

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

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

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SUMMARY

The Commission's Rules for frequency sharing among Direct Broadcast Satellite Service ("DBS") and Multichannel Video Distribution and Data Service ("MVDDS") systems discriminate in the protection afforded to existing DBS customers, as compared to customers whose receivers are deployed after a given MVDDS transmitter has been sited. In fact, under these new rules, MVDDS systems are not required to take steps to protect later-deployed DBS receivers.

Such rules will chill the introduction of competition to the incumbent DBS providers, by placing new entrants at a distinct disadvantage. Further, as demonstrated herein, the Commission may not lawfully permit harmful interference from terrestrial systems into DBS systems, regardless of whether the receivers have been deployed before or after a neighboring MVDDS transmitter.

SES AMERICOM has proposed a system – the AMERICOM2Home platform – to provide capacity for DBS service to the United States. Its system, and any other new DBS systems, will be affected to a significantly greater degree than will incumbent DBS systems by the introduction of MVDDS systems. Because the AMERICOM2Home service involves construction and launch of a new satellite, it is probable that it will be deployed after installation of at least some MVDDS transmitters, particularly in urban areas. In this event, AMERICOM2Home subscribers, although receiving service under a primary allocation, will not be protected from interference by the Commission's Rules.

The consequences of such a result could be particularly dire, given that the only two incumbent DBS providers have proposed to merge, leading to the possibility of a single DBS provider in the United States. The Commission should not permit MVDDS interference to threaten meaningful competition in the DBS marketplace. Such a result would be directly contrary to the public interest and clearly-stated Commission policy. The Commission's Rules for protection of DBS systems from MVDDS interference should apply equally to all DBS receivers, no matter when deployed.

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| A Fixed Service in the 12.2-12.7 GHz Band) | |
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PETITION FOR RECONSIDERATION

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys, hereby petitions the Commission to reconsider certain rules adopted in the *Memorandum Opinion and Order and Second Report and Order* in the above-captioned proceeding.¹

¹ FCC 02-116, released May 23, 2002. Herein, the *Memorandum Opinion and Order* will be denoted "MO&O" and the *Second Report and Order* will be denoted "Second Report & Order" or "2nd R&O". The MO&O and 2nd R&O stem from a *First Report and Order and Further Notice of Proposed Rulemaking* in the same docket. See FCC 00-418, released December 8, 2000. The *First Report & Order* will be denoted "First Report & Order" or "1st R&O." The *Further Notice of Proposed Rule Making* will be denoted "Further Notice" or "FNPRM." The 1st R&O and FNPRM stem from a *Notice of Proposed Rulemaking*, denoted "NPRM". See FCC 98-310, released Nov. 24, 1998.

Because these rules, by their terms, permit new Multichannel Video Distribution and Data Service (“MVDDS”) systems to cause harmful interference to Direct Broadcast Satellite service (“DBS”) systems in the 12.2-12.7 GHz band, the new rules violate domestic and international regulations, and clear Congressional mandate. Moreover, because the rules fail to afford protection to future DBS customers, they threaten competition in the DBS market.

I. INTRODUCTION

SES AMERICOM has proposed a platform — to be known as “AMERICOM2Home” — to provide capacity for DBS service in the United States and certain British Overseas Territories in the Caribbean.² SES AMERICOM’s satellite will operate in the 12.2-12.7 GHz band, pursuant to the international and domestic primary allocations for broadcasting-satellite service (“BSS”), or DBS, as this service is known in the United States. As demonstrated below, the Commission’s new rules for sharing between DBS and MVDDS systems do not require MVDDS systems to take steps to

² On April 25, 2002, SES AMERICOM filed a petition (the “SES AMERICOM Petition”) with the Commission requesting a declaratory ruling that it is in the public interest for SES AMERICOM to offer satellite capacity to third parties that will provide direct-to-home services to consumers in the United States and certain British Overseas Territories in the Caribbean. *See* Public Notice, Report No. SAT-00110, May 17, 2002. SES AMERICOM will offer this capacity on a satellite, known as AMC-14, licensed by the Government of Gibraltar to operate at 105.5° West Longitude (“W.L.”). The satellite will use the 12.2-12.7 GHz downlink frequencies and 17.3-17.8 GHz feeder link frequencies that have been allocated and are currently used in Region 2 (including the United States) for DBS. As described in its Petition, SES AMERICOM proposes to provide a platform for others to offer a broad range of innovative services to consumers in the United States and certain British Overseas Territories in the Caribbean. SES AMERICOM, while providing DBS transponder capacity to third parties, will not itself offer any retail or consumer services.

protect DBS receivers deployed after an MVDDS transmitter has been sited in a particular geographic area. Therefore, SES AMERICOM's proposed system will be severely affected by these rules.

