

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

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| 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 DBS PETITIONS FOR RECONSIDERATION**

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EXECUTIVE SUMMARY

MDS America, Incorporated (“MDS America”), by its undersigned counsel, hereby submits its Opposition to two Petitions for Reconsideration of the Commission’s *Memorandum Opinion and Order and Second Report and Order* that re-affirmed the Commission’s decision to authorize the Multichannel Video Distribution and Data Service (“MVDDS”) and adopted technical rules for MVDDS operations. This Opposition addresses the Petitions for Reconsideration filed (a) jointly by EchoStar Satellite Corporation and DIRECTV, Inc. and (b) by the Satellite Broadcasting and Communications Association (collectively, “Petitioners”).

The *Petitions* essentially represent a thinly disguised attempt to have the Commission revisit establishment of MVDDS, a policy determination already affirmed on reconsideration, and that therefore is not subject to further reconsideration.

To the extent the *Petitions* do substantively address the technical and related rules to govern MVDDS and its spectrum sharing with DBS, the *Petitions* reiterate positions already rejected by the Commission in a carefully reasoned decision that balanced numerous competing policy issues and carefully considered the comments of all parties, including Petitioners. Not only is mere disagreement with a Commission decision no basis for reconsideration, but also in spectrum matters the Commission’s decisions are entitled to a particularly high level of deference. It is for the Commission, not Petitioners, to determine what will be deemed “harmful” interference in the context of spectrum sharing between the DBS and MVDDS services. The Commission provided all parties with adequate notice of the factors that would be considered in making this determination, and it was perfectly proper for the Commission to use a 10% additional outage guideline as a starting point, rather than as a hard limit, in developing region-specific interference standards. Nor is reconsideration warranted because, as is routine

practice, changes were made in the draft decision between the time of the Commission's agenda meeting and the release of the final text.

The *Petitions* should therefore be dismissed and the *Second R&O* affirmed in all respects challenged by Petitioners.

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**OPPOSITION OF MDS AMERICA, INCORPORATED
TO DBS PETITIONS FOR RECONSIDERATION**

I. INTRODUCTION

MDS America, Incorporated ("MDS America"), by its undersigned counsel, hereby submits its Opposition to two Petitions for Reconsideration of the Commission's *Memorandum Opinion and Order and Second Report and Order*¹ that, in the *MO&O*, re-affirmed 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, 02-1195, 02-1209, 02-1234, 02-1235, 02-1236, and 02-1270 (*consolidated*) filed Jun. 21, 2002; *stay granted Aug. 29, 2002*) [hereafter "*Decision*," and, individually, "*MO&O*" and "*Second R&O*"].

Commission's decision² to authorize the Multichannel Video Distribution and Data Service ("MVDDS") and, in the *Second R&O*, adopted technical rules for MVDDS operations. This Opposition addresses the Petitions filed (a) jointly by EchoStar Satellite Corporation and DIRECTV, Inc. (collectively, "DBS Operators")³ and (b) by the Satellite Broadcasting and Communications Association ("SBCA")⁴ (collectively with the DBS Operators, "Petitioners") ("Petitions").⁵

MDS America submits that the *Petitions* represent a thinly disguised attempt to have the Commission revisit establishment of MVDDS, a policy determination already affirmed on reconsideration in the *Memorandum Opinion and Order*.⁶ As such, the *Petitions* essentially

² 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*, 16 FCC Rcd. 4096 (2000) [hereafter "*First R&O*" and "*Further Notice*"].

³ The DBS Operators' Petition is directed only to the Second R&O. The DBS Operators filed applications for review of the *MO&O*. *Joint Petition of EchoStar Satellite Corporation and DirecTV, Inc. for Reconsideration of Second Report and Order* [hereafter "*DBS Operators' Petition*"] at 1 n.1.

⁴ *Petition for Reconsideration of the Satellite Broadcasting and Communications Association* [hereafter "*SBCA Petition*"]. SBCA also filed an application for review. *SBCA Petition at 1*.

⁵ The Petitions for Reconsideration filed by Pegasus Broadband Corporation ("Pegasus"), by SES AMERICOM, Inc. ("SES AMERICOM"), and by SkyBridge, L.L.C. ("SkyBridge") are addressed in separate pleadings filed today.

