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;	)	ET Docket No. 98-206 RM-9147 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 Corp., and Satellite Receivers, Ltd., to Provide a Fixed Service in the 1 12.2-12.7 GHz Band	)	

COMMENTS OF NORTHPOINT TECHNOLOGY, LTD., AND BROADWAVE USA, INC., IN RESPONSE TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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INTRODUCTION AND SUMMARY

In its Second Further Notice of Proposed Rulemaking in ET Docket No. 98-206 ("*Second Further Notice*"),[1] the Commission sought comment on the appropriate service area designation and the appropriate build-out requirement for its newly created Multichannel Video Distribution and Data Service ("MVDDS"). Northpoint Technology, Ltd., and Broadwave USA, Inc. (collectively, "Northpoint") strongly endorse the use of Nielsen Media Research's Designated Market Areas ("DMAs") rather than the Commerce Department's Component Economic Areas ("CEAs") and also support a shortening of the build-out period to five years.

As its name implies, one important potential application of "Multichannel Video Distribution and Data Service" is to distribute multichannel video programming in competition with cable and satellite television services. The choice of DMAs as the geographic licensing areas for this service is crucial because "cable systems," including wireless cable systems like MVDDS, have a royalty-free statutory copyright license to retransmit local TV programming within the DMA of the station being rebroadcast. By contrast, retransmission outside the DMA requires payment of a license fee that is almost always so high as to make the retransmisson uneconomical. The use of CEAs rather than DMAs as the geographic units for MVDDS licenses would severely undermine the ability of MVDDS licensees to compete with incumbent cable TV and Direct Broadcast Satellite ("DBS") operators by restricting access to the royalty-free copyright and making it more

[1] Second Further Notice of Proposed Rule Making, *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, FCC 03-85 (rel. Apr. 15, 2003).

difficult, both technically and economically, to ensure that local TV service is available to MVDDS customers.

It is not apparent why the Commission should be hesitant about using DMAs in its MVDDS rules, given that the Commission has *already* incorporated DMAs into several other portions of its rules. To the extent that the Commission has any lingering concerns about using the term "DMA" in its MVDDS rules, it can avoid the issue simply by referring back to the copyright statute or its own must-carry rules, thus avoiding the direct incorporation of copyrighted or trademarked material in the MVDDS rules themselves.

Finally, Northpoint believes that the public should not have to wait as long as ten years before enjoying the benefits of MVDDS service. Having committed itself publicly to a two-year build-out, Northpoint thinks that shortening the build-out requirement to five years still gives more than enough time for licensees to commence substantial service.

DISCUSSION

I. The Commission Should Use DMAs As The Geographic Licensing Areas For MVDDS Licenses

In its *First Report and Order*,[2] the Commission announced 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*

[2] First Report and Order and Further Notice of Proposed Rule Making, *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*, 16 FCC Rcd 4096 (2000) ("*First Report and Order*").

local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets." 16 FCC Rcd at 4108, ¶ 18 (emphasis added). By failing to use DMAs as the geographic licensing areas for MVDDS in the *Second Report and Order*,[3] however, the Commission authorized a new service that is, as a practical matter, *not capable* of delivering local television station signals.

A. A Compulsory Copyright License for Retransmitting Local Television Signals Is Available Within the Station's DMA

The *Second Further Notice* acknowledges Northpoint's arguments that DMA-based licensing is crucial because cable systems are organized along these lines and because a compulsory copyright license is available for retransmitting local television broadcast stations within DMAs. *Second Further Notice* ¶ 12. The Commission notes that the definition of "cable system" for purposes of rebroadcasting television programming under the compulsory copyright licensing provisions of the Copyright Act is "quite broad and may extend to MVDDS licensees." *Id.*

The statutory copyright license for cable is granted in 17 U.S.C. § 111 and regulated in 37 C.F.R. Part 201. Subject to certain exceptions not relevant here, cable systems may rebroadcast programs contained in local TV broadcasts so long as they file with the Register of Copyrights a statement of account every six months showing royalties due. *See* 17 U.S.C. § 111(c)-(d). Royalties are payable only on transmissions "beyond the local service area of [a] primary transmitter." *Id.* § 111(d)(1)(B); *see also* 37

[3] Memorandum Opinion and Order and Second Report and Order, *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*, 17 FCC Rcd 9614 (2002) ("*Second Report and Order*").

C.F.R. § 201.17. No royalties are due on retransmissions within the local service area of the local TV station being rebroadcast.

There can be no serious dispute that the definition of "cable system" in the compulsory licensing provisions does indeed cover MVDDS. Initially, the Copyright Office took the contrary position and issued regulations to the effect that multipoint distribution service ("MDS") and multichannel multipoint distribution service ("MMDS") were not cable systems within the meaning of § 111(f) of the Copyright Act. *See Cable Compulsory License; Definition of Cable System*, Final Regulation, 57 Fed. Reg. 3284 (1992). At the time, § 111(f) required that transmission be via "wires, cables, or other communications channels" – a phrase that the Copyright Office interpreted as being limited to closed transmission paths primarily and excluding wireless retransmission. *Id.*

The Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477, amended the definition of "cable system" in § 111(f) to include "wireless" cable operators and amended the definition of "local service area of a primary transmitter" – *i.e.*, the area in which a royalty-free license is available – to correspond to the transmitter's must-carry area. In view of these changes, the Copyright Office reversed its position and determined that wireless systems like MDS and MMDS are cable systems within the meaning of § 111(f). *See Cable Compulsory License; Definition of Cable System*, Amendment of Cable License Regulation, 59 Fed. Reg. 67,635 (1994). There is no reason to think that a wireless MVDDS system should be treated any differently from other wireless broadcast systems in this regard. *See* 17 U.S.C. § 111(f) (defining "cable

system" to include systems transmitting programming "by wires, cables, microwave, or other communications channels").

