

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

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

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: March 8, 2002

Released: March 13, 2002

By the Deputy Chief, Wireless Telecommunications Bureau:

1. This *Memorandum Opinion and Order* denies petitions for reconsideration filed by Pegasus Broadband Corporation (Pegasus) and Northpoint Technology, Ltd. (Northpoint) and BroadwaveUSA of our *Memorandum Opinion and Order*.¹ In the *MO&O*, we rejected allegations by Pegasus that Northpoint had committed serious violations of the Commission's *ex parte* rules by meeting with Commission decisionmakers on several occasions without notice to Pegasus.² We concluded that no significant violations of the *ex parte* rules occurred.³

2. The somewhat complicated procedural history of this matter is set forth in the *MO&O*.⁴ For the present purposes, we note that Pegasus and Northpoint's subsidiaries, including Broadwave Albany, L.L.C. (Broadwave), have filed applications and associated waiver requests for the terrestrial use of the 12.2 - 12.7 GHz band (Ku band). Currently, the 12.2 - 12.7 GHz band is authorized for use by Direct Broadcast Satellite operations, Non-geostationary Satellite Orbit operations, Multichannel Video

¹ Broadwave Albany, L.L.C., 16 FCC Rcd 893 (2001) (*MO&O*). Before the Commission are: (1) Petition for Reconsideration, filed February 16, 2001, by Pegasus Broadband Corporation, Opposition of Northpoint Technology, Ltd. and BroadwaveUSA to Petition for Reconsideration of Pegasus Broadband Corporation, filed March 1, 2001, and Reply to Opposition to Petition for Reconsideration, filed March 12, 2001, by Pegasus Broadband Corporation; and (2) Petition of Northpoint Technology, Ltd. and BroadwaveUSA for Partial Reconsideration, filed February 16, 2001, Opposition to Petition for Partial Reconsideration, filed March 1, 2001, by Pegasus Broadband Corporation, and Reply to Opposition to Petition for Partial Reconsideration, filed March 13, 2001, by Northpoint Technology Ltd. and BroadwaveUSA.

² See generally 47 C.F.R. §§ 1.1200 *et seq.*

³ See *MO&O*, 16 FCC Rcd at 896, 898 ¶¶ 11, 15.

⁴ See *id.* at 893-894 ¶¶ 2-5. The *MO&O* stated that WTB requested comment on the Pegasus and Satellite Receivers Ltd. (SRL) waivers and also designated them as permit-but-disclose. However, while we note that the relevant Public Notices designated the waivers as permit-but-disclose, they did not specifically seek comment on the Pegasus and SRL waivers. *Id.* at 894 ¶ 5.

Distribution and Data Service operations, and Private Operational Fixed Microwave Service operations.⁵ The parties do not dispute that Northpoint personnel met on several occasions with Commission decisionmakers to discuss the Broadwave and Pegasus applications. At issue is whether Northpoint complied with the *ex parte* rules applicable to these meetings.

3. This question turns on whether the respective applications were deemed “restricted” under Section 1.1208⁶ or “permit-but-disclose” under Section 1.1206⁷ of the Commission’s Rules. If the former, Northpoint was prohibited from meeting with decisionmakers without giving Pegasus advance notice and an opportunity to be present; if the latter, Northpoint need only have filed an appropriate memorandum summarizing the meeting in the record of the proceeding. Northpoint attempted to comply with the permit-but-disclose procedures by filing summaries of discussions it had regarding the Broadwave applications, but it filed them in the docket of a related rulemaking proceeding.⁸

4. We agreed with Northpoint that the relevant public notice⁹ properly designated the Broadwave applications as permit-but-disclose.¹⁰ Additionally, we rejected arguments by Pegasus that the *Public Notice* did not by its terms designate the applications as permit-but-disclose as well as arguments that we did not have the authority to so designate the applications. In its petition for reconsideration, Pegasus renews its contention that the Broadwave applications should have been deemed restricted. The petition, however, essentially repeats the arguments Pegasus previously made. The Commission has long held that reconsideration will not be granted “merely for the purpose of again debating matters on which the [decisionmaker] has once deliberated and spoken.”¹¹ Therefore, we deny the petition.