⁶ While the DBS Operators assert that they are not here challenging the *MO&O*, *DBS Operators' Petition at 1 n.1*, the intent of their Petition is either to have the Commission adopt technical constraints on MVDDS that would make co-existence impossible, or to have the Commission "rescind the authorization for MVDDS to operate in the 12 GHz band." *Id.* at iii. The Commission properly dismissed out of hand the DBS Operators' 'too little, too late' alternative suggestion that MVDDS be considered only for the CARS band. *See Decision at ¶ 4*.

rehash matters already twice addressed by the Commission. Being repetitious, these *Petitions* provide no basis for further reconsideration of the MVDDS allocation.⁷

To the extent the *Petitions* do substantively address the technical and related rules to govern MVDDS and its spectrum sharing with DBS promulgated under the *Second R&O*, the *Petitions* essentially reiterate positions already rejected by the Commission. At most, the *Petitions* merely disagree with the Commission's policy decision. Particularly in spectrum matters such as this, however, the Commission's decisions are entitled to a high degree of deference. Because disagreement is an insufficient basis for reconsideration of the *Decision*, the *Petitions* should be dismissed and the *Second R&O* affirmed in all respects challenged by Petitioners.

⁷ The Commission's rules allow for the dismissal of a petition for reconsideration as repetitious. 47 C.F.R. § 1.429(i). See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, *Third Order on Reconsideration*, 14 FCC Rcd (1999); Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14487 (1999) (denying requests for reconsideration for parties that raised no new arguments); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, *Second Order on Reconsideration and Memorandum Opinion and Order*, 14 FCC Rcd 10771, 10784 (¶ 17) and 10796 (¶ 34); Beehive Telephone Company, Inc., *Order on Reconsideration*, 14 FCC Rcd 5456, 5459 (¶ 9) (1999); Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, *Third Order on Reconsideration*, 11 FCC Rcd 6835, 6841 (¶ 10) (1996) (rejecting petitions for reconsideration that raised no new arguments).

II. FAILURE OF PETITIONS TO SATISFY STANDARDS FOR RECONSIDERATION

The *Petitions* must be rejected for failure to satisfy the standards for a grant of reconsideration. The Commission's words in its *Memorandum Opinion and Order* denying reconsideration of the decision to establish the Direct Broadcast Satellite ("DBS") service in the 12 GHz band clearly articulated these standards and are equally applicable here:

[T]he petition fails to meet the basic requirements of a petition for reconsideration, and on this ground alone should be rejected [T]he substantive allegations of error on the part of the Commission are not supported by facts meeting the basic pleading and procedural standards for a petition for reconsideration.

* * * *

Most relevant here, petitions for reconsideration are not granted for the purpose of debating matters which have been fully considered and substantively settled.

* * * *

In essence, the petition for reconsideration simply restates the objections to the ... rule making that have been stated previously by this petitioner ... [T]he resolution of these issues has been a central feature of this rule making from the outset, full opportunity for all affected parties to comment has been amply afforded, ... all relevant matters have been fully considered, and ... the Commission made its policy choices and fashioned its procedural rule making processes to assure that the needs of the public and all interested parties were taken into account fully. That petitioner disagrees with some of these policy choices ... is quite clear. However, bare disagreement, absent new facts and argument properly placed before the Commission, is insufficient grounds for reconsideration.⁸

It is also well-established that Commission decisions are entitled to an especially high level of deference in spectrum matters because of the Commission's unique expertise and mandate in this area. In reviewing a decision by the Commission to allocate new mobile telephone channels, the Court of Appeals for the District of Columbia Circuit said:

⁸ Regulatory Policy Regarding the Direct Broadcast Satellite Service, *Memorandum Opinion and Order*, 94 FCC 2d 741, 747 – 48 (¶¶ 10-12) (1983) (footnotes omitted).

We begin our evaluation of these challenges by recalling two cardinal points. First, the Commission is empowered by the Communications Act to foster innovative methods of exploiting the radio spectrum in order to “generally encourage the larger and more effective use of radio.” Second, when piloting such a regulatory course, the Commission functions as a policymaker and, inevitably, a seer—roles in which it will be accorded the greatest deference by a reviewing court. As oft has been repeated, the court will not pass upon the wisdom of the agency’s perception of where the public interest lies, nor will it require “complete factual support” in the record when the agency’s ultimate conclusions necessarily rest on “judgment and prediction rather than pure factual determinations.”⁹

Similarly, even when a reviewing court found that a spectrum allocation decision would have substantial anti-competitive effects, it nonetheless upheld the Commission’s decision, stating:

We conclude that such determinations are precisely the sort that Congress intended to leave to the broad discretion of the Commission, by imposing a broad public interest convenience, interest, or necessity standard. In cases of such broad delegations to expert agencies, the standard of review is that of the reasonableness of the conclusions reached.¹⁰

Any challenge to a Commission decision that addresses spectrum allocation and sharing issues must therefore overcome a heavy burden of proof. The *Petitions* do no more than re-argue positions the Petitioners already repeatedly presented in this docket and therefore do not warrant reconsideration. Those positions were rejected by the Commission once, and they should be rejected again.

