

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
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 Broadwave USA,
PDC Broadband Corporation,
and Satellite Receivers, Ltd. to
Provide a Fixed Service in
the 12.2-12.7 GHz Band
ET Docket No. 98-206
RM-9147
RM-9245

THIRD REPORT AND ORDER

Adopted: June 25, 2003

Released: July 7, 2003

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this *Third Report and Order (Third R&O)*, we revise our service area definition and build out requirement for the Multichannel Video Distribution and Data Service (MVDDS) in the 12.2-12.7 GHz band (12 GHz band). In the *Second Further Notice of Proposed Rule Making (Second Further Notice)* in this proceeding, we sought further comment on the most appropriate service area definition for the geographic licensing of MVDDS.¹ In this connection, we sought comment on whether use of the Designated Market Areas (DMAs) defined by Nielsen Media Research (Nielsen) will facilitate delivery of advanced wireless services, such as video and data broadband services, to a wide range of populations, including those areas that are unserved and underserved.² In addition, we sought comment on whether we should modify the MVDDS build out requirement as a means to foster expeditious deployment of advanced wireless services to these communities as well.³

2. Upon consideration of the record in this proceeding, including but not limited to the comments filed in response to the *Second Further Notice*, we adopt DMAs as the service area definition for MVDDS. We also conclude that a five-year substantial service build out requirement is more appropriate for the MVDDS. We believe that these actions will facilitate delivery of advanced wireless services in the 12 GHz band and promote expeditious deployment of such services to a wide range of populations, including unserved and underserved communities.

II. BACKGROUND

3. In 2002, the Commission adopted a geographic licensing approach for MVDDS.⁴ Under this approach, the Commission defined the service areas for MVDDS based on Component Economic Areas (CEAs).⁵ In reaching its decision to use CEAs, the Commission declined to use Nielsen's DMAs, despite support in the record for such use, in part because Nielsen, as the copyright owner of the DMA listing, had not given the Commission a blanket license to use the listing for MVDDS licensing.⁶ The

¹ 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, *Second Further Notice of Proposed Rule Making*, ET Docket 98-206, 68 Fed. Reg. 19,486 (2003) (*Second Further Notice*).

² *Id.*

³ *Id.*

⁴ 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 with 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 Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. To Provide A Fixed Service in the 12.2-12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, ET Docket No. 98-206, 17 FCC Rcd 9614, 9665 ¶ 130 (2002) (*Second R&O*).

⁵ *Id.* at 9665-9666 ¶ 132. CEAs are based on Economic Areas delineated by the U.S. Dept. of Commerce. Each CEA consists of a single economic node and the surrounding counties that are economically related to the node. The 354 CEA service areas are based on the 348 CEAs delineated by the Regional Economic Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce February 1995, with the following six FCC-defined service area additions: American Samoa, Guam, Northern Mariana Islands, San Juan (Puerto Rico), Mayagüez/Aguadilla-Ponce (Puerto Rico), and the United States Virgin Islands.

⁶ See *Second R&O*, 17 FCC Rcd at 9665-66 ¶ 132.

Commission also determined that it would apply a ten-year build out requirement with a demonstration of substantial service by the MVDDS licensee as the basis for its license renewal expectancy.⁷ The Commission concluded that a ten-year build out requirement was more appropriate for MVDDS because it provided MVDDS licensees both sufficient time and flexibility to deploy systems in the 12 GHz band, a band which is shared with other service providers.⁸

4. After the release of the *Second R&O*, Commission staff and Nielsen representatives continued discussions regarding the Commission's use of the DMA listing in the MVDDS context.⁹ Although Nielsen declined to enter into a blanket license agreement with the Commission, regarding use of DMAs for licensing MVDDS,¹⁰ there was an indication that Nielsen would agree to extend a perpetual, royalty-free license to the Commission with certain conditions.¹¹ To provide the Commission with the opportunity to revisit the service area issue without causing undue delay in the auction, the Wireless Telecommunications Bureau (Bureau) sought comment on its standard auction procedural questions such as upfront payments, and minimum opening bids as they would apply to two possible MVDDS service area regimes - CEAs and DMAs.¹²

5. On March 25, 2003, MDS America, Inc. (MDS America) filed an *ex parte* notification (*ex parte*) which describes its continued concern about the current build out requirements for MVDDS.¹³ MDS America indicated that the current ten-year build out period for MVDDS licenses is too long. It also expressed concern that the build out requirement presented the potential for anti-competitive

⁷ *Second R&O*, 17 FCC Rcd at 9683 ¶ 175.

