35. Additionally, the keep-what-you-use rule is pro-competitive and provides another method for smaller license areas to be made available to small businesses, thus promoting access to spectrum and the provision of service, especially in rural areas. This rule ensures that spectrum covering areas that are not adequately built out is returned to the Commission and others are given an opportunity to acquire licenses for this spectrum. Because the license areas returned to the Commission under the keep-what-you-use rule are likely to be smaller in nature, this rule will provide small entities with an additional opportunity to obtain valuable wireless spectrum.

36. Although the Commission recognizes that the performance and reporting requirements for the 700 MHz Commercial Services licenses places burdens on both large and small businesses alike, these requirements will further several important policy objectives including taking advantage of the excellent propagation characteristics of the spectrum in the 700 MHz Band enabling broader coverage at lower costs, promoting the provision of innovative services to consumers throughout the license areas, including rural areas, and allowing large license areas to be served at lower infrastructure costs. Moreover, the inclusion of interim benchmark reporting requirements ensures that licensees provide service to consumers as early as possible. Because of the importance of these requirements, we do not believe that they should be applied on a differential basis to large and small business. Neither do we believe that such requirements will impose an unacceptable burden on small entities.

37. License Terms. The *Second Report and Order* extends the license terms of all the existing A Block licensees, given the changed circumstances of the band plan and service rules, as the licensees are relocated to the reconfigured A Block. This license term extension will benefit any Guard Bands licensees, and any lessees currently using their spectrum, that may be small entities as they will have more flexibility in the use of their spectrum with a longer period of time within which to make use of the spectrum.

38. Partitioning and Disaggregation. In this *Second Report and Order*, the Commission concludes that Section 27.15(d) of its rules regarding partitioning and disaggregation should be amended to clarify how the performance obligations will apply to the partitioning and disaggregation of the 700 MHz Commercial Services licenses that remain to be auctioned. These modifications seek to continue to provide flexibility to licensees and third parties to enter into partitioning and disaggregation arrangements that will facilitate the provision of new services to consumers, including consumers in unserved and underserved areas.

39. Under the modifications of the Section 27.15 (d) rules relating to geographic partitioning of new 700 MHz Commercial Services licenses, the Commission establishes two options for partitioners and partitionees with regard to the newly adopted performance requirements. Under the first option, the partitioner and partitionee must each certify to the Commission that they will share responsibility for meeting the performance requirements for the entire geographic license area. If the parties meet the end-of-term construction benchmarks, they will retain the ability to continue to build out the unserved portion of their license areas. Parties that fail to meet the end-of-term benchmarks will be subject to a "keep-what-you-use" rule, under which they will lose their authorization for unserved portions of their license areas, which will automatically cancel and return to the Commission for reassignment. This option enables parties to share the cost of meeting the stricter buildout benchmarks as required by the Commission under its new performance requirements, while ensuring that buildout will occur over the original license are to the same extent as it would have occurred had the license never been partitioned. Under the second option, the partitioner and partitionee must each certify that it will independently meet the applicable performance requirements for its respective partitioned service area. If the partitioner or partitionee fails to meet the four-year build-out requirement for its respective area, then its license term will be reduced by two years. If the parties meet the end-of-term construction benchmarks, they will retain the ability to continue to build out the unserved portion of their license areas. Parties that fail to meet the end-of-term benchmarks will be subject to an automatic "keep-what-you-use" rule, under which they will lose their authorization for unserved portions of their license areas, which will automatically

cancel and return to the Commission for reassignment. This option provides a way for partitioners and partitionees to ensure that their licenses will not be affected by the other party's conduct with regard to meeting the applicable performance requirements.

40. Under the modifications of the Section 27.15(d) rules relating to disaggregation of new 700 MHz Commercial Services band licenses, the Commission provides that the disaggregator, disaggregate, or both the disaggregator and disaggregate working together, can meet the four-year and end-of-term construction benchmarks for the entire geographic license area. If either party meets the performance requirement, then the requirement will be satisfied for both parties. If neither party meets the four-year build-out requirement, then each of their license terms will be reduced by two years. If either of the parties meets the end-of-term build-out requirement, then this requirement is considered to be satisfied for both parties. Those parties that meet the end-of-term construction benchmarks will retain the ability to continue to build out the unserved portion of their license areas. Parties that fail to meet the end-of-term benchmarks will be subject to an automatic "keep-what-you-use" rule, under which they will lose their authorization for unserved portions of their license areas, which will automatically cancel and return to the Commission for reassignment.

41. Partitioning and disaggregation allow smaller or newly-formed entities to enter the market for the first time, because they will be able to negotiate for portions of original licenses at costs that are proportionately less than the entire license. Moreover, these modifications provide the opportunity for small businesses to enter into partitioning and disaggregation agreements that would enable them to share the cost of meeting the more stringent performance requirements for the unauctioned commercial 700 MHz Band spectrum.

42. Open Platforms for Devices and Applications. In order to promote innovation in the 700 MHz spectrum band from the outset, the Commission is imposing certain conditions on the 700 MHz C Block to provide open platforms for devices and applications. The C Block – a large 22-megahertz block (comprised of paired 11-megahertz blocks) – is of sufficient size and scope to provide an environment conducive for the development and deployment of 4G services designed to compete with other broadband alternatives, and to provide an opportunity for innovators and entrepreneurs to develop equipment and applications that require substantial bandwidth to realize their full potential. The requirements should also provide sufficient potential market penetration to attract investment and achieve economies of scale in the equipment marketplace. In addition, we believe that the open platform requirement for devices and applications will provide additional opportunities for small entities to participate in the device and application market, since such a requirement will make it easier for customers, device manufacturers, third-party application developers, and others to use or develop devices and applications made by small entities on the network of the C Block licensee.

43. In adopting this requirement for the 700 MHz C Block, the Commission has taken a targeted, focused approach to achieve benefits to consumers. In particular, the Commission declines to impose additional openness requirements on the 700 MHz C Block, including wholesale and interconnection requirements. In addition, the commission declines at this time to impose the requirement to provide open platforms for devices and applications or other openness obligations broadly in the 700 MHz Band, or in other spectrum bands.

44. Licensee Eligibility. The Commission declines to impose eligibility restrictions for the licenses in the 700 MHz band. The record does not demonstrate that open eligibility is likely to result in substantial competitive harm in the provision of broadband services. There are numerous actual and potential broadband service providers, and currently, consumers can obtain broadband service from wireline providers, cable companies, satellite, and wireless providers. Given this number of providers, it is unlikely that incumbent local exchange carriers, cable providers, or large wireless carriers would be able to behave in an anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum. Furthermore, there are potential competitive benefits to not imposing eligibility requirements. First,

allowing incumbents to hold 700 MHz band licenses will provide opportunities for these carriers to extend service into rural and hard-to-serve areas, which is a major goal the Commission seeks to achieve. Also, an incumbent service provider may already be a rural provider and to limit their eligibility would be contrary to the goals of the Commission. We also do not believe that imposing eligibility restrictions for licenses in the 700 MHz band is necessary to provide small entities with the opportunity to obtain such licenses. As discussed above, among other things, the smaller licensing areas made available here will increase opportunities for small entities.

45. Anonymous Bidding. In response to its request for comments on whether to use anonymous bidding (or "limited information") procedures in the auction of the new 700 MHz licenses, the Commission received comments both in support of and in opposition to such procedures. One of the supporters is a small licensee who argued that anonymous bidding would bring about a more level playing field between large and small bidders.[1198] The Commission further concludes that the many uncertainties regarding the technologies that will be used in the 700 MHz Band will result in the potential anti-competitive use of detailed information regarding bidding outweighing the benefit to some bidders of having such information.

46. The Commission further concludes that anonymous bidding should be employed even if the pre-auction eligibility ratio indicates that competition in the auction will be significant. Even in an auction with many competitors individual bidders could still use retaliatory bidding unilaterally to block the market, and it is important to avoid that from occurring especially given that the 700 MHz auction is going to offer multiple, substitutable blocks of licenses for sale, with prices relatively high, and the outcome having possible significant effects on post-auction market structure.

