

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) DA 01-933
)
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; and)
)
Applications of Broadwave USA, PDC)
Broadband Corporation, and Satellite)
Receivers, Ltd. to Provide a Fixed Service)
in the 12.2-12.7 GHz Band)

**COMMENTS OF THE SATELLITE
BROADCASTING AND COMMUNICATIONS ASSOCIATION
ON THE MITRE REPORT**

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The Satellite Broadcasting and Communications Association ("SBCA"), by its attorneys, pursuant to the Public Notice released by the Commission on April 23, 2001,¹ hereby submits these Comments on the MITRE Corporation's *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band*.²

¹ FCC Public Notice, *Comments Requested on the MITRE Corporation Report on Technical Analysis of Potential Harmful Interference to DBS from Proposed Terrestrial Services in the 12.2-12.7 GHz Band* (ET Docket 98-206), DA 01-933 (April 23, 2001).

² SBCA's Comments are limited to major policy issues raised by the MITRE Report. SBCA directs the Commission to the comments being filed concurrently by its members, including DIRECTV, Inc. and EchoStar Satellite Corporation, for a detailed discussion of the technical issues raised by the MITRE Report. In addition, to the extent any issues raised in the MITRE Report are addressed by

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I. INTRODUCTION AND SUMMARY

Pursuant to Section 1012, Prevention of Interference to Direct Broadcast Satellite Services, of the Commerce, Justice, State and Judiciary Appropriations Act,³ the Commission directed the MITRE Corporation to prepare a report analyzing the effects of authorizing terrestrial Multichannel Video Distribution and Data Service (“MVDDS”) operation in the 12.2-12.7 GHz (“12 GHz”) band. On April 18, MITRE Corporation delivered its report, entitled “Analysis of Potential MVDDS interference to DBS in the 12.2-12.7 GHz band” (the “MITRE Report”), which the Commission entered into the record of the instant proceeding. The MITRE Report concludes that MVDDS operations will cause “significant interference” to DBS subscribers and thus substantiates what SBCA, DBS operators and others have been telling the Commission since Northpoint first proposed to shoehorn itself into the DBS band.

In the *First Report and Order*⁴ in the above-captioned proceeding, the Commission authorized terrestrial MVDDS operations in the 12 GHz band. As SBCA has demonstrated in its comments, reply comments, petition for reconsideration, and reply to oppositions to its petition for reconsideration submitted in this proceeding, the Commission’s decision amounted to a wholesale repudiation of more than 20 years of Commission policy on terrestrial-satellite spectrum sharing both within and outside the 12 GHz band and did not meet the standards for reasoned decision-making set forth in the Administrative Procedure Act. Particularly troublesome are the undeniable facts that the Commission (i) based its

SBCA’s previous filings in this proceeding, SBCA hereby incorporates such filings in these comments.

³ H.R. 5548, Pub. L. No. 106-553, 114 Stat. 2762A-141 (2000).

⁴ *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*” and “*FNPRM*”).

decision solely upon test data supplied by Northpoint Technologies, Ltd. (“Northpoint”), dismissing – without explanation – extensive test data supplied by DBS parties that controverts the test data supplied by Northpoint, and (ii) made its decision with full knowledge that MVDDS cannot function without causing harmful interference to DBS operations, which have priority status in the 12 GHz band.

As detailed below, the release of the MITRE Report makes clear that the Commission’s decision in the *First Report and Order* to authorize MVDDS was incorrect and should be reversed. The MITRE Report not only concluded that MVDDS poses a significant interference threat to DBS operations, but used Northpoint-supplied equipment in reaching its conclusion. The MITRE Report thus casts substantial doubt on the validity of the test data supplied by Northpoint which served as the sole justification for the Commission’s decision to authorize MVDDS. Northpoint’s *ex parte* campaign to ameliorate the MITRE Report’s damaging conclusions are unconvincing and do not alter the fundamental problems with MVDDS or the clear error of the Commission’s decision to authorize MVDDS.