⁸ *Id.* at 9684 ¶ 176.

⁹ See Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (FCC) and Jane Mago, General Counsel, FCC, to David Schwartz-Leeper, Vice President/GC, Nielsen Media Research (Jan. 24, 2003).

¹⁰ See Letter from David A. Schwartz-Leeper, Senior Vice President/ GC, Nielsen Media Research, to Thomas J. Sugrue, [former] Chief, Wireless Telecommunications Bureau, FCC and Jane Mago, [former] General Counsel, FCC at 2 (Mar. 26, 2003) (Nielsen letter). See also Appendix C of the *Second Further Notice* for the text of the Nielsen Letter.

¹¹ See Nielsen letter at 3. Specifically, Nielsen's counsel stated that Nielsen would agree to extend a perpetual, royalty-free license to the Commission, without the right to sublicense, to "Nielsen Media Research's DMA market and regions," provided that the Commission: (i) agrees, and continues to communicate to prospective MVDDS suppliers, that a territorial license from the Commission to supply MVDDS does not confer the right to use Nielsen Media Research's DMA mark, regions, or data, and that such right must be obtained from Nielsen Media Research on such terms as may be mutually acceptable to Nielsen Media Research and the supplier, in their sole and respective discretion, and (ii) does not republish DMA regions or data in any statute, regulation or rule or otherwise. *Id.*

¹² See *Public Notice*, Auction of Multichannel Video Distribution and Data Service Licenses Rescheduled for June 25, 2003, Report No. AUC-03-53-A, 18 FCC Rcd 1105 (rel. Jan. 30, 2003) (*Auction PN*). We note that the Bureau postponed the auction. *Public Notice*, Wireless Telecommunications Bureau: Auction of Multichannel Video Distribution and Data Service Licenses (Auction No. 53) Is Postponed, Report No. AUC-03-53-C (rel. May 9, 2003).

¹³ See Letter from Nancy Killien Spooner, Counsel for MDS America, Inc., to Ms. Marlene H. Dortch, Secretary, FCC (Mar. 25, 2003).

warehousing of the MVDDS spectrum. It noted that a five-year build out period would better address the demand for rural broadband service.

6. On April 10, 2003, we adopted the *Second Further Notice* wherein we sought further comment on the most appropriate MVDDS service area definition. Given that we revisited the service area definition, we also explored whether the current ten-year build out requirement based on substantial service as a basis for renewal expectancy¹⁴ sufficiently promotes expeditious deployment of service.¹⁵

III. DISCUSSION

A. Service Area Designation

7. *Background.* As noted in the *Second Further Notice*, we continue to believe initially MVDDS licensees will provide multichannel video programming distribution (MVPD) of local television programs and high speed Internet access in the MVPD marketplace. We also continue to believe that use of DMAs and CEAs comparatively provide similar public interest benefits as the service area designation for MVDDS. We nonetheless note, as indicated in the *Second Further Notice*, our belief that utilizing DMAs could be more effective in affording MVDDS licensees the opportunity to provide a wide array of services. In this connection, in the *Second Further Notice*, we sought comment on whether the conditions described by Nielsen are so restrictive that use of DMAs would be of limited utility. In addition, we sought comment on the administrative and economic benefits that may flow from the use of DMAs. We also sought comment on the appropriate service area designation for MVDDS and how such designation should be defined in the Commission's rules.

8. *Decision.* We are now persuaded that DMAs, rather than CEAs, are the most appropriate service area designation for MVDDS. Although DMAs and CEAs have similar advantages with respect to licensing MVDDS, we believe that DMAs are more effective in affording MVDDS licensees the opportunity to provide a wide array of services. Primarily, DMAs, as opposed to CEAs, provide a better method of delineating service areas for those who seek to provide MVPD service offerings involving the retransmission of broadcast programming.¹⁶ In addition, we believe that DMAs may allow MVDDS licensees to compete more vigorously with cable systems who generally have a royalty-free statutory copyright license to retransmit local TV programming within the DMA of the station being rebroadcast.¹⁷ Furthermore, DMAs, as opposed to CEAs, may be administratively easier due to the close nexus between the television viewer market areas as determined by the DMA delineation and the proposed use of the service. However, with regard to other uses, including fixed services, DMAs and CEAs are equally advantageous because they are both local in nature. While we recognize that CEAs are smaller than DMAs, we continue to believe that DMAs, which are county-based, provide a viable option in facilitating

¹⁴ See *Second R&O*, 17 FCC Rcd at 9683-85 ¶¶ 175-77.

