

**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	)	

**OPPOSITION OF MDS AMERICA, INCORPORATED  
TO SES AMERICOM, INC., PETITION FOR RECONSIDERATION**

**I. Introduction and Overview**

MDS America, Incorporated ("MDS America"), by its undersigned counsel, hereby submits its Opposition to the Petition for Reconsideration ("Petition") of SES AMERICOM, Inc. ("SES AMERICOM"). The SES AMERICOM Petition seeks reconsideration of the Commission's *Memorandum Opinion and Order and Second Report and Order*<sup>1</sup> that, in the

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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; 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, *Memorandum Opinion and Order and Second Report and Order*, FCC 02-116 (released May 23, 2002), *appeals docketed sub nom. Northpoint Technology, Ltd. et al. v. FCC*, (D.C. Cir. Nos. 02-1194, 02-1195, 02-1209, 02-1234, 02-1235, 02-1236, and 02-1290 (*consolidated*) filed Jun. 21, 2002; *stay granted* August 29, 2002) [hereafter, "*MO&O*," "*MVDDS Second Report and Order*;" or the "*Decision*"].

*Memorandum Opinion and Order*, re-affirmed the Commission's decision to authorize the Multichannel Video Distribution and Data Service<sup>2</sup> ("MVDDS") and, in the *Second Report and Order*, adopted technical rules for MVDDS operations. SES AMERICOM in April filed an application<sup>3</sup> to provide Broadcast Satellite Service through third party providers to U.S. customers from a Gibraltar-licensed satellite and plans to commence service in 2004 after receiving FCC authority.

The gist of the SES AMERICOM Petition is that SES AMERICOM and other later-entering DBS providers are entitled to the same level of interference protection from MVDDS signals as current operators, such as DirecTV and EchoStar.<sup>4</sup> SES AMERICOM alleges that for the Commission not to afford such protection would be unreasonable because it would be discriminatory.<sup>5</sup> SES AMERICOM therefore requests that the Commission reconsider its

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<sup>2</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; 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 Order and Further Notice of Proposed Rulemaking*, FCC 00-418, 16 FCC Rcd. 4096 (2000) [hereafter "*First R&O*" and "*Further Notice*"].

<sup>3</sup> *In the Matter of SES AMERICOM, Inc. Petition for Declaratory Ruling to Serve the U.S. Market Using BSS Spectrum from the 105.5° W.L. Orbital Location*, File No. SAT-PDR-20020425-00071 ("SES AMERICOM Application").

<sup>4</sup> *SES AMERICOM Petition* at p. 3.

<sup>5</sup> *SES AMERICOM Petition* at p. 18.

decision to provide less protection to DBS receivers installed more than 30 days after the commencement or modification of MVDDS operations from a given transmitter site.<sup>6</sup>

In brief, the SES AMERICOM Petition must be denied for two reasons. First, as discussed in the *MDS America Opposition to the DBS Petitions for Reconsideration* filed today, it was a perfectly reasonable decision for the Commission to grandfather a higher level of protection to existing DBS receiver installations than to later installations,<sup>7</sup> and, to the extent that its service is protected by the signal strength and other technical limitations imposed on MVDDS operations, SES AMERICOM is not treated differently from other DBS operators. Second, in the case of SES AMERICOM, it is in fact entitled to *no* protection from MVDDS operations because it proposes to operate from an orbital slot not included in the Region 2 DBS Plan.<sup>8</sup> Given the extremely high burden of proof applicable to petitions for reconsideration of the Commission's spectrum allocation decisions,<sup>9</sup> the SES AMERICOM Petition must be dismissed.

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<sup>6</sup> *Second R&O* at ¶ 92, stating that a DBS operator must provide to the MVDDS operator a list of DBS customers of record, including any installed within 30 days following the MVDDS site notification.

<sup>7</sup> *See, e.g., MDS America Opposition to DBS Petitions for Reconsideration* at 8.

<sup>8</sup> MDS America submits that SES AMERICOM, should it ever implement its proposed service, would not be entitled to take advantage of the special "safety valve" procedure available for use by DBS operators who claim that the general technical restrictions on MVDDS service fail to provide adequate protection to particular receive sites because of geographic or other anomalies. *See Second R&O* at ¶ 83.

<sup>9</sup> *See MDS America Opposition to DBS Petitions for Reconsideration* at 3 – 5.