DBS has operational priority in the 12 GHz band over fixed service operations, such as MVDDS, which are expressly prohibited from causing harmful interference to DBS operations in the 12 GHz band. As SBCA and others have already made clear in prior filings in this proceeding, it is undisputed that harmful interference exists as an elemental aspect of MVDDS design. The MITRE Report effectively confirms this fact. The Commission’s proposals to address the harmful interference caused by MVDDS through mitigation is inappropriate in this case, where it is undisputed that MVDDS will, by design, cause harmful interference to *priority* DBS operations. Moreover, any mitigation measures that would be implemented at DBS consumer premises are unlawful.

II. THE MITRE REPORT MAKES CLEAR THAT AUTHORIZING MVDDS IN THE 12 GHZ BAND WILL SUBJECT DBS OPERATIONS TO SIGNIFICANT INTERFERENCE

The MITRE Report concludes that “MVDDS sharing of the 12.2-12.7 GHz band currently reserved for DBS poses a significant interference threat to DBS operation in many realistic operational situations.”⁵ Significantly, the MITRE Report reached this conclusion based upon testing of a “single channel MVDDS transmitter supplied by Northpoint.”⁶ This conclusion casts substantial doubt on the validity of the test data submitted by Northpoint in this proceeding. Because the Commission’s decision to authorize MVDDS in the 12 GHz band was based solely upon Northpoint’s test data, the MITRE Report’s conclusion has erased the factual predicate for the Commission’s decision. Accordingly, the Commission’s decision to authorize MVDDS must be reversed.

Immediately upon release of the MITRE Report, Northpoint launched an *ex parte* public relations campaign at the Commission in an apparent effort to re-write the MITRE Report’s damaging conclusions and cast them in a more favorable (if unsupported) light. For example, Northpoint comments that the MITRE Report’s conclusion that “MVDDS sharing of the 12.2-12.7 GHz band currently reserved for DBS poses a significant interference threat to DBS operation” stands for the proposition that “‘Generic’ MVDDS can pose an interference threat.”⁷ Northpoint’s interpretation is incorrect. In fact, the MITRE Report reached its conclusion that MVDDS poses significant interference to DBS operations based

⁵ MITRE Report at xvi.

⁶ *Id.* at 3-13.

⁷ Annotated Version of MITRE Technical Report - Abstract and Executive Summary, Northpoint Technology, Ltd. *Ex Parte* communication (April 27, 2001); *see also* Northpoint Technology, Ltd. *Ex Parte* communication (May 3, 2001).

upon testing of a “single channel MVDDS transmitter *supplied by Northpoint.*”⁸ Thus, the MITRE Report makes clear that *Northpoint’s* design for an MVDDS service – not “generic” MVDDS systems – poses a significant interference threat to DBS operations. Moreover, the MITRE Report’s specific findings and exclusive use of Northpoint equipment make clear that the Commission’s assertion in the *First Report and Order* that “[t]ests conducted in the 12.2-12.7 GHz band by Northpoint under an experimental authorization confirm that the MVDDS could operate without excessively impacting DBS subscribers” was unsupported by objective data and unfounded as a basis for authorizing MVDDS service.⁹ The MITRE Report further confirms that the Commission’s dismissal of DIRECTV’s and EchoStar’s test data because “there were no reported DBS outages attributable to the tests”¹⁰ was wholly erroneous; as the MITRE Report indicates, “MITRE believes that DBS customers may not *know* what is causing a particular outage, or the reason for its duration.”¹¹ In short, the MITRE Report invalidates the bases of the Commission’s decision to authorize MVDDS and warrants immediate reversal of that decision.

Northpoint further takes the MITRE Report’s text out of context in commenting that the “bottomline” of the report is that “MITRE recommends licensing of new service.”¹² In fact, MITRE did nothing of the sort, but rather proffered a range of recommendations (not a single one of which affirmatively recommended moving forward with MVDDS licensing) and

⁸ MITRE Report at 3-13 (emphasis added).

