

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Broadwave Albany, L.L.C. *et al.* )  
 )  
Application for Licenses to Provide New )  
Terrestrial Services in the 12.2-12.7 GHz )  
Band )  
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 )

**MEMORANDUM OPINION AND ORDER**

**Adopted:** January 16, 2001

**Released:** January 17, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

1. This order denies a Petition to Dismiss or Deny, filed August 21, 2000, by Pegasus Broadband Corporation (Pegasus). It rejects allegations that Northpoint Technology, Ltd. (Northpoint) and its subsidiaries, including Broadwave Albany, L.L.C. (Broadwave), violated the Commission's *ex parte* rules.<sup>1</sup> The allegations relate to applications filed by Broadwave, Pegasus, and Satellite Receivers Limited (SRL) to institute terrestrial service on the 12.2-12.7 GHz band.

**I. BACKGROUND**

2. These proceedings originated with an application filed by Skybridge L.L.C. (Skybridge) on February 28, 1997, requesting authority to launch and operate a global network of non-geostationary (NGSO) satellites to provide data, voice, and video broadband services in the fixed-satellite service (FSS).<sup>2</sup> Skybridge's satellite and terrestrial operations proposed use of the 10.7-12.7, 12.75-13.25, 13.75-14.5 GHz, and 17.3-17.8 GHz frequency bands (Ku-band). In view of the complex technical, legal, and policy issues involved, the International Bureau (IB) designated the *ex parte* status of the Skybridge applications as permit-but-disclose.<sup>3</sup> The effect of this action was to permit presentations regarding the applications to Commission decisionmakers provided that they were disclosed on the public

<sup>1</sup> Northpoint filed an opposition on September 6, 2000, and Pegasus filed a reply on September 21, 2000.

<sup>2</sup> See *Public Notice*, SPB-98 (Aug. 28, 1997).

<sup>3</sup> See *Public Notice*, DA 98-833 (May 1, 1998).

record.<sup>4</sup> Otherwise, the applications would have been deemed restricted under the Commission's *ex parte* rules, and such presentations would have been prohibited.<sup>5</sup>

3. IB subsequently established a cut-off date of January 8, 1999 for additional NGSO satellite applications.<sup>6</sup> Several entities filed applications for proposals similar to Skybridge's. After initial review, these were found acceptable for filing.<sup>7</sup> The *ex parte* status of these NGSO applications was also designated as permit-but-disclose.<sup>8</sup>

4. Additionally, Northpoint's subsidiary, Broadwave, on January 8, 1999, submitted its proposal for video and Internet services in the terrestrial fixed microwave service to use the 12.2-12.7 GHz band, one of the same bands as the NGSO proposals. Broadwave accompanied its applications with a request for waiver of certain technical requirements of Part 101 of the Commission's rules, which would be necessary for the processing of its applications.<sup>9</sup> The Wireless Telecommunications Bureau (WTB) requested comment on Broadwave's waiver requests and designated relevant matters as permit-but-disclose.<sup>10</sup> WTB based its action on the policy implications of the waivers, and the potential impact of the waiver proceeding on other proceedings and on persons not parties to the waiver proceeding.

5. Subsequently, Pegasus, on April 18, 2000, and SRL, on August 25, 2000, submitted their applications and waiver requests proposing services similar to Broadwave's proposal. WTB requested comment on these waiver requests and also designated them as permit-but-disclose.<sup>11</sup>

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<sup>4</sup> See 47 C.F.R. § 1.1206.

<sup>5</sup> See 47 C.F.R. §§ 1.1202(d), 1.1208.

<sup>6</sup> See *Public Notice*, SPB-141 (Nov. 2, 1998). As a related matter, in light of the proposals for satellite operations not currently authorized by the Commission's rules, the Commission, on November 19, 1998, initiated a rulemaking regarding the use of the bands involved. Additionally, the rulemaking included consideration of a petition for rulemaking by Northpoint proposing to use the 12.2-12.7 GHz band for terrestrial purposes (*i.e.*, the Broadwave proposal). See 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, *Notice of Proposed Rulemaking*, ET Docket No. 98-206, 14 FCC Rcd 1131 (1998). The scope of the rulemaking includes the issues of whether the proposed new uses would cause interference to existing satellite uses of the bands in question, as well as whether they would cause interference to each other. The rulemaking is classified as permit-but-disclose under the Commission's *ex parte* rules. See *id.* at 1181 ¶ 100; 47 C.F.R. § 1.1206.

<sup>7</sup> See *Public Notice*, SAT-00013 (Mar. 23, 1999).

<sup>8</sup> *Id.*

<sup>9</sup> We note that Broadwave's applications have not yet been found acceptable for filing.

<sup>10</sup> See *Public Notice*, DA 99-494 (Mar. 11, 1999).