47. The Commission does not believe that anonymous bidding will have a detrimental effect on small entities. First, as discussed in Section III.A.3.a of the Order, the potential benefit to bidders, such as small entities, of knowing the identity of other parties placing bids for particular licenses appears likely to be less in this auction than in past Commission auctions, in light of the early stage of development with respect to new services in these frequencies. Second, because bidding information can be used by incumbents to deter or exclude new entrants, we believe that anonymous bidding will increase the opportunities for new entrants, including small entities, to obtain licenses.

48. Package Bidding. Commenters are divided on the issue of package bidding for the upcoming auction of the 700 MHz band of spectrum. While some commenters support package bidding because they feel it is essential for a new entrant seeking to aggregate licenses and offer service nationwide,[1199] there are other commenters who feel that package bidding will disadvantage bidders not bidding on packages, which are more likely to be small entities.[1200]

49. The Commission concludes that package bidding, with respect to the Upper 700 MHz Band C Block, would serve the public interest by reducing the exposure problem that might otherwise inhibit bidders seeking to create a nationwide footprint. Absent package bidding, the exposure problem creates an opportunity for competitors to block a would-be package bidder without actually competing for all the licenses in the package.[1201]

[1198] *See* McBride *700 MHz Further Notice* Comments at 11.

[1199] *See, e.g.*, Google *700 MHz Further Notice* Comments at 7-8.

[1200] *See Aloha 700 MHz Further Notice Comments at 7-8; Blooston 700 MHz Further Notice Comments at 10; Cellular South 700 MHz Further Notice Comments at 16; Leap 700 MHz Further Notice Comments at 9; MetroPCS 700 MHz Further Notice Comments at 22; RCA 700 MHz Further Notice Comments at 18; RTG 700 MHz Further Notice Comments at 16.*

[1201] Frontline *700 MHz Further Notice* Comments, Exhibit 1 at 22-23.

50. Minimizing the exposure problem, by implementing package bidding, should facilitate the entry of applicants whose business plans require the economies of scale that only can be obtained with nationwide operation. The Commission further concludes that package bidding solely with respect to licenses for the Upper 700 MHz Band C Block provides sufficient opportunities to bid with minimal risk of an exposure problem. However, we limit package bidding to the C Block so that bidders, including small entities, who are unwilling or unable to compete against package bids will not be deterred from participating in the auction. The variety of blocks and licenses that are not subjected to package bidding will provide any such bidders, including small entities, with a wide array of opportunities.

51. "New Entrant" Bidding Credit. The possibility of granting "new entrant" bidding credits attracted far less comment than other issues relating to the auction of the 700 MHz licenses, and those parties that did respond were divided on the issue. The Commission concludes that a "new entrant" bidding credit for the 700 MHz Band licenses is not needed to facilitate the entry of new service providers. The Commission already offers substantial bidding credits to small entities, many of which may be new entrants in the spectrum services market, and we therefore do not believe that there is a need for an additional "new entrant" bidding credit. In addition, the availability of multiple licenses in each and every market with varied geographic sizes, coupled with the large number of licenses should offer new ventures, including small entities, a variety of opportunities to provide service.

52. Bidding Credits for the 700 MHz Public/Private Partnership. A number of small entities have proposed, in their comments, that the Commission should offer designated entities bidding credits with regards to the license that has been proposed by Frontline.[1202] In brief, these commenters maintain that bidding credits will help potential applicants overcome efforts by incumbents to prevent others from winning newly available licenses.

53. The Commission concludes that it should provide applicants that are eligible to be licensed as designated entities with bidding credits in the auction of the D Block license, consistent with the Commission's prior decision regarding bidding credits for 700 MHz licenses and our current designated entities rules. This decision will improve the opportunity for small entities to successfully bid for the D Block license.

54. Public Safety Broadband. The *Second Report and Order* reallocates the wideband spectrum to broadband use consistent with a nationwide interoperability standard, and prohibits wideband operations within the newly designated broadband spectrum on a going forward basis. The public safety community expressed broad support for a broadband allocation to enable advanced communications capabilities. The availability of a contiguous block of broadband spectrum, subject to a nationwide interoperability standard, enables partnerships with commercial licensees in adjacent broadband spectrum. As a result, the band plan ultimately enables public safety entities to utilize the 700 MHz spectrum in a more cost-effective and spectrally efficient manner to address their homeland security and emergency response roles. In particular, we believe that the interoperable broadband network will be of benefit to smaller governmental entities who would otherwise be unlikely to have the resources to construct such a network. Because the Commission does not anticipate that this reallocation will impose additional economic burdens on public safety, and is in fact designed to reduce economic burdens on public safety, the Commission has taken steps to minimize any adverse impact of the rule changes.

55. The *Second Report and Order* also consolidates the narrowband spectrum to the top of the public safety band and locates the broadband spectrum at the bottom of the public safety band, in light of the potentially significant benefits such reconfiguration will afford the public safety community. The

[1202] *See, e.g.*, McBride Spectrum Partners, LLC *700 MHz Further Notice* Comments at 4-8; Blooston Rural Carriers *700 MHz Further Notice* Comments at 7; Council Tree Communications, Inc. *700 MHz Further Notice* Reply Comments at 5-7.

alternative would have been to retain the existing band plan. The *Further Notice* sought comment on how to implement reconfiguration of the narrowband channels with minimum disruption to incumbent operations. The *Second Report and Order* accommodates public safety operations in the border areas with Canada and Mexico, and defrays the costs of relocation by providing that such costs will be covered by the D Block Licensee. This defrayal of costs should be of particular benefit to small governmental entities, which are less likely to have the resources to fund such a relocation on their own. The Commission expects that the number of entities impacted and the expected cost of reconfiguration should be relatively minor. In order to receive reimbursement for the cost of the transition, however, affected public safety entities are required to provide information regarding the narrowband radios and base stations that they have deployed. We do not believe that such a reporting requirement will place an unacceptable burden on small governmental entities.

F. Report to Congress

56. The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[1203] In addition, the Commission will send a copy of the *Second Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Second Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[1204]

[1203] *See* 5 U.S.C. § 801(a)(1)(A).

[1204] *See* 5 U.S.C. § 604(b).

APPENDIX D

Upper 700 MHz A Block License Modifications

Market	Guard Band A Block (746-747, 776-777 MHz)	Modified Guard Band A Block (757-758, 787-788 MHz)
MEA001	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA002	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA003	PTPMS II Communications, L.L.C.	PTPMS II Communications, L.L.C.
MEA004	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA005	Dominion 700, Inc.	Dominion 700, Inc.
MEA006	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA007	Access 700, LLC	Pegasus Guard Band, LLC
MEA008	Access 700, LLC	Access 700 Holdings, LLC
MEA009	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA010	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA011	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA012	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA013	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA014	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA015	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA016	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA017	Pegasus Guard Band, LLC	Access 700, LLC
MEA018	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA019	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA020	Access 700, LLC	Access 700, LLC
MEA021	Access 700, LLC	Access 700, LLC
MEA022	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA023	Pegasus Guard Band, LLC	Access 700, LLC
MEA024	Access 700, LLC	Access 700, LLC
MEA025	Pegasus Guard Band, LLC	Access 700, LLC
MEA026	Access 700, LLC	Access 700, LLC
MEA027	Access 700, LLC	Access 700, LLC
MEA028	Pegasus Guard Band, LLC	Access 700, LLC
MEA029	Access 700, LLC	Access 700, LLC
MEA030	Access 700, LLC	Access 700, LLC
MEA031	Access 700, LLC	Access 700, LLC
MEA032	Access 700, LLC	Access 700, LLC
MEA033	Access 700, LLC	Access 700, LLC
MEA034	Pegasus Guard Band, LLC	Access 700, LLC
MEA035	Pegasus Guard Band, LLC	Access 700, LLC
MEA036	Pegasus Guard Band, LLC	Access 700, LLC
MEA037	Access 700, LLC	Access 700, LLC
MEA038	Access 700, LLC	Access 700, LLC
MEA039	Access 700, LLC	Access 700, LLC
MEA040	Pegasus Guard Band, LLC	Access 700, LLC
MEA041	Pegasus Guard Band, LLC	Access 700, LLC
MEA042	Access 700, LLC	Access 700, LLC
MEA043	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA044	Access 700, LLC	Access 700, LLC
MEA045	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA046	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA047	Pegasus Guard Band, LLC	Access 700 Holdings, LLC
MEA048	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA049	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA050	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA051	Pegasus Guard Band, LLC	Pegasus Guard Band, LLC
MEA052	Access 700, LLC	Access 700, LLC

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (WT Docket No. 06-150); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Docket No. 94-102); Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones (WT Docket No. 01-309); Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services (WT Docket No. 03-264); Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules (WT Docket No. 06-169); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (PS Docket No. 06-229); Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 (WT Docket No. 96-86); Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule (WT Docket No. 07-166); Second Report and Order

With this Second Report and Order, the Commission takes an historic step towards two goals that have been priorities of mine as Chairman: (1) creating a nationwide, interoperable public safety broadband network and (2) furthering pro-competition broadband policies designed to increase penetration and ensure that consumers benefit from innovation and technological advancements.

