STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
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, *Second Report and Order*, FCC 07-132

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.

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[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).

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 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 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

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[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.

[8] *Id*. at 157.

[9] *Id*. at 155.

[10] *Id*.

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 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

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

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

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[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.*

together consumer groups, industry and all interested parties to broker a private sector solution to any perceived imperfections. The 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.