⁹ *First Report and Order* at ¶ 214.

¹⁰ *Id.* at ¶ 215.

¹¹ MITRE Report at 6-8 (emphasis added).

¹² Annotated Version of MITRE Technical Report - Abstract and Executive Summary, Northpoint Technology, Ltd. *Ex Parte* communication (April 27, 2001). *see also* Northpoint Technology, Ltd. *Ex Parte* communication (May 3, 2001).

acknowledged that “it is the FCC that must ultimately resolve the various policy issues and the approach to licensing new MVDDS services.”¹³ The recommendation proffered by MITRE addressed ways in which the “significant interference” caused by MVDDS might be mitigated *if* the Commission decided to move forward with MVDDS licensing in the face of MITRE’s conclusions. As demonstrated below, however, mitigation techniques that require modification of DBS equipment owned by DBS subscribers are unlawful and should not be authorized.

III. MITIGATION TECHNIQUES DISCUSSED BY MITRE THAT WOULD BE IMPLEMENTED AT DBS CONSUMER PREMISES ARE UNLAWFUL

In allocating the 12.2-12.7 GHz band for DBS, the Commission gave DBS operations band priority over fixed service (“FS”) licensees, which are expressly prohibited from causing harmful interference to DBS operations in the 12 GHz band by footnote 844 of the United States Table of Frequency Allocations.¹⁴ As SBCA has made clear in its earlier filings, the

¹³ MITRE Report at xxi and 6-8.

¹⁴ 47 C.F.R. § 2.106, n.844; *see also* 47 C.F.R. § 101.147(p). As the Commission explained to Congress in reporting Northpoint’s request to operate on a secondary basis: “Stations of a secondary service: a) shall not cause harmful interference to stations of primary services to which frequencies are already assigned or to which frequencies may be assigned at a later date; b) cannot claim protection from harmful interference from stations of a primary service to which frequencies are already assigned or may be assigned at a later date . . .” *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, FCC 00-454, 2001 FCC LEXIS 10, at n.9 (Jan. 2, 2001) (*citing* International Telecommunication Union Radio Regulations, Edition of 1998, Article S5, Section II -- Categories of services and allocations, S5.28 through S5.31). In addition, the Rural Local Broadcast Signal Act (“RLBSA”), which was enacted as Title II of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-544., requires the Commission to “ensure that no facility licensed or authorized” under the statute “causes harmful interference to the primary users of that spectrum,” in this case, the DBS service. *See* RLBSA, § 2002(b)(2). Further, Section 303(y) of the Communications Act of 1934, as amended (the “Act”), grants the Commission “authority to allocate electromagnetic spectrum so as to provide flexibility of use, if . . . such use is consistent with international agreements to which the United States is a party, and . . . such use would not result in harmful interference among users.” The Commission has indicated that it “interpret[s] the Section 303(y) review requirement as applicable to flexible use determinations by the Commission that would enable the sharing of specific spectrum bands by services treated as distinct by the international and domestic allocations process.” *Service Rules for Fn Con’d*

Commission has acknowledged the priority status of DBS service, but also has acknowledged that MVDDS will cause harmful interference to DBS operations in areas around the MVDDS transmitter. In an effort to address the legal prohibition against interfering with DBS operations, the Commission has concluded that mitigation techniques can be deployed to correct harmful interference caused by MVDDS operations.¹⁵ The MITRE Report similarly confirms that interference to DBS operations is an inherent aspect of MVDDS design and also suggests that various mitigation techniques may lessen the interference problem.

