



O'MELVENY & MYERS LLP

LOS ANGELES
CENTURY CITY
IRVINE SPECTRUM
MENLO PARK
NEWPORT BEACH
NEW YORK

1650 Tysons Boulevard
McLean, Virginia 22102
TELEPHONE 703-287-2400
FACSIMILE 703-287-2404
INTERNET: www.omm.com

SAN FRANCISCO
WASHINGTON, D.C.
HONG KONG
LONDON
SHANGHAI
TOKYO

April 5, 2002

OUR FILE NUMBER
486,860-001

VIA ELECTRONIC FILING

William F. Caton, Acting Secretary
Federal Communications Commission
445 Twelfth Street, S.W. - The Portals - TW-B204
Washington, D.C. 20554

WRITER'S DIRECT DIAL
703-287-2407

WRITER'S E-MAIL ADDRESS
khawa@omm.com

Re: *Ex Parte* Presentation by Northpoint Technology, Ltd.
in CS Docket No. 01-348 and ET Docket No. 98-206

Dear Mr. Caton:

On behalf of Northpoint Technology, Ltd. ("Northpoint") and pursuant to §1.1206 of the Commission's rules, we hereby submit this letter to report that on April 4, 2002, Antoinette Cook Bush, Executive Vice President of Northpoint, Deborah Lathen of Lathen Consulting, J. Allen Martin of The Livingston Group, and Kemal M. Hawa of O'Melveny & Myers LLP, met with the following Commission officials:

W. Kenneth Ferree (Media Bureau)
Barbara Esbin (Media Bureau)
Marcia Glauberman (Media Bureau)
James Bird (Office of General Counsel)
C. Anthony Bush (Office of General Counsel)
Neil Dellan (Office of General Counsel)
Joel Rabinovitz (Office of General Counsel)
Harry Wingo (Office of General Counsel)
JoAnn Lucanik (International Bureau)
Rockie Patterson (International Bureau)
Marilyn Simon (International Bureau)
Donald K. Stockdale, Jr. (Office of Plans and Policy)

At the meeting, Northpoint argued that the Commission should not consider approving the proposed merger between Hughes Electronics Corporation ("Hughes") and EchoStar Communications Corporation ("EchoStar") without imposing certain remedial conditions on the merger. Specifically, Northpoint argued that the Commission should discontinue direct broadcast satellite ("DBS") providers' exemption from Commission regulations implementing

Section 629 of the Telecommunications Act of 1996 (the "Act"), which requires multivideo programming distributors to: (1) separate set-top box security functions from non-security functions; (2) permit subscribers to attach compatible navigation devices to a multichannel programming distribution system, provided they do not adversely affect the network; and (3) provide technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems.

According to Northpoint, the DBS market has changed dramatically since 1998, when the Commission exempted DBS providers from the requirements of Section 629. Today, Hughes and EchoStar are no longer the fledgling entities the Commission once sought to protect, but instead are each among the top ten largest providers of multichannel video programming services, growing rapidly. Indeed if the Commission does not lift DBS providers' exemption from Section 629, the combined entity arising out of any Hughes and EchoStar merger would have more than sufficient market power to engage in precisely the sort of anticompetitive behavior that Congress sought to prevent through its adoption of Section 629.

Northpoint emphasizes that it does not seek a set-top box condition that provides for compatibility only with its own technology, but rather seeks a condition that allows all providers to attach to the set-top box in a manner consistent with the Act and the Commission's rules. The merger, if approved, should be conditioned on the combined entity's provision of set-top boxes with an open protocol that allows for interoperability with alternative technologies, and the reception of terrestrial as well as satellite delivered signals. Indeed, absent such interoperability, consumers would have to change set-top boxes every time they want to change service providers (which is tantamount to requiring consumers to buy all new telephones each time they want to change telephone service providers).