First and foremost, we have no greater responsibility than meeting the needs of public safety. And I appreciate the presence of so many representatives of the public safety community here today. During a crisis, public safety officials need to be able to communicate with one another. We are all aware of problems that have been created by the lack of interoperability for public safety communications during recent crises like 9/11 and Hurricane Katrina. Emergencies – natural or man-made – do not make distinctions among emergency responders. It is imperative that the Commission recognize these challenges and provide a communications solution for our Nation's first responders that is available to everyone, regardless of the uniform they wear or the towns in which they live and work.

The public safety-private partnership we adopt today will ensure that public safety keeps pace with the advances in communications and gives first responders the broadband communications capabilities they need to protect safety of life and property of the American public. It has been almost six years since brave police and fire fighters ran into the Twin Towers and the Pentagon without an effective emergency communications system. We should not make these brave men and women wait any longer.

While I also would have supported a network exclusively for the use of public safety, the simple reality is that there currently is no way to fund such an enterprise. The use of a public safety-private partnership, however, creates an opportunity to provide state-of-the-art technologies to our Nation's first responders in a timely and affordable manner. Many national and local public safety organizations have expressed support for a public-private partnership approach as their last, best chance to make this network a reality. We cannot afford to let the opportunity that the 700 MHz band offers for public safety pass us by.

The adoption of a National Public Safety Broadband Licensee to be a part of this partnership is also the best way to establish a truly interoperable network. The local licensing regime that has been used to date has resulted in a patchwork of networks that do not talk to each other. We cannot keep licensing public safety spectrum in the same manner as before and expect a different result. A National Public Safety Broadband Licensee will facilitate a unified national approach to the use of this spectrum, finally

enabling all public safety users to talk to each other during a crisis. I therefore wholly support the public safety-private partnership adopted in today's order.

In addition, the license winner for about one-third of the spectrum will be required to provide a platform that is more open to devices and applications. Consumers will be able to use the wireless device of their choice and download whatever software they want onto it.

I am committed to ensuring that the fruits of wireless innovation swiftly pass into the hand of consumers. Currently, American consumers are too often asked to throw away their old phones and buy new ones if they want to switch cell phone carriers. And when they buy that new phone, it is the wireless provider, not the consumer, who chooses what applications the consumer will be allowed to use on that new handset.

Wireless consumers in many other countries face fewer restraints: for example, they can take their cell phones with them when they change carriers, and they can use widely available Wi-Fi networks – available in their homes, at the airport or at other hotspots – to access the Internet.

This auction provides an opportunity to have a significant impact on the next phase of wireless broadband innovation. A network that is more open to devices and applications can help foster innovation on the edges of the network. As important, it will give consumers greater freedom to use the wireless devices and applications of their choice when they purchase service from the new network owner.

When the same decision was made decades ago on the wireline network, we saw an explosion in innovation and choice. In the wake of the Carterfone decision, AT&T subscribers went from renting black rotary phones to purchasing competitively priced, innovative phones such as cordless phones with voice mail and caller ID. Investment in the market increased, new phones and calling features were developed and consumers benefited. Ultimately, these rules facilitated the development of the Internet, as consumers were able to attach modems to the network and go anywhere the Internet could take them without interference from the network owner.

We will ensure these open platform rules are implemented, through significant enforcement mechanisms that place the burden on the licensee to demonstrate their compliance and that their policies are fair and reasonable. The auction provides a rare chance to promote innovation and consumer choice without disrupting existing networks or business plans. Indeed, the vast majority of spectrum used for wireless services will remain without such restrictions.

We must continue to encourage the critical investment needed to build the next generation wireless network. Since I have been Chairman, I have advocated strongly that applying network neutrality obligations, unbundling, or mandatory wholesale requirements to networks can undermine investment incentives. I do not support such regulations. The Order we adopt today does not apply these regulations to this block or any other block. The Commission has found the right balance between providing incentives for infrastructure investment and fostering innovation for new services and products.

The Commission recognizes that spectrum is a unique public asset, and we must obtain a fair return on this asset for the American people. To ensure that a fair price is paid, the Order includes a reserve price for this block of spectrum. That price, which is based on the winning bids for spectrum in our recent AWS-1 auction, will safeguard the value of the spectrum for American tax-payers.

Finally, the order adopted today provides a variety of block sizes and geographic areas, which will allow for broad participation by potential bidders with a variety service plans and business models. Stringent build-out requirements – the toughest ever imposed by the Commission – will ensure that this

spectrum is put to use quickly in both urban and rural areas. Those who fail to follow through will face tough penalties including the loss of spectrum.

This mix includes a block of spectrum that contains the ingredients to allow a national wireless broadband service to emerge. I have said it before, but it bears repeating, the upcoming auction presents the single most important opportunity for us to achieve the goal of a nationwide third broadband pipe – one that would be available to rural as well as urban Americans. With the adoption of this order, we are one step closer to allowing all Americans to enjoy the benefits of broadband competition – availability, high speeds, and low prices.

In conclusion, I am pleased that the Commission is adopting a fair and balanced plan that will help:

1) Facilitate next generation wireless broadband services in both urban and rural areas;
2) Establish a public-private partnership to deploy a wireless broadband network for public safety that will address the interoperability problems of today's system; and
3) Provide a more open wireless platform that will facilitate innovation and investment.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, CONCURRING IN PART

Re: Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (WT Docket No. 06-150); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Docket No. 94-102); Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones (WT Docket No. 01-309); Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services (WT Docket No. 03-264); Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules (WT Docket No. 06-169); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (PS Docket No. 06-229); Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 (WT Docket No. 96-86); Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule (WT Docket No. 07-166); Second Report and Order

Today we set the ground rules for how some of the most valuable spectrum on earth will be used. The stakes are enormous. Will our decisions today make our nation's citizens safer in the event of an emergency? Will they increase the number and quality of wireless services available to American consumers—to ***all*** consumers, both urban and rural? Will they help correct America's dismal broadband performance?

Let's begin with public safety, because that's the most critical part of all this. As I have many times said, my first preference—by a long country mile—would have been a fully-funded, federally-funded public-safety-grade network reserved solely for first responders and built to the specifications they deem essential for their job of protecting you and me. At this late date, that is apparently not to be. In light of the options before us today, then, I believe that pursuing a shared public-private model—and trying to make it work—is the next best choice. There are no guaranteed outcomes here, but we have to find a way—finally—to get this done.

For far too long, our nation's first responders have struggled with the lack of interoperability. The terrible costs of this failure became tragically apparent in the aftermath of 9/11 and again following Hurricane Katrina. Today's item creates a framework for building a national broadband network, based on a common technical standard, that will allow universal interoperability among every jurisdiction in the country. This represents a tremendous step forward.

Our nation's first responders have struggled for too long without finding the capital necessary to build out a broadband network with the configuration and the features they so desperately need and deserve. Given where we are today, I think it is entirely appropriate to permit them to trade access to their spectrum during off-peak periods—but always with the ability to preempt commercial use during any time of need—in return for access to a public-safety-grade broadband network. This network will reach virtually all of the nation's citizens within 10 years. It will be constructed to the standards that public safety demands and expects. And it will harness the astonishing technological advances of the commercial wireless sector. If it works—and it's a ***big*** if—the American people will be appreciably safer.

Moreover, the shared network concept means that public safety will have access to 20 MHz of broadband spectrum in the event of an emergency, not just 10 MHz. This too is a difference that can save lives. Bandwidth matters; speed matters.