In particular, under the new rules, MVDDS operators are *not* required to meet power limits – designed specifically by the Commission to protect DBS receivers – into DBS receivers that are deployed after a site is selected for an MVDDS transmitter. This approach is contrary to both domestic and international rules. The allocation on which the MVDDS service is based explicitly prohibits harmful interference to DBS systems from terrestrial systems, such as MVDDS, regardless of whether the DBS receivers are deployed before or after the terrestrial transmitters. Moreover, Congress mandated that primary satellites systems, such as DBS, must be protected against interference from such terrestrial systems. There is absolutely no justification whatsoever for those aspects of the Commission's Rules that permit such interference, and reconsideration of those provisions is therefore respectfully requested.

Moreover, under the Commission's Rules, SES AMERICOM's system (and any other new DBS systems) will be affected to a significantly greater degree than will incumbent DBS systems. Because the AMERICOM2Home service involves construction and launch of a new satellite, it is probable that this system will be deployed after installation of at least some MVDDS transmitters, particularly in urban areas. In this event, AMERICOM2Home subscribers, although receiving service under a primary allocation, will not be protected by the MVDDS power limits. Therefore, the

Commission's Rules will seriously hinder introduction of competition to the incumbent providers.

The consequences of such a result could be particularly dire, given that the only two incumbent DBS providers have proposed to merge, leading to the possibility of a single DBS provider in the United States. The Commission should not permit MVDDS interference to create a barrier to meaningful competition in the DBS marketplace.

II. THE COMMISSION'S RULES FOR MVDDS SERVICE VIOLATE DOMESTIC AND INTERNATIONAL RULES AND CONGRESSIONAL MANDATE.

A. The Commission's Rules Permit MVDDS Transmitters to Cause Harmful Interference to DBS Systems.

The Commission has adopted equivalent power flux-density ("EPFD") limits for MVDDS systems;³ these limits were designed specifically by the Commission to protect DBS receivers from MVDDS interference.⁴ However, even if these limits are sufficient to protect DBS receivers,⁵ the Commission's new rules do not require MVDDS operators to meet these limits into DBS receivers that are not "of record" at the time that

³ 47 C.F.R. § 101.105(a)(4)(ii).

⁴ The Commission stated that these limits "will ensure that any interference caused to DBS customers will not exceed a level that is considered permissible." *2nd R&O*, ¶ 8. The Commission further stated that this level "does not approach a level that could be considered harmful interference." *Id.*, ¶ 72. *See also id.*, ¶¶ 32, 78.

⁵ In this pleading, SES AMERICOM takes no position on whether these EPFD limits are sufficient for protecting DBS receivers, when applicable. However, whatever limits apply for the protection of existing DBS receivers should apply to future DBS receivers. Any other approach will harm competition in the DBS market.

the MVDDS operator announces a proposed transmitter location.⁶ To be considered “of record,” a DBS receiver must be installed prior to or within 30 days of this notification.⁷ Therefore, under these new rules, *there is essentially no meaningful restriction on the EPFD that an MVDDS transmitter can emit into a later-deployed DBS receiver.*⁸

Clearly, therefore, the new rules permit MVDDS operators to expose later-deployed DBS receivers to levels of interference that the Commission has determined to be impermissible for earlier-deployed DBS receivers. Moreover, in the absence of any obligation on the part of MVDDS operators to protect later-deployed receivers, these levels may rise to the level of harmful interference.

B. Terrestrial Systems in the 12.2-12.7 GHz Band Are Prohibited From Causing Harmful Interference to DBS Systems.

Although the Commission’s justification for permitting such interference to later-deployed DBS receivers was far from clear, the Commission appeared to believe

⁶ *2nd R&O*, ¶ 68; 47 C.F.R. § 101.1440.