This letter, as well as copies of the presentation that Northpoint circulated at the meeting, have been filed electronically for inclusion in the above-referenced dockets and for review by applicable Commission staff and interested parties in accordance with §1.1206(b)(2) of the Commission's rules. Should you have any further questions regarding this meeting or this notice, please do not hesitate to contact the undersigned.

Very truly yours,



Kemal Hawa*

for O'MELVENY & MYERS LLP

Attachment

cc: Service List

* Admitted in Maryland and the District of Columbia.

Northpoint Technology

An Integrated Satellite-Terrestrial System

- Northpoint's next generation technology integrates the best of satellite and terrestrial systems to create the ultimate in spectrum efficiency
- Local programming and broadband via a terrestrial network
 - Local channels and other local multi-channel content
 - High speed Internet access – 2 Mbps down; 512 kbps upstream
- National programming via satellite
 - Will provide 300+ channels of national programming
- Basic Core Offering
 - 96 video channels (including all local stations) and high speed Internet access for \$39/month –available in all 210 markets.
- Next Generation Set Top Boxes
 - Modular set top boxes will allow outside innovators to develop an array of new consumer entertainment and information services.

Improved Competitive Offering Through an Integrated Terrestrial Platform (“ITP”) & Satellite System

- Significantly improved service to consumers through spectrum efficiencies of combined platform.
- Compass Systems’ proposal offers unprecedented spectrum efficiency:

	Previous	New
Platform	Terrestrial only	Terrestrial & satellite
Video channels	96	300
Internet downstream	1 mbps	2 mbps

Finally a Home for the Orphaned U.S. Western DBS Slots

- Bringing slots 157 and 166 into service benefits the United States and consumers.
 - Currently 3 of the 8 BSS slots are not used
 - Slot at 166: Two licensees failed to deploy and surrendered their licenses.
 - Slot at 157: Hughes failed to deploy and surrendered license.
- The Compass Systems' plan remedies the deficiencies of the far Western locations of the two orbital positions by:
 - Supplementing with Northpoint terrestrial services
 - Providing international service to the Pacific region, Canada and Mexico
- Service to Hawaii and Alaska will be provided from slot at 166

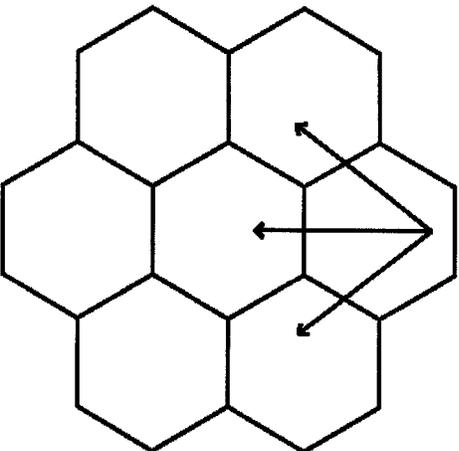
An Integrated Terrestrial-Satellite Network is More Spectrum Efficient than a Terrestrial Only System

- In a terrestrial-only system, capacity must be allocated to uniform “national” video broadcasts that are better broadcast by satellite.
- Freeing this resource provides a radical improvement in overall system capacity through improved spectrum efficiency.

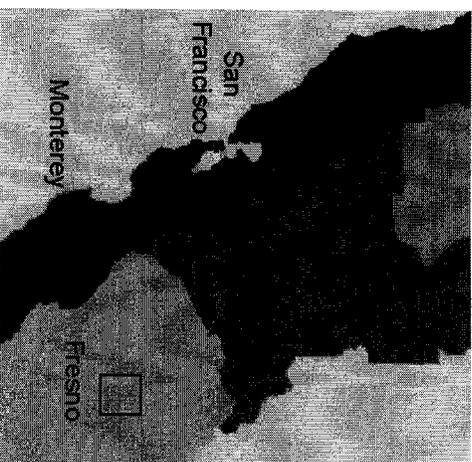
	Reuse potential	Reuse Factor
Single market video	Each television market	210 X
Internet downstream	Each tower	14,000 X
Combined improvement	(half and half allocation)	7105 X

- Every MHz of “national” video that can be placed on a satellite can be reused over 7000 times on the ground.
- Improved spectrum efficiency enables greater diversity of content and internet download speeds.

