

STATEMENT OF COMMISSIONER
MICHAEL J. COPPS
Approving in part, dissenting in part

RE: In the Matter of Amendments to Parts 1, 2, 27, and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz and 2385-2390 MHz Government Transfer Bands (Report and Order).

In an era of scarce spectrum, with all the new technologies and services out there clamoring for additional spectrum, making 27 additional megahertz available for commercial use is good news indeed. And we are continuing the process set in motion by Congress to fully transfer this spectrum from government use to commercial use. I support this process, and I support and the vast majority of the rules that we adopt today.

I have deep misgivings, however, about one aspect of today's Order, the significant extension of our transfer of FCC allocation responsibilities to "band managers."

A "band manager" is a private entity to which the FCC grants spectrum rights to act as a "spectrum broker" rather than as a service provider. Band managers need not provide communications services; they may sell the use of their spectrum to whoever is willing to pay for it. This enables the band manager to gain private profits by brokering public spectrum. The Commission has permitted band managers in limited circumstances in the past for narrow guard bands. To date, we have not adequately analyzed the success of this initiative. In fact, the first annual band manager report is still in preparation. Nevertheless, today's Order represents a significant expansion of the FCC's use of band managers. I recognize the potential theoretical benefits of band managers. They can arguably allocate spectrum more quickly and dynamically than can an overburdened Commission, and the profit motive gives them an incentive to squeeze the most out of the spectrum as possible. But I also see grave risks.

The spectrum is a public asset. The Commission's stewardship of the spectrum is a public trust. Congress gave the Commission the responsibility to allocate spectrum for a reason. While there are often downsides to government management when it comes to speed and innovation, there are sometimes very important advantages. This Commission is legally obligated to operate transparently. Our charter commands us to promote the public interest. And we are accountable to the American people. Our charter is different than a band manager's. A band manager need not reveal its decisions to the public. It is legally obligated to maximize profits for its shareholders rather than serve primarily the public interest. Band managers are accountable to those private interests that control them, not to the people. Probably most band managers would recognize their larger responsibilities and it is not the majority I am worried about; it is the few who may come along and see this as an opportunity to put their private gain ahead of the public interest.

Congress understands the costs and benefits of government versus private stewardship of various assets. Here, I believe, Congress chose the FCC to manage spectrum because the protections inherent in FCC allocation of spectrum outweigh the costs.

Beyond these questions of the general propriety of band management, I also note that practical questions about band management remain unresolved. While we have allowed band managers recently in guard bands, we do not have much experience in their operation. What will happen if a band manager's lessee violates our rules? Will we be able in practice to successfully to enforce our rules against the lessee and the band manager when they start pointing fingers at each other? What will happen if band managers faced with economic distress break our rules to increase profits in a way that helps them in the short term but throws the band into confusion in the long run? Even if we are able to enforce, how will we clean up the mess? What will happen if band managers artificially limit spectrum supply to drive up prices for their own profit? Recent experience in electricity trading should indicate that such destructive tactics are altogether plausible. Our previously established band manager rules attempt to address some of these concerns, but they remain largely untested.

I do not believe that Congress wanted the FCC to delegate its spectrum authority to private speculators who can turn public spectrum into private profits with no intention of providing communications services. I believe that significant questions about the enforcement of our rules and the effect of band managers on the public interest are too uncertain to support an extension of our reliance on band managers at this time. I therefore must dissent from this section of the Order.

I understand resource constraints and all the other arguments used to justify the conferring onto others of the authority reposed in us. In my mind, none of these arguments even begins to offset the Commission's obligation to perform its duties itself as the agent of the American public to manage the American public's spectrum.

On a separate matter, I also believe that the Commission has far too little information to rely on partitioning and disaggregation as fulfilling our statutory responsibility to promote service to rural areas. Section 309(j)(3) states that the Commission must design competitive bidding systems so as to promote objectives including "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women."¹

One theory is that partitioning and disaggregation will accommodate the entry of new entrants and small businesses, and will speed service to unserved or underserved areas, enhance competition, and encourage new entrants into the market. Relying on this theory, the Commission could decide that it can auction spectrum in nationwide blocks or

¹ 47 U.S.C. § 309(j)(3).

large EAGs, rather than in small geographic blocks geared toward rural service, depending on partitioning and disaggregation to eventually provide spectrum to rural areas. To make such a decision we would have to believe that a nationwide carrier will buy a nationwide license and if it finds that it will not use the rural portion of its spectrum, as is often the case when a national carrier buys such a license, it will strike deals with local carriers using the partitioning and disaggregation rules.

However, rural telecom commenters state emphatically that partitioning and disaggregation do not result in significant new service to rural areas. These rural carriers explain that the cost to a national carrier of negotiating and signing a partitioning or disaggregation deal with a small carrier is often higher than the profit the nationwide carrier would gain from the deal. Therefore, they find it better business to let the rural spectrum lie fallow, even if rural carriers are interested in using it.

I believe that section 309(j)(3) compels us to design our auctions to promote service to rural areas. While partitioning and disaggregation theoretically could accomplish this goal, there is no proof that they do so. Therefore, we should not rely on these tools to meet our statutory obligation until we gather far more information.

I support the use of partitioning and disaggregation here only because we do not rely on these tools as fulfilling our statutory duty to rural America, and because we promise to release a formal Notice of Inquiry into tools at our disposal to promote rural service through our auction rules, by the end of the year. This NOI will explore whether partitioning and disaggregation are useful for this goal, whether there are ways to improve partitioning and disaggregation, whether there are additional and better tools that we should adopt in addition to auctioning smaller service areas. I believe that this NOI will give us the information we need to determine how to meet our responsibilities. I note, however, that until this NOI provides me with new information, I will continue to push for RSAs to promote rural service, and will not rely on partitioning and disaggregation for this purpose.