JOINT PRESS STATEMENT OF
CHAIRMAN MICHAEL POWELL AND
COMMISSIONER KATHLEEN ABERNATHY

In 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, RM-9245)

This proceeding has challenged the Commission to balance conflicting goals, promote competition through new technology, and minimize interference to existing licensees. We believe the Commission and its wonderful staff have done an admirable job.

A few aspects of the decision deserve particular attention, which we will lay out in more detail upon release of the Order. First, the Commission has wisely chosen not to saddle MVDDS licensees with regulatory burdens based on the types of services that may be provided. Instead, the Commission has exercised regulatory restraint to allow MVDDS to evolve in the marketplace first, and as a topic of regulation second. In addition, we believe the Commission wisely adopted a reasonable, but strict interference limit on MVDDS operations to ensure a regulatory regime that is clear and enforceable, yet flexible. Although several well-intentioned proposals were considered, including compensation formulas, mandated service calls, and hundreds of precision measurements, we believe the Commission correctly chose an acceptable interference approach that limits the equivalent power flux density (EPFD) at DBS receive sites.

Electromagnetic interference issues are among the most vexing aspects of public policy faced by the Commission in the spectrum area. The agency has defined "harmful interference"[1] – but the Commission's service rules are generally based on an acceptable level of interference that far more narrowly restricts operations than a harmful interference standard would. Here, the Commission defines permissible interference levels and determines that MVDDS service cannot exceed the EPFD limits at existing DBS sites. The EPFD limits are based on a complex predictive model, which in turn is based on certain assumptions and technical criteria in various parts of the country, including the general assumption that the limits would not noticeably increase DBS outage during rain events. Other variables include the power levels of different satellites, the weather variations in a given region from year to year and the elevation angle and size of DBS dishes. Outage increases are also easily avoidable at most consumer receive sites through a variety of mitigation techniques that are available to DBS providers.

We believe simplicity, clarity, and ease of implementation necessitate the majority's approach. We also believe the noticeable impact, if any, on DBS customers will be minimal and is outweighed by the overall consumer benefits to be derived from a new service. We also acknowledge, however, that the Commission's predictive model is

[1] See 47 C.F.R. 2.1 ("harmful interference" is defined as "interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades obstructs, or repeatedly interrupts a radiocommunication service.. . . ")

just that -- a prediction. Therefore, the Commission has also adopted a "safety valve" that allows individual DBS licensees or distributors to present evidence that the appropriate EPFD for a given service area should be different from the EPFD applicable in that zone. Thus, to the extent that DBS providers can show that our predictive judgment requires fine-tuning, they have a readily available recourse.

The end result is one that this Commission can and should be proud of – efficient and effective spectrum sharing on a broad scale that allows us to license an entirely new service. Broadwave USA (commonly known as Northpoint), and its affiliates, have vigorously argued that an auction is not required or in the public interest for these licenses. Northpoint arrived at the Commission many years ago with a proposal for a new and innovative way to share the DBS spectrum. Today, thanks in large part to its fine work and diligence, that service will go forward. Many have claimed that Northpoint deserves a nationwide 500 MHz terrestrial license for free based on its regulatory and technical efforts to make this service a reality. We sympathize with the sentiments that underlie these claims. There is little question that had it not been for Northpoint, the MVDDS service would not be ready to move forward today. Northpoint has put significant time and resources into developing its service model as well as its Commission and congressional advocacy over a long period of time. We applaud these efforts. But the statute does not support exempting this spectrum from auction nor does it grant Northpoint the exclusive privilege it seeks. We also do not believe other licensing distribution mechanisms that avoid mutual exclusivity are appropriate for this service. While we understand the equitable basis for Northpoint's claims, we cannot support that equitable concern trumping the auction regime Congress created in the statute, or the value of allowing other competitors to vie for a chance to offer service to the public. If Northpoint's service model is a winner, the market will reward it just as it has done for other technology companies.

This has been an extremely difficult proceeding for the Commission, but we believe the Commission has arrived at a policy that appropriately balances the competing interests while allowing an important new service to move forward. We look forward to an auction for these licenses in the near future and the provision of the corresponding new services to the American people.