¹⁵ *Second Further Notice*, ¶ 17. Comments and reply comments were due on April 28, 2003 and May 5, 2003, respectively.

¹⁶ See *Definition of Markets for Purposes of the Cable Television, Broadcast Signal Carriage Rules, Order on Reconsideration and Second Report and Order*, CS Docket No. 95-178, 14 FCC Rcd 8366, 8372 (1999).

¹⁷ See 17 U.S.C. § 111; 37 C.F.R. § 201.17 (establishing a royalty-free copyright linked to cable must-carry area); cf. also 47 C.F.R. § 76.55(e) (the default must-carry market is DMA-based). We note that MVDDS does not have must-carry obligations.

local access to cable, non-cable, and MVDDS service offerings. In sum, we conclude that using DMAs, as opposed to CEAs, will facilitate delivery of advanced wireless systems to a wide range of populations, including those areas that are unserved and underserved.

9. We reach this conclusion, in part, based on our belief that DMAs may provide a better method of delineating service areas for those who seek to provide MVPD service offerings and, in turn, may allow MVDDS licensees to compete more vigorously with cable systems and other MVPD providers. Specifically, we find that the DMA service area designations will promote a level playing field for MVDDS licensees seeking to provide video services such as the retransmission of local television programming. In this regard, we note the contentions of Northpoint and Genaracorp, LLC (Genaracorp) that use of DMAs is a critical factor affecting whether MVDDS licensees will be able to pursue video service offerings.¹⁸ Specifically, both parties explain that wired cable systems are obligated to retransmit local television programming signals within each DMA, and have a royalty-free statutory copyright license to do so.¹⁹ The statutory copyright license for cable sets forth generally that “cable systems,” which includes both wired and wireless systems for purposes of the Copyright Act’s statutory license,²⁰ may rebroadcast programs contained in local television broadcasts so long as the licensee files a statement of account with the Register of Copyrights every six months and contains, among other things, the royalties due.²¹ Cable licensees must pay royalties only on transmissions “beyond the local service area of [a] primary transmitter.”²² Since such local service areas are defined by DMAs, these commenters explain that retransmission in portions of a CEA outside the DMA would require either (a) payment of a license fee to the television broadcaster, or (b) obtaining programming from another DMA, and they both agree that either alternative would be so costly that retransmission would be uneconomical.²³ Thus, these commenters argue using CEAs would severely undermine the ability of MVDDS operators who seek to distribute such programming to compete on equal footing with incumbent cable television and Direct Broadcast Satellite (DBS) operators.²⁴ We also believe that utilizing DMAs may allow MVDDS licensees providing MVPD service offerings to realize certain administrative benefits due to the close nexus between the television viewer market areas as determined by the DMA delineation and the services they offer.

¹⁸ Genaracorp, LLC Reply Comments at 2-3 (filed May 5, 2003) (Genaracorp Reply); Northpoint Technology, Ltd. Comments at 3 (filed Apr. 28, 2003) (Northpoint Comments).

¹⁹ Northpoint Comments at 2, 6; Genaracorp Reply at 2.

²⁰ The definition of “cable system” as found in 17 U.S.C. § 111(f) includes those systems transmitting programming by “wires, cables, microwave, or other communications channels.” *See also* 37 C.F.R. Part 201.

²¹ *See* 17 U.S.C. § 111(c)-(d).

²² *See* 17 U.S.C. § 111(d)(1)(B).

²³ Northpoint Comments at 6; Genaracorp Reply at 3. These commenters explain that in order to achieve coverage of a given DMA, multiple CEA licenses would have to be obtained, and these multiple areas would then contain parts of multiple other DMAs, which would have to receive a different set of local channels. For example, Northpoint points to a Des Moines, Iowa, CEA that overlaps with nine different DMAs, and explains that serving different portions of each CEA-based license area with different programming would substantially increase the cost of operating a terrestrial wireless system because it would require multiple “head-ends” in each license area to feed different programming to different regions. Genaracorp Reply at 2-3; Northpoint Comments at 6.

²⁴ Northpoint Comments at 6; Genaracorp Reply at 2-3.