Because a station's must-carry area usually corresponds to its DMA, by keying the copyright license to the must-carry area, the Copyright Act indirectly makes DMAs the operative geographic areas for royalty-free rebroadcast. Satellite broadcasters have their own, distinct statutory license in 17 U.S.C. § 122 (which is keyed explicitly to Nielsen DMAs in the statute).

As currently formulated, § 111(f) of the Copyright Act defines the royalty-free "local service area of a primary transmitter" in relevant part as "the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on Septebmer 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations." 17 U.S.C. § 111(f). Section 76.55(e) sets DMAs as the default local TV market. Section 76.59 permits stations to petition the Commission to alter the contours of the local market. Thus, absent amendment, a cable system (including a wireless cable system like MVDDS) may retransmit local TV broadcasts royalty-free within the local TV station's DMA. Outside the DMA, copyright royalties must be paid for retransmission, and these royalties generally make the retransmission uneconomical.

B. The Use of CEAs as Geographic Licensing Areas Would Seriously Undermine the Ability of MVDDS To Compete sith Cable and DBS

Cable companies are obliged to retransmit local signals within each DMA, *see* 47 C.F.R. § 76.55(e), so it is essential that would-be wireless competitors to cable do so as well – and that they be able to do so in an economically viable manner. In effect, this requires that terrestrial wireless operators organize their systems based on DMAs in order to compete effectively. The use of CEAs rather than DMAs as the geographic units for MVDDS licenses would severely undermine the ability of MVDDS operators to compete with incumbent cable TV and DBS operators by restricting access to the royalty-free copyright license and making it more difficult, both technically and economically, to ensure that local TV service is available to MVDDS customers.

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. To take just one example, the Des Moines, Iowa, CEA overlaps with *nine different DMAs*. Serving different portions of each CEA-based license area with different programming would dramatically increase the cost of operating any terrestrial wireless system because it would require multiple "head-ends" in each license area to feed different programming to different regions. By choosing wireless license areas that do not correspond to the areas in which the statutory copyright license to rebroadcast local stations can be had on a royalty-free basis, the Commission would effectively thwart the emergence of a viable competitor to the entrenched cable and DBS players that currently dominate the video market.

C. The Commission Has *Already* Incorporated DMAs Into Other Portions of Its Rules; There Is No Reason It Should Not Do Likewise for MVDDS

The Commission initially decided against using DMAs as the geographic licensing areas due to concern about the lack of a blanket license agreement with Nielsen. *Second Further Notice* ¶ 9. It is not apparent why the Commission should be hesitant about using DMAs in its MVDDS rules, given that the Commission has *already* incorporated DMAs into several other portions of its rules. *See* 47 C.F.R. §§ 73.624(d)(2), 73.658(m)(1), 73.3555, 76.55(e), 76.66(d)(1)(iii)(E), 79.1(e)(3); 79.3.

The Commission has sought comment on "whether the conditions described by Nielsen are so restrictive that the use of DMAs would be of limited utility." *Second Further Notice* ¶ 11. But there is no indication that Nielsen's copyright or trademark policies have reduced the utility of cable, DBS, or broadcast TV licenses that are affected by Commission rules incorporating or referring to DMAs. Nor is it clear how simply holding a license, the geographic boundaries of which are based on DMAs, could constitute copyright or trademark infringement. Northpoint does not believe that the absence of an express "blanket license" by Nielsen to the Commission should cause any more problems for MVDDS than it has for other services licensed by the Commission. Given the clear advantages of using DMAs to license MVDDS and the Commission's willingness to refer to DMAs in its rules in the past, the Commission should adopt DMAs as the geographic licensing areas for MVDDS.

To the extent that the Commission has any lingering concerns about using the term "DMA" in its MVDDS rules, it can avoid the issue simply by referring back to the copyright statute or its own must-carry rules. Thus, for example, the Commission could

write its rules so as to issue one license for every geographic area corresponding to the "television market" of one or more local television stations, as that term is defined in 47 C.F.R. § 76.55(e), without giving effect to any amendment of any market pursuant to 47 C.F.R. § 76.59. The default markets in § 76.55(e) have been DMAs since January 1, 2000. By using words along these lines referring only to its own regulations, the Commission could in effect designate geographic licensing areas corresponding to the DMAs without actually using the words "Nielsen" or "DMA," thus avoiding any question about using copyrighted or trademarked material in the MVDDS rules.

II. The Commission Should Adopt A Shorter Build-Out Requirement

Northpoint has stated in these proceedings that it would, if its applications were granted, build out nationwide service within two years of licensing. Comments of Northpoint Technology, Ltd., and Broadwave USA, Inc., at 21, ET Docket No. 98-206 (FCC filed Mar. 12, 2001). Accordingly, Northpoint fully supports the suggestion that the build-out requirement be shortened to five years from ten years in order to oblige licensees to provide service to the public more rapidly. Northpoint believes that it would be appropriate to require licensees to meet the substantial service requirement within five years in order to fulfill the build-out requirement.

CONCLUSION

The Commission should use DMAs rather than CEAs as the geographic licensing areas for MVDDS service, and it should shorten the build-out requirement to five years from ten years.

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Respectfully submitted,

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