STATEMENT OF COMMISSIONER
MICHAEL J. COPPS
Approving in Part and Dissenting 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.*

Authorizing and licensing the Multichannel Video Distribution and Data Service (MVDDS) serves the public interest. Therefore I agree with today's decision to move forward with authorizing MVDDS. I continue to believe, however, that the Commission can reduce uncertainty and promote greater efficiency by establishing a more universal understanding of the meaning of "harmful interference" rather than establishing new standards each time a dispute arises. Such an effort would reduce uncertainty and would lead to fewer firefights between new and incumbent spectrum users. Short of this larger effort, however, I believe that the rules established here will allow a new service to move forward and will protect customers of existing services. I therefore agree with the interference portions of the item.

I regret that I must dissent, however, to two portions of today's order. I am of firm belief that the open eligibility established by this Order will not maximize the potential benefits of MVDDS or minimize the potential pitfalls of an unconditioned auction. Therefore I must dissent to the eligibility and auction portions of the order.

Additionally, I believe that one of the main benefits of the MVDDS service is the opportunity to increase the distribution of local television programming. One potential MVDDS applicant has offered to accept full must carry responsibilities as a condition of becoming a licensee. I am opposed to determining at this stage that MVDDS licensees should be exempt from the must carry obligations carried by their cable and DBS competitors. Those obligations were imposed to advance the public interest; I see no reason for jettisoning them here.

I want to commend the work of the FCC staff who worked on this incredibly difficult proceeding over a period of several years. Each time a thorny spectrum dispute arises, I become more convinced that the FCC has the best engineers and communications lawyers in the country working for our consumers. We are all lucky to have them as public servants.

MVDDS Offers Great Potential Value to Consumers

In November, 2000, in the *First Report and Order and Further Notice of Proposed Rulemaking* in this proceeding we concluded that "[a]fter an exhaustive analysis and the time-consuming development on the international front of a consensus regarding critical technical issues, we have made a major threshold determination to authorize a new service, MVDDS, that will be capable of delivering local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets."[1]

I commend the previous Commission for this correct and forward-looking decision. I believe that authorizing and licensing this new service has great potential to serve the public interest. Companies hoping to win licenses have stated on the record that an MVDDS system can be a low-cost terrestrial wireless multi-channel video and broadband Internet service. This service has the potential to further several of my most important goals as a Commissioner.

First, MVDDS has the potential to serve as an important new competitor to cable and DBS in the provision of video services. Encouraging such competition is an important Commission responsibility. Improved competition in multi-channel video services can drive down prices and create incentives for service improvements. As consolidation throughout the communications industry continues unabated, the creation of a new competitor is of great importance.

Secondly, MVDDS has the potential to provide service in rural areas where today DBS is the only option. Encouraging rural service is, of course, a high responsibility incumbent upon the FCC.

Thirdly, MVDDS has the potential significantly to increase the availability of local television service. Because MVDDS technology uses local facilities to transmit signals, it can transmit local television signals, much like a cable service. While some rural areas receive local television signals via DBS, most do not. Potential MVDDS operators have promised, on the record, that they will offer local television stations where they offer service. One company has volunteered to accept full must carry responsibilities and provide all local television channels in all 210 local television markets.

Fourthly, MVDDS has the potential to speed the deployment of broadband telecommunications services throughout the country, and especially to rural America. The MVDDS service includes the ability to offer broadband services, such as Internet access, via terrestrial wireless facilities. Today, many rural consumers are unserved by *any* broadband service provider. In many other areas a single provider serves residential consumers. MVDDS can therefore bring broadband services to literally millions of rural Americans, and it can increase competition throughout the country. Congress in 1996 instructed the Commission to make broadband deployment a top priority. By licensing a viable new MVDDS service, we would be working toward Congress's mandate and the Commission's own priority.

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[1] *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 4096, ¶ 18 (2001)

Finally, authorizing the MVDDS service in the 12.2 – 12.7 GHz band is an efficient and innovative use of increasingly scarce spectrum. The FCC has determined that MVDDS operators can provide terrestrial service in the same band used by others to provide satellite services. As we struggle with ever increasing demands on spectrum resources, we should work hard to find ways to allow innovative spectrum arrangements where they are technically possible, do not cause harmful interference, and serve the public interest.

The Majority's Form of Auction Undermines the Value of MVDDS

It is our obligation to develop an assignment mechanism that maximizes the potential value of the MVDDS service. This means, as outlined above, finding a way of assigning MVDDS licenses so that licensees: (1) provide new competition to cable and DBS; (2) increase the distribution of local television channels; (3) can combine multi-channel video services with broadband telecommunications services so as to speed broadband deployment; and (4) use the spectrum efficiently and intensively.