10. In addition, we believe that our previous concerns regarding the negative consequences of utilizing a geographic licensing approach for MVDDS premised on service areas not in the public domain have been addressed. In this connection, we believe that the conditions Nielsen described for use of its DMA listing in the context of MVDDS licensing are not so restrictive that use of DMAs would be of limited utility. Based on the record in this proceeding, we believe that the conditions described by Nielsen would give Commission licensees sufficient flexibility to make practical use of the DMA designation in connection with their MVDDS operations. Our belief is premised primarily on statements in the record of this proceeding that MVDDS licensees will not need to use Nielsen's DMA listing in order to construct or operate their systems; and, thus, the royalty-free license Nielsen offered to the Commission would be sufficient.²⁵ The commenters further state that to the extent that such use is needed, interested parties could acquire authorization from Nielsen on a case-by-case basis. We also believe that the Nielsen conditions would not limit our enforcement capabilities because effective enforcement will not require the Commission to republish Nielsen DMAs or data, which is the specified use limitation that Nielsen has asked us to honor. In this regard, we note that the Commission has satisfactorily cross-referenced to Nielsen's DMA service area designations in our cable and broadcast rules, and we agree with the commenters that this practice should pose no different outcome for MVDDS.²⁶

11. Accordingly, we adopt DMAs as the service area designation for MVDDS. With respect to our decision to license MVDDS based on DMAs, it is important for all parties interested in acquiring an MVDDS license to be aware that the Commission's assignment of such licenses will not confer on licensees the right to use Nielsen's DMA mark, regions, or data, and that the right to use any of Nielsen's protected intellectual property must be obtained from Nielsen. In addition, Nielsen has not granted the Commission the right to republish DMA regions or data.²⁷ Therefore, the Commission will not provide Nielsen's compilations of population and counties, or a map of DMAs to MVDDS applicants or licensees.²⁸ Accordingly, interested parties, including MVDDS applicants and licensees, wishing to obtain such DMA data and maps will need to acquire them from Nielsen.

12. Further, as we proposed in the *Second Further Notice*, we will define MVDDS service areas based on the 210 DMAs Nielsen delineated in its publication "U.S. Television Household Estimates" dated September 2002 (2002 Nielsen DMA Listing). We will also include four additional FCC-defined service areas to cover the following areas: (1) Alaska - Balance of State (all geographic areas of Alaska not included in Nielsen's three DMAs for the state: Anchorage, Fairbanks, and Juneau); (2) Guam and the Northern Mariana Islands; (3) Puerto Rico and the United States Virgin Islands; and (4) American Samoa.²⁹ We did not receive comments responsive to this modified approach, but note that we have

²⁵ Northpoint Comments at 7-8 (Nielsen's copyright or trademark policies have not reduced the utility of cable, DBS, or broadcast TV licenses); Genaracorp Reply at 2.

²⁶ Northpoint Comments at 7-8; Genaracorp Reply at 2.

²⁷ See Nielsen letter at 3.

²⁸ As it did in the *Auction PN*, the Bureau will provide only such information as is available on Nielsen's website, which includes the DMA name, rank, number of television households, and percentage of total U.S. television households for the 210 Nielsen DMAs. See <http://www.nielsenmedia.com>.

²⁹ See *Second Further Notice*, ¶ 15.

modified service area designations in other licensing proceedings.³⁰ At the same time, we note that Nielsen may alter the boundaries of its DMAs in the future, as it has in the past, but the boundaries of the DMA-based license areas we adopt for MVDDS licenses today will not change. Thus, we will utilize the service area designations as described herein.

13. While we recognize that the 2002 Nielsen DMA Listing may be different from future Nielsen DMA listings, we decline to establish service areas that may change solely based on determinations made by a third party. We believe that the better approach is to establish permanent rather than dynamic service areas to provide applicants with certainty as to the service areas on which they will bid. Similarly, this approach ensures that licensees will have an established pre-defined service area on which to develop their business plans and service offerings. Furthermore, we do not believe that a modification to Nielsen's DMA listings will be so significant that the benefits derived from adopting DMAs will be undermined. In fact, it has been our experience that such changes in the past have been extremely limited in scope. Consequently, even if a change is made in future Nielsen DMA listings that may impact a particular MVDDS licensee's royalty-free copyright protection for purposes of retransmission of television programming, we believe that such licensee will be able to effectively adjust to the change avoiding a significant adverse impact on its service deployment. We also are concerned that a random, fluctuating service area approach would be administratively unwieldy with little or no concomitant public interest benefits.