⁹ *Telocator Network of America v. FCC*, 691 F.2d 525, 538 (1982) (citing numerous cases; footnotes omitted). The *Telocator* court went on to note, “To insist upon concrete proof that a proposed innovation will succeed without undesirable side effects would be effectively to relegate the Commission to preserving the status quo. All that is required is that the Commission set forth generally the bases for its informed prediction that the plan should be workable and beneficial.” *Id.* at 542; *see also Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C.Cir. 2001).

¹⁰ *NARUC v. FCC*, 525 F.2d 630, 636 (D.C.Cir.), *cert. denied*, 425 U.S. 992 (1976) (footnotes omitted).

III. REASONABLENESS OF THE COMMISSION'S DECISION

This is exactly the type of situation in which the Commission must employ “judgment and prediction” in functioning as a “policymaker and a seer.” Ample evidence in the record supports the reasonableness of the Commission’s decision with respect to the rules and policies challenged by Petitioners, and the *Petitions* must therefore be dismissed.

A. The Commission’s Responsibility to Determine Harmful Interference Standard

The chief complaint of the DBS Operators is that the DBS/MVDDS sharing rules do not sufficiently protect DBS service from interference.¹¹ Petitioners are concerned about the level of protection offered existing as well as possible future DBS reception.¹² However, the Petitioners overlook that, at most,¹³ DBS service is entitled to be protected only from “harmful

¹¹ See, e.g., *DBS Operators’ Petition* at 4.

¹² The view of the DBS Operators and SBCA, *DBS Operators’ Petition* at 4; *SBCA Petition* at 2 - 7, that if Private Operational Fixed Service (“POFS”) users were given secondary status and required to re-locate to avoid interference to DBS, the same is required of MVDDS, erroneously presumes that the services are similar, and that MVDDS, which was not at issue when such relocation was before the Commission, must be treated in the same way. As the Commission recognized, however, unlike the high-powered, point-to-point two-way fixed service use, MVDDS is a lower-power service that is point-to-multipoint and specifically designed to co-exist with DBS. *MO&O* at 28. Finding that it could define a level of MVDDS operations that could co-exist with DBS, the Commission properly did so. Whether or not the Commission has found such band sharing feasible for other services or in other bands, *cf. DBS Operators’ Petition* at 10 – 11, is irrelevant.

¹³ It may well be that the DBS Operators have in fact forfeited their right to be treated as co-primary users. As the *Second R&O* recognizes, at ¶ 87 n.216, under the Commission’s and International rules, only DBS operations conforming to the provisions of the Region 2 DBS Plan are entitled to non-interference protection from other users given co-primary status in the Rules, which users included terrestrial Fixed Service users such as MVDDS operations. See 47 C.F.R. § 2.105 (c) and § 2.106 footnote 5.490. Petitioners acknowledge they do not satisfy this standard. *SBCA Petition* at 9; *concurrent with DBS Operators’ Petition* at 4 n.3. Significantly with respect to co-existence with DBS, as the Commission noted in the recent decision modifying the DBS rules, one of the aspects in which the DBS operations differ from the Region 2 Plan is in having lower downlink e.i.r.p., see Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, FCC 02-110, IB Docket No. 98-21 (2002) (“*DBS Rules*”).

interference,” not from all interference, even if it is measurable.¹⁴ Petitioners also overlook that it is the Commission, not the DBS Operators, whose role it is to define what will legally constitute “harmful interference” in accordance with the definition contained in Section 2.1 of the Commission’s Rules.¹⁵

Under that definition, interference is not to be deemed harmful unless it “*seriously* degrades, obstructs, or repeatedly interrupts” the subject service.¹⁶ Therefore, DBS service is not entitled to absolute protection from interference, and it is for the Commission to determine what constitutes serious impairment of service.¹⁷