The Commission could easily have designed an auction and licensing process to further these goals. We should have limited auction participation to entities that would provide new competition in the multi-channel video market. That would have meant excluding DBS licensees. In addition, we should have committed to explore ways to ensure that the process placed a priority on the value of local ownership, sustainable rural service, diversity, small business ownership, and the provision of local television stations. Instead, the Commission sacrificed these public interest mandates to the theory that an unconstrained auction will, by itself, yield the best result.

Auctions are far from perfect in recent history. Examples in both in the United States and across the world invalidate the assumption that auctions will automatically assign spectrum to an entity that will put spectrum to its most efficient, highest, and best use. Nonetheless, in order to avoid legal challenges and in the interest of stabilizing our spectrum management system, I was willing to use a carefully constructed auction to assign MVDDS licenses provided that eligibility for those licenses was limited so as to promote competition. Unfortunately we did not get there. I am pleased, however, that the Commission will at least bar dominant cable providers from this service, and will permit some small business incentives.

But I am still faced with an auction process where incumbent DBS companies can buy spectrum that I hoped would be used to heighten competition. Futhermore, I am left without any guarantees that we will be aggressive in finding service and auction rules that, consistent with *Adarand*, can account for the value of local ownership, sustainable rural service, diversity, and the provision of local television channels. These values are substantial, and we must work to make sure that they play a central role in any assignment mechanism. In this case they are, however, marginalized.

Given the choice between a bad auction and no auction, I must choose no auction. Therefore, I will dissent from both the eligibility and the auction provisions of this order.

The Commission Should Not Preclude Must Carry Responsibilities

Local television is of great importance to consumers and Congress. Promoting the increased availability of local channels has always been a priority of the Commission. Broadcast stations are at the center of a locality's marketplace of ideas, a function critical to our democratic society. It is important that any multi-channel video distribution service licensed by the Commission serve the particular needs of local communities.

Broadcasting is a uniquely local medium. Local broadcasters understand what it means to serve their community. They provide local news, public affairs, and entertainment programming that serves the particular needs of ethnic or demographic groups within their community. One hundred and fifty-five million Americans regularly receive their news from local TV stations; another sixty-seven million often do. If localism becomes a casualty of this Commission's fear of rules, American consumers will suffer; the country will suffer.

That is why I believe we should ask the question of whether MVDDS licensees should have must carry obligations. As already noted, one potential MVDDS applicant has offered to accept must carry. It understands that must carry here is feasible and workable. Why, then, do we cast overboard this important public interest principle? Both cable and DBS have important must carry obligations. There may be unique reasons to create service-specific must carry for MVDDS, but we have an ongoing obligation to American consumers to ensure the continued viability of the free-over-the-air broadcast service, and local television stations in each market. By prematurely closing the door on must carry for MVDDS at this stage we are not meeting that obligation.

Additionally, I believe that the combination of foreclosing must carry responsibilities here and allowing DBS to hold MVDDS licenses creates an opportunity to evade the will of Congress. Congress imposed a "carry-one, carry-all" rule on DBS. If a DBS company carries one local station in a community, it must carry ***all*** local stations in a community. Exempting MVDDS service from such a requirement and allowing DBS to hold MVDDS licenses means that a DBS company would have the technical and legal means to circumvent the carry-one, carry-all rule. Such a company could use a MVDDS license to distribute a selected group of local channels in a community without distributing all the channels, while continuing to provide national channels via their satellites. This end-run around the will of Congress would make a mockery of the public interest.

In order to protect local broadcasting and to eliminate a carry-one, carry-all loophole, therefore, I would have at least asked whether MVDDS should have must carry responsibilities, and, if so, what responsibilities. Because the majority disagreed, I must strongly dissent from the must carry portion of the order.

Conclusion

I have high hopes for MVDDS. The market cries out for competition. I, for one, would have welcomed the legal rationale to proceed immediately to license a service. Unfortunately, that legal underpinning could not be found. This being so, I believe the approach I have outlined herein is, far and away, the best available option. MVDDS has the technical ability to compete and offer valuable new service to consumers. I also believe that FCC rules can reduce interference to an acceptable level and can provide mechanisms to resolve unacceptable interference.

I fear, however, that our auction design, and our premature foreclosure of must carry responsibilities will result in MVDDS failing to reach its potential. For these reasons I respectfully agree in part and dissent in part to this order.

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.