One additional benefit of creating a national public safety licensee is the effect it will have on the price and quality of equipment that first responders use. Today, we have thousands of public safety agencies that deal with a handful of equipment manufacturers, so public safety doesn't have much protection against the higher prices big suppliers can charge for the tools public safety must have. Our first responders can't negotiate lower prices, nor can they drive technology development. Today's order changes that equation. It establishes a single public safety purchasing block. This will result in equipment that is both better and less expensive, exactly what our nation's first responders need. The item also ensures that the national public safety licensee—and not the commercial operator—will have the final word on which devices public safety users can attach to the network.

I appreciate my colleagues' willingness to work with me to build these many safeguards for public safety into today's order. But I also want to emphasize my belief that our work has really just begun. At the end of the day, we need to ensure that this network ***actually works for public safety.*** To me, this cannot and will not happen without strong and ongoing FCC oversight. I have believed this for years. Today we put the Commission in the middle of the public safety action—right where it should have been all along. When the parties reach a network sharing agreement, the license will be granted only if the full Commission concludes that the terms reached are in the public interest. If agreement has not been reached, the full FCC has the authority either to decide outstanding disputes or to select another commercial entity to negotiate a different network sharing agreement. After the license has been granted, there will inevitably be questions about what a particular provision means or whether it is necessary to adjust certain terms in the agreement. Again, the Commission will be at the table, and it will be there during the ensuing operation of the license, too.

Only a strong, active and involved FCC can hold the commercial licensee to the spirit, as well as the letter, of the network sharing agreement. I have no illusions that this process will be easy—but the stakes are just too high to give this effort anything other than the fullest measure of the Commission's effort.

Let's get one more thing on the table. The requirements we announce today are very demanding. Building this network will involve costs above and beyond those required to build a typical commercial network. But I think that these are the minimum process requirements necessary to ensure that the network actually works for public safety. If the stringency of the requirements we announce today means that no one shows up to bid on the commercial license, or that the two parties ultimately cannot reach an agreement that ends up being in the public interest, then I am perfectly willing to go back to the drawing board. I won't be happy if this happens, but I'm not about to cut corners if it means compromising public safety. Far better that public safety remains in control of its spectrum—and free to find another model for funding it—than for this Commission to bless a sharing arrangement that does not fully protect the nation's citizens and its first responders.

Let me turn now to the commercial side of this auction. There is a lot in this part of the Order of which we can be proud—but here, too, there are no guarantees and some last-minute changes give me considerable pause. First, the good news. I commend the Chairman's leadership on the *Carterfone* issue. Six months ago, *Carterfone* was a term of largely historical interest—an important and venerable decision, to be sure, but hardly on the tips of most policymakers' tongues. Even four months ago, when I called for a general rulemaking on how *Carterfone* could be applied to the current wireless marketplace, I had little hope that such principles would be codified in our wireless rules anytime soon.

Now, within just the last month, *Carterfone* and wireless open access have been on the front pages of *USA Today*, the *New York Times*, and the *Washington Post*. They have been the subject of Congressional hearings and industry and academic policy forums, as well thousands of emails and letters to the Commission from citizens across the country. What a striking reminder of just how powerful a

good idea can be—especially when coupled with strong Congressional oversight and grass roots activism. I find it extremely heartening to see that an academic paper—in this case by Professor Timothy Wu of Columbia Law School—can have such an immediate and forceful influence on policy. Credit is due to Professor Wu as well as many tireless advocates in the public interest and high-tech communities for bringing this idea to the fore. As Congressman Ed Markey, who has been a true trail-blazer here, put it: *Carterfone* "result[ed in] ... incredible innovation and [was] an unquestioned policy success. The FCC has a rare chance to foster similar innovation in the wireless marketplace in the upcoming auctions." Wireless *Carterfone*, in short, is an idea whose time has come.

It is especially heartening to see wireless open access getting so much attention because I am a true believer in openness and decentralization when it comes to ***all*** of the industries this Commission regulates. Whether we're talking about media ownership, the future of the Internet, video distribution, or ownership of wireless and wireline assets, I believe that reducing the power of gatekeepers and increasing the intensity of competition is the right policy call. It's the right call because it returns power to consumers and entrepreneurs and limits incumbents' power to extract monopoly or oligopoly rents. The device and application openness principles that today's Order implements for 22 MHz of the commercial spectrum will mean more choices, better services and lower prices. They will permit entrepreneurs to innovate without asking somebody else for permission—just as the developers of the fax machine, dial-up modem, and Wi-Fi router did.

Of course, as with so much of the Commission's work, the devil will be in the details. It is especially important that today's item gives consumers, device manufacturers, and other interested parties a right to seek redress if the C-block licensee seeks to discriminate against them. I believe that this case-by-case approach strikes the appropriate balance between preventing harm to the network and giving teeth to our anti-discrimination mandate. Justice delayed is often justice denied, the old adage says, and that is why I am happy that we announce today a 180-day shot clock for Commission enforcement decisions.

Even though the device and application openness principles are indeed good news, the Order does not go far enough in one important respect. We all know that America's broadband performance leaves a lot to be desired. To me, the culprit is clear: a stultifying lack of competition in the broadband market, which in the words of the Congressional Research Service is a plain old "cable and telephone . . . duopoly." A 22 MHz block of 700 MHz spectrum is uniquely suited to provide a broadband alternative, with speeds and prices that beat current DSL and cable modem offerings. Maybe this can happen yet in this spectrum, but by declining to impose a wholesale requirement on the 22 MHz C-block, the Commission misses an important opportunity to bring a robust and badly-needed third broadband pipe into American homes.

A wholesale requirement would have been sound policy for several reasons. First, requiring licensees to offer network capacity on non-discriminatory terms would have been an enormous shot in the arm for smaller companies—including those owned by women and minorities—that aren't interested in or capable of raising the huge sums necessary to build a full-scale network. Smaller entrepreneurs deserve an alternate path to wireless access. Wholesale would have been good news for them—and for consumers.

Second, a wholesale requirement would have leveled the playing field for companies that want to get into the network business but cannot break through the defenses erected by the massive incumbents who dominate the industry. It is not hard to see why companies with extensive networks and millions of customers are generally able to outbid new entrants, even deep-pocketed ones. After all, the incumbents are (quite rationally) willing to pay an enormous "blocking premium" just to discourage new competitors. And their existing network infrastructure gives them a huge cost advantage when it comes to building a new network. Our current spectrum rules are tilted too much toward companies with built-in,

competition-killing advantages.

Moreover, due to the Commission's short-sighted decision a few years ago to eliminate spectrum caps, we have seen a wave of consolidation among wireless incumbents that has substantially increased the hurdles facing potential new entrants. And now we live in a world where the two leading ***wireless*** companies are owned in whole or in part by the leading ***wireline*** telephone companies. It is no knock on these companies to say that they may be more than a little reluctant to employ their spectrum holdings to put price and quality pressure on their wireline broadband products. What else would we expect them to do? The solution is to encourage an additional wireless competitor that has no affiliation with a wireline provider. A wholesale requirement would have given unaffiliated companies the fighting chance they need.

Third, the record in this proceeding clearly demonstrates a strong business case for the wholesale model. Some parties initially raised doubts about whether a wholesale business model could be economically self-sustaining. I believe that the record compiled in this proceeding answers that question. Several sophisticated companies and financial institutions have concluded that wholesale is indeed a viable economic model.

I think it is very good news for consumers that we adopt build-out requirements in this band that are among the strongest and most innovative that we have ever adopted. Use-it-or-lose-it provisions, along with geography-based benchmarks in the lower band, will ensure that licensees have a reasonable period to make use of their spectrum rights, while also allowing third parties a chance to provide service in areas where the original licensees are not. In one respect, I would have gone further. I believe that Commissioner Adelstein's proposal that licensees who have met their 10-year benchmark should still be subject to "triggered" use-it-or-lose it provisions—because if a competitor is willing to make use of remaining unused spectrum, it should have the right to do so. Spectrum is too valuable a resource to allow it to lay fallow.

