STATEMENT OF COMMISSIONER
MICHAEL J. COPPS
Agreeing in part, dissenting in part
August 8, 2002

RE: Year 2000 Biennial Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services (WT Docket No. 01-108).

Although there are numerous requirements in this proceeding that I can support eliminating, there are also some from which I must dissent. They are five in number. (1) the elimination of the analog standard and the possible effects on the deaf and hard-of-hearing; (2) the elimination of the requirement that cellular applicants demonstrate their financial ability to operate their system at a time when bankruptcies are threatening consumers; (3) the elimination of cellular anti-trafficking rules; (4) the decision to allow cellular licensees to claim they serve rural areas by merely serving roaming in those areas; and (5) the mischaracterization of our biennial review responsibilities

The Order threatens service to Americans with hearing disabilities

A year ago this Commission said, unambiguously, that "we will not take any action that would undermine service to persons with disabilities" in the Part 22 biennial review proceeding.[1] I must dissent from this Order because I believe it may do just that. At a minimum, this part of the Order is premature. Wireless services have become central to American's lives. They are critical for our jobs and our safety. Indeed, for an increasing number of us, they are becoming our primary phones. Most Americans can now choose to have digital service. Digital service has tremendous advantages, and I am confident that such service will continue to usher in new products, more spectrum efficiency, and higher quality of service. Unfortunately, millions of American with hearing and speech disabilities currently have only analog devices available to them. Wireless companies have not brought hearing-aid and cochlear-implant compatible phones to the market, except in very limited circumstances.

Our goal must be to make all wireless technologies available to Americans with hearing and speech disabilities. Digital service must be compatible with hearing aids and cochlear implants. Accessibility must go hand in glove with advances in technology. The Commission has an opportunity to fulfill this commitment in a pending proceeding on rules governing hearing aid compatible telephones. We should complete an Order in that proceeding as rapidly as possible. I hope that each of my colleagues will make this a strong personal commitment.

Until digital service is a reality for Americans with hearing aids or cochlear implants, however, their only option is the analog standard. If this standard were to

[1] *In the matter of Year 2000 Biennial Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, Notice of Proposed Rulemaking*, 16 FCC Rcd. 11169 (2001).

disappear prematurely, these citizens would be stranded without any wireless options. That is unacceptable. We must not eliminate the analog standard until hearing-aid-compatible devices are widely available. Yet today the majority finds that the analog standard is no longer "necessary," even though compatible services are not yet available. It guesses that such devices will soon be available, but fails to support this prognostication with any record evidence. Based on this guess, the majority delays final elimination of the rule for five years. But make no mistake, the analog standard has been eliminated *even if hearing-aid-compatible devices are not available* five years from now – *unless* the Commission starts another proceeding and decides to reestablish the rule. My experience at the Commission leads me to believe that such a turn of events is unlikely. My question is: Why is it even necessary to put these citizens through an exercise that is neither necessary not timely? I am further troubled that the Order does not commit to complete the wireless hearing aid compatibility item by a date certain – we owe this to those of our fellow citizens who depend on these services.

Eliminating the analog requirement before compatible devices are available could leave millions of Americans without service in the near future. I am willing to eliminate the rule, but will not until the actual availability of accessible devices. Additionally, I think that setting elimination in process now takes away the best incentive manufacturers have to produce this equipment in volume. It would be better for the industry to know that the rule will not be eliminated until it has done its job.

The majority misstates the Commission's Biennial Review standard

The majority also applies an interpretation of the Commission's Biennial Review standard that I find contrary to law. Congress instructed the Commission to review its rules on a biennial basis and "determine whether any . . . regulation [of a provider of telecommunications service] is no longer necessary in the public interest as the result of meaningful economic competition between providers of [that] service."[2] This created a two-step process for the Commission when we review a regulation under this provision. First we must determine if there is "meaningful competition" in the relevant market. Then we must determine whether the existence of "meaningful competition" means that the regulation in question is "no longer necessary in the public interest."