⁷ *2nd R&O*, ¶ 89, n.221. Moreover, an MVDDS operator will be required to take corrective action with respect to a complaint of an “of record” customer only if such complaint is received within one year after the MVDDS transmitter commences operation. *Id.*, ¶ 93. This is inconsistent with the Commission’s apparent intention to protect earlier-deployed DBS receivers from MVDDS interference. The interference environment may change over time, due, for example, to changes in buildings, foliage, etc. The EPFD limits should apply to all DBS receivers, throughout their lifetime of use.

⁸ While the Commission adopted a maximum MVDDS transmitter EIRP limit of 14.0 dBm per 24 MHz, 47 C.F.R. § 101.113(a), n.10, DBS receivers located near a transmitter operating at this power will receive high levels of EPFD, in the absence of any other restriction.

that its “first-come, first-served” approach is appropriate under the current domestic and international allocations for the 12.2-12.7 GHz band. As demonstrated below, it is not.

1. The Commission’s Rules Unequivocally Prohibit Harmful Interference to DBS Systems Caused by Terrestrial Systems.

The Commission based its decision to permit MVDDS operations in the 12.2-12.7 GHz band on the existing Fixed Service (“FS”) allocation in that band.⁹

However, it is undisputed that FS licensees are prohibited from causing harmful interference to DBS operations. This is the case regardless of whether the FS allocation is characterized as “co-primary” or “secondary.”¹⁰

Footnote S5.490 of the United States Table of Frequency Allocations (“U.S. Allocation Table”) states that “in the band 12.2-12.7 GHz, existing and future terrestrial radiocommunication services shall not cause harmful interference to the space services operating in conformity with the [ITU BSS Plan].”¹¹ There has been no proposal to amend this clear prohibition, nor did the Commission claim that it was doing so in adopting its new rules.¹² In fact, the Commission explicitly claimed that its MVDDS

⁹ See *1st R&O*, ¶ 2; *MO&O*, ¶¶ 1, 11, 26, 28.

¹⁰ The Commission characterized the FS allocation as “co-primary” with DBS. *2nd R&O*, ¶ 87. However, under Commission and ITU rules, if a service may operate “subject to not causing harmful interference, this means also that this service cannot claim protection from harmful interference caused by other services to which the band is allocated.” 47 C.F.R. § 2.104(g)(1); ITU Radio Regulation 5.43. This is essentially the definition of a secondary service. See 47 C.F.R. § 2.105(c)(2).

¹¹ *Id.* § 2.106, footnote S5.490. See also *id.* § 101.147(p).

¹² See *1st R&O*, ¶ 2; *MO&O*, ¶ 11, 26, 28.

allocation and rules would result in an interference level that does not approach a level that could be considered “harmful.”¹³ Therefore, the Commission’s Rules must be evaluated on the basis of whether they comport with this allocation. They clearly do not pass this test.

There is no reasonable interpretation of the U.S. Allocation Table that could justify discriminating between existing and future DBS subscribers or systems. Indeed, any such reading would be entirely inconsistent with the Commission’s long-standing decision to encourage terrestrial users to vacate the band to protect DBS operations, and to ensure the continued growth and development of the DBS service.¹⁴

More generally, such a regime is utterly inconsistent with any co-primary allocation of ubiquitous services.¹⁵ While a “first-come, first-served” procedure is often used in order to resolve mutually exclusive proposals for discrete radiocommunication stations, such an approach is illogical in the context of sharing between two different

¹³ *2nd R&O*, ¶ 72; *see also 1st R&O*, ¶¶ 21, 167, 213; *2nd R&O*, ¶¶ 78.

¹⁴ Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, *Report and Order*, 90 F.C.C. 2d 676, 692, 702 (1982) (“1982 DBS R&O”); *Notice of Proposed Policy Statement and Rulemaking*, 86 F.C.C. 2d 719, 732 (1981) (“1981 DBS NPPS&R”); FCC Public Notice, *Initiation of Direct Broadcast Satellite – Effect on 12 GHz Terrestrial Point-to-Point Licensees in the Private Operational Fixed Service*, 10 FCC Rcd 1211 (1994).

