

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

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

**MDS AMERICA, INCORPORATED
OPPOSITION TO PETITION FOR RECONSIDERATION
OF PEGASUS BROADBAND CORPORATION**

MDS America, Incorporated ("MDS America") hereby opposes the Petition for Reconsideration ("the Petition") filed by Pegasus Broadband Corporation ("Pegasus") requesting reconsideration of the Commission's recent decision in the above-referenced docket.¹ Pegasus maintains that the Commission should not have dismissed its application to provide Multichannel Video Distribution and Data Service ("MVDDS"). Pegasus claims that the

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; 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, ET Docket No. 98-206, FCC 02-116 *Memorandum Opinion and Order and Second Report and Order*, (released May 23, 2002), *appeals docketed sub nom. Northpoint Technology, Ltd., et al. v. FCC* (D.C. Cir. Nos. 02-1194,

Commission is required to reinstate its application due to the requirements of the LOCAL TV Act.² Neither the LOCAL TV Act nor any other argument posited by Pegasus obligates the Commission to take the action Pegasus requests, and its Petition should be denied.

I. BACKGROUND

In its Petition, Pegasus fails to mention that its application to provide terrestrial service in the Ku band never was accepted for filing by the Commission. Pegasus and others had filed their terrestrial service applications pursuant to a public notice requesting applications for Non-Geostationary Satellite Orbit (“NGSO”) service in the Ku band.³ Thus, from the very beginning, the Commission would have been procedurally correct to dismiss the Pegasus application because it failed to conform to the Commission’s public notice soliciting applications from prospective NGSO providers.

Instead, the Commission chose to issue a second public notice requesting comment on these non-conforming applications,⁴ and afterward, extended the request for comment within an existing rulemaking proceeding⁵ in which the technical rules for MVDDS were being

02-1195, 02-1209, 02-1234, 02-1235, 02-1236, and 02-1270 (*consolidated*) filed Jun. 21, 2002; *stay granted* Aug. 29, 2002) (hereafter, “Order”).

² Launching Our Communities’ Access to Local Television Act of 2000, Pub. L. No. 106-553, App. B. Tit. X, §§ 1012(a) and (b), 114 Stat. 2762, 2762A-128, 2762A-141 (2000) (Section 1012 to be codified at 47 U.S.C. § 1110) (hereafter, “LOCAL TV Act”).

³ *Public Notice*, International Bureau Satellite Policy Branch Information: Cut-off Established for Additional 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, 1998 WL 758449 (rel. Nov. 2, 1998). (hereafter, “Ku-Band Cut-Off Notice”).

⁴ *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Broadwave Albany, L.L.C., *et al.*, Requests for Waiver of Part 101 Rules, DA 99-494, 14 FCC Rcd 3937 (1999) (comment period ending April 22, 1999).

⁵ 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; 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,

considered. The Commission had already tentatively concluded that it would permit MVDDS in the 12 GHz band in the fall of 1998, within just a few weeks of releasing the Ku-Band Cut-Off Notice for NGSOs, but sought additional comment on the subject by issuing a Further Notice of Proposed Rulemaking.⁶

After the Commissions released the FNPRM, Congress passed the LOCAL TV Act. The caption of section 1012 of the LOCAL TV Act, which Pegasus conveniently omits from its Petition, reads: “Prevention of Interference to Direct Broadcast Satellite Services.” As MDS America has pointed out before in this docket, captions are part of the legislative enactment, and must be given full effect along with the text of the statute.⁷ The LOCAL TV Act itself reads 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 terrestrial service in the direct broadcast satellite frequency band to determine whether the terrestrial service technology proposed to be provided by that entity will cause harmful interference to any direct broadcast satellite.

(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 independent of any interested party based on a

Notice of Proposed Rule Making, 14 FCC Rcd 1131 (2000). This NPRM was issued just three weeks after the Ku-Band Cut-Off Notice was released, so these two documents were released contemporaneously.

⁶ 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; 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, *First Report and Further Notice of Proposed Rule Making*, 16 FCC Rcd 4096 (2000) (hereafter, “FNPRM”).

⁷ A legislatively-enacted section caption is evidence of the legislative intent underlying the entire provision. *also* 2A N. Singer, *Statutes and Statutory Construction*, 6th ed. (2000) (hereafter, “*Sutherland*”) at § 47:14, “Headings and marginal notes.” Each word, including those in the caption, should be given effect. *See Sutherland* § 46:06, “Each word given effect.”

recommendation made by the Institute of Electrical and Electronics Engineers (IEEE), or a similar independent professional organization, 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.⁸

Despite Pegasus' assertions to the contrary, nothing in the LOCAL TV Act, nor any other law or rule, compels the Commission to accept the Pegasus application for filing or to grant that application by issuing Pegasus an MVDDS license.