So, here, even once the Commission determines that there is "meaningful competition" it must eliminate a regulation only if it finds that such elimination serves the "public interest." Congress did not limit this public interest inquiry in any way. The 1996 Act certainly does not say that for Biennial Review purposes "public interest" only means "promotes competition." The Act also nowhere even hints that "public interest" only refers to the policies originally referred to in creating the underlying regulation, even though the majority sees this in the "plain meaning" of the statute. "Public interest" here is left unmodified and therefore must be interpreted to mean the traditional Commission public interest standard.

[2] 47 U.S.C. § 161(a)(2).

The D.C. Circuit recently reinforced this fact. It stated in *Fox Television Stations v. F.C.C.*, that "nothing in §202(h) signals a departure from [the public interest's] historic scope," and that limiting the inquiry to competition alone is not consistent with the Telecommunication Act.[3] Section 202(h) is directly tied to section 11, stating that "the Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11." It goes on to use identical language to section 11, stating that the Commission "shall determine whether any of such rules are necessary in the public interest as a result of competition" and that "[t]he Commission shall repeal or modify any regulation it determines to be no longer in the public interest." To argue that the recent D.C. Circuit decision is not relevant to section 11 is suspect.

Congress directs us to facilitate the elimination of unnecessary regulation, but insists that we should do so only where such elimination serves the public interest. The majority, in explaining the section 11 standard, fails to recognize that a competition analysis is only part of its responsibility. Throughout the Order it makes decisions based solely on competitiveness findings, ignoring the duty to protect the larger public interest. This misuse of our section 11 standard is contrary to law. For these reasons I dissent to these parts of the Order.

The majority eliminates financial safeguards, anti-trafficking rules, and threatens rural wireless service

This is a wide-ranging Order, covering many topics other than the analog standard. I agree with a large number of the decisions made today. They remove regulations that have outlived their usefulness or recognize where market or technology changes have made regulations obsolete. Three rules are eliminated, however, that are still very "necessary" in the pubic interest. I must dissent to the elimination of these protections.

- *The majority eliminates financial safeguards at a time of market turmoil.* Our rules currently require an applicant for a new cellular system, when it applies for a license, to make a demonstration of financial qualification.[4] This means a company must show that it has financial commitments to construct and operate a cellular system for one year. The majority today decides to eliminate this financial safeguard at a time when we can least afford to do so, and at a time, I might add, when financial safeguards seem to be at a premium. The morning papers tell us that banks are looking for more evidence, not less, of financial viability before giving the green light to financial assistance. Perhaps we should take a clue. The fact that this rule applies only to cellular applicants, and only in a narrow set of circumstances, does not mean that it is not important. Rather than looking to cut away the few nets under the high-wire that American telecommunications consumers today walk, we would be better advised to build new precautions.

[3] 208 F.3d 1027, 1042 (D.C. Cir. 2002).
[4] 47 C.F.R. § 22.937.

- *The majority eliminates anti-trafficking rules*. Our rules also currently protect consumers against the dangers of speculation and the trafficking of cellular licenses. There is a danger to American consumers when speculators obtain licenses with the intention of "flipping their license" for a quick profit rather than providing service. The spectrum is a public resource. Congress entrusted the Commission with the duty to manage the spectrum intending that we work to assign it to people who will promote the public interest. Our anti-trafficking rules require cellular licensees to provide service for one year before selling their license. This furthers Congress's goal, and does not seem too much to ask of those privileged to hold a cellular license. Nonetheless, the Commission eliminates this rule today.

- *The majority allows serving only "roamers" to count as rural service*. Our rules currently state that "[a] cellular system is not considered to be providing service to subscribers if . . . the system intentionally serves only roamer stations."[5] By eliminating this rule, the majority now allows a carrier to serve no local residents of a rural area, but only people roaming while driving through. Rural communities are already at a disadvantage when it comes to wireless service. In many areas around the country only the major highways are covered, leaving communities off these highways unserved. By saying that a carrier can claim that an area they promised to serve in its license application is being served by denying all but roamers access to wireless services, we are further undermining rural service.

For all these reasons, I will approve this Order in part and dissent in part. I do want to thank the Bureau for its hard work in tackling these issues and I am pleased that I am in agreement with some, but not all, of its recommendations.

[5] 47 C.F.R. § 22.946.