5. We also faulted Northpoint for filing *ex parte* notices concerning the Broadwave applications solely in the related rulemaking docket.¹² We observed that the *Public Notice* regarding the Broadwave applications and waiver request directed interested persons to file comments that referenced the waiver request and the DA number of the *Public Notice*.¹³ We saw no basis to distinguish between the filing of comments and the filing of *ex parte* notices with respect to the waiver requests in this regard.

⁵ See *First Report and Order and Further Notice of Proposed Rule Making*, FCC 00-418, ET Docket No. 98-206, 16 FCC Rcd 4096 (2001).

⁶ 47 C.F.R. § 1.1208.

⁷ 47 C.F.R. § 1.1206.

⁸ See *MO&O*, 16 FCC Rcd at 895 ¶¶ 6-7.

⁹ *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Broadwave Albany, L.L.C., et. al. Requests for Waiver of Part 101 Rules, 14 FCC Rcd 3937 (1999).

¹⁰ See *MO&O*, 16 FCC Rcd at 896-897 ¶¶ 11-14. The applications would otherwise have been restricted. Northpoint indicates that it made no presentations regarding Pegasus’ applications until after the WTB issued a public notice designating them as permit-but-disclose. Northpoint Opposition at 10; see *Public Notice*, Wireless Telecommunications Bureau Sets Permit-But-Disclose Status For PDC Broadband Corporation Requests For Waiver of Part 101 Rules, 15 FCC Rcd 14,999 (2000).

¹¹ See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹² See *MO&O*, 16 FCC Rcd at 898 ¶ 15.

¹³ *Id.* at 898 n.18.

Northpoint was admonished to follow the appropriate filing procedure in the future.

6. In its petition for partial reconsideration, Northpoint reargues its contention that the *Public Notice* did not specifically provide that *ex parte* notices regarding the waiver requests were to be filed in the same manner as comments. Northpoint therefore believes that the *MO&O* inappropriately admonished it for not doing so.¹⁴ We already rejected Northpoint's contention in the *MO&O* and continue to believe that readers of the *Public Notice* would reasonably deduce that *ex parte* notices should be filed in the same manner as comments by referencing both the waiver requests and the DA number of the *Public Notice*.¹⁵ Nevertheless, as the *MO&O* indicates, we regard Northpoint's conduct as an innocent and harmless error of no consequence. While we "admonished" Northpoint to follow the correct procedure in the future,¹⁶ we did not impose any sanctions for its past practice. We see no need for further discussion of this point.

7. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Pegasus Broadband Corporation on February 16, 2001 and the Petition for Partial Reconsideration filed by Northpoint Technology, Ltd. and BroadwaveUSA on February 16, 2001 are DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

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Deputy Chief, Wireless Telecommunications Bureau

¹⁴ Although Northpoint argues that most parties filing *ex parte* notices with respect to the Broadwave applications did not include the DA number in their submissions, Northpoint failed to provide the Commission with sufficient documentation for us to evaluate such claims. *Compare, e.g.*, Northpoint Petition at 7 (alleging, in passing and without further discussion, that other parties also failed to include the respective DA number) and Northpoint Technology, Ltd. and BroadwaveUSA, Opposition to Petition to Dismiss or Deny (dated Sept. 6, 2000) (briefly remarking that the parent corporation of Pegasus may have violated the *ex parte* rules in this proceeding on, at least, two occasions but failing to explain or substantiate the claims) with Pegasus Broadband Corporation, Petition to Dismiss or Deny (filed Aug. 21, 2000) (discussing Northpoint's alleged *ex parte* violations at length and providing the Commission with substantial documentation to support its claims and requested relief).

¹⁵ See *MO&O*, 16 FCC Rcd at 898 n.18.

¹⁶ As we explained in the *MO&O*, "Northpoint should have filed copies of those notices in both the rulemaking and the application files." See *MO&O*, 16 FCC Rcd at 898 ¶ 15.