

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:
(202) 326-7999

EX PARTE OR LATE FILED

WRITER'S DIRECT DIAL: 202-326-7985

WRITER'S E-MAIL ADDRESS:
jrozendaal@khhte.com

February 11, 2002

RECEIVED

VIA HAND DELIVERY

FEB 11 2002

EX PARTE

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: 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; SAT-MOD-20010810-00071; SAT-A/O-20010810-00073

Dear Mr. Caton:

Enclosed for filing please find an original and eight copies of a *Petition for Reconsideration* by Northpoint Technology, Ltd., and Broadwave USA, Inc. in the above-captioned matter, four for inclusion in file SAT-MOD-20010810-00071 and for inclusion in file SAT-A/O-20010810-00073.

I have enclosed an additional copy for date-stamp and return in the self-addressed envelope provided. Thank you for your assistance in this matter.

Yours sincerely,



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

attachments

No. of Copies rec'd 078
List A B C D E

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

RECEIVED

FEB 11 2002

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

To the Chief, Satellite and Radiocommunication Division, International Bureau:

PETITION FOR RECONSIDERATION

On January 15, 2002, acting pursuant to delegated authority, the Satellite and Radiocommunication Division (the "Division"), granted the application of EchoStar Satellite Corp. ("EchoStar") for authority to launch and operate the EchoStar 7 satellite for use in Direct Broadcast Satellite ("DBS") service.¹ Northpoint Technology, Ltd. and Broadwave USA, Inc. (collectively, "Northpoint"), which participated in the licensing proceedings, hereby petition for reconsideration of that decision. Northpoint respectfully suggests that the Division acted arbitrarily and capriciously and that the decision is not supported by substantial evidence in the record as a whole. It very clearly does *not* serve the U.S. public interest to devote precious resources for potential service to Mexico City when there is such a pressing need for service in this country.

¹ See Order and Authorization, *EchoStar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for EchoStar 7*, SAT-MOD-20010810-00071, SAT-A/O-20010810-00073, DA 02-118 (SRD-IB rel. Jan. 16, 2002).

EchoStar has the burden of demonstrating to the Commission that the granting of its application will promote the public interest, convenience, and necessity. The *sole* public-interest benefit that EchoStar proffered in support of its application was that the EchoStar 7 satellite would carry local TV signals in more markets than is currently possible, thus facilitating compliance with the must-carry provisions of the Satellite Home Viewer Improvement Act (“SHVIA”). EchoStar claimed in its application that it wanted “to provide service that is a closer substitute to cable offerings, as envisioned by Congress.”² Yet one of EchoStar’s spot beams is aimed squarely at Mexico City rather than at any U.S. television market.

EchoStar’s application itself offered 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 did not even acknowledge 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. EchoStar conveniently buried that fact in a technical annex. Both Northpoint and the National Association of Broadcasters (“NAB”) commented that the Division should reject the application and require EchoStar to serve some of the 100 million U.S. consumers who cannot get local TV signals via satellite instead of devoting scarce transponder resources to foreign consumers.³

If EchoStar had sought to justify leaving a U.S. local television market unserved by relying on the supposed public interested benefits that might accrue through serving

² EchoStar Application at 2.

³ See Letter from Henry L. Baumann and Benjamin F.P. Ivins, NAB, to Magalie Roman Salas, FCC (Sept. 24, 2001); Petition of Northpoint Technology Ltd., and Broadwave USA, Inc., to Stay Proceedings Pending Disclosure and Analysis of Data Regarding Planned Signals (Sept. 24, 2001).

Mexico City, then the parties could have debated the merits of that issue before the Division. But EchoStar did no such thing; instead, it responded by denying any present intention actually to serve customers in Mexico.⁴ EchoStar belatedly sought to excuse its failure to bring local signals to more U.S. customers by suddenly asserting – without offering or citing *any evidence whatsoever* – that directing the Mexico City spot beam to the U.S. would risk causing harmful interference to other U.S.-oriented spot beams.⁵

EchoStar’s claim that it cannot fit more than 12 spot beams from EchoStar 7 into the continental United States (“CONUS”) without risking harmful interference is implausible, in view of DIRECTV’s plan (recently approved by the Division) to direct more than 25 spot beams from the DIRECTV 4S satellite at the U.S. The maps attached to this Petition show the planned EchoStar 7 and DIRECTV 4S spot beams, as revealed in their respective applications. Even a cursory comparison of the maps suggests quite clearly that there are plenty of spots in the U.S. that EchoStar could target without risking harmful self-interference.

EchoStar’s utter failure to document any technical difficulty with serving another U.S. local television market – indeed, its utter failure even to identify which beams might be subject to interference – renders EchoStar’s claims about technical difficulties frankly incredible. EchoStar’s uncorroborated assertion of an unidentified technical problem

⁴ See EchoStar Opposition at 8 (“EchoStar has no immediate plans to serve Mexico.”).