## II. Reasonableness of Granting Less Protection to Later DBS Receiver Installations

As discussed in *MDS America's Opposition to DBS Petitions for Reconsideration* filed today,<sup>10</sup> the Commission's decision to "grandfather" a higher level of protection to subject DBS receivers installed within 30 days of a new or modified MVDDS transmitter reflected an appropriate balancing of inter-related policy needs and a careful review of the record.

Further, with respect to SES AMERICOM, this rationale is even more compelling. Given that SES AMERICOM's system is far from deployment, and the characteristics of its equipment are unavailable, SES AMERICOM is really requesting that the future of MVDDS operations be subject to a possible time bomb, depending on what deployment decisions SES AMERICOM should decide to make.

The Commission reasonably decided against such an unacceptable outcome. Instead, the Commission reasonably, and consistent with its approach in the NGSO and other contexts, left to the DBS operators which would be making later installations the decision as to implementation of DBS system-based mitigation techniques which would provide greater protection from MVDDS signals than that generally afforded by the Commission's technical rules restricting MVDDS operations.

Such an approach leaves to the marketplace the cost-benefit analysis with respect to additional mitigation efforts. It encourages deployment of more spectrum-efficient DBS equipment, but it does not require it.<sup>11</sup> It also recognizes the likely tendency for DBS operators

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<sup>10</sup> *MDS America Opposition to DBS Petitions for Reconsideration* at 8.

<sup>11</sup> For example, the FCC has declined to require certain antenna parameters, but "strongly encourage[s] DBS operators" to provide the best service to all users. See *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service, Report and Order*, IB Docket No. 98-21, released Jun. 13, 2002 [hereafter "*DBS Order*"] at ¶ 68.

to resist new competition from MVDDS, and use claims of possible interference as a shield to prevent competitive, not interference, harm. The Commission's decision is therefore a reasoned approach to maximizing consumer choice, and thereby consumer welfare.

### III. SES AMERICOM's Ineligibility for Interference Protection

Moreover, SES AMERICOM is not entitled to claim *any* interference protection from prior-installed MVDDS operations. As the Commission recognized in its *Decision*,<sup>12</sup> the Commission's Rules and the international allocation table treat DBS and terrestrial fixed services, which includes MVDDS service, as co-primary.<sup>13</sup> Non-interference protection is to be afforded only to DBS operations that conform to the Region 2 DBS Plan. As recognized by the Commission,<sup>14</sup> not even existing U.S. DBS operations so conform. Therefore, even their entitlement to interference protection *vis-à-vis* either prior or later-installed MVDDS operations is questionable.

With respect to SES AMERICOM's proposed BSS operation, there is no entitlement to interference protection whatever. SES AMERICOM's proposed operation is from an orbital slot not included in the Region 2 DBS Plan, and not even licensed through a Region 2 Administration. SES AMERICOM should be more than happy to piggy-back on the level of protection the Commission has elected to provide existing U.S. DBS operations as a result of the

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<sup>12</sup> *Decision* at ¶¶ 3, 11, 28.

<sup>13</sup> "Specifically, the fixed service allocation in the Table of Frequency Allocations for the 12.2-12.7 GHz band appears in capital letters and is, therefore, considered to be a "primary" allocation." *Decision* at ¶ 28; *see also id.* at ¶ 87: "[T]he BSS and Fixed services have co-primary status in the 12.2-12.7 GHz band, but the Fixed Service is required by a footnote to the Table of Frequency Allocations not to cause harmful interference to DBS."

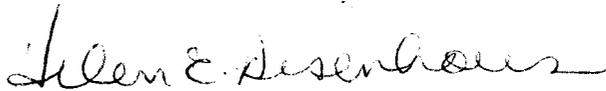
MVDDS technical rules. Moreover, SES AMERICOM is not entitled to the benefits of the “safety valve” procedure, because any protection it receives is as a fortuitous by-product of the MVDDS technical rules. SES AMERICOM is certainly in no position to claim that it should get special treatment merely because its business plan is to compete with existing DBS operations in the U.S.

#### IV. Conclusion

The SES AMERICOM Petition falls far short of offering any basis for reconsideration of the Commission’s *Decision*, much less a compelling one that satisfies the extremely high threshold applicable to spectrum allocation decisions such as the one at issue here. The SES AMERICOM Petition should therefore be dismissed and the request for reconsideration denied.

Respectfully submitted,

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<sup>14</sup> “We note that, in general the DBS satellites have characteristics that require modification to the Plan assignments.” *Decision* at n. 216; see also *DBS Order* at ¶ 6 n.13.

## CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> 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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