Order”) at ¶ 112. The Commission also stated: “The ITU Radio regulations require completion of the Plan modification procedure before a DBS system can claim protection from interference from assignments that conform to the Plan.” *Id.* at ¶ 109. Given that MVDDS is a Fixed Service with co-primary status under the Plan, *Decision* at ¶ 87 and n. 216, the Commission has used its domestic authority to give DBS the level of interference protection it has received in this proceeding. (Similarly, as detailed in MDS America’s separate petition to deny the SES AMERICOM reconsideration petition, the system proposed by SES AMERICOM would not even operate from an orbital slot contemplated by that plan, and would, in fact, operate pursuant to licensing by a nation in Region 1. As a result, it need not be considered with respect to protection from interference by MVDDS, regardless of whether it has a business plan contemplating competition with existing U.S. DBS service.)

¹⁴ See *Decision* at ¶¶ 17 – 20 (reviewing legislative history of the Satellite Home Viewer Improvements Act (“SHVIA”) and the Rural Local Broadcast Signal Act (“RLBSA”) and noting potential establishment of a new terrestrial service contemplated thereby).

¹⁵ Section 2002(b)(2) of the Rural Local Broadcast Signal Act (“RLBSA”) requires the Commission to define “harmful interference” consistent with Section 2.1 of the Commission’s rules. Pub. L. 106-113 Stat. 1501 (enacting S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, including Title II, the RLBSA); *cf.* *Decision* at 19 (specifically finding that the final rules prevent harmful interference).

¹⁶ 47 C.F.R. § 2.1 (emphasis added). The syntax of the sentence makes it clear that “seriously” applies to each of the following verbs.

¹⁷ The Commission has expressly determined that MVDDS interference “would not likely approach a level that could be considered harmful interference.” *Decision* at ¶ 26; *see also id.* at Appendix G at 150 (“most DBS customers ... are expected to experience much less interference than calculated since the calculations do not take into account a number of factors that would

The DBS Operators may disagree with the Commission's decision not to define such impairment in terms of an absolute ceiling on the maximum permitted percentage of increased outage.¹⁸ Nonetheless, it was hardly novel, or irrational (which is the relevant question), for the Commission to define harmful interference in terms of signals from MVDDS operations exceeding a region-specific permitted signal strength.¹⁹ Similarly, it was hardly unreasonable for the Commission to limit the higher level of protection to existing DBS receivers by taking into account the ability of later-installed DBS receiver installations to use improved equipment and to be adjusted to avoid potential interference from existing MVDDS transmitters. However unhappy the DBS Petitioners may be with these and other decisions by the Commission,²⁰ they have failed to demonstrate that the decisions are arbitrary or unreasonable.

reduce the impact of MVDDS signals.") The Commission has already twice rejected Petitioners' view that "MVDDS is purely 'secondary' to DBS." *MO&O* at ¶ 28.

¹⁸ Nothing requires the Commission to define harmful interference in terms of a particular percentage of increased outage. (In the broadcast context, for example, the Commission has long defined FM service in terms of fixed mileage separations but AM service on the basis of protected signal strength contours.) The Commission has discretion to specify what interference would be deemed harmful in terms that best serve the context in which the definition would be applied. In this case, geography-based technical standards were chosen.

¹⁹ The DBS/NGSO sharing rules, as discussed *infra* at note 22, also use a specified maximum strength of an interfering NGSO signal as the measure of what would be deemed harmful to DBS, and the onus is placed on DBS operators to engage in mitigation by using improved equipment or receive more interference. As the Commission noted in the *Second R&O*, this is not the only instance in which primary users are required to implement mitigation techniques. *Second R&O* at at ¶ 92, n.226.

²⁰ The DBS Operators, surprisingly, also take aim at the availability of a "safety valve" provision allowing them to challenge MVDDS systems operating in conformance with the Commission's rules if the DBS operator thinks the conditions at a particular DBS receive-site make applicability of the regional limit inappropriate. *DBS Operators' Petition* at 18. Amazingly, the DBS Operators object also to the broad latitude given them to present such a challenge on whatever basis they can creatively put forward, rather than having the safety valve option being strictly limited, which might have been easier for the Commission to administer. In providing this safety valve, far from attempting to salvage an otherwise unreasonable rule, the Commission was clearly bending over backwards to give additional protection to DBS service

