

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.

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. Furthermore, 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.