

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

In the Matter of	)	
	)	
Amendment of Parts 2 and 25 of the	)	ET Docket No 98-206
Commission's Rules to Permit Operation	)	RM-9147
of NGSO FSS Systems Co-Frequency with	)	RM-9245
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	)	
	)	
Applications of Broadwave USA, PDC	)	
Broadband Corporation, and Satellite	)	
Receivers, Ltd. to Provide a Fixed Service	)	
in the 12.2-12.7 GHz Band	)	

**REPLY COMMENTS OF THE SATELLITE BROADCASTING AND  
COMMUNICATIONS ASSOCIATION**

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April 5, 2001

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The Satellite Broadcasting and Communications Association ("SBCA") submits these reply comments in response to the Further Notice of Proposed Rulemaking released on December 8, 2000, in the above-referenced proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

SBCA and numerous other commenters have made clear throughout this proceeding and specifically in response to various petitions filed by Northpoint Technology, Ltd. ("Northpoint") that the terrestrial Multichannel Video Distribution and Data Services

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<sup>1</sup> *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*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 98-206, FCC 00-418 (Dec. 8, 2000) ("*First Report and Order*" or "*FNPRM*"). The deadline for submitting reply comments was extended by order of the Commission to April 5, 2001. 66 Fed. Reg. 18,061 (Apr. 5, 2001).

(“MVDDS”) cannot operate in the 12.2-12.7 GHz band without causing harmful interference to Direct Broadcast Satellite (“DBS”) operators and consumers. For this reason, SBCA and certain of its members have filed Petitions for Reconsideration of the Commission’s decision to authorize such service in the *First Report and Order*.<sup>2</sup>

SBCA reiterates that the Commission’s authorization of the MVDDS service in the 12.2-12.7 GHz band was contrary to precedent, arbitrarily imposed, and unlawfully exposes primary DBS operations and DBS’s nearly 16 million subscribers to harmful interference which the Commission has not adequately addressed. Accordingly, SBCA urges the Commission to reconsider its decision to authorize MVDDS service unless it can be proven that this terrestrial use of the DBS spectrum will not cause harmful interference to DBS operators and consumers. If, however, the Commission allows terrestrial MVDDS service to operate in the DBS band, it must license MVDDS spectrum not by waiver, as requested by Northpoint, but in accordance with the Commission’s normal application processing procedures, which will necessitate dismissal of Northpoint’s pending application.<sup>3</sup> As SBCA demonstrates herein, there is nothing about Northpoint’s technology or its participation in these proceedings that obviates the applicability of the Commission’s competitive bidding procedures, and there is no statutory or precedential basis for granting Northpoint’s waiver

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<sup>2</sup> See FCC Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2475 (April 2, 2001). As SBCA’s Petition outlined, in authorizing the MVDDS service, the Commission: (i) failed to justify its abrupt departure from its consistently-held position that band sharing between Broadcast Satellite Services and point-to-multipoint terrestrial services is not technically feasible; (ii) ignored record evidence that demonstrates that MVDDS operations in the 12.2-12.7 GHz band will cause harmful interference to DBS operations; (iii) misapplied its own analytical framework and failed to demonstrate that it has or can resolve the interference problems posed by MVDDS; and (iv) did not adequately explain why alternative spectrum options were not suitable for MVDDS.

<sup>3</sup> SBCA directs the Commission to the Reply Comments being filed concurrently by its members, DIRECTV, Inc. and Echostar Satellite Corporation, for detailed discussion of the technical issues raised by the *FNPRM*.

application. Finally, with respect to the Commission’s specific proposals, the Commission’s proposed mitigation approach to controlling MVDDS interference is unlawful.

## **II. NEITHER NORTHPOINT’S TECHNOLOGY NOR ANY ASPECT OF ITS PARTICIPATION IN THIS PROCEEDING OBVIATE THE APPROPRIATENESS OF THE AUCTION PROCESS**

Northpoint contends that the Commission’s “traditional” process for establishing new terrestrial wireless services involves opening up unoccupied or underused spectrum, but does not apply to Northpoint because its technology has “created new bandwidth out of thin air”<sup>4</sup> from spectrum already allocated to DBS. Northpoint further contends that MVDDS is defined by Northpoint’s technology<sup>5</sup> and concludes that “the Commission is considering, in effect, an auction not of spectrum but rather of the right to use [Northpoint] technology”<sup>6</sup> that would “appropriate for the Government some share of the economic value” of Northpoint’s proprietary technology.<sup>7</sup> Finally, Northpoint claims that its application has always been grouped with NGSO FSS because its participation was required to negotiate band sharing criteria with the International Bureau, NGSO-FSS applicants and DBS operators,<sup>8</sup> and that the Commission’s decision to “abruptly bifurcate the processing of Northpoint and NGSO FCC licenses” was arbitrary and a “wholly unjustifiable change in the way the Commission has managed the 12 GHz band to date.”<sup>9</sup> Finally, Northpoint points to various statutes as justification for processing its waiver application. As explained below, these contentions are baseless.