B. The Commission's Proper Balancing of Multiple Policy Objectives

Significantly, in devising spectrum sharing rules, the Commission had the challenge of achieving multiple policy objectives.²¹ First, the Commission had to devise rules that were consistent with its overall mission of ensuring efficient spectrum use and bringing the benefits of new technology to the public.²² Next, the Commission was obligated to implement to the extent feasible the Congressional goal of establishing a new service that could provide a choice of signals to rural areas.²³ In so doing, the Commission was properly mindful that MVDDS service is a potential competitor to DBS service, and, therefore, that the DBS Operators may well have

and address concerns that the regional approach may sometimes allow what could be shown to be harmful interference at a particular location. It is equally mysterious that the DBS Operators complain that the Commission did not impose a directionality requirement on MVDDS operations. *DBS Operators' Petition* at 11 - 12. Given that the MITRE Report found that "northpointing" would often be inappropriate, The MITRE Corporation, *Analysis of Potential MVDDS Interference to DBS in the 12.2 - 12.7 GHz Band* (2001) ("*MITRE Report*") at xviii, 6-3, what would have been unreasonable would have been for the Commission to require that orientation.

²¹ *Second R&O* at ¶ 53; see also *MO&O* at ¶ 2 (noting, with respect to dismissal of petitions for reconsideration of the *First R&O*, "We believe that the Commission's allocation for MVDDS ... reflects a carefully crafted balance of technical and policy concerns.").

²² See, e.g., *FCC NEWS*, "FCC Chairman Michael K. Powell Outlines Critical Elements of Future Spectrum Policy" (Aug. 9, 2002). Indeed, very recently, in its order revising and amending the rules governing the DBS service, the Commission imposed NGSO sharing criteria that assumed DBS operations were utilizing reception equipment satisfying new international standards, whether or not such higher quality antennas were actually being used. *DBS Rules Order* at ¶ 128. Here, the Commission found it appropriate to grandfather protection of existing DBS reception equipment, whatever its quality, but also encouraged DBS operators to promote better DBS service by employing the variety of means available to them to ensure higher quality service in an environment reflecting the presence of MVDDS transmissions. Given the vehement opposition of DBS Operators to having MVDDS operators engage in mitigation activities at DBS customer sites, and given the substantial evidence of the feasibility of mitigation, that DBS operators may have to try a little harder to ensure quality installations of new receivers is neither inappropriate nor unprecedented.

²³ In its RLBSA report to Congress, the Commission referred to its establishment of the MVDDS service as part of its efforts to implement the RLBSA. *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, 16 FCC Rcd. 578 (2001).

an anti-competitive, as well as an anti-interference, motive for supporting sharing standards so restrictive as to make deployment of MVDDS essentially impossible.²⁴ Last, but not least, the Commission also had to devise spectrum sharing rules that were not prohibitively complex to administer.²⁵

C. Use of 10% Outage Starting Guideline Proper

The Commission's use of a 10% outage increase guideline as a starting point in developing region-specific EPFD limits for MVDDS service illustrates the reasonableness of the Commission's approach to balancing these multiple objectives.

Whether or not the DBS Operators agree with the rules developed by the Commission, there can be no doubt that the Commission's *Decision* must be affirmed as a reasonable, if not as an exemplary, approach to satisfying this multiplicity of sometimes-conflicting goals. Nor is there anything substantively wrong with the Commission's decision to use a 10% outage increase parameter as a guideline in performing its initial analysis, rather than as a rigid ceiling.²⁶ In looking at both absolute and percentage level increases, and consistent with its obligation to promote efficient sharing usage, the Commission properly made sure that it did not impose percentage limitations in an arbitrary and unnecessary way as a hard and fast rule when the actual minutes of outage that were at issue were minimal.²⁷

²⁴ *MO&O* at ¶ 28.

²⁵ *See, e.g., Second R&O* at ¶ 84.

²⁶ *See DBS Operators' Petition* at 7; *SBCA Petition* at 12 - 13.

²⁷ *Second R&O* at ¶¶ 71 - 72.