As SBCA made clear in its reply to oppositions to its petition for reconsideration, it is undisputed that harmful interference exists as an elemental aspect of MVDDS service. Any form of mitigation is an after-the-fact interference band-aid intended to cure a problem that is prohibited in the first place. MVDDS service should not be authorized unless, as a threshold matter, MVDDS systems are designed so that they are incapable of causing harmful interference to DBS operations under any conditions.¹⁶ Indeed, under the Commission's approach, it could "accommodate" *any* service in *any* band by simply forcing the incumbent priority band users to modify *their* systems to the extent necessary to make them immune to the harmful interference caused by the secondary service, as the Commission seeks to do in

the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, 15 FCC Rcd 476, 487 (2000).

¹⁵ See, e.g., *First Report and Order* at ¶ 216 ("We note that the record in this proceeding demonstrates a variety of techniques that an MVDDS operator may use to protect DBS operations from harmful interference caused by MVDDS operations."); see also *FNPRM* at ¶ 271 ("Another alternative would be to simply require the MVDDS operator to mitigate harmful interference in response to DBS subscribers' complaints of increased unavailability caused by MVDDS operations.").

¹⁶ Northpoint itself claimed at the outset that "Northpoint will be able to engineer *its* systems so that [Northpoint] subscribers do not suffer harmful interference from other terrestrial sources." Northpoint Petition for Rulemaking at 20 (emphasis added). If Northpoint can engineer its system to make it immune from receiving interference, it is reasonable to require it to engineer its system to prevent it from causing interference to DBS, which is required by law.

this proceeding. Managing spectrum usage in this fashion would render the Table of Frequency Allocations and the concept of priority status meaningless.

If the Commission elects to proceed with its ill-advised plan to implement MVDDS predicated upon on the availability of mitigation techniques, such mitigation may not be effected on the equipment and premises of DBS subscribers. Mitigation generally refers to notification and coordination and/or technical requirements (such as field strength limits) that are designed to prevent co-primary services (where a first-in-time, first-in-right policy prevails) from interfering with each other – a situation that does not apply to MVDDS operations in the 12 GHz band, where DBS has priority over MVDDS operations. Significantly, these measures are implemented at the head-end (base station) facilities of the wireless network because this is the origination point for the interfering signal and where it is most efficient to remedy any interference caused by such signal. The MITRE Report’s suggestions concerning the application of mitigation techniques at the DBS receiver location – *i.e.*, the premises of the priority user in the 12 GHz band – is not only inefficient, but is contrary to law and common sense. Such mitigation actions, if carried out, would effectively force DBS consumers – who own right, title and interest in their equipment and receive their DBS service pursuant to contracts with DBS providers – to either accept modifications to their private property by an unrelated third-party or accept harmful interference from a secondary service to the DBS programming they receive under contract which is provided in full conformance with U.S. and international law.

U.S. consumers have embraced new DBS technology and have purchased state-of-the-art equipment in good faith reliance on its functionality – reliance which derives largely if not entirely from the FCC-required equipment authorization labeling affixed to such equipment,

which informs consumers that the equipment operates in conformance with the FCC rules. Forcing millions of these consumers to shoulder the burden of a secondary service's inability to engineer a system that complies with U.S. and international law improperly shifts the burden of regulatory compliance away from the regulated licensee on to a class of unregulated consumers over whom the Commission lacks jurisdiction. In effect, such approach is akin to forcing homeowners to board up the windows on their homes as a remedy against neighbors throwing rocks at the homeowners' windows. SBCA is not aware of any analogous circumstance in which the Commission has required private individuals who are subscribers of a primary service to either modify their private property to accommodate a lower priority service, or accept interference that effectively abrogates the terms of their service contracts.

Neither the Commission nor the MITRE Report provides any legal, precedential or policy justification for adopting mitigation at the DBS subscriber's premises. The closest thing to any legal, precedential or policy justification offered for justifying mitigation at the DBS subscriber's premises is the Commission's passing reference to the procedures used to address FM blanketing interference set forth at 47 C.F.R. § 73.318.¹⁷ These rules, however, do not in any way support mitigation at the DBS subscriber's premises. Blanketing interference is a form of interference that occurs where high-powered analog transmissions overload nearby receivers – resulting in “desensitization” where the receiver becomes locked-in to the carrier frequency of the high-powered transmissions.¹⁸ This interference phenomena occurs because of the susceptibility properties of the *receivers* themselves and typically

¹⁷ *First Report and Order* at ¶ 271.