B. Build Out Requirement

14. *Background.* In the *Second Report and Order*, the Commission established a ten-year build out requirement for MVDDS licensees based on substantial service as a basis for renewal expectancy.³¹ In addition, the Commission set forth a safe harbor to serve as a guide to licensees in satisfying the substantial service requirement, as well as additional factors that it would take into consideration in determining whether a licensee satisfies the substantial service standard.³² In the *Second Further Notice*, we took the opportunity to explore whether this build out requirement sufficiently promotes expeditious deployment of service. We sought to generate a complete record as to the best approach to foster

³⁰ See, e.g., Amendment of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934, 16943 ¶ 18 (2000); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12452 ¶ 46 (1999).

³¹ *Second Report and Order*, 17 FCC Rcd at 9684 ¶ 177.

³² *Id.* The Commission described the following safe harbor for MVDDS: for an MVDDS licensee that chooses to offer point to multipoint service, a demonstration of substantial service would consist of actual delivery of service to customers via four separate transmitting locations per million population. In addition, the Commission provided additional factors that it would take into consideration in determining whether the substantial service standard is satisfied: a) whether the MVDDS licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers; b) whether the licensee's operations serve niche markets or focus on serving populations outside of areas served by other licensees and MVPDs, including rural areas or those areas that are traditionally deemed unserved and/or underserved; c) whether the licensee's operations serve populations with limited access to communications services; and d) a demonstration of service to a significant portion of the population or land area of the license area. The Commission explained that the safe harbor example is not exhaustive and that the substantial service standard can be met in other ways. As such, the Commission determined that it would review these showings on a case by case basis.

expeditious delivery of advanced wireless services to various communities, particularly those communities that are traditionally unserved or underserved.

15. *Decision.* Based upon the record in this proceeding, we are now persuaded that a five-year, as opposed to a ten-year, build out requirement would better promote expeditious deployment of MVDDS in the 12 GHz band. Although we previously believed that a longer build out period was necessary in order to provide MVDDS licensees ample time and flexibility to work with other service providers in the 12 GHz band, the commenters contend that a five-year period is sufficient time to deploy MVDDS services in this band.³³

16. They also contend that there are additional benefits associated with a shorter build out period. First, a shorter build out period protects against spectrum warehousing, especially where incumbent providers may have an incentive to purchase spectrum licenses, but not construct MVDDS systems or provide service until the end of the period.³⁴ Thus, it prevents anti-competitive behavior.³⁵ Second, with a five-year build out period, if a licensee fails to construct, we can avoid a significant delay in construction and ultimately the provision of service by auctioning a new license for the spectrum in a more compressed timeframe.³⁶ Third, a five-year build out period promotes more rapid deployment of service to the public.³⁷ Against this backdrop, we conclude that the optimal timing for a build out requirement to foster expeditious delivery of advanced wireless services to all communities is five years after initial license grant. As discussed in the *Second Further Notice*, we retain substantial service as the substantive requirement. Accordingly, we adopt a five-year build-out requirement for MVDDS with the substantial service standard and safe harbor example described in the *Second Report and Order*.³⁸ Thus, licensees will be required to meet the substantial service requirement at the end of five years into the license period in order to satisfy the construction requirement.

17. Given that we have decoupled the initial build out requirement from the end of the license term, we must now address what a licensee needs to do in order to earn a renewal expectancy. We believe that an MVDDS licensee's renewal expectancy should be dependent upon service provided during the course of the license term. Since the five-year build out requirement we adopt today covers years one through five, for purposes of earning a renewal expectancy, we will require that an MVDDS licensee demonstrate provision of substantial service between years five and ten. We believe that such requirement is consistent with our approach in other wireless services and will further promote deployment of advanced wireless services to a variety of populations and communities.

³³ Northpoint Comments at 8; Genaracorp Reply at 3; MDS America Reply at 2.

³⁴ MDS America, Incorporated Reply Comments at 2 (filed May 5, 2003) at 2. (MDS America Reply).

³⁵ Genaracorp Reply at 3 (a new MVDDS competitor's entrance in the market is not delayed). Genaracorp believes that a five-year build out requirement would work if substantial service remains in place and is not replaced with a reduced initial deployment of service (where a small investment in equipment may preserve the license for warehousing purposes).