My deepening concern this afternoon is that this auction might not end up being the stimulus to a third pipe, the right to attach devices, to run applications and to encourage the innovation and entrepreneurship that we all hope for because of some add-on provisions. The item now imposes reserve prices on each of the individual spectrum blocks, something without precedent in previous auctions and something, it seems to me, rather at odds with letting the market pick the auction block winners. The procedure in this Order carries chilling risk to the success of the auction. If some of these blocks do not fetch the bid prices stipulated, perhaps because of gaming of the worst sort, they will be re-auctioned with weaker build-out requirements. If the 22 MHz block, where we hope for *Carterfone* open access principles, fails to elicit a $4.6 billion bid, it will be re-auctioned without *Carterfone* open access. In the end, all of this micro-managing virtually hands industry the pen to write the auction rules and to constrict all the opportunities this spectrum held forth. The end result could be: same old, same old. What a pity that would be!

In closing, we came farther on some things than many thought likely a few months, or even a few weeks, ago. There is much to approve in this Order. I will concur in two parts because wholesale open access is not stipulated and also because of the concerns I have discussed regarding how the micro-managed reserve pricing scheme could subvert the higher goals of the auction.

Many individuals and groups—too numerous to mention—worked hard to assist us in our deliberations on this proceeding. I do want to thank the Bureaus and particularly commend Chief Derek Poarch and Fred Campbell for their insights, vision, constant availability and just plain dogged determination to get to a promising result. I want to thank the public safety community who gave so generously of its perspective and counsel; consumer and advocacy groups that worked to make this more

consumer- and democracy-friendly, and the many entrepreneurs and business leaders who shared their perspectives on how to make this effort viable. I thank my personal staff, particularly Bruce Gottlieb, for his tireless efforts, and also the staffs of my colleagues. I am grateful to Chairman Martin for his vision and courage, and I thank each of my colleagues for their commitment to public safety and their yeoman work on this important proceeding. This has been a truly monumental effort. I hope it works. And I pledge my ongoing commitment to make that happen.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, CONCURRING IN PART

Re: Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (WT Docket No. 06-150); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Docket No. 94-102); Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones (WT Docket No. 01-309); Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services (WT Docket No. 03-264); Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules (WT Docket No. 06-169); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (PS Docket No. 06-229); Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 (WT Docket No. 96-86); Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule (WT Docket No. 07-166); Second Report and Order

Our decision today is one of the most significant and groundbreaking we have conducted in the time I have served. These 700 MHz licenses are the finest crown jewels the FCC has to put up for auction. This coveted spectrum presents us with a historic opportunity to facilitate vibrant, spectrum-based opportunities for both consumers and wireless providers. I am pleased that today's item, to some extent, embraces this potential for the next generation of wireless broadband service providers. I commend Chairman Kevin Martin for his leadership in steering this item on a consensus path that serves consumers.

Most of the time, our decisions are relatively narrow – limited to a specific issue or segment of industry. Other times, we are presented with an opportunity to shape a larger segment of the market. On this rare occasion, we are presented with the dual opportunity to fundamentally begin to change the way over 200 million U.S. consumers receive their wireless services, while at the same time substantially redefining the FCC's approach to spectrum policy for years to come.

It would have been easier to stick with what's tried and true in considering the 700 MHz band. We could have declined to adopt any controversial conditions to open the market; we could have stuck with our traditional substantial service construction standard; we could have allowed public safety agencies to fend for themselves in trying to develop a long-awaited interoperable network. We could hold a fine auction without much effort. But because our job is to promote the public interest, the status quo was not an option.

I have heard the plea of 250,000 consumers who submitted comments in support of open access. I have heard the concerns of Silicon Valley's best minds expressing frustration with their inability to innovate in the wireless space. I have heard the public safety community's cry for help, and their willingness to join their spectrum with a commercial provider in order to create a unique public-private partnership. And we've responded.

Open Access. While this item does not deliver everything consumers and innovators wanted, or many of the improvements I suggested, our decision today represents an important step, if a modest one, in the right direction. We can be proud to say we are offering consumers a new paradigm they have longed for and certainly deserve. We cannot afford to let innovation in wireless devices and applications take root in Europe and Asia before it can occur in the U.S. If we want to maintain our world leadership in technology, we need to harness the full creativity of our many wireless engineers and entrepreneurs.

We need to unleash them from the shackles of a handful of gatekeepers who dominate access to the wireless mass market.

The item before us is a positive step for consumers because its sets in motion a new approach. I am pleased with the willingness of my colleagues to support a meaningful, though not perfect, open access environment on a significant portion of the 700 MHz spectrum. It represents an honest, good faith effort to establish an open access regime for devices and applications.

I especially appreciate my colleagues' willingness to work with me to include real enforcement with teeth, and provisions to promote a genuinely open standard that innovators can build upon. The Order before us is significantly improved in these areas, although the true test of their effectiveness will be seen over time and through future Commission actions and oversight. So, we'll need a true commitment if this Order is going to be effective. If successful, our approach can ultimately lead to benefits for the many consumers who so desperately want unfettered ability to use any wireless handset and download any application they want on the C Block spectrum.

The past several years have seen an explosion of new opportunities for consumers, like Wi-Fi, WiMax, and more advanced mobile services. But despite these technological advances, consumers are frustrated by arbitrary limitations on the types of devices and functions they can access. The open access requirements we adopt today can and should improve the consumer experience. Now, instead of being limited to purchasing a phone and service contract from one network provider, a consumer can purchase any wireless device compatible with the C Block network and use all of the available features and functions.

This also means progress for wireless innovators – application developers, manufacturers, and carriers alike who will now be unleashed to bring new multi-media products to market for use on this spectrum. The Internet has been a source of remarkable innovation and an engine for economic growth and productivity. It is critical that we bring the benefits of the Internet to the wireless world, and I believe our actions today take us in that direction.

Wholesale. One of the best options for promoting broadband, particularly in rural areas, and for providing new competition all across the country, is maximizing the potential of spectrum-based services. Instead of the third "pipe," this holds promise as the third "channel." Or – if we can wax truly optimistic – perhaps we have an opportunity for a fourth or fifth channel through the innovative use of spectrum. Ideally, this auction will facilitate the emergence of new broadband channels with the goal of providing consumers everywhere the benefits of a high-quality wireless broadband network.

Though we have hope and expectations for this auction, we must recognize that today's decision alone won't solve our broadband challenges, nor will it provide any instant remedies. Even if all goes well, today's decision won't afford opportunities until 2010 at the earliest. Yet, right now, we face major challenges bringing affordable, truly-high speed broadband to all our communities and ensuring that we give our citizens the same choices and tools that are available to citizens in the countries that are our leading global competitors. So, we can certainly ill afford to claim "victory" and sit idly on our hands for the next two plus years.

While I remain hopeful that such a third channel does emerge, I am concerned that we haven't done enough here to open up these critical airwaves to badly needed competition in the broadband space. Those who argue such measures are not necessary because the wireless market is already competitive miss the point. The real problem is the lack of competition in the *broadband* market, where 96 percent of consumers are served by the incumbent telephone or cable company.

I believe that a truly open wholesale model would stand as a breeding ground for innovation, for allowing new and diverse competitors to flourish, and for spurring unparalleled levels of competition into the broadband marketplace. While this item represents progress for consumers in terms of new openness for devices and applications, I can only concur to this portion of the item because we could have done more to promote open markets by adopting a wholesale model to attract vigorous competitive alternatives.

We have also lost an opportunity to provide crucial bidding credits to designated entities that wholesale fully built-out network services. I think it is essential that we revisit our policies in this respect to ensure that all bidders have opportunities to bid, particularly where wholesale service is a compelling option for new and diverse providers.

We have had to strike a compromise – and while the measures we take here today are less than what I would have proposed, they are significant and will serve consumers well. At the end of the day, though, I am afraid we may have missed a golden opportunity to open that elusive third channel into the home.

Band Plan and Service Rules. I've often talked of "spectrum facilitation" – looking at all approaches, technical, economic or regulatory, to get spectrum into the hands of operators ready to serve consumers at the most local levels possible. We have a special responsibility to establish band plans that allow for a diversity of license sizes and to maximize the level of utilization by giving more options so that the market can perform most efficiently. I recognize that many small providers believe that we have failed to provide for them today. I am somewhat frustrated that the pro-consumer open access provisions were tied to a large 22 MHz block, and would have been happy to break that into pieces that could have better accommodated the needs of a variety of sizes of players. I am also concerned that the reserve price and second auction requirements set out in this item leave open a real potential for gaming and may result in unintended consequences.