¹⁸ *See, e.g., FM Broadcast Station Blanketing Interference*, Report and Order, 57 RR 2d 126, at ¶ 24 (1984); *Amendment of Parts 73 of the Commission's Rules to More effectively Resolve Broadcast Blanketing Interference, Including Interference to Consumer electronics and Other Communications Devices*, Notice of Proposed Rulemaking, 11 FCC Rcd 4750 (1996).

affects cheaply produced, mass-market receivers that are not manufactured according to any immunity standards.¹⁹ Moreover, the saturation of the U.S. market with such susceptible receivers – and the attendant glut of consumer complaints that high-powered FM transmitter towers were interfering with their radios – can be traced to the Commission’s historic policy of refusing to adopt immunity requirements for consumer electronics.²⁰ This policy resulted from the Commission’s concern that mandating such requirements would drive up consumer prices, effectively shifting the burden of compliance with the non-interference rules for free broadcast services from service providers to the public at large.²¹ Indeed, the Congress amended Section 302 of the Act in 1982 to provide the Commission with authority to establish performance standards for consumer electronic devices precisely because there was considerable doubt as to whether the Commission had any jurisdiction over such devices in the first place.²² Accordingly, the Commission adopted the FM blanketing interference rules

¹⁹ *Id.*

²⁰ See, e.g., *Radio Frequency (RF) Interference to Electronic Equipment*, Notice of Inquiry, 70 FCC 2d 1685, 1688 (1978); *FM Broadcast Station Blanketing Interference*, Proposed Rule, 47 Fed. Reg. 18936, at ¶ 3 (1982); *FM Broadcast Station Blanketing Interference*, 57 RR 2d 126, at ¶ 24 (1984).

²¹ See, e.g., *Radio Frequency (RF) Interference to Electronic Equipment*, Notice of Inquiry, 70 FCC 2d 1685, 1687 (1978).

²² Communications Amendments Act of 1982, Pub. L. No. 97-259, § 108, 96 Stat. 1087, 1091. As Congress explained in the legislative history of that law:

Many believe that the Commission does not now have authority to compel the use of protective devices in equipment which does not emit radio frequency energy sufficient in degree to cause harmful interference to radio communications. . . . The Commission has thus far acted in consonance with this belief. The Conference Substitute would thus give the FCC the authority to require that home electronic equipment and systems be so designed and constructed as to meet minimum standards of protection against unwanted radio signals and energy.

H.R. Conf. Rep. No. 97-765, at 21-22, 1982 U.S.C.C.A.N. at 2265-66. While the Congress further clarified that the Commission has exclusive jurisdiction over radio frequency interference incidents, courts have interpreted this grant of authority – codified at 47 U.S.C. § 302a(a)(1) – as being limited to “authority to regulate RF emissions *causing* interference.” *Freeman, et al. v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 323 (2nd Cir. 2000) (emphasis added).

“to protect *listeners* of FM radio and viewers of television, *not* other licensees or permittees” without shifting the burden for interference compliance upon the public at large through mandating costly receiver immunity standards.²³

By contrast, MVDDS interference is not an RF propagation by-product of MVDDS operations, but rather is an inherent aspect of MVDDS design, which intentionally directs signals of sufficient power into the backlobes of DBS receive antennas, thus causing interference. Further, the problem of MVDDS interference has nothing at all to do with DBS subscriber equipment, which has been carefully and specifically engineered to receive and process 12 GHz satellite transmissions in accordance with international technical standards and the Commission’s equipment authorization and marketing rules. Moreover, in dramatic contrast to inexpensive radio receivers, DBS equipment represents state-of-the-art technology that is frequently professionally installed.²⁴ Indeed, DBS receivers utilize high-gain antennas

²³ *Greater Boston Radio, Inc.*, 8 FCC Rcd 4065, at n.1 (1993) (emphasis in original).