³⁶ MDS America Reply at 2. MDS America also supports a build out period that is shorter than five years, stating that MVDDS systems can be constructed relatively quickly.

³⁷ Genaracorp Reply at 3; Northpoint Comments at 8. Northpoint believes that a five-year build out requirement would work if licensees are required to meet the substantial service requirement.

³⁸ *Second Report and Order*, 17 FCC Rcd at 9684 ¶ 177.

C. Impact on Competitive Bidding

18. *Background.* In the *Second Further Notice*, in light of the fact that the MVDDS auction was scheduled to begin on June 25, 2003, we requested comment on the potential impact on business plans if we change the service area designation or the build out requirement.³⁹ Additionally, we invited comment on whether revising the service area definition or the build out requirement at this time is more likely to speed deployment of advanced services to consumers. MDS America believes that as things currently stand, interested parties should have ample time to modify their business plans before the auction, should the Commission elect to use a different geographical service area.⁴⁰

19. *Decision.* Based on the record in this proceeding, we conclude that our change to the MVDDS build out requirement is likely to speed deployment of advanced services to consumers but will not otherwise have an impact on the business plans of potential MVDDS providers. Moreover, because the MVDDS auction has been postponed,⁴¹ we find that neither our decision to issue DMA-based licenses nor our change to the build out requirement will have an adverse impact on the business plans of potential MVDDS providers.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

20. The Final Regulatory Flexibility Analysis, required by Section 603 of the Regulatory Flexibility Act, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), is contained in Appendix C.

B. Paperwork Reduction Analysis

21. This *Third Report and Order* contains either a new or modified information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the public and the Office of Management and Budget (OMB) to take this opportunity to comment on revision to the information collections contained in the *Report and Order* as required by the Paperwork Reduction Act of 1995.⁴² Public and agency comments are due **[60 days after date of publication in the Federal Register]**. Comments should address:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility.
- The accuracy of the Commission's burden estimates.
- Ways to enhance the quality, utility, and clarity of the information collected.

³⁹ *Second Further Notice*, ¶ 18.

⁴⁰ MDS America Reply at 2 (Notice required to change service area designation).

⁴¹ *Public Notice*, Wireless Telecommunications Bureau: Auction of Multichannel Video Distribution and Data Service Licenses (Auction No. 53) Is Postponed, Report No. AUC-03-53-C (rel. May 9, 2003).

⁴² See Pub. L. No. 104-13.

- Ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

22. Written comments by the public on the modified information collections are due sixty days after the date of publication in the Federal Register. Written comments must be submitted by the OMB on the modified information collections on or before 120 days after the date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith-B.Herman@fcc.gov and to Kim A. Johnson, OMB Desk Officer, Room 10236 New Executive Office Building, 725 Seventeenth Street, N. W., Washington, D.C. 20503, via the Internet to Kim.A.Johnson@omb.eop.gov, or by fax to 202-395-5167.

C. Further Information

23. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426, TTY (202) 418-7365, or via e-mail to bmillin@fcc.gov. This *Third Report and Order* can be downloaded at <http://www.fcc.gov>.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 7(a), 301, 303(c), 303(f), 303(g), 303(r), 308, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157(a), 301, 303(c), 303(f), 303(g), 303(r), 308, 309(j), this *Third Report and Order* IS ADOPTED.

25. IT IS FURTHER ORDERED that, Part 101 of the Commission's Rules IS AMENDED as specified in Appendix B, effective sixty days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r) and 309(j).

26. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Third Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A: COMMENTS AND REPLY COMMENTS

Comments

(Filed April 28, 2003)

Northpoint Technology, Ltd., and Broadwave USA, Inc. (Northpoint)

Pegasus Broadband Corporation (Pegasus)

Reply Comments

(Filed May 5, 2003)

Genaracorp, LLC (Genaracorp)

MDS America, Inc. (MDS America)

APPENDIX B: FINAL RULES

Part 101 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 101 - FIXED MICROWAVE SERVICES

1. The authority citation for Part 101 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303.

Subpart P- Multichannel Video Distribution and Data Service Rules for the 12.2-12.7 GHz Band

2. Section 101.1401 is amended to read as follows:

§ 101.1401 Service areas.