<sup>11</sup> See *Public Notice*, DA 00-1841 (Aug. 14, 2000); *Public Notice*, DA 00-2134 (Sept. 20, 2000). We note that the Pegasus and SRL applications also have not yet been found acceptable for filing.

## II. ALLEGED EX PARTE VIOLATIONS

6. Pegasus alleges that Northpoint's principals "barraged key Commission decisionmakers" with at least 37 prohibited *ex parte* presentations, beginning May 23, 2000. Pegasus contends that during this period the *ex parte* status of the Broadwave and Pegasus applications was restricted, because they are mutually exclusive. In this regard, Pegasus relies on two provisions of the Commission's *ex parte* rules. The first, 47 C.F.R. § 1.1202(d)(1), defines as parties for *ex parte* purposes:

In a proceeding not designated for hearing, any person who files an application . . . and . . . in the case of an application, any person filing a mutually exclusive application;

The second, 47 C.F.R. § 1.1208, provides that unless otherwise provided by the Commission or its staff, or listed as exempt or permit-but-disclose in other sections of the *ex parte* rules, proceedings are restricted. Thus, according to Pegasus, the existence of mutual exclusivity between its application and Broadwave's establishes a restricted proceeding involving their applications. In Pegasus' view, this remains the case despite WTB's action designating the associated waiver requests as permit-but-disclose. Moreover, Pegasus argues that the Commission cannot classify mutually exclusive applications as permit-but-disclose and be consistent with general principals of administrative law.<sup>12</sup>

7. Pegasus bases its allegations on notices of *ex parte* presentations filed by Northpoint in the docket of the rulemaking proceeding. It asserts that the presentations dealt with "the merits of its [*i.e.*, Broadwave's] applications and the timing of the proceeding."<sup>13</sup> Pegasus complains that it did not have advance notice and an opportunity to be present at these meetings and that Northpoint did not serve copies of the *ex parte* notices on Pegasus. Additionally, Pegasus faults Northpoint for filing the notices in the docket of the rulemaking proceeding, but not "in the proceeding involving its application and waiver requests. . . ."<sup>14</sup> Finally, Pegasus maintains that the descriptions of the meetings contained in the *ex parte* notices are excessively brief.

8. Pegasus urges that Northpoint's repeated and intentional violations of the *ex parte* rules warrant dismissal of Broadwave's applications. Pegasus asserts that Northpoint's violations are rendered more egregious because Northpoint was put on notice of Pegasus'

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<sup>12</sup> See, e.g., *Sangamon Valley Television Corp. v. U.S.*, 269 F.2d 221 (D.C. Cir. 1959).

<sup>13</sup> Petition to Dismiss or Deny at 7. In its reply, Pegasus alleges that Northpoint discussed the merits of Pegasus' own application in later presentations. These occurred, however, after the Pegasus application had been designated as permit-but-disclose.

<sup>14</sup> *Id.* at 8.

concerns about the *ex parte* status of the applications by a letter Pegasus sent to the Commission's Office of General Counsel.<sup>15</sup>

9. Northpoint responds in its opposition, filed September 6, 2000, that it has fully complied with the Commission's *ex parte* rules. Northpoint observes that it did serve Pegasus with all pleadings relating to Pegasus' own application, as opposed to Broadwave's. Northpoint denies that the Broadwave and Pegasus applications should be treated as mutually exclusive because it claims that only the Commission can designate applications as mutually exclusive and because the issue of whether the frequencies involved can accommodate multiple users is unresolved. In any event, Northpoint urges that WTB made the "case" involving the applications and waivers permit-but-disclose and not merely the waiver requests. Northpoint characterizes Pegasus' July 3, 2000 letter to the Commission's Office of General Counsel as an inquiry, not a warning. Additionally, Northpoint alleges that its *ex parte* filings were adequate and properly filed in the rulemaking docket.

10. Pegasus reiterates, in its reply filed September 21, 2000, that Northpoint violated the *ex parte* rules, which are designed to safeguard the fairness of Commission proceedings. According to Pegasus, the applications became restricted on the submission of Pegasus' mutually exclusive application, notwithstanding the previous designation of Northpoint's waiver requests as permit-but-disclose. In this regard, Pegasus contends that the two parties' applications are clearly mutually exclusive and do not require Commission action to make them so. Additionally, Pegasus argues that only the waiver requests and not the applications were made permit-but-disclose. Pegasus notes that Northpoint's later presentations concerned Pegasus' as well as Broadwave's applications.

### III. DISCUSSION

11. We conclude that Northpoint committed no significant violation of the *ex parte* rules. We find in this regard that, at the time of the presentations in question, Northpoint reasonably understood that WTB had classified both the Broadwave and Pegasus applications as permit-but-disclose proceedings. The public notice with respect to the Broadwave applications states:

Because of the policy implications and the potential impact of this proceeding on other proceedings, as well as, persons not parties to the waiver requests, we believe it would be in the public interest to treat this case as a permit-but-disclose proceeding under the *ex parte* rules.[Footnote omitted.] Therefore, any *ex parte* presentations made with respect to the issues involved in the subject waivers, subsequent to the release of this Public Notice, will be permissible but must be disclosed . . . . [Emphasis added.]