²⁴ SBCA is aware of only one non-broadcast instance where the Commission has adopted protections for consumer equipment based on the FM blanketing interference rationale, which is not analogous to the instant proceeding but rather further demonstrates that the rules are premised on the need to protect unwitting purchasers of poor-quality consumer equipment. After establishing the wireless communications service (“WCS”) in the in the 2305-2320 and 2345-2360 MHz bands, the Commission adopted FM blanketing interference-like requirements for WCS licensees with respect to MDS/ITFS receivers, despite the fact that such receivers operate in the 2150-2162 MHz and 2500-2690 MHz bands. *See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, 12 FCC Rcd 3977, 3983-86 (1997). However, the circumstances surrounding the WCS-MDS/ITFS situation are not applicable to the proposed “sharing” of the 12 GHz band by DBS and MVDDS operations. Specifically, the MDS/ITFS receivers utilized analog downconverters based on an inexpensive design which did not employ any filtering for the frequencies between 2162 MHz and 2500 MHz, resulting in minimal frequency selectivity and reception of signals throughout the entire 2.1-2.7 GHz band. *Id.* at ¶ 12. Further, the Commission – which adopted WCS pursuant to a formal spectrum allocation based upon the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996) – had initially imposed no power limit on WCS operations at all, and only after objections restricted WCS fixed, land and radiolocation land stations to 2,000 watts peak EIRP and WCS mobile and radiolocation mobile stations to 20 watts EIRP. *Id.* Finally, the trade association representing MDS/ITFS interests had itself concluded that the 20 watts EIRP would not cause destructive interference to MDS/ITFS reception. *Id.* The Commission’s action was not a condition precedent to authorizing WCS – the Commission initially rejected calls to protect

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and for that reason (and others) are expressly excluded from the FM blanketing rules.²⁵ In short, MVDDS interference is not blanketing interference but rather intentional interference directed by design into DBS antennas.

IV. CONCLUSION

Based upon the MITRE Report's conclusion that MVDDS will cause significant interference to DBS operations and the fact that such conclusion was arrived at using Northpoint equipment, SBCA urges the Commission to reverse its decision to authorize terrestrial MVDDS operations in the 12.2-12.7 GHz band and to revise its rules accordingly. If the Commission elects to proceed with authorizing MVDDS service, it must reject all mitigation measures discussed in the MITRE Report which involve making any form of alterations, relocations or replacement of DBS subscriber equipment.

MDS/ITFS devices in adopting WCS precisely because the cause of the interference problem resided in the MDS/ITFS equipment and not in the WCS service – but rather an accommodation to protect consumers of MDS/ITFS receivers. By contrast, MVDDS apparently is being slotted under an existing allocation based solely upon a rulemaking petition and general plenary authority. Far from having a specific mandate from Congress to adopt MVDDS, and to the extent that the Commission attempts to cite the RLBSA as authority for its decision, the RLBSA makes clear that Congress does not desire authorization of a service that unquestionably interferes with DBS by expressly requiring that the Commission obtain independent testing precisely to ensure that no new service authorization would cause harmful interference to DBS service. Most importantly, the problem of MVDDS interference to DBS receivers has nothing to do with the manufacturing quality of DBS receivers – which have been carefully engineered to exacting international specifications for reception of satellite DBS signals within the 12 GHz band – but rather the crude technology of MVDDS design, which intentionally directs sufficiently high powered signals into the backlobes of DBS antennas using the very frequencies that have been internationally and domestically allocated to DBS on a priority basis.

²⁵ See 47 C.F.R. § 73.318(b).

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