It is telling that, however loudly they complain about percentage increases at various locations, Petitioners never report the number of actual minutes at issue.²⁸ If, for example, DBS had actually achieved an unavailability standard of one minute per year at a given location, an increase of a second minute would represent a 100% increase. Yet it would be absurd for anyone to suggest that the increase would likely be of concern to subscribers. Even in the more common case where the predicted percentage increase amounts to more than a minute, it is quite a stretch to assume that customers would be watching television during every outage incident, or would notice, or would much care if they did notice, every increase.²⁹ Indeed, it may be that the DBS Operators' real concern is that if, when asked by a potential MVDDS operator to waive a received-interference limit, a subscriber would be happy to do so, just to have a choice of service providers.³⁰

²⁸ See *id.* at Appendix G at n. 668 (“It should also be noted that these cases where the ‘difference in outage’ or increase in unavailability was above 20% did not include the ‘worst case’ (*i.e.*, the situation with the largest minutes of unavailability). The analysis also shows that in these cases the new total calculated outages will still be less than the current outages in a few of the cities served by that satellite. More generally, ... the increases in unavailability due to an MVDDS signal — even beyond 10% — do not rise to the level of harmful interference.”) It should also be noted that in New York City, for example, service availability levels vary widely by satellite. *Id.*, text at n.672 and n.672. Further, SBCA’s complaints to the contrary, the Commission has not ignored MITRE’s recommendation of protection of DBS service on a long-term basis, *SBCA Petition* at 14; the Commission has imposed long-term operational standards on MVDDS operations that are intended to protect DBS operations. The Commission has merely given an extra degree of protection to “customers of record.”

²⁹ Nor is it to be expected that all would be watching the high action/adventure-type of programming that MITRE found most susceptible to outages. See *Second R&O* at 72; *MITRE Report* at A-9.

³⁰ See *DBS Operators’ Petition* at 21 - 22. At the same time the DBS Operators complain of having the burden of mitigation, they also complain of the information to be made available to potential MVDDS operators to allow them to ensure compliance with technical rules. DBS can’t have it both ways. Similarly, their concern that they wouldn’t hear about actual harmful interference when there was an opportunity to challenge it is rather disingenuous. Customers with real complaints usually air them. Those that decide to disconnect would obviously make themselves known to the DBS operator.

Thus it was clearly reasonable for the Commission, rather than to impose an arbitrary ceiling, to look at the preliminary results of using a 10% outage factor and consider them in the light of the real world.³¹ When the trade-off for a few minutes of extra outage, regardless of the percentage increase, is the ability to receive a completely new service providing a competitive choice, the Commission quite appropriately struck a balance by giving a real-world sanity check to the preliminary 10% outage guideline.

IV. THE COMMISSION'S SATISFACTION OF APPLICABLE PROCEDURAL STANDARDS

A. No Reliance on Undisclosed Analysis or Methodology

The order provides ample evidence that the Commission gave careful consideration to the extensive public record,³² in which Petitioners fully briefed the issues they repetitiously raise

³¹ Such a “clear light of day” review is particularly appropriate in a context in which numerous assumptions of the analysis were clearly conservative, *see Decision at* ¶ 72, and would have resulted in higher-than-likely predicted outage increases. For example, the analysis assumed that rain would attenuate DBS signals but not the MVDDS signals, when simultaneous attenuation is much more likely. Similarly, the analysis ignored the likely presence of “natural shielding” to protect many DBS receive sites. Additionally, such mitigation techniques as optimally oriented DBS receivers were not considered, although expecting that customers would receive quality service and complete installation information from DBS operators, equipment installers, and retailers is hardly unreasonable. *Cf. SBCA Petition* at 15.

³² The *Second R&O* discusses its methodology at length, and refers to positions of various parties throughout the discussion. That it considered, *inter alia*, the views of the DBS Operators is obvious from the Commission’s resolution of such issues as the quality of service level to factor into the analytical model, an aspect in which the Commission’s model was more favorable to DBS than that used by MITRE. *See Second R&O* at ¶ 80; *see also id.* at Appendices A – C (identifying participants in the proceeding). The Commission used “the highest threshold value in the predictive model, QEF, rather than VQ6, the level MITRE had used in its analysis. *Second R&O* at ¶ 80.

here.³³ The DBS Operators nonetheless also challenge the analysis documented in Appendix F on both procedural and substantive grounds.

