

STATEMENT OF COMMISSIONER
KEVIN J. MARTIN
Dissenting in Part and Approving in Part

RE: 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 (ET Docket No. 98-206; RM-9147 and 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.

After several years and thousands of pages of debate, today the Commission finally acts on Northpoint's application. I am glad we are finally moving forward. I believe we should proactively seize opportunities to encourage, and even insist on, more efficient use of current spectrum, particularly through sharing. But the Commission needs to do so while still protecting the rights of existing licensees and their customers.

Unfortunately, today's Order settles on a licensing approach that sanctions unlimited interference to some DBS subscribers, and places too much of the burden of MVDDS deployment on the backs of DBS licensees and their customers. For example, the Order falls short in justifying why half of the Nation's population, and most of the Nation's geography, is not considered in calculating the appropriate interference protection standards. It injects uncertainty into the spectrum market. Accordingly, I dissent from the majority of this decision, and approve only the auctions, eligibility, and broadcast carriage sections of the order.

By law, DBS service is entitled to protection from "harmful interference." And even more important, existing DBS customers deserve to be protected from unreasonable interference. The majority, however, refuses to quantify a harmful interference standard. Instead, the majority announces the adoption of technical requirements that should "limit" the amount of increased DBS unavailability caused by MVDDS to "10%," and contends that such operating limits will ensure that the DBS service is protected from harmful interference. If the majority stopped here, I might have been supportive. However, the majority announces that many DBS customers will actually experience more than a 10% increase in unavailability. The majority implements the "10%" baseline in such a manner that, by its own estimates, will result in at least double or triple those levels in several of the nation's top 32 television markets. In fact, there is no practical limit on how much more outage may permissibly result. And there is little analysis concerning how much interference may occur to consumers residing outside those top 32 television markets.

The problem arises because the interference "limits" in the Order are based on an underinclusive, double-averaging methodology for calculating the MVDDS signal power

detected by the DBS transmitter (“EPFD”), a technical parameter the MVDDS operator must meet prior to deployment. The implementation and resulting limits are arbitrary given the majority’s conclusion that 10% additional outage strikes a reasonable balance of the burden that should be placed on DBS subscribers, while at the same time allowing vast numbers of DBS subscribers to experience significantly more than that 10%.

The calculations are underinclusive in two fundamental respects. First, they exclude service from two of the orbital slots being used to provide DBS service in the United States. Second, they count only the top 32 television markets. The majority refuses to even consider the increased outage levels that the millions of DBS subscribers who live outside of the top 32 markets will experience. Indeed, the calculations fail to take into account entire states that have high DBS penetration rates and unique geographic characteristics (e.g., Montana and Maine). This is particularly troubling because DBS is such an important service to the millions of consumers who live in rural areas and do not have access to cable. Yet those are the very subscribers whose interference levels are not directly considered when evaluating whether the new service meets the “10%” additional outage level the majority deems appropriate.

The EPFD levels are “double-averaged,” further compounding the problem. First, the level of interference caused is averaged across the selected orbital slots. Next, the Commission averages those interference averages within each of four Commission-constructed “regions” (which consist of anywhere from seven to 23 states), based on the results of the 32 selected cities. The majority concludes that the MVDDS licensee need only meet this region-wide, double-averaged EPFD level when it initially deploys. As long as it meets this initial threshold, there is no cap on the actual amount of interference from MVDDS that DBS customers may experience. I cannot support such a result.

While I appreciate the late addition by the majority of a safety valve to address some of my concerns, I believe this process will undermine the simplicity they advocate. Moreover the fact that a safety valve is necessary is recognition of the fact that the proposed interference scheme will not adequately protect DBS consumers in all parts of the country.

Providing a standard EPFD limit and then allowing, on a case-by-case and service area-by-service area basis, challenges to those EPFD limits if the limits are not “appropriate” will create a series of challenges that the Commission will still have to resolve. I believe that a process that allows any customer or service provider to lodge a challenge to the interference standard we adopt today when they feel it is not “appropriate” is far from “simple, clear, or easy.” Rather, I fear that the lack of clarity with regard to what is or is not appropriate will only further complicate and confuse this process. Simplicity of process, clarity of decision making, and achievement of an easy implementation standard that protects consumers from interference all dictate in favor of establishing interference limits in each service area using the Commission’s predictive model up front rather than at the back end of this process. Thus, I believe the proposed safety valve may only complicate, not simplify the Commission’s licensing approach.