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<sup>4</sup> Northpoint Comments at 2.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.* at 3, 12, 17.

<sup>9</sup> *Id.* at 12.

### **A. This Proceeding Is Not Defined By Northpoint's Technology**

Northpoint's pretzel-logic argument that because it "is not asking the Commission to clear any space,"<sup>10</sup> the traditional licensing approach is inapplicable, is both irrelevant and false. Northpoint's argument essentially seeks to transform the Commission's MVDDS rulemaking process into an application process -- focusing, of course, only on Northpoint's application. However, Northpoint is not the only would-be MVDDS license applicant, and its technology does not define MVDDS service. Accordingly, what Northpoint "asks" of the Commission is irrelevant. Indeed, Northpoint entered this proceeding by requesting a generally applicable rulemaking proceeding -- a request that was granted by the Commission. Now that Northpoint faces the prospect of competing with other parties for an MVDDS license, however, it is repudiating the Commission's actions. Further, Northpoint's claim that the Commission is not opening spectrum to additional users -- aside from being irrelevant to determining an appropriate licensing scheme -- is simply absurd. The 12.2-12.7 GHz band has a finite capacity to carry radiofrequency signals, and every radio operation therein incrementally reduces this capacity. The indisputable result of this fact is that, far from creating bandwidth, authorizing MVDDS operation in the 12 GHz band poses interference dangers for the primary DBS licensees and their subscribers, as both Northpoint and the Commission have acknowledged.<sup>11</sup>

Northpoint further argues that Commission precedent shows that the Commission does not require payment for "bandwidth-expanding" technologies, which it claims includes its own technology. The cases that Northpoint cites for this proposition, however, are distinguishable from the instant proceeding in that each of those decisions involved

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<sup>10</sup> *Id.* at 8.

<sup>11</sup> *See FNPRM* at ¶¶ 206 and 208.

expanding the scope of the terrestrial service offerings of the existing licensees of the spectrum in question.<sup>12</sup> No payment was required, because the entities offering the services were already licensed to use the spectrum. Moreover, in the majority of these cases, the so-called “bandwidth harvesting” was nothing more than increased spectral efficiency through the substitution of digital modulation for analog modulation. In contrast to these cases, Northpoint is not a “licensee” seeking to expand its licensed service offering. Indeed, Northpoint is not even an “applicant,” since its application has not been accepted for filing, and even if it were, the service -- MVDDS -- does not yet exist. Further, this is not a case of expanding the scope of a terrestrial service. Rather, the Commission is unwisely -- and, in SBCA’s view, unlawfully -- authorizing a ubiquitous terrestrial service to operate in a band that is internationally and domestically allocated on a primary basis to Broadcast Satellite Service operations. Finally, this is not a case of achieving spectral efficiency through the introduction of a unique modulation technology. Indeed, Northpoint’s technology does not create bandwidth nor does it represent a technical breakthrough. Rather, whereas DBS subscriber antennas are permanently oriented towards the southern horizon to receive northward-oriented transmissions from DBS satellites in orbit over the equator, Northpoint’s receive antennas would be oriented northward to receive signals transmitted from Northpoint’s southward-oriented transmitting antennas. This hardly constitutes a breakthrough in the radio art. Indeed, both Northpoint and the Commission have

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<sup>12</sup> Northpoint cites to the Commission’s decisions to: (i) permit the use of digital technology in cellular services to provide PCS-type services; (ii) permit the use of FM subchannels for paging and other services; (iii) permit the use of the vertical blanking interval in broadcast for data services; (iv) authorize AirCell Inc. to provide air-to-ground cellular service; (v) expand the scope of MMDS licenses; and (vi) allow all CMRS providers to provide fixed wireless and hybrid services. *See* Northpoint Comments at 9-11.

acknowledged that Northpoint's transmissions can cause interference as they enter the backlobe of a DBS receive antenna.<sup>13</sup>