First, with respect to the procedural issue, the analysis performed by the Commission staff was clearly contemplated by the *Further Notice*.³⁴ While the specific computations and scenarios run by the staff may not have been made available to the public prior to their release in the *Decision*, they employ methodology and parameters repeatedly referenced in the docket.³⁵ The factors considered and general mode of analysis have been in the record since at least the filing of the MITRE Report in April 2001.³⁶ The use of four regional signal strength levels has been in the record since at least since Northpoint Technology, Ltd., filed its Comments on the *Further Notice*.³⁷ That some satellites should not be considered during the analysis was a

³³ See MCI Telecommunications Corp. Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, *Memorandum Opinion and Order on Reconsideration*, 59 Rad. Reg. (P&F) 2d 631(1985) at 11 (affirming initial decision and noting challenged issue had been “fully briefed in the original proceeding”); Creation of an Additional Private Radio Service, *Memorandum Opinion and Order*, 1 FCC Rcd 5, 6 (at ¶¶ 9 – 10) (1986) (“petitions for reconsideration are not granted for the purpose of altering our findings of the basis of matters that have already been fully considered and substantively settled. bare disagreement, absent new facts and arguments properly submitted, is insufficient grounds for granting reconsideration.”).

³⁴ The *Further Notice* expressly indicated an intention to develop an analytical model and requested comment on various inputs to that model. See 16 FCC Rcd. at 4198 ¶ 272 and Appendix H. Contrary to what is said in the *DBS Operators Petition* at 7 n.10, there was no new computer model unveiled for the first time in the *Second R&O*. The model included in Appendix F and described in Appendix G is merely a refinement of the analyses made in the proceeding since at least the *MITRE Report* was presented.

³⁵ The approach is also similar to that used in other contexts, such as NGSO sharing. *Decision* at Appendix G at 154 (“Other parties have taken a similar approach for evaluating the potential for interference to DBS associated with particular models.”)

³⁶ *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 (Apr. 23, 2001).

³⁷ See *Second R&O* at ¶ 64.

recommendation of MITRE, which took the view that satellites experiencing unavailability levels exceeding 100 hours per year should be excluded from the class of satellites considered in establishing protection criteria,³⁸ as was the idea that use of DBS receivers of a particular quality should be a prerequisite for entitlement to protection.³⁹ Thus, the DBS Operators should hardly have been surprised to find these or similar elements factored into the Commission's analysis.

The Commission was not required by applicable standards to have issued another notice of proposed rulemaking to allow parties to comment on each way in which the rules the Commission adopted differed from what was proposed initially.⁴⁰ Considering initial proposals in light of the record and its policy determinations is exactly what the Commission is supposed to do. The staff performed calculations that addressed the criteria and policy decisions reached by the Commission, with possible further calculations as the Commission reviewed preliminary data and then requested that it be refined in light of other policy considerations. Rather than being error by the Commission, however, such an iterative process can only properly be viewed as evidence of the care and attention the Commission gave to its rule making task.

³⁸ *MITRE Report* at 6-7. Nonetheless, the Commission verified that its analysis based on the CONUS satellites was also applicable to the non-CONUS satellites. *Second R&O* at ¶ 82. It was hardly unreasonable for the Commission to use averaging so “that the EPFD for neither the ‘worst case’ nor the ‘best case’ satellite predominates.” *Id.* at Appendix G at 155. The Commission also recognized that DBS operators “apportion their satellite resources to different customer locations based on a variety of factors, such as population density and differences in average rainfall,” *id.* at 151, so the level of performance is not beyond the control of the DBS licensees.

³⁹ *Id.*

⁴⁰ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, *First Order on Reconsideration, Second Report and Order and Third Further Notice of Proposed Rule Making*, 9 FCC Rcd 11641164, 1178 (at ¶ 17) (1993) (“The courts have long held that in applying 5 U.S.C. Section 553(b)(3), the notice requirement is satisfied so long as the content of the agency’s final rule is a ‘logical outgrowth’ of its rulemaking proposal.”).

B. Only Final Text Relevant

Nor, as the DBS Petitioners have also alleged,⁴¹ should reconsideration be granted merely because the final text of the Commission's decision reflected changes made between the time of a public meeting at which the decision was adopted and the release of the decision. Deviations between a draft agenda item and the text finally released publicly are both permissible and routine. Drafts are internal agency documents exempt even from FOIA review.⁴² The courts have recognized that the final text is the only official public document relevant for purposes of review.⁴³ That changes were made before release of the final text therefore affords no basis for reconsideration of the *Decision*.⁴⁴

⁴¹ *DBS Operators' Petition* at 23 - 24.