But I am pleased that we have added a paired Economic Area block in the lower band to the Cellular Market Area license already set for auction. And, as discussed below, we have adopted aggressive build-out requirements to promote network buildout. These are significant changes that will help provide additional opportunities for small and mid-sized interests, rural providers, and new entrants.

Our job at the FCC is to do whatever we can to promote spectrum-based opportunities in the future. To get there, I am continually evaluating the FCC's service and construction rules to ensure that our policies do not undercut the ability of wireless innovators to get access to new or unused spectrum. I have advocated a carrot and stick approach. We want to promote flexibility and innovation, but since the spectrum is a finite public resource, we want to see results as well.

In our item today, we adopt some of the strongest performance requirements in history to ensure that this wireless frontier truly gets developed. As we did with the homesteaders 150 years ago, we are happy to get this prime real estate in the hands of those that will use it. Just like the government required of homesteaders, we want this fertile soil tilled and put into use, including in rural areas of the country. Out of this development will sprout the fruits of innovative product and service offerings to every corner of America.

Regrettably, though, I have long advocated the adoption of a triggered "keep what you use" approach to spectrum policy, and I am disappointed that such an approach is not adopted in this item. I am hopeful we can make progress on this because I think it presents the best vehicle to ensure that fallow spectrum is either put to use or made available to other interested parties.

Public-Private Partnership for Public Safety. Finally, I'd like to turn to perhaps the most paramount issue for this Commission: public safety. The role of communications is so important during emergencies, whether citizens are trying to find out what is happening with their families or emergency personnel are responding to an urgent situation. It is critical that the Commission provide the best leadership possible to ensure that communications are fully operational during these most serious events. Indeed, this is one of our core directives under the Communications Act of 1934, codified in the Act's very first section.

The Commission can and must play a key role in improving our nation's disaster preparedness, network reliability, and communications among first responders. This item marks a pivotal step in addressing the needs of public safety. Six years after the tragedies of 9/11 and three years after the 9/11 Commission issued its report on terror attacks on the United States, our country is still without a national interoperable public safety broadband network. Policymakers all agree that our first responders need the best technology and communications network possible. Yet to date, there have been no other viable plans brought forward to realize the critical need for an interoperable network for public safety.

The implementation of this shared commercial and public safety network presents a myriad of complex and novel issues. There is no guarantee that the model we've created here will nurture a nationwide interoperable public safety system that is both commercially viable and technically feasible. And while I would prefer direct Federal funding for building a national public safety broadband network, it presents the only option available to us at the Commission. For this reason, I am happy that this Commission is stepping forward to meet this challenge by paving the way for a public/private partnership. This may be the only way to realize the important goal of making a nationwide and interoperable network truly available to our nation's first responders.

Conclusion. There's an old expression that to make an omelet, you have to break some eggs. Today, we are cooking up a new age of wireless services. I appreciate the steps we are taking, and am pleased that we are moving forward in ways that this Commission would have never even considered a year or two ago. I look forward to a successful auction and the successful implementation of our exciting new policies.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE
APPROVING IN PART, CONCURRING IN PART

Re: Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (WT Docket No. 06-150); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Docket No. 94-102); Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones (WT Docket No. 01-309); Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services (WT Docket No. 03-264); Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules (WT Docket No. 06-169); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (PS Docket No. 06-229); Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 (WT Docket No. 96-86); Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule (WT Docket No. 07-166); Second Report and Order

To begin, I also would like to thank the staff of the Wireless Bureau and the Public Safety and Homeland Security Bureau for their incredibly hard work on this item.

With the upcoming auction of spectrum in the 700 MHz Band, we have the historic opportunity to generate billions of dollars for the U.S. Treasury and its taxpayers, spur the development of broadband to rural Americans, and support the creation of a nationwide interoperable broadband communications network for the benefit of state and local public safety users—and ultimately for the safety and security of all Americans. A majority of this Commission has agreed to the rules established by this item and I cannot say they are totally wrong. I may not agree with their reasoning or philosophy, but this is a very close call. Given the importance of this auction, our statutory time constraints and my desire to always try to reach a consensus, overall I support the item, noting my strong support for the portions of the order related to public safety service, while being lukewarm regarding the portion of the item that places what my colleagues call "open access" in the C Block on devices. I can only concur as to the majority's extension of open access to applications. There is much that is good about this item, but it is by no means a perfect one.

I would have preferred, as some commenters noted, to have a full and open hearing, time for thoughtful discussion within the context of another, more appropriate legal venue. However, this was my only chance to have what I consider a more positive impact on a less than perfect experiment.

First and foremost is our joint desire and one we have all spent a great deal of time discussing: a nationwide broadband infrastructure for public safety. The promise of this type of network will help finally fulfill important and indeed life-saving goals of the 911 Commission, our own post-Katrina panel as well as what we have seen and heard around the nation: the ability for a firefighter and a police chief to communicate during a local emergency.

Regarding our public safety community, the dissemination of vital information and interoperable communications are the backbone of our defense against attacks on our homeland, as well as our ability to respond to natural disasters or even an environmental crisis or pandemic. Today's item strengthens this defense. In addition, we re-band the public safety spectrum in a way that will allow more broadband service to the public safety community by working in cooperation with the commercial licensee involved in a public/private partnership. With input from the public safety community regarding their needs and desires and a number of fascinating, entrepreneurial concepts proposed in the comments, the

public/private partnership made possible by this order also will help create important incentives for a commercial entity to serve private consumers as well as the public safety community as they protect the safety of life, health, and property of all Americans. We also adopt strict build-out rules for the commercial licensee in this partnership, with an aggressive schedule for serving public safety users.

In addition, I am pleased that the item helps promote broadband service in rural America. Broadband deployment means, or should mean, the availability of advanced services to all Americans. As a former state official in a state with a large rural population, expanding the availability of broadband beyond the largest cities is important to me. Just last week, I joined Tennessee officials for the announcement of "Connect Tennessee". This public-private partnership, already wildly successful in Kentucky, will be a blueprint for expanding and encouraging all types of broadband connectivity. This item takes an important step towards this goal by adopting smaller geographic license areas for almost half of the spectrum to be auctioned in the 700 MHz Band. Such a policy makes it easier for small and rural service providers – firms that often best know the rural consumer – to acquire the spectrum they need to serve in these rural markets. We also establish strict build-out requirements to ensure that the majority of consumers, including those in rural areas, are served.

For the most part, the rules that we apply to the 700 MHz Band also will allow licensees the flexibility they need to experiment and develop those services that are demanded by consumers. Similarly, the mix of geographic license areas – including smaller license areas over CMAs and EAs as well as larger license areas – will allow potential service providers of all sizes to more easily acquire spectrum licenses that meet their business needs.

We take other steps in this order in a similar effort to allow consumers more control over the devices and applications they use in one specific block, the Upper 700 MHz C Block. I am hesitant to use the term "open access," since it means different things to different people. Here, I interpret our decision to pertain to "unlocking and unblocking" legal devices and applications as used by the consumer, while also recognizing and specifically allowing for protection of the network, and nothing more. I hope this decision will unleash untold new devices and applications that users will be able to enjoy at home, at work, on the go, in hotspots, and in rural areas.

Many consumers want mobile devices that are not tied to any one network. For this reason, I support device portability as yet another means of consumer choice. I also recognize that at least some network operators increasingly are giving their customers this option, or stating they may give this option, in the future. Thus, to some extent, the item we adopt today simply codifies what the market already is doing.

Many consumers also want to access a variety of applications, including some currently not available under arrangements with many network operators. This issue poses great potential for incredible consumer benefit. It also poses risks.

Moreover, we should keep in mind that our wireless infrastructure, including commercial wireless infrastructure, plays an important role in supporting public safety and homeland security. The conditions we adopt today are designed to apply so long as the operator's network is properly protected. We should not underestimate the value of reasonable requirements established by a network operator to protect its network and allow for compliance with its regulatory obligations, such as an obligation to provide e911 service.