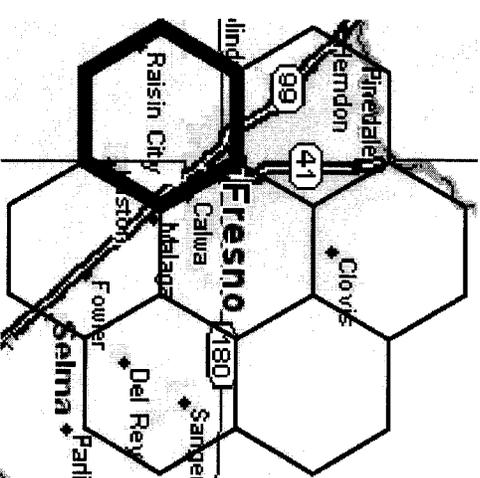
How a Terrestrial Platform Reuses Spectrum



A Northpoint terrestrial network operates as a system of cells.



Cells can function as "repeaters," creating precisely shaped service areas based on television market boundaries. This allows transmission of local channels or other "single market" content. Frequencies are reused in each market area.



Cells can also provide unique content only to users within the footprint of a single cell. Internet downloads and other specialized data can be provided this way. Frequencies are reused in every cell.

Compass Terrestrial Platform Should be Authorized as a “Non-conforming” Use of DBS Spectrum

- DBS licensees are permitted to “make unrestricted use of [their assigned DBS] spectrum” assignments to provide non-conforming services prior to launching and commencing operation of their DBS systems.
 - The FCC has sought comment on whether to expand the non-conforming use policy for DBS licensees in the western portion of the orbital arc (the location of the licenses requested by Compass).
 - The Commission has explicitly recognized that DBS operators must be allowed to engage in non-conforming uses in order to meet the high up-front costs of launching a DBS system.

Grant of Compass Application is Consistent with Statute, Policy and Precedent for Flexible Use

- Grant of CSI's application promotes spectrum efficiency (highest and best use of spectrum) and other public interest goals.
- Flexible use by Compass:
 - Satisfies the specific flexible use criteria of the Communications Act
 - Consistent with the Commission's stated flexible use policies
 - Increased spectrum efficiencies by encouraging the introduction of new, more efficient technologies
 - Consistent with current Commission proposals and prior actions

Grant of Compass Application is Consistent with Current FCC Proposals and Actions

- SDARS licensees: satellite radio equivalent of DBS operating terrestrial networks pursuant to Special Temporary Authority
 - Ancillary terrestrial use of L-band, 2 GHz, and Big LEO: considering allowing terrestrial use by satellite licensees
 - Flexible use permitted for following:
 - **ITFS and MMDS licensees:** mobile services using their fixed service spectrum assignments
 - **Television broadcasters:** digital spectrum assignments to provide other wireless services other than traditional broadcast services
 - **CMRS licensees:** to stimulate competition and encourage innovation
 - **WCS licensees:** authorized to provide any service for which their frequency bands are allocated to encourage deployment of new services and products
-

The Compass Application is Exempt from Competitive Bidding by ORBIT

- Compass is an international satellite applicant.
 - Service will be provided to United States, Mexico, Canada, and portions of the ITU Region 3, including Australia, New Zealand, Papua New Guinea, and other population centers.
 - The ORBIT Act expressly states:
 - “notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services”
 - Thus, the Compass application is not subject to competitive bidding procedures.
-

Cable Interoperability Requirements Should Apply to DBS to Promote Competition

- In today's digital world, the set top box is evolving into a network computer capable of providing a multitude of services and functions, e.g., video on demand, Internet access, interactive television, to mention a few – not just the decoder and tuner.
 - Section 629 of the 1996 Telecommunications Act required the FCC to establish rules to allow for the commercial availability of set top boxes.
 - In 1998, the Commission issued rules which provide, in part, all MVPD's must permit subscribers to attach any compatible navigation devices to a multichannel programming distribution system, if they do not adversely affect the network.
-

DBS Exemption from Section 629 is No Longer Warranted.