⁴² Draft orders are internal Commission documents exempt from disclosure under Exemption 5 to the Freedom of Information Act. *See* 5 U.S.C. § 552(b)(5); *Community Broadcasting of Boston, Inc., Memorandum Opinion and Order*, 55 FCC 2d 271 (1975) at ¶¶ 9, 10.

⁴³ Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, *Report and Order*, 2 FCC Rcd 3011, 3021(at ¶ 76) (1987) ("the 'deliberative process' does not end with the public announcement of the Commission's action but only after release of the authoritative text of its decision. Oftentimes what ensues between these actions is an editorial process among the staff and individual Commission members that results in final refinements of the rules and the order itself. Matters that are still subject to this 'deliberative process' are generally not disclosed to the public either under our FOIA rules or under our rules governing employee conduct."); *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (holding that where an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at Sunshine Act meetings should not routinely be used to impeach that written opinion; because examination of the agency's pre-decisional deliberations by the court of appeals is at least as likely to injure the consultative process as the disclosure of pre-decisional documents forbidden by the deliberative process privilege, and stating that "an agency's action should be reviewed based upon what it accomplishes and the agency's stated justifications.").

⁴⁴ Moreover, it would appear that the changes that concern the DBS Operators were editorial changes that conformed the final text to the analysis demonstrated in the appendices and clarified that the Commission used a 10% increased outage parameter as a guideline rather than as a hard limit in determining the operating rules for the MVDDS service. *See DBS Operators' Petition* at 23 n.3; *cf. Decision, Joint Statement of Chairman Michael Powell and Commissioner*

V. CONCLUSION

The Commission recognized in the *Second R&O* that deployment of MVDDS service represents an important opportunity to maximize consumer choice of multi-channel video and broadband access services.⁴⁵ The Commission also recognized that MVDDS is a potential new competitor to DBS service, and that, despite the protestations of DBS operators, the spectre of harmful interference could be raised to disguise efforts to exclude potential new market entrants.⁴⁶ MDS America submits that, for the most part, the Petitions of SBCA and the DBS Operators adopt just such a mask. As demonstrated by both the MITRE Report and MDS America's Clewiston test report (which was never commented on by SBCA or the DBS Operators),⁴⁷ it is possible for MVDDS and DBS operations to co-exist.⁴⁸ The Commission's *Decision* is a long-awaited and important step in bringing new service to the public.

Kathleen Q. Abernathy at 6. Insofar as these editorial changes better articulated the Commission's policy decisions, they were clearly appropriate as eliminating potential ambiguities and facilitating third parties' understanding of the policy decisions made by the Commission, as well as making easier any judicial review of the Commission's decision. See *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁵ *Second R&O* at ¶ 53.

⁴⁶ Recognizing that MVDDS represents potential competition for DBS, the Commission properly rejected an approach that would have left DBS Operators the sole prosecutors, judges, and juries with unfettered discretion with respect to claims of interference by new MVDDS installations.

⁴⁷ LCC International, *Clewiston Phase I Test Report* (Oct. 2001); *id.* at 16 (discussing the worst-case scenario in which the DBS antenna had to be placed in an atypical location, nearly at the center of the MVDDS transmitter beam and only 100 m away, so as to force the presence of detectable interference).

⁴⁸ To the extent that the DBS Operators are concerned that the Commission's decision may constrain the ability to use some of the mitigation techniques found beneficial by the MITRE Report, see *DBS Operators' Petition* at i, MDS America at least in part shares these concerns. More specifically, MDS America has requested that the Commission reconsider that portion of its decision in which it declined to adopt its proposal for permitting higher EPFD limits in rural

Whatever Petitioners' disagreements with the policy choices made by the Commission, these choices reflect careful analysis of the record and the policy issues, and they represent reasoned decision making by the expert agency charged with responsibility in this area. As such, they were well within the Commission's purview and discretion. Second-guessing is not a sufficient basis for grant of a petition for reconsideration. The Commission should therefore decline Petitioners' requests that it grant reconsideration "for the purpose of altering ... findings on the basis of matters that have already been fully considered and substantively settled."⁴⁹

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areas. MDS America believes that adopting a dual power limit approach will facilitate use of taller towers and allow service to urban areas at the perimeter of an MVDDS transmitter's service contour in a way that will minimize multipath problems.

⁴⁹ Creation of an Additional Private Radio Service, *Memorandum Opinion and Order*, 1 FCC Rcd 5, 6 (1986) (at ¶ 9) (footnotes omitted).

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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