### **B. Auctioning MVDDS Licenses Will Not Deprive Northpoint Of Any Value In Its Technology**

Northpoint's assertion that auctioning MVDDS licenses amounts to a government taking of the value of its technology, and that any auction proceeds derived therefrom may be required to be disgorged to the extent they amount to a "taking of Northpoint's property without compensation,"<sup>14</sup> is baseless. The simple truth is that Northpoint has no property rights to and no band rights in the 12 GHz band.<sup>15</sup> Moreover, even if Northpoint had created a significant new technology -- which it has not -- as Northpoint and its expert recognize, the reward for technical innovation in the United States is a patent which confers upon its holder the exclusive right, for a limited time period, to license that technology for a fee.<sup>16</sup> The reward is not, however, the grant of an FCC license. Nevertheless, Northpoint and its expert argue for precisely that result, in part on grounds of efficiency.<sup>17</sup> However, that form of reward -- the pioneer's preference -- has been explicitly abolished by Congress.<sup>18</sup>

Northpoint similarly speaks of "innovative" technology "magically [] extract[ing] new bandwidth out of already-licensed bands" and implies that the more such magical technology must "work out sharing and non-interference criteria, the less likely it is to end up

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<sup>13</sup> *FNPRM* at ¶¶ 206 and 208.

<sup>14</sup> Northpoint Comments at 25.

<sup>15</sup> *See, e.g., Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9767 (1995) (where the Commission held with respect to DBS operators' claims to rights as Commission-authorized permittees of reclaimed DBS channels, "[e]nforceable rights sufficient to support a [Fifth Amendment] due process ["takings"] claim cannot arise in an area voluntarily entered into and one which, from the start, is subject to . . . pervasive government control.") (*citations omitted*).

<sup>16</sup> *See* Northpoint Comments, Declaration of Thomas W. Hazlett, Ph.D at ¶ 16.

<sup>17</sup> *Id.*

<sup>18</sup> *See* 47 U.S.C. § 309 (j)(13)(F).

being brought into profitable service.”<sup>19</sup> However, after encouraging DBS operators to invest billions of dollars to provide a service that is allocated by international treaty and U.S. law as the primary service in the 12.2-12.7 GHz band, the Commission cannot rely on “magic” to justify allocating terrestrial service in the DBS band. Further, the priority of protecting primary DBS operations cannot be diluted by the speculative profitability of a secondary service that is prohibited by law from interfering with DBS operations. Indeed, if the focus is on profits, the Commission should focus on the potential lost profits of the DBS operators who, relying upon the primary status of DBS service conferred by Commission precedent, international treaty, and U.S. law, invested billions of dollars to develop a service that has been placed in jeopardy by the Commission’s unjustified (and unlawful) decision to authorize a ubiquitous terrestrial service without any proven basis (and, indeed, against a wealth of evidence to the contrary) that such a service can operate without interfering with DBS operations. Such action would be particularly damaging just as DBS has begun to make inroads into cable’s dominance and, as the Commission recently recognized, has become “the principal competitor of cable television service . . . .”<sup>20</sup>

### **C. Northpoint Is Not Entitled To NGSO FSS Processing Procedures**

Northpoint’s contention that it was lured into participating in the 12 GHz proceeding by the International Bureau so that interference issues could be resolved, only to have its application arbitrarily processed apart from NGSO FSS, is equally unconvincing.<sup>21</sup> As a preliminary matter, as SBCA and other commenters have pointed out, it is quite clear that the Commission has not resolved the substantial interference dangers imposed upon DBS

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<sup>19</sup> Northpoint Comments at 9.

<sup>20</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, FCC 01-1, at ¶ 61 (January 8, 2001).

<sup>21</sup> Northpoint Comments at 12.

operations by authorizing MVDDS service in the 12 GHz band. Northpoint's contention that it has negotiated sharing criteria with NGSO FSS and DBS operators over the past seven years is simply false. The NGSO FSS / DBS interference criteria were negotiated and arrived at under the auspices of the ITU -- not the International Bureau -- and did not involve Northpoint or any other terrestrial technology advocate. Indeed, far from "negotiating" with Northpoint, every DBS and NGSO FSS commenter in this proceeding has objected to authorizing MVDDS, in general, and Northpoint, in particular, because of the very real threat of DBS service degradation posed by that service.

