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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUN 24 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Parts 2 and 25 of the)	ET Docket No. 98-206
Commission's Rules to Permit Operation of)	RM-9147
NGSO FSS Systems Co-Frequency with GSO)	RM-9245
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; 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)	
)	

PETITION FOR RECONSIDERATION

Pegasus Broadband Corporation ("Pegasus") by its attorneys hereby urges the Commission to reconsider its decision in the above-referenced proceedings dismissing Pegasus' application.¹ Pegasus submitted a timely-filed application to provide Multichannel Video Distribution and Data Service ("MVDDS") and successfully subjected its technology to testing

¹ *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, Memorandum Opinion and Order and Second Report and Order, ET Docket No. 98-206, FCC 02-116 (May 23, 2002) ("Second MVDDS Order").* Petitions for reconsideration of licensing decisions with respect to specific parties that are associated or contained in rulemaking documents are due within 30 days of the release date of the order. See 47 C.F.R. 1.4(b)(1) note 1, 1.106(f).

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by MITRE Corporation, in compliance with Section 1012 of the Local TV Act.² That statute mandated that, in order to facilitate the rapid deployment of Ku-band terrestrial services, the Commission limit terrestrial Ku-band applications to those already on file and validated by independent testing. Moreover, apart from the mandate of the Local TV Act, by limiting the licensing of MVDDS spectrum to the two qualified entities, the Commission will greatly speed the introduction of service. Accordingly, the Commission should reinstate Pegasus' application and issue licenses expeditiously.³

Background

Pegasus Broadband Corporation. Pegasus (and its affiliates) is one of the fastest growing media companies in the United States. Pegasus has provided television service on three platforms and has a demonstrated record of successfully deploying competitive services by building new facilities. At present, Pegasus serves more than 1.4 million Direct Broadcast Satellite ("DBS") subscribers in 42 states and is the largest non facilities-based provider of DBS services in the United States. Pegasus also operates or programs eleven television stations serving more than two million television households in smaller markets. Additionally, Pegasus

² See Launching Our Communities Access to Local Television Act of 2000, Pub. L. No. 106-553, App. B., Tit. X §1012, 114 State. 2762 ("Local TV Act").

³ To the extent necessary, Pegasus also requests reinstatement and grant of its waiver requests.

holds a license to provide Ka-band geostationary orbit fixed-satellite service⁴ and has submitted applications to provide broadcasting-satellite service in the 17.3–17.8 GHz band.⁵

Applications to provide terrestrial service. On April 18, 2000, Pegasus filed an application to provide terrestrial service in the Ku band.⁶ That application was placed on public notice by the Commission.⁷ On December 8, 2000, the Commission released the *First MVDDS Order* making a threshold determination to allocate spectrum for MVDDS systems in the Ku band.⁸

Shortly after release of the *First MVDDS Order*, Congress—concerned about delays in the Commission’s licensing process—enacted legislation mandating that the Commission within a 60-day period provide for independent testing of the then-pending MVDDS applications.⁹

⁴ See *In the Matter of Pegasus Development Corporation*, 16 FCC Rcd 14378 (2001).

⁵ See Pegasus Development DBS Corporation, Application for Authority to Construct, Launch, and Operate a System of Direct Broadcast Satellites in the Broadcasting Satellite Service (March 21, 2002).

⁶ See PDC Broadband Corporation, Application for License to Provide New Terrestrial Transport Service in the 12.2-12.7 GHz Band (April 18, 2000).

⁷ See Public Notice, DA 00-1841 (August 14, 2000).

⁸ 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*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 4096, at ¶¶325, 328 (December 8, 2002) (“*First MVDDS Order*”). The Commission also requested comments on its proposed technical service rules and licensing rules. See *id.* at ¶¶259-317.

⁹ The relevant language of the statute provides as follows:

(a) Testing for Harmful Interference.—The Federal Communications Commission shall provide for an independent technical demonstration of any terrestrial service technology proposed by any entity that has filed an application to provide

(There were three pending applications, submitted by Pegasus, Northpoint Technology, Ltd., and Satellite Receivers, Ltd. (“SRL”),)¹⁰ The Commission selected MITRE Corporation to conduct those tests.¹¹ Pegasus and Northpoint participated in the tests.¹² MITRE concluded that the two companies’ technology could be deployed without causing harmful interference to users of other services in the band.¹³

terrestrial service in the [Ku band] to determine whether the terrestrial service technology proposed to be provided by that entity will cause harmful interference to any direct broadcast satellite service.

(b) Technical Demonstration.—In order to satisfy the requirement of subsection (a) for any pending application, the Commission shall select an engineering firm or other qualified entity ... to perform the technical demonstration or analysis. The demonstration shall be concluded within 60 days after the date of enactment of this Act and shall be subject to public notice and comment for not more than 30 days thereafter.

Local TV Act, at §1012.

¹⁰ See *Broadwave Albany, L.L.C. et al.*, Application for License to Provide a New Terrestrial Transport Service in the 12.2-12.7 GHz Band (Jan. 8, 1999); *Satellite Receivers, Ltd.*, Application for Licenses to Provide Terrestrial Television Broadcast and Data Services in the 12.2-12.7 GHz Band in Illinois, Indiana, Iowa, Michigan, Minnesota, and Wisconsin (August 25, 2000).