¹⁵ Indeed, as the Commission has noted, “satellite and terrestrial systems share spectrum on a co-primary basis, but typically not for ubiquitous deployment.” *See FNPRM*, ¶ 279.

consumer services, both of which depend on blanket coverage of the same geographic regions.¹⁶

For a service intended to be provided to consumers over a wide geographic region, there is no rational basis for the contention that the service enjoys primary status if its customer base may be limited by the deployment of a second service in that region. In this case, even if a DBS provider launches its satellite and commences service before installation of an MVDDS transmitter in a particular area, many of its customers (those whose receivers are installed after the MVDDS system is deployed) will be relegated to secondary status. And for any later-deployed DBS system, all of its customers will be subject to secondary status. This is entirely inconsistent with the primary status granted DBS systems by the Commission. As explained by the Satellite

¹⁶ A “first-come, first-serve” approach is used, for example, in coordinating two or more discrete terrestrial links. In bands shared by terrestrial and satellite services, it is also used in coordinating a terrestrial link and an earth station. However, these scenarios involve discrete links, individually licensed, in specific geographic locations. They also generally involve cases in which the later entrant has some geographic and/or operational flexibility, and the need to coordinate with the first entrant will not preclude establishment of the desired link. Neither of these characteristics exists in the case of ubiquitous services to be provided to homes and offices. The Commission’s use of the approach in the instant context, involving a geographic overlap of two ubiquitous consumer services, is truly unprecedented.

To the extent the Commission based its proposed regime on that used to address blanketing interference in the FM radio service, *see FNPRM*, ¶ 274, DIRECTV has detailed in the record the numerous reasons why any such comparison is unfounded. For example, the FM context involves intra-service interference, not inter-service, interference, and involves interference caused by overlapping service areas, not the licensing of two different services in the same geographic area. *See Comments of DIRECTV, Inc., ET Docket No. 98-206, March 12, 2001 (“DIRECTV FNPRM Comments”)* at 12-14.

Broadcasting and Communications Association (“SBCA”) in this proceeding, the DBS allocation “does not come with an expiration date.”¹⁷

The Commission’s Rules are even more egregious in view of the unambiguous dictates of footnote S5.490 of the U.S. Allocation Table,¹⁸ which unequivocally grants DBS systems priority over terrestrial applications in the band. The clear intent of that provision was to ensure that development of the DBS service is not encumbered by terrestrial interference. There is no rational basis for interpreting this footnote to permit interference from terrestrial transmitters deployed prior to DBS receivers. Indeed, it has been clear since the earliest U.S. DBS regulations, in the early 1980’s, that terrestrial operations would be required to operate on a “strict” non-interference basis with respect to DBS systems, *even DBS systems deployed many years after a given terrestrial link*.¹⁹

¹⁷ Reply Comments of the Satellite Broadcasting and Communications Association, ET Docket 98-206, April 5, 2001 (“SBCA *FNPRM* Reply Comments”) at 12.

¹⁸ 47 C.F.R. § 2.106, footnote S5.490.

¹⁹ 1982 DBS *R&O*, 90 F.C.C. 2d 676, 702 (explaining that “[i]t is the Commission’s intent that such terrestrial operations operate on a strict non-interference basis and make any and all adjustments necessary to prevent interference to operating DBS systems”); 1981 DBS *NPPS&R*, 86 F.C.C. 2d 719, 733) (stating that “[g]iven the lead time required to construct a satellite, [the proposed rules] would allow terrestrial users a minimum of three and a half years’ notice before they would be required to change frequencies.”); FCC Public Notice, *Initiation of Direct Broadcast Satellite – Effect on 12 GHz Terrestrial Point-to-Point Licensees in the Private Operational Fixed Service*, 10 FCC Rcd 1211 (1994) (announcing the launch of the first DBS satellite and reminding existing FS licensees that “in the event that DBS service experiences interference from terrestrial point-to-point operations, it is the sole responsibility of terrestrial licensees to eliminate such interference immediately”). *See also NPRM*, ¶ 91, n.157; *MO&O*, ¶ 28; Petition for Reconsideration of the Satellite Broadcasting

The Commission's Rules are particularly inexplicable when compared to those for sharing between DBS and non-geostationary satellite orbit ("NGSO") fixed-satellite service ("FSS") systems, which are also allocated in the band on a co-primary basis. The Commission has stated that the impact of MVDDS "would be evaluated in the same terms as" that of NGSO FSS.²⁰ Yet in the DBS/NGSO FSS sharing studies, it was taken for granted that the rules must ensure equal protection of all present and future DBS customers from NGSO FSS interference.²¹ The Commission has provided no rationale for the double-standard it has applied in this very same proceeding.

