

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

In the Matter of	)	
	)	
MDS America, Inc.	)	File No. 0095-EX-PL-2001
	)	Call Sign WC2XPU
Experimental Special Temporary Authorization	)	
	)	
	)	<u>EXPEDITED ACTION</u>
	)	<u>REQUESTED</u>

**REPLY REGARDING EMERGENCY PETITION FOR A
CEASE AND DESIST ORDER AND FOR A FREEZE ORDER**

EchoStar Satellite Corporation and DIRECTV, Inc. (collectively, the “DBS Operators”) hereby reply to the opposition of MDS America, Inc. (“MDS America”) to the DBS Operators’ above-captioned emergency petition, which requests immediate cessation of further private experiments for a new terrestrial service in the band used for reception of Direct Broadcast Satellite service by more than 15 million households.¹ MDS America’s reply tries to obfuscate the principal point here: where Congress specifically has directed an independent testing process to evaluate interference with DBS, and such a process is underway, it is at least unproductive, if not illegal, for the Commission to authorize new private experiments in the DBS band. Such authorizations become especially inappropriate in light of the findings by the MITRE Corporation. MITRE has found that a new service in the band poses a risk of

¹ According to a revised Test Plan submitted to the Commission by MDS America, MDS America intends to commence testing on July 5, 2001. *See* Letter from James W. Olson to James R. Burtle, MDS America, Incorporated – Phase I Test Plan for Clewiston, Florida Experimental Testing Under Call Sign: WC2XPU, File No. 0095-EX-PL-2001 (June 28, 2001).

undermine Congress' intent by authorizing more private experiments and perhaps introducing more divergent results, even in the midst of the independent testing process. Where Congress has spoken to a specific issue or concern, the administrative agency's discretion to respond to that issue is necessarily limited.⁴ Even if the Commission were to ignore Congress' design, the authorization of such further experiments is at least inopportune and comes perilously close to the appearance of a somewhat cavalier disregard for the will of Congress.⁵

MDS America tries to downplay the significance of MITRE's findings by claiming their import is a matter of interpretation. However, MITRE's first and foremost conclusion was that "MVDDS sharing of the 12.2-12.7 GHz bands currently reserved for DBS poses a *significant interference threat* to DBS operation in many realistic operational situations."⁶ These are MITRE's own words, notwithstanding MDS America's underhanded efforts to misrepresent them as the DBS Operators' spin.⁷ That conclusion cannot be reconciled with the essential premise of any experimental license – that the experiment may not cause harmful interference. In other words, the grant was made subject to a condition that, according to MITRE, can probably not be satisfied.

⁴ In general, courts have held that an agency exceeds its statutory authority when it adopts rules or makes findings that are inconsistent with a specific statutory mandate. *See e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")

⁵ Nor is the issue whether the Commission "acted too quickly" in granting an experimental license, as MDS America maintains. *See* MDS America Opposition at 4. Rather, the issue is the propriety of the grant under the unique circumstances presented.

⁶ MITRE Report at xvi, 6-1 (*emphasis added*)

⁷ *See* MDS America Opposition at 4.

The MITRE Report also concluded that band sharing “appears feasible *if and only if* suitable mitigation measures are applied.”⁸ All of the mitigation measures identified by MITRE are unworkable or impractical, however, and significantly, there is no guarantee that any of the MVDDS operation or design-related mitigation measures will eliminate harmful interference to DBS. While the MITRE Report acknowledges that additional work and analysis may need to be undertaken concerning MVDDS sharing of the 12.2-12.7 GHz bands, any further study is properly the Commission’s responsibility in its pending rulemaking proceeding, not the job of MDS America. It is for this reason that the DBS Operators do not argue, to MDS America’s apparent disappointment, that MDS America “be required to test to prove its points.”⁹ At a minimum, the Commission must conduct the evaluation called for by the MITRE Report before any further experiments may proceed.

Finally, MDS America accuses the DBS Operators of being “schizophrenic” and “hysterical” because they complain of the threat of interference while at the same time observing that MDS America is manipulating its test to permit a “conclusion” of no interference.¹⁰ There is nothing inconsistent in those concerns, however; they are both valid. MDS America essentially admits the motives behind its decision to locate its transmitter next to a lake: “MDS America chose the site near Clewiston, a rural area, out of an abundance of caution, *to minimize interference concerns*, although it fully anticipates that no harmful interference will result from

⁸ MITRE Report at xvii, 6-1 (*emphasis added*).

⁹ See MDS America Opposition at 5 (*emphasis omitted*).