Multichannel Video Distribution and Data Service (MVDDS) is licensed on the basis of Designated Market Areas (DMAs). The 214 DMA service areas are based on the 210 Designated Market Areas delineated by Nielsen Media Research and published in its publication entitled U.S. Television Household Estimates, September 2002, plus four FCC-defined DMA-like service areas: (1) Alaska - Balance of State (all geographic areas of Alaska not included in Nielsen's three DMAs for the state: Anchorage, Fairbanks, and Juneau); (2) Guam and the Northern Mariana Islands; (3) Puerto Rico and the United States Virgin Islands; and (4) American Samoa.

* * * * *

3. Section 101.1413 is amended by revising paragraph (b) to read as follows:

§ 101.1413 License term and renewal expectancy.

* * * * *

(b) Application of a renewal expectancy is based a showing of substantial service at the end of five years into the license period and ten years into the license period. The substantial service requirement is defined as a service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal. At the end of five years into the license term and ten years into the license period, the Commission will consider factors such as:

* * *

4. Section 101.1421 is amended by revising paragraphs (b) and (c) to read as follows to read as follows:

§ 101.1421 Coordination of adjacent area MVDDS stations and incumbent public safety POFS stations.

* * * * *

(b) Harmful interference to public safety stations, co-channel MVDDS stations operating in adjacent geographic areas, and stations operating on adjacent channels to MVDDS stations is prohibited. In areas where the DMAs are in close proximity, careful consideration should be given to power

requirements and to the location, height, and radiation pattern of the transmitting and receiving antennas. Licensees are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

(c) Licensees shall coordinate their facilities whenever the facilities have optical line-of-sight into other licensees' areas or are within the same geographic area. Licensees are encouraged to develop operational agreements with relevant licensees in the adjacent geographic areas. Incumbent public safety POFS licensee(s) shall retain exclusive rights to its channel(s) within the relevant geographical areas and must be protected in accordance with the procedures in § 101.103 of this part. A list of public safety incumbents is attached as Appendix I to the Memorandum Opinion and Order and Second Report and Order, Docket 98-206 released May 23, 2002. Please check with the Commission for any updates to that list.

APPENDIX C: FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),⁴³ we incorporated an Initial Regulatory Flexibility Analysis (IRFA) in the *Second Further Notice of Proposed Rule Making*.⁴⁴ In view of the fact that we have adopted a further rule amendment in this *Third Report and Order*, we have included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.⁴⁵

Need for, and Objectives of the *Third Report and Order*:

In this *Third Report and Order*, we revisit the geographic licensing plan adopted in the *Second Report and Order*, and adopt a revised licensing framework for MVDDS. In the *Second Report and Order*, the Commission adopted a service area definition for MVDDS on the basis of Component Economic Areas (CEAs). Based on the previously-established record in this proceeding, differing responsive comments to the January 20, 2003 *Auction PN* received from Northpoint Technology, Ltd. (Northpoint) and MDS America on the issue of service area designations, and on subsequent discussions between Commission staff and Nielsen representatives concerning the use of its Designated Market Areas (DMAs),⁴⁶ we revisited the service area designation. We are persuaded to adopt a service area definition for MVDDS on the basis of DMAs instead of CEAs. We believe that licensing MVDDS on the basis of DMAs may place wireless competitors on the same economic footing as cable systems, which generally have a royalty-free statutory copyright license to retransmit local television programming within the DMA of the station being rebroadcast. In addition, we believe that the use of DMAs may be administratively easier for licensees due to the close nexus between the television viewer market areas as determined by the DMA delineation and the proposed use of the service (the delivery of television programming).

We also took the opportunity to explore whether the current build out requirement sufficiently promotes expeditious deployment of service. We believe that reducing the build out period from ten years to five years will ensure effective use of the spectrum and a faster deployment of service to the public.

Summary of Significant Issues Raised by Public Comments in Response to the FRFA:

We received no comments in response to the IRFA in the *Second Further Notice*.

⁴³ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁴⁴ *Second Further Notice*, Appendix A at p. 11.

⁴⁵ See 5 U.S.C. § 604.

⁴⁶ See Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to David Schwartz-Leeper, Vice President/GC, Nielsen Media Research (Jan. 24, 2003).

Description and Estimate of the Number of Small Entities To Which the Rules Will Apply:

The RFA directs agencies to provide a description of, and, where feasible an estimate of, the number of small entities that may be affected by the rules adopted herein.⁴⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁴⁸ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴⁹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵⁰

Small Multichannel Video Programming Distributors (MVPDs). The SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts.⁵¹ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.⁵² Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. We address below each service individually to provide a more precise estimate of small entities.