The Commission's only suggestion for protection of later-deployed DBS receivers that may receive interference is for the DBS operator to take siting or shielding steps, or use a larger-diameter antenna.²² The Commission appeared to believe that this is an acceptable burden for DBS to bear, despite DBS's clear priority over MVDDS operations. In support of this claim, the Commission cited to certain other cases involving co-primary operators in which antenna replacement may be required of a co-

and Communications Association, ET Docket 98-206, March 19, 2001 ("SBCA Petition") at 4.

²⁰ *1st R&O*, ¶ 213.

²¹ The Commission clearly stated that "NGSO FSS operations should not hinder the evolution of DBS." *NPRM*, ¶ 58. *See also 1st R&O*, ¶ 163. As the Commission noted, both the ITU and the Commission itself considered the protection requirements of future systems in developing the NGSO FSS/DBS sharing regime. *1st R&O*, ¶¶ 172, 177. *See also* DIRECTV *FNPRM* Comments at 12, 16; Reply Comments of DIRECTV, Inc., ET Docket No. 98-106, April 5, 2001 ("DIRECTV *FNPRM* Reply Comments") at 19.

²² *2nd R&O*, ¶ 92.

primary operator to facilitate sharing.²³ However, those cases involve inter-service sharing of generally non-ubiquitous services. They are therefore not at all comparable to the instant context. More importantly, they also involve situations in which the original antenna does not meet a specific standard or is otherwise considered inadequate.²⁴ In this case, it can hardly be argued that even a state-of-the-art DBS antenna is sub-standard simply because it is being placed in close proximity to an MVDDS transmitter.

2. International Rules Also Prohibit Harmful Interference to DBS Systems Caused by Terrestrial Systems.

The Commission's decision is also inconsistent with the ITU Radio Regulations, and, therefore, the international treaty obligations of the United States. The ITU Radio Regulations permit operation of "terrestrial radiocommunication services" in the 12.2-12.7 GHz band *only if* they do "not cause harmful interference to the space services operating in conformity with the broadcasting satellite Plan for Region 2 contained in Appendix S30."²⁵ Indeed, footnote S5.490 of the U.S. Allocation Table²⁶ was adopted to ensure U.S. conformity with this international requirement.

The ITU Radio Regulations specifically prohibit ITU members from assigning "to a station any frequency in derogation of either the Table of Frequency Allocations . . . or the other provisions of these Regulations, except on the express

²³ *See id.*, ¶ 92, n.226.

²⁴ *See* 47 C.F.R. § 74.937(a); 47 C.F.R. § 101.115(d).

²⁵ ITU Radio Regulations, footnote 5.490.

²⁶ 47 C.F.R. § 2.106, footnote S5.490.

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.”²⁷ The Commission has recognized that, while this rule does not preclude additional allocations in the U.S., any such additional uses of a band must not cause harmful interference to the primary ITU-allocated service.²⁸ The Commission’s decision to permit interference, which, in the absence of any adequate restrictions, clearly may rise to harmful levels, to later-deployed DBS receivers violates this U.S. treaty obligation.

Furthermore, the violation does not concern only U.S. systems. A number of foreign BSS Plan assignments or proposed modifications to that Plan include U.S. coverage, and indeed, the Commission has explicitly encouraged entry of foreign systems into the U.S. DBS market.²⁹ At the same time, the Commission is actively pursuing BSS assignments that would permit operation of Commission licensees in foreign territories.³⁰ The Commission’s decision clearly has international ramifications.

²⁷ ITU Radio Regulation 342.

²⁸ *See Amendment to Parts 2, 15, and 97 of the Commission’s Rules To Permit use of Radio Frequencies Above 40 GHz for New Radio Applications*; 13 FCC Rcd 16947, 16953 (1998); *see also* SBCA Petition at 8.