None of us would want an e911 call to go unanswered because it could not find its way through a maze of movie and music downloads, or malicious software. Thus, the network operator must be able to reasonably manage the foreign applications on its network.

I also recognize that, in adopting these limited conditions, we also may influence the next generation of industry structure. Mandating a certain type of industry structure in one band may have a positive impact, and certainly that is what we hope. Again, we must carefully consider the risks.

We should not forget that the U.S. wireless market that has so effectively served American consumers is one of the most competitive in the world, with prices lower, and usage higher, than any country in Europe and almost any country in the world. It also is a market with great innovation, including, most recently, the Apple I-phone and a Sprint Nextel partnership with Google to bring applications via WiMax service.

I hope today's item will not result in unexpected negative consequences, such as consumers seeing less of such innovations or losing access to the many packages of services they enjoy today. If this effort is successful, consumers will enjoy the fruits of one additional type of business model in the years to come. In the end, it is the consumer and the marketplace who will be the judge.

It is with these concerns that I support the narrowly tailored requirements in this order. However, let me be clear regarding what it does not include. As adopted here, these rules do not apply to any currently issued spectrum license. They do not directly affect any existing network. They do not affect any existing pricing structure. Carriers will still be free to establish business plans of their choice, including, for instance, pricing models based on the amount of bandwidth used, tiered pricing, or other innovations we have not yet seen. Carriers also will retain the ability to establish reasonable safeguards in order to protect their network. Moreover, even if a device meets network certifications, wireless providers of course may stop malicious or illegal applications. Similarly, carriers will not be liable for harms that arise out of the use of foreign devices, including harms related to applications used on such devices, much like our treatment of cable and wireline providers when customers use foreign devices on their networks. Given our recognition of the importance that wireless infrastructure plays – and will continue to play for years to come – in homeland security, the carriers are held harmless for devices and applications that cause network failures that may affect e911, CALEA, or other social obligations required by law.

We also provide even more safeguards regarding the auction proceeds and the potential winning bids pursuant to the Deficit Reduction Act of 2005, by setting a reasonable reserve price for spectrum blocks in this auction. Thus, if we are wrong about the "open access" conditions and the reserve price is not met, then this spectrum block, as the Chairman recently testified, will immediately be re-auctioned without any of these conditions.

My hope is that we have created an incubator for the next killer app, the next platform or the next cool device. In fact, the entrepreneur-inventor who will make all this happen is probably just in the 8th grade. We have provided one finite place to encourage the next fantastic innovation to occur and for Americans to roam free across networks, miles and corporate business models.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, DISSENTING IN PART

Re: Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (WT Docket No. 06-150); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Docket No. 94-102); Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones (WT Docket No. 01-309); Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services (WT Docket No. 03-264); Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules (WT Docket No. 06-169); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (PS Docket No. 06-229); Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 (WT Docket No. 96-86); Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule (WT Docket No. 07-166); Second Report and Order

First, I would like to thank my colleagues, the dozens of bureau professionals, the scores of representatives from the tech community, the investment community, consumer, public safety, public interest groups, and potential bidders - both large and small - with whom I have met and who have worked so hard on what is being dubbed the "auction of the century." Thank you for your suggestions and insight regarding what is the best way to use this spectrum to meet the demands of American consumers. This is an historic day for the Commission and for America.

The Order before us has certain positive attributes. Among them is the plan to spark a public/private partnership for public safety by allocating an additional 10 megahertz of spectrum to aid in the construction of a nationwide, interoperable network. This plan has been assembled as the result of close coordination with the public safety community, and I am pleased to support it. We all owe many thanks to my distinguished colleague, Commissioner Copps, for his passion, vision, leadership, and toil on this matter that is so vital to our country. Of course, the next step is to ensure that a bidder willing to accommodate public safety's specifications buys this slice of spectrum at auction and builds it out in a timely manner with state-of-the-art technology. With today's action, public safety will have about 107 megahertz of spectrum at its disposal.[1] So it appears to me that ongoing efforts should more closely focus on attaining the quickest and most efficient use of this spectrum. Protection of America's security can't wait any longer.

Another positive attribute of today's Order is the band plan for the commercial blocks of the 700 MHz spectrum, which I am supporting. This band plan has been advocated by a wide variety of interested parties, including possible new entrants, Silicon Valley companies, as well as existing wireless license holders. The band plan, minus the open access condition, could provide new opportunities for a wide variety of technologies and business plans.

With respect to performance requirements for the commercial spectrum, I have listened to parties

[1] *See* Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State and Local Emergency Providers, Federal Communications Commission ¶ 5 (rel. Dec. 21, 2005).

discuss the merits of various requirements with an open mind. On the one hand, it is important that the Commission not set the bar too high, which may cause licensees to deploy less robust technologies. On the other hand, this spectrum has excellent propagation characteristics, so network construction should be more economically efficient. Certainly we want to ensure that all Americans, no matter where they live or work, have prompt access to advanced wireless services. I support the requirements set forth in the Order, and am pleased that the new rules will allow interested entities access to any un-built spectrum sooner rather than later.

After careful deliberation, my conclusions regarding some of the other more-publicized issues are as follows:

1) While we can agree on the destination -- consumers should be able to enjoy device and application portability if they want -- we may respectfully disagree about the best path to get there;

2) In an unencumbered auction, any winning bidder is free to offer those features without restrictions;

3) Large wealthy corporations interested in a particular business plan do not need the government's help in this auction; and

4) In the absence of market failure, I favor a market-based pro-competition solution to the challenges raised in this proceeding over a prescriptive regulatory approach.

In other words, I am disappointed that the majority didn't try to work with industry to forge a consensus solution rather than rushing to regulate without thinking through possible unintended consequences.

As background, my original vision for the 700 MHz auction was for our rules to maximize investment, innovation, and consumer choice by promoting competition through the crafting of a wide variety of unencumbered market and spectrum block sizes. We had the opportunity to help foster the development of a fourth, fifth or sixth new broadband pipe offered perhaps by small town entrepreneurs or new regional players. In fact, we've heard from a broad array of companies, and an overwhelming number of Members of Congress on this important point. Unfortunately, the encumbered spectrum structure supported by the majority will force large wealthy bidders away from the Upper Band and into the smaller, unencumbered blocks in the Lower Band. Smaller players, especially rural companies, will be unable to match the higher bids of the well-funded giants.

Depriving the nascent 700 MHz market place of smaller new entrants will result in less innovation and competition, not more. Consumers could be short-changed as a result. And it is small new entrants that should be as important to this equation as large new entrants. Pinning our hopes on a single national "white knight" to offer only one new pipe is risky at best. And keep in mind that the Commission's rules do not prevent any bidder from offering any kind of new application or functionality, including device portability, or from aggregating smaller market sizes to forge a national footprint, as we witnessed with last summer's Advanced Wireless Services auction. Throughout this proceeding, I have not heard a convincing argument refuting why wealthy Silicon Valley new entrants are not as capable of bidding on unencumbered spectrum as other wealthy companies. More importantly, I remain unconvinced that the Commission must favor large companies over smaller entrepreneurs. Why not give both an equally fair shot with *one* open, condition-free auction that offers varied market and spectrum block sizes?

Curiously, however, in an effort to favor a specific business plan, the majority has fashioned a

highly-tailored garment that may fit no one. It's not what Silicon Valley wants; it's not what smaller players have told me they want; and it's not what rural companies want. To date, the Commission has received no assurances that any company is actually interested in bidding on the encumbered spectrum. Not one. The majority recognizes the risk that the encumbrances pose by taking the unprecedented step of designing a fall-back "Plan B" auction in the event the first auction fails. Perhaps the majority has only little more confidence in its plan than I do.

If this new regulatory regime is all in the name of fostering device and application portability, I want consumers to know that the seeds of these offerings are already germinating. The wireless market is starting to deliver device and application portability because it has been allowed to function freely and has been responsive to consumer demand. For example, over the past couple of years, wireless carriers have offered at least ten different phones that are compatible with *any* Wi-Fi network. This capability allows consumers to navigate the Internet just as they can on their home computer, and download software such as voice over Internet protocol applications, or popular search engines.