⁵ See, e.g., *id.* at 6 (“EchoStar has decided to place a spot beam over Mexico City because the satellite’s complex architecture . . . could not feasibly accommodate an additional spot beam over any part of the continental United States.”)

provides an inadequate basis for the Division's decision to authorize the launch and operation of EchoStar 7.⁶

The Division's decision to authorize the launch and operation of EchoStar 7 appears to rest on three grounds, each of which is flawed. First, the Division appears to have accepted Echostar's assertions about technical difficulties at face value.⁷ Next, the Division brushed aside the concerns about the Mexico spot beam raised by Northpoint and the NAB by saying that the SHVIA does not itself require that all the spot beams point into the CONUS.⁸ Finally, the Division noted that the Commission allows DBS operators to offer service outside the United States, thus implicitly basing its decision in part on whatever public interest benefits that may accrue from such international broadcasts.⁹ With due respect to the Division, Northpoint respectfully suggests that its reasoning does not support the conclusion that the launch and operation of EchoStar 7 is in the public interest.

To the extent that the Division's decision rests on an uncritical acceptance of EchoStar's spurious argument that technical difficulties kept it from serving an additional U.S. local television market, the decision is unsupported by substantial evidence in the

⁶ EchoStar's assertion that the putative interference may not be with EchoStar 7's spot beams but also with "those of the forthcoming EchoStar 8 and other satellites in our system," is unavailing. *Id.* at 7. The EchoStar 8 application has not been filed and it is impossible to tell what other present or future satellites EchoStar might have in mind, making it impossible to identify, much less to evaluate, the supposed interference risk. EchoStar's appeal to unspecified beams on unspecified satellites provides no opportunity for the Division or anyone else to evaluate the merits of EchoStar's convenient technical impediment.

⁷ See Order and Authorization ¶ 4 (repeating EchoStar's assertion that "it could not technically direct this beam into the United States without causing harmful self-interference into other spot beams in EchoStar's fleet").

⁸ *Id.* ¶ 5.

record as a whole and is therefore arbitrary and capricious. The record is utterly devoid of any explanation of EchoStar's supposed technical problem, much less any factual showing to support the assertion of a technical problem.

As for the Division's second point, the relevant question is not whether SHVIA by its terms mandates that all spot beams go into the U.S. Instead, the question is whether it is arbitrary and capricious to grant a launch application when:

(i) the *only* purpose for the launch cited by EchoStar in its application is to increase local-into-local rebroadcasting in U.S. local television markets;

(ii) the *only* reason given by EchoStar for not providing local-into-local rebroadcasting in an additional U.S. local television market is that it is technically impossible to do so; and

(iii) there is not a shred, not a scrap, not a single iota of evidence in the record supporting the notion that it is in fact technically impossible to do so.

Under these circumstances, EchoStar's own logic in support of its application requires that it provide some evidence tending to support the existence of its newfound technical impediment.

Finally, the Division cannot salvage its decision by relying on whatever public interest benefits that might accrue from serving Mexico City because EchoStar has specifically disclaimed any present intention to serve Mexico City. Furthermore, satellite orbital locations and spectrum bands are scarce resources, of which the U.S. is allocated only a limited amount by international treaties. It very clearly does *not* serve the U.S. public interest to devote these precious resources to possibly serving Mexico City when

⁹ *Id.*

there is such a pressing need for service in this country, where some 100 million people cannot receive local TV signals via satellite. EchoStar already carries fewer local TV stations in the U.S. than DIRECTV, a fact that underscores the need for EchoStar to use its resources to reach American markets rather than squandering scarce resources on a speculative future service to Mexico. Moreover, if EchoStar really did have to point a beam outside the CONUS, it could provide service to the U.S. possession of Puerto Rico.

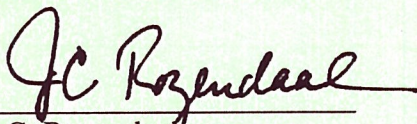
Where, as here, the only proffered objective of a new satellite is to increase service to U.S. local television markets, the Commission fails to fulfill its obligation to engage in reasoned decisionmaking when it allows EchoStar to shirk on service to U.S. consumers in un-served or underserved local TV markets in the absence of any evidence in the record to suggest the existence of the all-too-convenient technical problem that is EchoStar's only excuse for the shirking.

Unless and until EchoStar either modifies its proposal to aim all of its spot beams at U.S. consumers, the Division should reconsider its decision and deny authority to launch and operate EchoStar 7.

Respectfully submitted,
NORTHPOINT TECHNOLOGY, LTD.
AND BROADWAVE USA, INC.