Northpoint's terrestrial technology is not analogous to NGSO FSS or any other satellite technology, and there is no justification for processing it in a manner analogous to an NGSO FSS application. Northpoint entered this proceeding by filing a petition for rulemaking, and the Commission (unwisely) elected to address that petition contemporaneously with Sky Bridge's NGSO FSS petition for rulemaking in a combined docket, apparently as a matter of administrative efficiency. If anything about this proceeding is wholly unjustified in light of the "way the Commission has managed the 12 GHz band to date," it is the Commission's decision to authorize MVDDS operations in the 12 GHz band in the first place. As SBCA detailed in its earlier Comments and its Petition for Reconsideration, the Commission has never authorized terrestrial point-to-multipoint operations in the 12 GHz band or, as far as SBCA is aware, in any band allocated on a primary basis to satellite services.

#### **D. Northpoint Has Not Presented Any Statutory Or Precedential Basis That Would Require Granting Its Waiver Application**

None of the statutes cited by Northpoint require the Commission to grant its application by waiver rather than subjecting it to competitive bidding. As an initial matter, Northpoint contends that the Open-Market Reorganization for the Betterment of International Telecommunications Act (the “Orbit Act”) prohibits the Commission from auctioning *any* license for *any* spectrum used for the provision of international or global satellite communication services.<sup>22</sup> Northpoint’s reading of the statute is overly broad and has no support in the Orbit Act’s legislative history. As the Commission explained in the *FNPRM*, the Orbit Act does not apply to auctioning licenses for domestic non-satellite services.<sup>23</sup> Northpoint’s reliance on the Rural Local Broadcast Signal Act (“RLBSA”)<sup>24</sup> and the Satellite Home Viewer Improvement Act (“SHVIA”)<sup>25</sup> as support for its contention that the Commission should grant its waiver application is equally misplaced. As SBCA made clear in its Petition for Reconsideration, the RLBSA requires the Commission to “ensure that no facility licensed or authorized” under the RLBSA “causes harmful interference to the primary users of that spectrum.”<sup>26</sup> The current posture of this proceeding is proof that the interference issues regarding DBS -- the primary user in the 12.2-12.7 GHz band -- have not been resolved. SHVIA is directed at and sets forth certain obligations that apply only to satellite operators and, thus, is irrelevant to and cannot serve as any justification for authorizing any terrestrial service.

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<sup>22</sup> Northpoint Comments at 14.

<sup>23</sup> *FNPRM* at ¶ 326.

<sup>24</sup> Pub. L. No. 106-113, Title II, 113 Stat. 1501A-531.

<sup>25</sup> Pub. L. No. 106-113, 113 Stat. 1501A-534.

<sup>26</sup> RLBSA at § 2002(b)(2), 113 Stat. 1501A-544.

Finally, Northpoint's long and tortuous reading of Section 309(j), which concludes that the Commission may not conduct auctions absent acceptance of mutually exclusive applications, is irrelevant. Northpoint is not an "applicant" for an initial license or construction permit because its application has not been formally accepted for filing. Even if Northpoint's application had been accepted for filing, it would not be grantable because there has been no cut-off notice.<sup>27</sup> In any event, it is clear that Section 309(j) (and, in particular, Section 309(j)(6)(E)) does not prohibit the Commission from adopting licensing schemes that result in mutual exclusivity where "the Commission finds such schemes to be in the public interest."<sup>28</sup> To that end, SBCA submits that the overwhelming public interest in this proceeding is to protect the primary DBS operations -- and the DBS subscribers -- from harmful interference. To achieve this purpose, any licensing scheme for MVDDS must be incremental, beginning with one market on a trial basis, and expanding to other markets if and only if it can be demonstrated that no harmful interference to DBS services occurs in the initial market.

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<sup>27</sup> As many commenters have pointed out, the so-called *Ku-Band Cut-Off Notice, Cut-off Established for Applications and Letters of Intent in the 12.75-13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands*, Report No. SPB-141 (IB Nov. 2, 1998), applies only to NGSO FSS applicants. See, e.g., SBCA Comments at 10; EchoStar Comments at 23-24; AT&T Corp. Comments at 4. Moreover, as explained in SBCA's comments, even if the *Ku Band Cut-Off Notice* were construed to extend to terrestrial operations, Northpoint's contentions would be essentially identical to contentions that waiver applicants made in the LMDS proceeding, which the Commission summarily dismissed in the *LMDS Third Order on Reconsideration*. See *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Order on Reconsideration, 13 FCC Rcd 4856 (1998) ("*LMDS Third Order on Reconsideration*") (finding that parties had no vested rights in waiver applications that were pending before the Commission, which it dismissed to implement the new LMDS service rules).