¹¹ See MITRE Corporation Report, *Analysis of Potential Harmful Interference to DBS from Proposed Terrestrial Services in the 12.2–12.7 GHz Band* (April 23, 2001) (“MITRE Report”).

¹² See, e.g., MITRE Report, at 6-4, B-58 (commenting on the effectiveness of certain of Pegasus’ proposals). SRL did not participate in the MITRE testing. See Letter from Nathaniel J. Hardy to James W. Marshall (January 31, 2001).

¹³ See *MITRE Report*, at 6-1.

In the Spring of 2001, Pegasus and others submitted filings in the MVDDS proceeding, responding to both the Commission's *First MVDDS Order* and to the MITRE report.¹⁴ In its filings, Pegasus stated its amenability to the Commission's suggestion of limiting MVDDS applications to those received by the Commission as of the date of the *First MVDDS Order* and noted that such a result would be consistent with the Local TV Act and the goal to facilitate the rapid deployment of services.¹⁵ Northpoint in its filings argued more directly that the Local TV Act established a cut-off and precluded the Commission from accepting any new, mutually exclusive applications.¹⁶

In April 2002, the Commission issued the *Second MVDDS Order* which, *inter alia*, dismissed, as premature, the applications of Pegasus, Northpoint, and SRL.¹⁷ The Commission also adopted competitive bidding procedures and, pursuant to the order, announced an auction date of February 12, 2003, for which any interested party could apply to provide MVDDS.¹⁸ In interpreting the statute, the Commission reasoned that the requirement to complete testing of MVDDS technologies within 60 days of enactment of the Local TV Act did not preclude the

¹⁴ See, e.g., Pegasus Broadband Corporation, Comments (March 12, 2001) ("Pegasus MVDDS Comments"); Pegasus Broadband Corporation, Reply Comments to MITRE Report (May 23, 2001) ("Pegasus MITRE Reply Comments").

¹⁵ See Pegasus MVDDS Comments, at 21 (March 12, 2001).

¹⁶ See Northpoint Technology, Ltd. and Broadwave USA, Inc., Comments on MITRE Corporation Report, at 6-12 (May 15, 2001); Letter from J.C. Rozendaal to Magalie Roman Salas (September 19, 2001); see also *Second MVDDS Order*, at ¶246.

¹⁷ See *Second MVDDS Order*, at ¶¶214, 269-71. The Commission also denied the associated waiver requests. See *id.* at ¶¶215-228.

¹⁸ See also Public Notice, DA 02-1258 (May 24, 2002).

Commission from accepting later-filed applications that had not met the timeliness requirements of participating in the MITRE testing. *Second MVDDS Order*, at ¶¶230, 246. The Commission supported this interpretation by examining what it called the “internal structure” of Section 1012. *Id.* at ¶230. The Commission also found that if Congress had intended to create a cut-off, it would have done so more explicitly. *Id.* at ¶246.

Discussion

The Commission’s decision dismissing the applications of Pegasus and others is inconsistent with the intent and language of Section 1012 of the Local TV Act. The statute requires the Commission to limit MVDDS licensing to those then-pending applicants that successfully participated in the independent testing. Section 1012(a) expressly states that testing is required and is applicable only to “any entity that has filed an application to provide terrestrial service.”¹⁹ Congress did not address what future applicants would need to do, presumably because it did not anticipate that there would be any such future applicants.

The Commission’s interpretation of the statute ignores this plain meaning and frustrates the intent of Congress. The Commission claims that its interpretation is “grounded in the internal structure”²⁰ of the statute, but the more logical internal structure is the simpler, more obvious one, that Congress was instructing the Commission to make decisions based on the applications that had been filed at the time. Nothing could be simpler or more effective in producing a set of qualified licensees capable of quickly providing service to the public. The more strained interpretation chosen in the *Second MVDDS Order*, produces a much different

¹⁹ Local TV Act, at §1012(a).

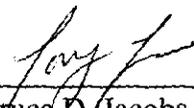
²⁰ *Second MVDDS Order*, at ¶231.

result. It delays the licensing for many months and then leaves open the possibility that further proceedings will be needed before additional independent tests of new technologies can be completed and reviewed. Congress did not need to be any more explicit. (If Congress had intended the Commission to continue to accept later-filed applications, it could have been more explicit regarding that requirement as well.) That Congress was not more explicit should not interfere with the common sense reading of the statute.

Accordingly, the Commission should reconsider its decision, reinstate Pegasus' application, and issue licenses expeditiously.

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June 24, 2002

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I hereby certify that a true and correct copy of the foregoing PETITION FOR RECONSIDERATION was sent by first-class mail, postage prepaid, on June 24, 2002 to the following:

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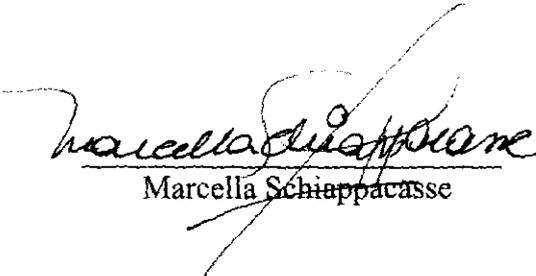
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