

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
MDS OPERATIONS, INC.	)	
	)	
Petition for Waiver to Increase Effective	)	WT Docket No. 07-255
Isotropic Radiated Power Limitations	)	
Applicable to Multichannel Video	)	
Distribution and Data Service Stations	)	
WQAR560, et al.	)	

**OPPOSITION OF ECHOSTAR SATELLITE L.L.C.**

EchoStar Satellite L.L.C. (“EchoStar”) opposes the waiver petition filed by MDS Operations, Inc. (“MDSO”).<sup>1</sup> MDSO has simply recast its repeated requests for higher power for its proposed Multichannel Video and Data Distribution Service (“MVDDS”) into a broad waiver request. That request is deficient on both substantive and procedural grounds, and should be rejected by the Federal Communications Commission (“Commission”).

In 2002, the Commission established licensing and service rules for MVDDS that sought to balance the competing interests of incumbent DBS providers and proposed MVDDS providers, as well as NGSO operators, all of which were required to share the same spectrum.<sup>2</sup> Those rules did not satisfy fully the interference concerns of Direct Broadcast Satellite (“DBS”) providers, nor did the rules provide MVDDS/NGSO operations with unfettered operational

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<sup>1</sup> Petition for Rule Waiver of MDS Operations, Inc., WT Docket No. 07-255 (Aug. 29, 2007) (“*Waiver Request*”).

<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 Broadware USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. To Provide A Fixed Service in the 12.2-12.7 GHz Band*, Memorandum Opinion and Second Report and Order, FCC 02-116, ¶ 53 (2002) (“*Second Report and Order*”) (noting “that the technical criteria we are adopting are a reasonable balance of the parties’ competing interests.”).

flexibility. Five years later, MDSO seeks to upset the Commission's balance, and operate at power levels far higher than contemplated by the Commission's rules. This would have a significant adverse effect on 30 million DBS households nationwide, and should be rejected.

MDSO is the MVDDS licensee for 80 DMAs across the country. Through this waiver petition, MDSO seeks to construct a terrestrial network with significantly less transmitters than would be required to operate a FCC rule compliant system. To do so, MDSO seeks to increase dramatically the power levels of its operations – almost 400 times that contemplated by the FCC rules: an EIRP increase from 14 dBm per 24 MHz to 40 dBm per 24 MHz. Such a dramatic shift in the MVDDS rules would come at great expense to customers of the second and third-largest multichannel video providers in the nation (DIRECTV and DISH Network).

MDSO bases its nationwide relief on a single study it commissioned in a non-representative market, Albuquerque. Such a study cannot support the radical relief sought by MDSO. First, a single study in a dry area of the country is a poor choice to evaluate interference effects on a rain-sensitive DBS service. Indeed, Albuquerque “bask[s] in 310 days of sunshine” a year.<sup>3</sup> The Commission's DBS/MVDDS rules recognize the need for a regional approach to DBS interference matters because of the different characteristics of DBS service throughout the nation, including rainfall amounts and effects.<sup>4</sup> MDSO, however, provides no explanation as to why its test was so limited, or why other tests were not conducted to corroborate these findings in more appropriate markets.

The study is also deficient because no notice was provided to appropriate DISH Network personnel to allow for proper monitoring of the testing. MDSO suggests that “both DBS

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<sup>3</sup> See Albuquerque Visitors Bureau, <http://www.itsatrip.org/trip-planning/weather/default.aspx> (last visited Dec. 17, 2007)

<sup>4</sup> *Second Report and Order*, n. 179 (noting geographic differences in DBS service).

companies” were notified, but it is unclear from the waiver request what notice was allegedly provided or what efforts to coordinate testing actually occurred. *Waiver Request* at 4. The Commission “encourage[d] MVDDS providers to consult with and hopefully secure support from each potentially affected DBS provider.”<sup>5</sup> Tellingly, no effort was made to share this report with DBS providers prior to the filing of this petition, nor did MDSO seek DBS support for this waiver request.

Nonetheless, the Commission was correct that MDSO’s testing should have been a coordinated effort to ensure meaningful results. MVDDS operations render DBS consumer dishes more susceptible to outages and rain fade. Outages and rain fade can occur for DBS subscribers for a multitude of reasons. The frequency and duration of those outages may have been significantly greater – both in number and duration – during MDSO’s testing, but such statistics cannot be acquired after the fact.

Fundamentally, MDSO’s limited study cannot alter the basic engineering principles at issue both here and in the rulemaking. Transforming MVDDS from a relatively low-power service to a high-power service places millions of DBS consumer dishes at substantially higher risk of interference concerns and outages. DIRECTV and EchoStar demonstrated in the rulemaking proceeding that power increases similar to – yet still lower than – the levels requested in this waiver would require over 17 times the distance between MVDDS transmitter

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<sup>5</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 Broadware USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. To Provide A Fixed Service in the 12.2-12.7 GHz Band*, Fourth Memorandum Opinion and Order, FCC 03-97, n. 235 (2003) (“*Fourth Report and Order*”).

and DBS receiver.<sup>6</sup> This held true over a number of different variables, and MDSO cannot ignore the magnitude of its proposed operation's effect on DBS service.