II. DISCUSSION

Pegasus' position in its Petition ignores an important point; its application was submitted in response to an FCC request for satellite service applications. Under no conceivable construction could that public notice be interpreted to have requested applications for terrestrial services. For this reason, the Commission rightfully determined that the Ku-Band Cut-Off Notice "was not reasonably comprehensible" to interested parties as a request for terrestrial service applications. The Commission logically found that the terrestrial service applications filed pursuant to the Ku-Band Cut-Off Notice were "not properly filed" and could therefore be dismissed.

If the LOCAL TV Act had never passed, Pegasus could hardly argue that the Commission acted improperly. The Commission's public notice requested satellite service applications, but Pegasus did not file a satellite service application. The proper forum for the issues raised by the application was a rulemaking proceeding, as originally requested by Northpoint in 1998.

⁸ LOCAL TV Act, *supra* note 2 (emphasis added).

Thus, Pegasus must rely entirely on the LOCAL TV Act to support its position that the Commission acted outside of its lawful procedures by dismissing the Pegasus application as “not properly filed.” However, a clear reading of the LOCAL TV Act is notable for what it *does not* say. It does not specify that the Commission may abrogate the terms of the Administrative Procedures Act or the Communications Act, both of which specify that the public be provided with adequate notice of Commission issues affecting their interests.

Pegasus maintains that the LOCAL TV Act could just as easily be read to bar later-filed applications, because if Congress had so intended, the LOCAL TV Act would have specifically required the Commission to consider later-filed applications. This twisted interpretation of the LOCAL TV Act ignores the fundamentals: Congress cannot be considered to have amended long-established procedural laws governing the Commission by implication. Thus, in order for the LOCAL TV Act to function as Pegasus proposes, that Act would have been required to explicitly state that the Commission was prohibited from accepting later-filed applications, *despite* the complete lack of appropriate public notice. Because the entire concept of adequate public notice has a statutory foundation, Congress may not eliminate it by faint implication.

As the Commission correctly points out in its Order, the focus of the LOCAL TV Act—based on its caption, which is considered to be part of the legislation enacted under that name—is interference with Direct Broadcast Satellite services.⁹ Next, the Commission correctly points out that the LOCAL TV Act consists of two parts, which must be read together. Indeed, the Commission is required to give effect to all parts of a statute governing its activities, and may not selectively read only those portions that a particular party prefers. Section 1012(a) of the LOCAL TV Act applies independent testing requirements—without any greater specificity—to

⁹ See *Order* at ¶¶ 230, 235.

“any entity that has filed an application,” while section 1012(b) sets forth how “*any pending application*” may satisfy the terms of section 1012(a). If Congress had intended to restrict MVDDS applicants to those in existence at the time the LOCAL TV Act was passed, there would have been no need for two subsections—the two would have been combined.

However, as made abundantly clear in the caption to the LOCAL TV Act, Congress’ primary concern was protecting DBS from harmful interference, while encouraging the Commission to review the feasibility of a new terrestrial service in the Ku band. Congress wanted to extend this concern beyond pending applications, and therefore, provided for a general testing requirement in section 1012(a) that would apply into the future.¹⁰ The manner and timing of that testing was left to the discretion of the Commission.

Ironically, if Pegasus’ reading of the LOCAL TV Act were correct, then it would be out of luck. Under Pegasus’ interpretation, the Commission’s dismissal of the application would be *with* prejudice, because nothing in the LOCAL TV Act mandates grant of the applications pending at the date of the Act’s passage, and there would be no further opportunity to file another application. Fortunately for Pegasus, the Commission has not read the LOCAL TV Act in this contorted manner, and Pegasus apparently is entitled to file again together with *all* interested parties, in accordance with normal procedure.

III. CONCLUSION

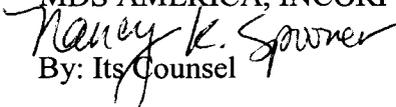
The Commission is obligated by various laws to provide appropriate and adequate public notice of its actions. Congress established these procedural foundations, and cannot eliminate them by implication. The LOCAL TV Act must be read as a whole. Its caption, together with

¹⁰ *Id.* at ¶¶ 229-236.

two separate subsections, one applying to all applicants for terrestrial services in the Ku band (current and prospective), and the other addressing applications pending at the time of enactment, all support the Commission's decision to dismiss the Pegasus application while calling for MVDDS applications from *all* interested parties at a future date. The Commission should therefore deny Pegasus' Petition forthwith.

Respectfully submitted,

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September 3, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2002, a true and correct copy of the foregoing was served via electronic filing (denoted by †), e-mail (denoted by *) or first class United States mail, postage prepaid, on the following individuals:

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