²⁹ Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, FCC 02-110 (June 13, 2002) (“*DBS Order*”), ¶ 127.

³⁰ Indeed, EchoStar 7, already licensed by the Commission, incorporates a spot-beam for serving Mexico. EchoStar Satellite Corporation, DA 02-118 (Int’l Bur., Jan. 16, 2002); Opposition of EchoStar Satellite Corporation and Motion to Strike, File Nos. DBS 88-01; DBS 88-02; SAT-MOD-20010810-00071; SAT-A/O-20010810-00073, October 4, 2001, at 6. Furthermore, in 1995, the United States filed for 12 modifications (two to the Region 2 Plans and ten to the Region 1 and 3 Plans) to provide BSS throughout the world. The United States actively pursued these modifications, culminating in the inclusion of five U.S. BSS systems in the Region 1

C. Congress Has Instructed the Commission to Prevent Terrestrial Interference to DBS Systems.

The Commission has cited the Satellite Home Viewer Improvement Act (“SHVIA”) and Rural Local Broadcast Signal Act (“RLBSA”),³¹ as a basis for its decision to authorize MVDDS operation in the 12.2-12.7 GHz band.³² However, regardless of whether MVDDS actually fulfills the purposes of these acts,³³ this legislation explicitly requires, in Section 2002(b)(2) of the RLBSA, that the Commission ensure that “no facility licensed or authorized to deliver local broadcast television signals . . . causes harmful interference to the primary users of that spectrum.”³⁴

It is clear that this prohibition was intended to apply to later-deployed receivers of existing DBS systems, and to future DBS systems. In fact, the record is clear that any primary satellite service in the band, even one not yet designated, is entitled to such protection from terrestrial systems. Specifically addressing this issue, Senator Gorton stated:

and 3 “List” for BSS downlinks. These modifications were associated with the Application of Hughes Communications Galaxy, Inc., for Authority to Construct, Launch and Operate Galaxy/Spaceway, File Nos. 174-SAT-P/LA-95 – 181-SAT-P/LA-95 (filed Sept. 29, 1995).

³¹ See Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521.

³² See, e.g., *1st R&O*, ¶ 18; *FNPRM*, ¶ 264, n.548; *MO&O*, ¶¶ 4, 8, 22.

³³ While the Commission found MVDDS “well-suited” for providing local broadcast television service to satellite television subscribers, it did not require MVDDS operators to provide such channels as part of their programming packages. *MO&O*, ¶ 23.

³⁴ RBLSA, 113 Stat. 1501A-545.

I want to clarify that Section 2002(b)(2) requires the FCC to prevent harmful interference [caused by new terrestrial communications services that provide local television in rural areas] not only with those who have been designated as primary users on the date of enactment of this Act, but also with prospective primary users of the Ku-band. If the FCC were to misinterpret this section, that is, if the FCC prevented only harmful interference with those who are primary users on the date of enactment, the public could be denied the substantial benefits of emerging satellite technologies.³⁵

Similarly, Senator McCain stated:

The term “primary user” in Section 2002 is intended to include primary users, regardless of whether these users are primary on the date of enactment or are later designated as primary. The provision in no way seeks to grant preferential regulatory treatment to terrestrial license applicants over satellite system applicants. While there appears to be an error in the report accompanying this legislation, which incorrectly states that the statute says that “existing” primary users must be protected, clearly the statute does not contain this qualifier, and it is our intent that the FCC protect primary users, whether designated now, or later.³⁶

Congress could not have intended to protect future primary satellite services from terrestrial interference, but not later-deployed receivers of an existing primary satellite service.³⁷ The Commission’s Rules are therefore utterly inconsistent with clear legislative mandate.