- In 1998 when the FCC exempted DBS from the requirements of Section 629, DBS only had 8% of the MVPD market compared to 87% cable share but they represented the only viable competitor to cable.
 - The landscape has changed—
 - The Applicants are among the ten largest providers of MVPD programming.
 - In one year DBS grew from 13 million subscribers to 16 million.
 - DBS is growing at rates greater than cable, 15% in one year compared to 1.9% for cable.
 - The merged entity would become the second largest paid TV service.
 - Without a condition lifting the exemption and imposing openness, DBS will become a gate keeper.
-

Now is the Time to Impose an Openness Condition

- EchoStar and Direct TV boxes are not compatible—millions of new boxes must be replaced. Standard has not been set.
 - *Carterfone*'s unbundling of telephone equipment from the network requirement promoted the creation of a wide variety of new products and services that Americans now enjoy.
 - Rural Americans should have more than one choice for video service. All Americans should have more choices. If the merger is approved without an open access condition, EchoStar will become a monopoly capable of using the set top box as an anti-competitive bottleneck—just like its monopoly brother, cable, did.
 - The merger, if approved, should be conditioned on EchoStar's providing set top boxes with an open protocol that allows for interoperability with alternative technologies, and the reception of terrestrial as well as satellite delivered signals.
-

Response to DBS Reply Comments

- Northpoint did not ask for a set top box condition compatible only with its technology - Northpoint asked for a condition that allows all providers to be able to attach to the set top box consistent with Carterphone and the 1996 Telecommunications Act.
 - The proposed condition is merger specific - But for the merger we would have two companies providing competing service.
 - Unless the exemption is removed, DBS will be a gatekeeper frustrating and impairing the FCC's key policy objective of promoting competition in the MVPD market.
 - For consumers to obtain a wide range of programming choices and other services it is imperative that third parties obtain access to the box for the same reasons those parties have access to cable set top boxes.
-

Response to DBS Reply Comments (cont.)

- The FCC exempted DBS providers in 1998, because DBS was in its infancy and it was the only viable competitor to cable.
 - If approved the merged entity will:
 - be the single largest spectrum licensee in the US by a substantial margin (79,000 MHz), and
 - control virtually all of the DBS slots in use in this country.
 - DBS has 16 million subscribers and in one year it grew 15% while cable grew a meager 1.9%. DBS no longer needs the protection the exemption provided. In fact, it is consumers that now require protection.
-

Response to DBS Reply Comments (cont.)

- The availability of set top boxes is not the issue; consumers should not have to change boxes if they want to change service providers.
 - That would be like having to buy all new phones in your house to change phone service.
 - Closed boxes deprive consumers of choice because it forecloses competitors from offering new and innovative services to consumers.
 - This is the appropriate forum to consider this issue because:
 - a different forum would cause unnecessary delay.
 - of the gate keeper harms this merger presents.
 - if approved, the government will have granted monopoly power to the applicants.
-

Conclusion

- The FCC should condition the merger on the Applicants compliance with section 629 because without such a condition the merger violates a key objective of the ACT—the promotion of competition in video services and equipment. Section 629 sought to break the strangle hold that cable has on the set top box, now DBS threatens to replace cable as the new gatekeeper.
 - If the merger is not granted, the threat remains. DBS is no longer a nascent industry. It has the ability and the incentive to utilize the set top box to thwart competitors like Northpoint. Therefore, it is in the public interest for the Commission on its own motion to declare the exemption no longer applicable.
 - The Commission should immediately grant Northpoint’s application so that consumers can reap the rewards of competition
-