DA 99-494. The public notices relating to the Pegasus and SRL applications contain identical language.

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<sup>15</sup> See Letter from Bruce Jacobs and Tony Lin to David Senzel, FCC, Office of General Counsel (July 3, 2000).

12. Although, as Pegasus points out, the scope of the word “case” is subject to some ambiguity, we believe that, in context, Northpoint reasonably concluded that the term included the applications as well as the waiver requests. At the time WTB acted, IB had already designated the Skybridge application, proposing use of these same bands, as permit-but-disclose. Moreover, shortly after WTB addressed the Broadwave applications, IB designated the other satellite applications filed in response to the NGSO cut-off as permit-but-disclose. Under the circumstances, it was reasonable for Northpoint to conclude that WTB intended that Broadwave’s applications would be treated consistently with the related NGSO applications proposing to use these bands. We note, in particular, that the Northpoint proposal was being considered in a consolidated manner with the satellite proposals in the related rulemaking and that the Broadwave public notice expressly relied on the “potential impact of this proceeding on other proceedings,” including, by implication, the rulemaking.

13. To the extent that there is any remaining ambiguity, we clarify here that WTB intended to make both the applications and waiver aspects of the Pegasus, Broadwave, and SRL proceedings subject to the Commission’s permit-but-disclose *ex parte* rules. Had we intended to do otherwise, we would have explicitly stated in our public notices that some aspects of the cases remained restricted proceedings.

14. In reclassifying the *ex parte* status of these proceedings, WTB acted within the scope of the discretion granted by 47 C.F.R. § 1.1200(a). As an additional matter, the Commission has previously rejected the view that cases such as *Sangamon Valley* bar the Commission, where circumstances warrant, from treating mutually exclusive applications as permit-but-disclose.<sup>16</sup> Moreover, we reject any suggestion that the filing of the Pegasus application somehow caused the Broadwave proceeding to revert to restricted status because of the provisions of 47 C.F.R. § 1.1202(d) regarding mutually exclusive applications. Assuming for the sake of argument that the Pegasus and Broadwave applications could be considered mutually exclusive, Pegasus became a party to the Broadwave application proceeding upon filing, but the status of the Broadwave proceeding remained a permit-but-disclose proceeding under WTB’s public notice. This arguably resulted in a period of time in which the Broadwave applications were classified as permit-but-disclose and the Pegasus application was classified as restricted, but, following Pegasus’ inquiry, WTB remedied this discrepancy (assuming one existed) in its public notice reclassifying the Pegasus application as permit-but-disclose.<sup>17</sup>

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<sup>16</sup> See Amendment of 47 C.F.R. § 1.1200, *Notice of Proposed Rulemaking*, GC Docket No. 95-21, 10 FCC Rcd 3240, 3242-43 ¶¶ 16-22 (1995).

<sup>17</sup> The public notice was issued subsequent to Pegasus’ letter to the Commission’s Office of General Counsel stating:

It is our understanding of the Commission’s Rules that our filing of a mutually exclusive application automatically changed the *ex parte* status of the Northpoint application proceedings from permit-but-disclose to restricted. By this letter, we seek confirmation of that conclusion.

(continued....)

15. In view of the foregoing, we find that Northpoint's actions in meeting with Commission officials on a *ex parte* basis regarding its applications and filing notices pursuant to 47 C.F.R. § 1.1206 were consistent with the *ex parte* rules. It does not appear, however, that Northpoint fully complied with the Commission's rules in this regard, because Northpoint should have filed copies of those notices that related specifically to Broadwave's applications for inclusion in both the rulemaking and application files.<sup>18</sup> While we admonish Northpoint to conform to this requirement in the future, Northpoint's conduct manifests no intent to prejudice Pegasus, and no showing has been made of prejudice to Pegasus, which was aware of the rulemaking docket. Additionally, neither the record nor Pegasus' petition provides a basis to conclude that specific notices omitted information that should have been summarized. We therefore find no basis for further action.

#### IV. ORDER

16. ACCORDINGLY, IT IS ORDERED, that the Petition to Dismiss or Deny, filed August 21, 2000, by Pegasus Broadband Corporation IS DENIED.

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham  
Deputy Chief, Wireless Telecommunications Bureau

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We note that, in its letter, Pegasus did not distinguish between the *ex parte* status of the waivers and the applications, as it does now.

<sup>18</sup> The pertinent public notice provided that comments on Broadwave's applications should reference the application proceeding, and we see no basis for Northpoint's attempted distinction between comments and *ex parte* filings in this regard.