³⁵ Cong. Rec., 106th Cong., 1st Sess. at S15014 (1999). The prospective primary users Senator Gorton was referring to are the NGSO FSS systems, which are allocated on a co-primary basis in the band, but which have not been licensed or deployed. *Id.*

³⁶ *Id.*

³⁷ Furthermore, the Commission has characterized to Congress the Northpoint proposal as one that would prohibit harmful interference to DBS systems, without ever suggesting that the Commission might interpret this prohibition to apply only to existing DBS customers. *See Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act, Report, FCC 00-454 (Jan. 2, 2001), ¶ 5, n.9.* Based on the Congressional record, which evinces a clear intent to protect DBS

Indeed, Congress was so concerned regarding protection of DBS systems from terrestrial interference that it required the Commission to obtain an independent study to determine whether any terrestrial service technology proposed to be deployed in the 12.2-12.7 GHz band “will cause harmful interference to any direct broadcast satellite service.”³⁸ Congress reiterated that the term “direct broadcast satellite service” means “any direct broadcast satellite system” operating in the 12.2-12.7 GHz band.³⁹ It did not distinguish between existing or future systems, or existing or future customers.

The MITRE Corporation was subsequently selected by the Commission to undertake this study, and MITRE released its report in April 2001 (the “MITRE Report”).⁴⁰ The MITRE Report unambiguously concluded that “future DBS customers

systems as a whole, it does not appear likely that Congress would have accepted such a proposition.

³⁸ Prevention of Interference to Direct Broadcast Satellite Services, Section 1012(a), Pub. L. No. 106-533, 114 Stat. 2762, 2762A-344 (2000).

³⁹ *Id.*, Section 1012(c) (emphasis added).

⁴⁰ See “Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band,” The MITRE Corporation, April 2001. See also *Public Notice*, DA 01-933, Apr. 23, 2001. As has been detailed exhaustively in this proceeding, the MITRE Report is highly ambivalent concerning the ability of MVDDS operators to prevent interference to DBS systems, and indeed concluded that sharing is possible “if and only if” suitable mitigation measures are applied. MITRE Report at xvii, 6-1. The record clearly indicates that such mitigation measures would not prevent interference in all cases, and are otherwise inconsistent with the primary status of DBS systems and footnote S5.490 of the U.S. Allocation Table, 47 C.F.R § 2.106, because they would place many of the burdens of such measures on the DBS licensees themselves. See, e.g., Comments of DIRECTV, Inc. on the MITRE Report, ET Docket No. 98-206, May 15, 2001 (“DIRECTV MITRE Report Comments”) at 27-32; Comments of EchoStar Satellite Corporation on the MITRE Corporation Report, ET Docket No. 98-206, May 15, 2001, at 5-10.

should be protected for as long as the MVDDS transmitter operates.”⁴¹ The Commission never addressed why it essentially disregarded this conclusion, contained in a report mandated by Congress to ensure protection of all DBS systems.

In sum, the Commission has violated clear Congressional mandate. While Congress has instructed the Commission to expedite licensing of technologies that could be used for provision of local broadcast channels in rural areas,⁴² it has made it clear that such systems may not be implemented at the expense of the DBS industry. Yet this is exactly what the Commission has done with the adoption of its DBS/MVDDS sharing rules.

⁴¹ MITRE Report at xix, 6-6. The fact that this conclusion was characterized by MITRE as a “recommendation” does not diminish its importance. Although recognizing the Commission’s discretion to resolve policy issues, this and other recommendations were an integral part of MITRE’s overall conclusions regarding the feasibility of sharing. As MITRE summarized, “MITRE believes that with implementation of the licensing process described in Section 6.3 *and other policy recommendations outlined above*, spectrum sharing between DBS and MVDDS services in the 12.2-12.7 GHz band is feasible.” MITRE Report at xxi, 6-8 (emphasis added). It is entirely disingenuous for the Commission to rely on the MITRE Report for the proposition that sharing is feasible, *see MO&O*, ¶ 36, without adopting the recommendations necessary to MITRE’s conclusions.

Furthermore, there is no rational basis for assuming that MITRE meant to exclude from this recommendation DBS receivers later placed in close proximity to MVDDS transmitters, even though such receivers will be susceptible to back-lobe interference that may be impossible to mitigate. MITRE stated unambiguously that regions where this should occur should not be exempted from the protection requirements. “All regions of the interference-mitigation region should be considered, regardless of size.” MITRE Report at xx, 6-8.

⁴² As noted above, the Commission has not required MVDDS operators to provide such channels as part of their programming packages. *MO&O*, ¶ 23.