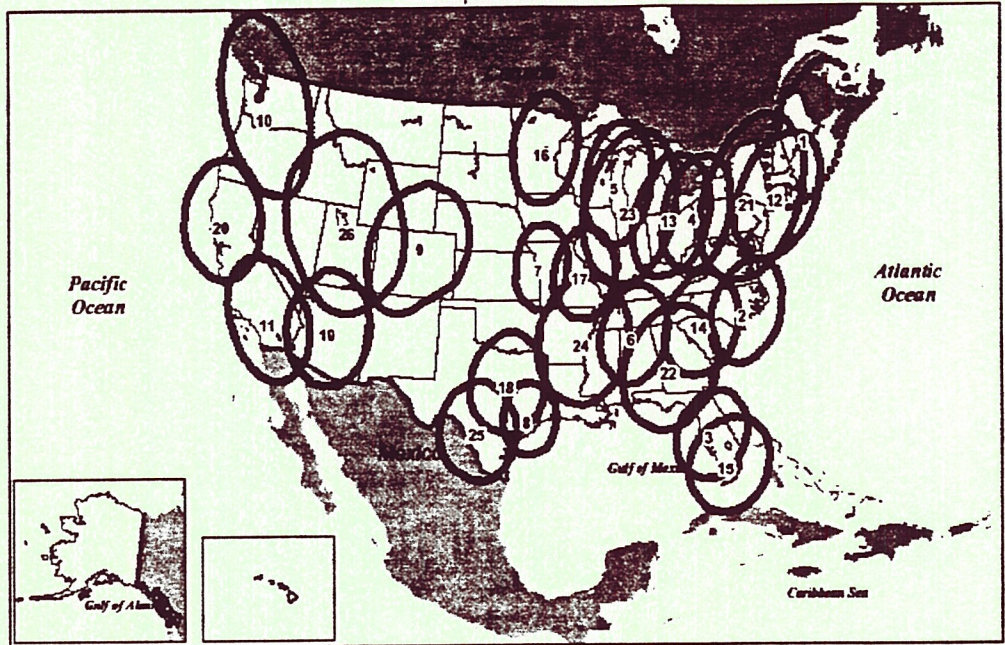
February 11, 2001

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

By: 
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
(202) 326-7900

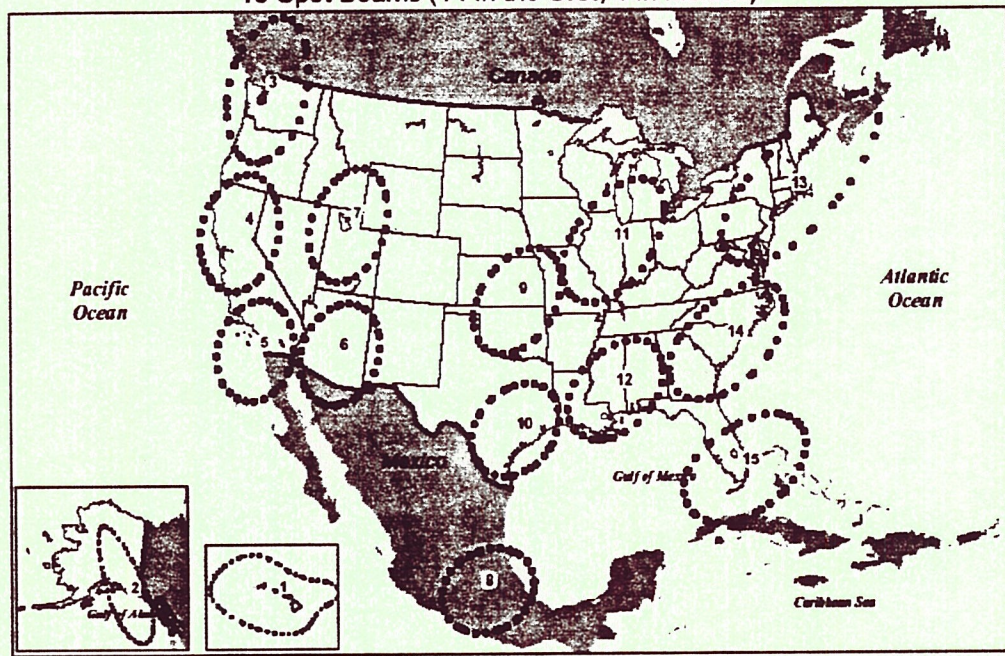
*Counsel for Northpoint Technology, Ltd.
and Broadwave USA, Inc.*

DirecTV Spot Beams 25 Spot Beams



Spot Beams (-6 dB contours)

Echostar Spot Beams 15 Spot Beams (14 in the U.S., 1 in Mexico)



Echostar Spot Beams (-6 dB contours)

CERTIFICATE OF SERVICE

I, Shonn Dyer, hereby certify that on this 11th day of February, 2002, copies of the foregoing were served by hand delivery* and/or first class United States mail, postage prepaid, on the following:

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

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

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

Paul Margie, Spectrum & International
Legal Advisor*
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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

Thomas Tycz, Chief*
Satellite and Radiocommuncations Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554


Kenneth Ferree, Chief*
Cable Service Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Roy Stewart, Chief*
Mass Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Henry L. Baumann
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

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

Pantelis Michalopoulos
Rhonda M. Bolton
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036


Shonn Dyer