Cable Services. The Commission has developed, with SBA's approval, a definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.⁵³ In 1996, the Commission estimated that 1,439 cable operators qualified as small cable companies.⁵⁴ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to merge with other cable operators.

⁴⁷ 5 U.S.C. § 603(b)(3).

⁴⁸ 5 U.S.C. § 601(6).

⁴⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁵⁰ Small Business Act, 15 U.S.C. § 632 (1996).

⁵¹ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

⁵² U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)", Table 4, NAICS code 513220 (issued October 2000).

⁵³ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

⁵⁴ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

Consequently, using this definition, we estimate that the decisions and rules may affect fewer than 1,439 small entity cable system operators.

The Communications Act defines a small cable system operator as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁵⁵ The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we deem an operator serving fewer than 617,000 subscribers to be a small operator under the Communications Act definition, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1,450.⁵⁶ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

DBS Service. DBS falls within the SBA definition of Cable and Other Program Distribution (NAICS 513220). As noted, this definition provides that a small entity has \$12.5 million or less in annual receipts. The operational licensees of DBS services in the United States are governed by Part 100 of the Commission's Rules. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees meeting this definition that could be impacted by these rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business by the SBA, if independently owned and operated.

Auxiliary, Special Broadcast and other program distribution services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radio stations (NAICS 513112), and television broadcasting (NAICS 513120). These definitions provide, respectively, that a small entity is one with either \$6 million or less in annual receipts or \$12 million in annual receipts. The numbers of these stations are very small. The Commission does not collect financial information on these auxiliary broadcast facilities. The Commission, however, continues to believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most of these types of services are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (as noted, either \$6 million for a radio station or \$12 million for a TV

⁵⁵ 47 U.S.C. § 543(m)(2).

⁵⁶ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

station). Furthermore, they do not meet the SBA's definition of a "small business concern" because they are not independently owned and operated.

Private Operational Fixed Service. Incumbent microwave services in the 12.2-12.7 GHz bands include common carrier, private operational fixed (POF), and broadcast auxiliary service (BAS) services. Presently, there are approximately 22,015 common carrier licensees, and approximately 61,670 POF licensees and broadcast auxiliary radio licensees in the microwave service. Inasmuch as the Commission has not yet defined a small business with respect to these incumbent microwave services, we utilized the SBA's definition applicable to cellular and other wireless telecommunications companies (NAICS 513322); i.e., an entity with no more than 1,500 persons. We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

The rules set forth in the *Third Report and Order* will affect all entities that intend to provide terrestrial MVDDS operations in the 12.2-12.7 GHz band.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

This *Third Report and Order* modifies the reporting, recordkeeping or other compliance requirements previously adopted in this proceeding. We are changing the service area designation from CEAs to DMAs, resulting in a change in the number and definition of the service areas. In addition, we are changing the build out period from ten years to five years, resulting in compliance with these rules in half the time. However, we believe that these rule changes will not have a burdensome result, especially in light of our finding that small businesses will benefit from the new service area designation and because the record indicates that interested parties will have no difficulty complying with the new five year build out.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵⁷

Regarding our revisiting the service area issue to utilize DMAs in the *Third Report and Order* in lieu of the CEA service area designation adopted in the *Second Report and Order*, we do not anticipate any adverse impact on small entities. We believe that the use of DMAs better comports with the proposed service and that this decision will place wireless competitors to cable services on the same economic footing as cable systems, which generally have a royalty-free statutory copyright license to retransmit local TV programming within the DMA of the station being rebroadcast.

⁵⁷ See 5 U.S.C. § 603(c).

We also revisited the build out requirement to establish a five-year construction period in the *Third Report and Order*, in lieu of the ten-year construction period established in the *Second Report and Order*.⁵⁸ We do not anticipate any adverse impact on small entities. We determined that the revised time frame was necessary in order to promote timely service to the public, and that those interested in providing service will have ample time to modify their business plans prior to a competitive bidding procedure.

Report to Congress:

The Commission will send a copy of this *Third Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.⁵⁹ In addition, the Commission will send a copy of this *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Third Report and Order* and FRFA (or summaries thereof) will also be published in the *Federal Register*.⁶⁰

⁵⁸ *Second Report and Order*, 17 FCC Rcd at 9684 ¶ 177.

⁵⁹ 5 U.S.C. § 801(a)(1)(A).

⁶⁰ *See* 5 U.S.C. § 604(b).