III. THE DBS/MVDDS SHARING RULES VIOLATE EXPLICIT COMMISSION POLICY, AND THREATEN COMPETITION IN THE DBS MARKET.

In addition to directly contradicting domestic and international allocations, and clear Congressional mandate, the Commission's sharing rules thwart critical Commission policies. The record in this proceeding exhaustively details the importance to the vitality of the DBS industry – currently the only competitor of cable systems – of protecting both present and future DBS subscribers.⁴³ The development of the DBS service will simply stall if future customers, and even existing customers that relocate, are not protected from interference to the same extent as current customers.

As an initial matter, it is not even clear that the EPFD limits adopted by the Commission will protect systems employing future DBS technologies, even if those systems are able to deploy receivers before introduction of MVDDS service. The MITRE Report explicitly acknowledged that “DBS receivers operating with new and different satellites could be at risk in unforeseen ways.”⁴⁴ MITRE therefore recommended “that any satellites not addressed in the current report be studied further.”⁴⁵ MITRE made the same recommendation with respect to changes and improvements to DBS system waveforms, concluding that this issue should be subject to further study.⁴⁶

⁴³ See DIRECTV *FNPRM* Comments at 16-17; DIRECTV *FNPRM* Reply Comments at 15-20; DIRECTV MITRE Report Comments at 10.

⁴⁴ MITRE Report at xix, 6-7.

⁴⁵ *Id.*

⁴⁶ *Id.* at xx, 6-7.

In the *Second Report & Order*, the Commission scarcely considered whether the limits take into account the expected evolution of DBS systems.⁴⁷ Therefore, even existing customers of current DBS systems may be affected as the satellites and technologies used to serve these customers change.

Furthermore, the Commission's Rules discriminate against new DBS operators. SES AMERICOM's system, and any other new DBS systems, will be affected to a significantly greater extent than incumbent DBS systems. Because the AMERICOM2Home service involves construction and launch of a new satellite, it is probable that it will be deployed after installation of at least some MVDDS transmitters, particularly in urban areas. In this event, SES AMERICOM's subscribers, although receiving service under a primary allocation, would not be protected by the EPFD limits.

Therefore, the Commission's Rules will chill the introduction of competition to the incumbent providers. The consequences of such a result could be particularly dire, given that the only two incumbent providers have proposed to merge,⁴⁸ leading to the possibility of a single DBS operator providing service in the United States.

⁴⁷ The Commission merely stated that, in designing future systems, DBS operators should take into account the interference caused by MVDDS systems, and concluded that "the performance of newer, more powerful satellites will decrease the potential outages to DBS customers." *2nd R&O*, ¶ 84. *See also id.*, ¶ 79. However, the Commission provides no analysis or other evidence in the record that such measures will be effective.

⁴⁸ Consolidated Application for Authority to Transfer Control, CS Docket No. 01-348, filed December 3, 2001; Public Notice, DA 01-3005 (Dec. 21, 2001).

Such a result is directly contrary to Commission policy. Just last month, the Commission issued a *Report and Order* revising the rules for DBS service to “promote fair and increased competition” and “efficient and expeditious use of spectrum and orbital resources.”⁴⁹ In introducing its new rules, the Commission stated that “[i]ncreased competition will benefit the public by maximizing consumer choice.”⁵⁰ The Commission also stated that “[w]e are . . . committed . . . to accommodating future entrants, including foreign entities, into our market.”⁵¹ It is difficult to understand how these objectives can be met with rules that explicitly permit MVDDS operators to exceed necessary power limits into the receivers of future DBS customers.

The Commission should not permit MVDDS interference to stall evolution of DBS systems and services. It should also not permit such interference to impede introduction of meaningful competition in the DBS marketplace. Either result would be directly contrary to the public interest.

IV. CONCLUSION

The Commission’s decision to implement rules which do not require MVDDS systems to protect later-deployed DBS receivers is contrary to domestic and international rules and Congressional mandate, and poses a clear impediment to competition in the DBS market. Therefore, SES AMERICOM respectfully requests that

⁴⁹ *DBS Order*, ¶ 1.

⁵⁰ *Id.*

⁵¹ *Id.*, ¶ 127.

the Commission amend its DBS/MVDDS sharing rules to afford all DBS customers and systems equal protection against MVDDS interference.

Respectfully Submitted,

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