateral agreement

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In sum, the "public interest" arguments of Northpoint and the NAB are premised upon their misunderstanding of the technological reason for the Mexico spot beam and applicable law, and for this reason, warrant no consideration by the Commission.

III. THE NAB VIOLATED THE COMMISSION'S EX PARTE RULES IN THIS PROCEEDING

The NAB failed to comply with the Commission's *ex parte* rules for restricted proceedings by not bothering to serve EchoStar.¹² NAB did rush to disseminate its letter to the press, together with a press release parlaying NAB's comments into an accusation of "hypocrisy" against EchoStar, and EchoStar was able to obtain a copy of the comments from members of the press. The NAB is not exempt from the *ex parte* rules. By serving a copy of this Opposition on the Commission's Office of General Counsel, EchoStar requests that the Commission take appropriate action against this violation.

IV. CONCLUSION

EchoStar's new satellite, rather than detracting from service to the American public, as Northpoint and the NAB erroneously posit, will actually introduce increased service to

with Mexico that permits U.S. DBS operators to serve Mexico as long as the U.S. operator obtains the necessary authorization from the Mexican government.

¹² There is no question under the Commission's Rules that the NAB's "comments" should have been served on EchoStar. Commission Rule 1.1208, which governs restricted proceedings, contains an example explaining that where there is an uncontested application, the party filing the application (the "filer") is the sole party to the proceeding and accordingly, may freely make presentations to the Commission without serving anyone else. "On the other hand," the example states, "because the filer is a party, a third person who wished to make a presentation to the Commission concerning the application . . . would have to serve or notice the filer." 47 C.F.R. § 1.1208, Note 1.

communities in the U.S. that historically have been underserved. Accordingly, the Commission should strike Northpoint's Petition and the comments of the NAB.

Respectfully submitted,



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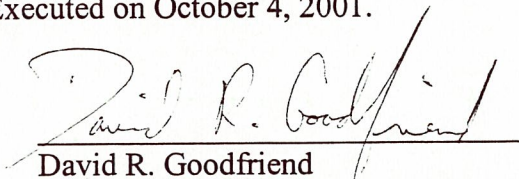
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October 4, 2001

DECLARATION

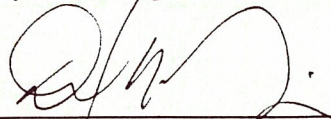
I, David R. Goodfriend, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on October 4, 2001.

A handwritten signature in black ink, appearing to read "David R. Goodfriend", is written over a horizontal line.

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**CERTIFICATION OF PERSON RESPONSIBLE FOR
PREPARING ENGINEERING INFORMATION**

I hereby certify that I am the technically qualified person responsible for preparation of the engineering information contained in the foregoing submission, that I have either prepared or reviewed the engineering information submitted in this pleading, and declare under penalty of perjury that it is complete and accurate to the best of my knowledge and belief.



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Dated: October 1, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served this 4th day of October 2001 by hand delivery (indicated by *) or first-class United States mail, postage prepaid, upon the following:

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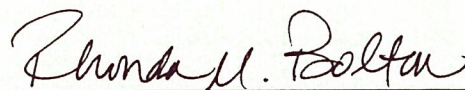
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