Procedurally, MDSO's waiver request rehashes arguments that were rejected in both a rulemaking proceeding and a petition for reconsideration. In 2002, FCC adopted EIRP power limits to "ensure that the DBS service is protected from harmful interference." *Second Report and Order*, ¶ 68. In doing so, the Commission rejected calls for higher power levels. *Id.*, ¶ 198. MDSO sought reconsideration of that decision, seeking a "EIRP limit of 39 dBm for areas outside the top 50 markets."<sup>7</sup> In 2003, the FCC rejected this request because the FCC's existing rule "effectively limit the potential from harmful interference to DBS." *Fourth Report and Order*, ¶ 87. The Commission explained that an EIRP increase "would inherently necessitate the adoption of additional constraints on MVDDS transmitting antenna characteristics." *Id.*

MDSO seeks for the third time to increase its power – again without constraint – nationwide. The Commission should not entertain this backdoor attempt to re-adjudicate this settled matter. MDSO's own words fairly characterize this immediate request: this waiver "reiterate[s] 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."<sup>8</sup>

Upon close examination, MDSO is seeking a new rulemaking, not a waiver. It is well-established that waiver of Commission rules is appropriate only if special circumstances warrant

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<sup>6</sup> Joint Opposition of DIRECTV, Inc. and EchoStar Satellite Corporation, ET Docket No. 98-206, at 7 (Sept. 3, 2002).

<sup>7</sup> Petition for Reconsideration of MDS America, Inc., ET Docket No. 98-206 (July 19, 2002) ("MDSA Petition for Reconsideration"); *see also* Letter to Marlene H. Dortch from Nancy Killian Spooner, Ex Parte Presentation, ET Docket No. 98-206 (Apr. 16, 2003); Letter to Marlene H. Dortch from Nancy Killian Spooner, Ex Parte Presentation, ET Docket No. 98-206 (Oct. 15, 2002).

<sup>8</sup> Opposition to Petition for Reconsideration of MDS America, Inc., ET Docket No. 98-206, at 1 (Sept. 3, 2002) ("MDSA Opposition").

a deviation from the general rule; such deviation serves the public interest; and the waiver does not undermine the Commission's overall policy.<sup>9</sup> With respect to MVDDS, the Commission has suggested a waiver could potentially be appropriate "in certain very specific circumstances." *Fourth Report and Order*, ¶ 88.<sup>10</sup> Yet MDSO's requested relief is not an exception to rule based on special circumstances, but a change in the rule itself. The courts have repeatedly found that "the very essence of waiver is the assumed validity of the general rule." *WAIT Radio*, at 1158. The Commission has rejected waiver requests when the petitioner "appears to question the wisdom of our rule rather than claim that special circumstances make the rule unjust in application to" the petitioner in particular.<sup>11</sup>

This is such an instance. MDSO does not cite special circumstances, but rather maintains its previous position that MVDDS operators should be permitted to operate at very high power levels. MDSO's request is not narrowly tailored to MDSO's system,<sup>12</sup> specific DMAs, or specific areas (urban vs. rural). Underscoring that this is not a waiver request, MDSO seeks broader relief here than it did in the rulemaking. Specifically, higher power levels are now sought, and the geographic scope has also expanded: national relief is now demanded in both urban and rural areas in DMAs 1 to 210.<sup>13</sup> To the extent MDSO wishes to alter significantly the

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<sup>9</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

<sup>10</sup> The broader rulemaking request is also premature. The Commission suggested that it would "entertain request to modify the general EPFD and ERIP limits ... [a]fter we gain experience with MVDDS operations." *Fourth Report and Order*, ¶ 88. No such experience is available at this time.

<sup>11</sup> See *Comcast Cable Communications*, Memorandum Opinion and Order, DA 05-3328, ¶ 5 (2005).

<sup>12</sup> Supplement to Petition for Rule Waiver of MDS Operations, Inc., WT Docket No. 07-255, at 6 (Aug. 29, 2007) (noting that "[o]ther licensees who employ similar network designs would be entitled to comparable treatment.").

<sup>13</sup> Compare MDSA Petition for Reconsideration at i, 5-6 ("increase the rural EIRP limit to 39 dBm."), and 2002 Ex Parte at 5 ("EIRP limit of 39 dBm for areas outside the top 50 markets."), with *Waiver Request* at 2 ("This

balance between DBS and MVDDS operations nationwide, MDSO should file a petition for rulemaking.

Even if this were to be treated as a waiver request, the Commission has consistently ruled that it “will not relitigate in waiver cases issues” settled by rulemaking.<sup>14</sup> The D.C. Circuit has agreed.<sup>15</sup> MDSO has offered no basis to alter the Commission’s 2002 policy “that a higher power benefit for MVDDS providers would not offset the potential constraints placed on other service subscribers in the 12 GHz band.” *Second Report and Order*, ¶ 198. Nor has MDSO established that waiver is necessary for the development or introduction of MVDDS service. This request is, therefore, not in the public interest, and should be dismissed.

For the foregoing reasons, the Commission should reject MDSO’s untimely and duplicative request to expand significantly the power levels of its MVDDS operation. In doing so, Commission should protect millions of existing and future DBS subscribers from harmful interference.

Respectfully submitted,

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request would permit MDSO to operate its transmitters at EIRP levels up to 40 dBm per 24 MHz for any transmitter site in its licensed areas . . . applicable throughout each of the [DMA’s], without regard to whether a particular DMA . . . would be “urban” or “rural.”).

<sup>14</sup> *Stockholders of Renaissance Communications Corp.*, 12 FCC Rcd 11866, ¶ 49 (1997).

<sup>15</sup> *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (upholding Commission denial of a waiver request that “was simply seeking a relitigation of matters which had already been resolved in the recently completed rulemaking proceeding.”).