¹⁰ *Id.* at 7-8.

its tests.”¹¹ With respect, however, the DBS Operators cannot rely on this admitted effort artificially to minimize interference, and they cannot draw any comfort that the interference warned of by MITRE will not, in fact, occur from MDS America’s desire to manipulate the process. In any event, what MDS America presents as “schizophrenic” complaints boils down to the fact that the test will either be harmful to DBS consumers or completely useless. If, with good luck, MDS America’s plan to minimize interference were to work, all that the Commission would learn is that transmissions of terrestrial signals over a lake will not cause harmful interference, a proposition that is, of course, meaningless in light of the absence of DBS households in the area. The proximity of large bodies of water is an even less reliable (indeed even more absurd) mitigation measure than those MITRE has identified as requiring evaluation.

¹¹ *Id.* at 7 (*emphasis added*).

CONCLUSION

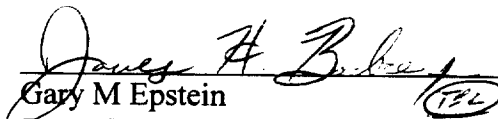
For the foregoing reasons, and those set forth in the DBS Operators' petition, the Commission should expeditiously issue an order requiring MDS America to cease and desist from conducting any experiments pursuant to the above-captioned experimental license. The Commission should also grant a freeze order preventing any other companies from receiving experimental authority in this band.

Respectfully submitted,

By: 

Pantelis Michalopoulos
Rhonda M. Bolton
Todd B. Lantor
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Counsel for EchoStar Satellite Corporation



Gary M Epstein
James H. Barker
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Washington, DC 2004
(202) 637-2200

Counsel for DIRECTV, Inc.

Dated: July 2, 2001

CERTIFICATE OF SERVICE

I, Todd B. Lantor, hereby declare that a true and correct copy of the foregoing Emergency Petition for Cease and Desist Order and for a Freeze Order was served this 2nd day of July, 2001, via hand-delivery or U.S. mail (indicated by *) upon the following:

Chairman Michael K. Powell
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Michael Copps
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Peter Tenhula
Senior Legal Advisor
Office of Commissioner Powell
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Lauren Max Van Wazer
Legal Advisor
Office of Commissioner Michael Copps
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Bruce A. Franca
Acting Chief
Office of Engineering and Technology
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Kathleen Abernathy
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Adam Krinsky
Legal Advisor
Office of Commissioner Tristani
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Bryan Tramont
Senior Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Thomas J. Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Michael J. Marcus
Office of Engineering & Technology
Federal Communications Commission
The Portals - Room 7-C140
445 Twelfth Street, S.W.
Washington, D.C. 20054

Julius P. Knapp
Office of Engineering & Technology
Federal Communications Commission
The Portals - Room 7-B133
445 Twelfth Street, S.W.
Washington, D.C. 20054

Ira R. Kelz
Office of Engineering & Technology
Federal Communications Commission
The Portals - Room 4-C421
445 Twelfth Street, S.W.
Washington, D.C. 20054

James R. Burtle
Office of Engineering & Technology
Federal Communications Commission
The Portals - Room 7-A267
445 Twelfth Street, S.W.
Washington, D.C. 20054

Bruce A. Franca, Acting Chief
Office of Engineering and Technology
Federal Communications Commission
The Portals - Room 7-C153
445 Twelfth Street, S.W.
Washington, D.C. 20054

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Rebecca Dorch, Deputy Chief
Office of Engineering and Technology
Federal Communications Commission
The Portals - Room 7-C161
445 Twelfth Street, S.W.
Washington, D.C. 20054

Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals - Room 6-A764
445 Twelfth Street, S.W.
Washington, D.C. 20054

Mark Rubin
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals - Room 8-C720
445 Twelfth Street, S.W.
Washington, D.C. 20054

D'wana R. Terry
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals - Room 4-C321
445 Twelfth Street, S.W.
Washington, D.C. 20054

Michael K. Kellogg*
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

Donald Abelson, Chief
International Bureau
Federal Communications Commission
The Portals - Room C-750
445 Twelfth Street, S.W.
Washington, D.C. 20054

Thomas S. Tycz
International Bureau
Federal Communications Commission
The Portals - Room 6-A665
445 Twelfth Street, S.W.
Washington, D.C. 20054

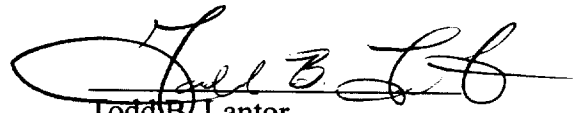
Jennifer Gilsonan
International Bureau
Federal Communications Commission
The Portals - Room 6-A520
445 Twelfth Street, S.W.
Washington, D.C. 20554

Christopher Murphy
International Bureau
Federal Communications Commission
The Portals - Room 6-C437
445 Twelfth Street, S.W.
Washington, D.C. 20554

Margaret L. Tobey*
Morrison & Foerster
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

Antoinette Cook Bush*
Northpoint Technology, Ltd.
400 North Capital Street, N.W.
Suite 368
Washington, D.C. 20001

James W. Olson
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, DC 20009-2402



Todd B. Lantor