<sup>28</sup> See, e.g., *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of The American Mobile Telecommunications Association*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709, 22721 (2000) (*citations omitted*).

### III. THE COMMISSION'S PROPOSED MITIGATION APPROACH TO CONTROLLING MVDDS INTERFERENCE IS UNLAWFUL

The overriding issue that must be addressed before MVDDS can be placed into service is the interference that will be caused to DBS operations. SBCA and others have already demonstrated that the Commission has not adequately addressed this issue, and SBCA will not repeat these arguments here. SBCA does, however, wish to reiterate its objection to the Commission's proposed "mitigation" techniques by which MVDDS providers could allegedly curtail after-the-fact harmful interference to DBS users. The Commission's suggested mitigation techniques include requiring MVDDS operators to: (1) more accurately point DBS receive antennas toward the intended satellite; (2) relocate the DBS receive antennas; (3) replace small DBS antennas with larger DBS antennas; (4) shield DBS antennas from MVDDS transmitters; and (5) replace the standard DBS receive antennas with planar DBS antennas.<sup>29</sup> Aside from being "quick fixes" the mere proposition of which makes clear that the Commission does not, contrary to its assertions, have the answers to the underlying interference problem, the notion that *DBS users -- i.e., the priority band users in the 12.2-12.7 GHz band -- should make adjustments to their receivers to accommodate a secondary user* turns the concept of "priority" spectrum rights on its head.<sup>30</sup> The way to address interference is by carefully and thoughtfully setting technical rules for MVDDS that

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<sup>29</sup> *Id.*

<sup>30</sup> See 47 C.F.R. § 2.104(d)(3) ("Stations of a secondary service: (i) Shall not cause harmful interference to stations of primary services to which frequencies are already assigned . . . ; [and] (ii) Cannot claim protection from harmful interference from stations of a primary service to which frequencies are already assigned . . . ."); see also 47 C.F.R. § 2.105(c)(2); ITU International Radio Regulations, RR No. 342, Radio Regulations, Dec. 6, 1979, Annex, Art. 6, § 4, S. Treaty Doc. No. 21, 97th Cong., 1st Sess. (1981), ratified, 97th Cong., 2d Sess., 128 CONG. REC. 33,138 (1982) ("Administrations of the members shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations given in this Chapter or the other provisions of these Regulations, *except on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations.*") (*emphasis added*).

will not allow for interference to DBS users in the first place. If the Commission cannot guarantee this outcome -- and based on the current record, it cannot -- then MVDDS should not be authorized. Moreover, the Commission should require MVDDS, as the secondary service that is prohibited from causing harmful interference to DBS consumers and operators, to monitor and test its operations at its own expense to prevent its operations from causing harmful interference to DBS consumers and operators.

Finally, the Commission's proposal to limit MVDDS operators' obligation to undertake mitigation techniques to the first 18 months after commencing operation is not only nonsensical, it is unlawful.<sup>31</sup> DBS is allocated under international and U.S. law as the primary service in the 12.2-12.7 GHz band. This allocation does not come with an expiration date. Barring ITU and Commission action to remove its primary status, DBS cannot lawfully be interfered with by any other user in the 12.2-12.7 GHz band -- not today, not tomorrow, not 18 months from now, not 18 years from now. The Commission's proposal, however, would effectively allow MVDDS to interfere with DBS users after 18 months, relegating DBS to *de facto* secondary status, which is contrary to law. The absurdity of the Commission's proposal is clear in that it does not account for increases in DBS subscribership or subscribers who move from one location to another. New DBS subscribers who sign up after the 18-month period have the same priority rights to receive DBS transmission free from any harmful MVDDS-originating interference as existing DBS subscribers.

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<sup>31</sup> FNPRM at ¶ 274.

## CONCLUSION

SBCA urges the Commission to reconsider its decision to authorize MVDDS for the reasons set forth in its Comments, its Petition for Reconsideration and these Reply Comments. If, however, the Commission moves forward with the MVDDS service, it should proceed in accordance with the its normal application processing procedures. Neither Northpoint's technology nor its participation in these proceedings obviates the applicability of the Commission's normal application processing procedures, and Northpoint has not presented any statutory or precedential basis for granting its waiver application. Accordingly, Northpoint's application should be dismissed. Finally, the Commission's proposed mitigation approach to controlling MVDDS interference, and in particular, its proposed 18-month limit on an MVDDS operators' responsibility for mitigating its interference to DBS users, is unlawful and should not be implemented.

Respectfully submitted,

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