Savvy consumers may be the only ones who are "in-the-know" today, but they are the early adopters who are paving the way for the rest of us laggards. Further, these business developments are by no means the end of the innovation that is rising above the horizon, but the beginning of a brighter revolution that is already dissolving walled gardens across all platforms. Just ask America Online about the long-term viability of a walled garden strategy. So, I'm not sure it makes sense for the majority to take credit today for spurring device and application portability when it's sprouting on its own.

The new regime adopted today is being imposed against the backdrop of a vibrant wireless market. Just last fall, in our *2006 Wireless Competition Report*,[2] all five of us concluded that it was healthy, open and competitive. There, we noted that, over the last 13 years, wireless subscriber growth has grown exponentially and competition among numerous providers has flourished. Ninety-eight percent of the total U.S. population continues to live in counties where three or more different operators compete to offer wireless service, while nearly 94 percent of the U.S. population continues to live in counties with four or more different operators competing to offer service.[3] At the same time, prices are decreasing. Our report estimates that revenue per minute (RPM) declined 22 percent in 2005 alone.[4] RPM currently stands at $0.07, as compared with $0.47 in December 1994 – a decline of 86 percent.[5]

It is interesting that today's Order does not cross reference or otherwise discuss the Federal Trade Commission's recent unanimous and bipartisan finding that there is no need for net neutrality regulations like the ones imposed today.[6] Only one month ago, the FTC's Internet Task Force recommended that policymakers proceed "with caution before enacting broad, *ex ante* restrictions in [the] unsettled, dynamic environment" of broadband Internet access.[7] Specifically, the report concludes that the effect of potential

[2] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 06-17, *Eleventh Report*, 21 FCC Rcd 10, 947 ¶ 2 (2006).

[3] *Id.* at 10,964 ¶ 41 (2006).

[4] *Id.* at 11,008 ¶ 154.

[5] *Id.*

[6] Federal Trade Commission, Internet Access Task Force, Broadband Connectivity Competition Policy FTC Staff Report (rel. June 27, 2007).

[7] *Id.* at 9.

conduct by broadband providers on consumer welfare is "indeterminate."[8] The report adds, "No regulation, however well-intended, is cost-free, and it may be particularly difficult to avoid unintended consequences here, where the conduct at which regulation would be directed largely has not yet occurred,"[9] and cites growing consumer demand, increasing access speeds, falling prices, and new market entrants as evidence that competitiveness in the broadband Internet access industry is moving in the right direction.[10] Today's Order offers no evidence to refute the FTC's findings and conclusions. Furthermore, the FCC should heed the FTC's warning about the unintended consequences of unnecessary regulation.

Perhaps most surprisingly, today's Order acknowledges that the Commission need not decide whether competition is sufficient enough to refrain from imposing open access requirements in this proceeding because these questions are being considered more broadly elsewhere. Despite this express acknowledgement, however, the majority seeks to "encourage additional innovation and consumer choice" and "spur the development of innovative products and services" by encumbering the C Block license. At the same time, the Order does not dismiss or otherwise dispose of the pending *Skype Petition*.[11]

Moreover, the majority's decision to impose "open access" requirements on the C Block licensee represents a sharp departure from well-settled FCC precedent. First, the decision runs contrary to the market-driven framework established by Congress. Starting at least as early as 1994, the Commission established as a principal objective the goal of ensuring that unwarranted regulatory burdens are not imposed upon any wireless providers.[12] Just this year, I was pleased to support the Commission's action to classify wireless broadband Internet access service as an information service because our determination will maximize innovation and consumer benefits as wireless services continue to flourish and evolve. By dictating how spectrum must be used, the majority is locking the Commission into a particular approach that is not guaranteed to work but is guaranteed to be nearly impossible to change.

Some say that *Carterfone*-style regulations are appropriate for application to today's wireless marketplace because application of that policy revolutionized the wireline marketplace.[13] Before arriving at the Commission, I spent my entire career counseling wireline entrepreneurs. There is a world of difference between the wireline industry of the 1960's and today's wireless market.

First, the AT&T of the 1960's was a nearly 100-year-old government protected and subsidized monopoly. By any measure, today's U.S. wireless service providers lack market or monopoly power, as this Commission concluded just 10 months ago.[14] Second, unlike wireline voice services offered in the

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[8] *Id.* at 157.

[9] *Id.* at 155.

[10] *Id.*

[11] *See* Skype Communications S.A.R.L.; Petition to Confirm A Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (filed Feb. 20, 2007).

[12] *See* Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1418 ¶15 (1994).

[13] *See, e.g.*, *Skype Petition*.

[14] As of Dec. 2005, the market power of Cingular Wireless (now AT&T) is 26.8 percent and that for Verizon Wireless is 25.4 percent. *See 2006 Wireless Competition Report* at Table 4. *See also* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Fourth Report & Order*, 15 FCC Rcd 13523, 13528 ¶ 12 (2000) (explaining that "*Carterfone* involved AT&T, the dominant provider of telecommunications at that time (continued....)

1960's, today's U.S. wireless service providers have never integrated into the applications or equipment markets. Third, under common antitrust analysis, today's wireless providers lack the ability to exercise buying power over upstream handset suppliers, of which there are many competitors, which wield significant countervailing selling power. Fourth, wireless service providers are not subject to price regulation in the market in which they are alleged to have market power, which otherwise might encourage them to seek profits in complementary markets.[15]

Others cite the European wireless marketplace as the one the U.S. should emulate. A closer look reveals that the European scenario isn't so rosy. First, as noted earlier, in our *2006 Wireless Competition Report*, the Commission found that, in addition to the four nationwide mobile telephone operators in the U.S., several large regional operators and a significant number of mobile telephone operators with smaller footprints compete in many regional and local U.S. markets.[16] In contrast, in Western Europe, national mobile operators do not face competition from smaller facilities-based carriers like they do in the U.S.[17] The top two competitors in Germany and Italy, for instance, have a combined market share of 74 percent.[18] In Finland, the combined share is 85 percent.[19] Whereas the FCC has consistently resisted broadly imposing technology mandates, European regulators mandated the use of a single technology: GSM. Given the dearth of choice among carriers and technologies, European per minute rates are high – approaching 22 cents per minute. Roaming rates from country-to-country are even worse – sometimes $1.50 per minute. Additionally, up front costs to consumers are much higher there than here.

I have also heard that today's action is just like the Commission's adoption of Wireless Local Number Portability (LNP) requirements in 2003. I disagree. First, the Commission mandated LNP only after years of attempts to broker negotiations between industry and consumers ended in failure. No such effort at negotiation has been attempted here. On a substantive level, LNP does not involve complicated network management issues like device and application portability does. Instead, LNP is completed through a simple computer dip, which has nothing to do with the complexities of a carrier's network. Finally, without knowing what standard(s) the C Block licensee will adopt, it is unclear in today's Order whether its customers will be able to port to other networks. I wonder whether this will lead the Commission down the path of imposing a European-style technical standard.

With respect to auction reserve prices, I believe these are best left to market forces. Like artificial conditions, reserve prices have the effect of skewing the auction and hindering the efficient allocation of spectrum. The problem with setting reserve prices is that it puts the Commission, rather than the market, in the precarious position of identifying the right value for the spectrum.

Finally, I am disappointed that the majority has rushed headlong to regulate with scant evidence in the record and without undertaking a sincere effort to try to bring together consumer groups, industry and all interested parties to broker a private sector solution to any perceived imperfections. The

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.... [t]hus, the Commission has not applied principles established there to interconnection to carriers without significant market power, such as CMRS providers").

[15] *See* ROBERT W. HAHN *ET AL.*, THE ECONOMICS OF "WIRELESS NET NEUTRALITY" (AEI-Brookings Joint Center for Regulatory Studies 2007).

[16] *See 2006 Wireless Competition Report*, 21 FCC Rcd at 10,967 ¶ 50.

[17] *Id.*

[18] *Id.* at 10,967 ¶ 51.

[19] *Id.*

Commission has a long and proud history of meeting similar challenges in such a positive and constructive way. I wish we had done so here.

For these reasons, I respectfully cast my very first dissent in part. Specifically, I dissent from Sections III.A.2.a.iii. (Open Access) and III.A.3.d. (Reserve Prices) of today's Order.