STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND CONCURRING IN PART

Re: *Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz Bands*, Report and Order, GN Docket No. 13-185

After five years without a major spectrum auction, things are starting to turn around. Last month the Commission completed the auction of the long-fallow H Block, and today we adopt service rules so that we can auction off the AWS-3 spectrum before the year is over. This is good news.

It's good news because consumer demand for mobile broadband services has never been greater, and new commercial spectrum is needed to "fuel the investment that has made the United States the world leader in wireless innovation."[1]

And it's good news because spectrum auctions can raise billions of dollars for national priorities identified by Congress in the Spectrum Act. Among those priorities are funding for state and local first responders, public safety research, deficit reduction, and next-generation 911 deployment—not to mention the funding of FirstNet.[2] We need to raise at least $27.95 billion in net revenues if we are going to meet all of these challenges.

Even more good news: We're using the right type of auction to sell off the right spectrum. On the former point, we are maintaining open eligibility and uncapped participation, consistent with the Commission's firmly-rooted standard that sets a high bar to any bidding restrictions.[3] In a long line of Commission cases, we have determined that eligibility restrictions may be imposed "only when open eligibility would pose a significant likelihood of substantial harm to competition in specific markets and when an eligibility restriction would be effective in eliminating that harm."[4]

On the latter point, we've paired the 1755–1780 MHz band with the 2155–2180 MHz band, which is adjacent to the existing AWS-1 band and already internationally harmonized for commercial use. Those characteristics should mean faster deployment and more efficient use of spectrum. Together, these

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[1] Letter from House Energy and Commerce Committee Federal Spectrum Working Group to Lawrence Strickling, Assistant Secretary of Commerce for Communications at 1 (July 10, 2012), *available at* http://go.usa.gov/gQ5d.

[2] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 § 6413(b) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1457(b).

[3] *See, e.g.*, *Service Rules for Advanced Wireless Services in the 2000–2020 MHz and 2180–2200 MHz Bands*, WT Docket Nos. 12-70, 04-356, ET Docket No. 10-142, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, 16193, para. 241 (2012) (*AWS-4 Order*); *see also Service Rules for the 698–746, 747–762 and 777–792 MHz Bands*, WT Docket No. 06-150, Second Report and Order, 22 FCC Rcd 15289, 15383-84, para. 256 (2007) (*700 MHz Second Report and Order*); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14227–32, paras. 165–76 (2004); *Allocations and Service Rules for the 71–76 GHz, 81–86 GHz and 92–95 GHz Bands*, Report and Order, 18 FCC Rcd 23318, 23346, para. 69 (2003) (*70/80/90 GHz Order*) ("[E]ligibility restriction [may] be imposed only when there is significant likelihood of substantial harm to competition in specific markets and when the restriction will be effective in eliminating that harm.").

[4] *AWS-4 Order*, 27 FCC Rcd at 16193, para. 241; *see also 700 MHz Second Report and Order*, 22 FCC Rcd at 15383–84, para. 256; *70/80/90 GHz Order*, 18 FCC Rcd at 23346, para. 70.

choices make it more likely that we will have "robust competition, maximizing revenue through vigorous auction participation,"[5] as called for by the leaders of the bipartisan Congressional Spectrum Caucus.

But there are a couple of catches: We are not clearing federal users out of the AWS-3 spectrum, and we are giving the government greater access to 85 MHz of prime, commercial spectrum at 2025–2110 MHz. We do this despite that fact that the federal government is already the sole or "dominant" user of more than half the spectrum ideally suited for mobile broadband. That's almost 1,300 MHz of spectrum where, as the President's Council of Advisors on Science and Technology (PCAST) put it, government exclusivity or dominance "effectively precludes substantial commercial use."[6]

This is bad news for the American public. The best way to maximize the value of spectrum in these types of bands, both at auction and for consumers, is to make it available for exclusive commercial use. That's what we did in the early 2000s when the FCC and the National Telecommunications and Information Administration (NTIA) cleared federal users out of the 1710–1755 MHz band and conducted the tremendously successful AWS-1 auction. Clearing that spectrum cost less than originally assumed even without giving the government new spectrum to use. So consumers got more spectrum, and the Treasury got more funds.

Since then, Congress has placed even greater emphasis on clearing. In a subsection titled "Relocation Prioritized Over Sharing," the Spectrum Act directs the NTIA to "choose options involving shared use only when it determines, in consultation with the Director of the Office of Management and Budget [OMB], that relocation is not feasible because of technical or cost constraints."[7] And if NTIA makes that determination, it *must* "notify [Congress] of the determination, including the specific technical or cost constraints on which the determination is based."[8] Consistent with these statutory requirements, the *AWS-3 NPRM* proposed to allocate the 1695–1710 and 1755–1780 MHz bands for shared use only "if clearing is not feasible."[9]

The NTIA has not carried out these statutory duties—at least not yet. Although the Commission commenced the notification-and-auction process of the Commercial Spectrum Enhancement Act more than one year ago,[10] NTIA has not yet notified Congress of its determination—assuming that one has been made in consultation with OMB.

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[5] *See* Letter from Hon. Brett Guthrie and Hon. Doris Matsui to Hon. Tom Wheeler, Chairman, FCC (Mar. 25, 2014), *available at* http://go.usa.gov/KFhw.

[6] *See* President's Council of Advisors on Science and Technology, Report to the President: Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth (rel. July 20, 2012) (PCAST Report); *see also Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz Bands*, GN Docket No. 13-185, Notice of Proposed Rulemaking and Order on Reconsideration, 28 FCC Rcd 11479, 11579–80 (2013) (Statement of Commissioner Ajit Pai, Approving in Part and Concurring in Part) (*AWS-3 NPRM*) (citing National Telecommunications and Information Administration, United States Frequency Allocations: The Radio Spectrum (Aug. 2011)).

[7] Spectrum Act § 6701(a)(3) (amending Section 113(j) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. § 923)).

[8] Spectrum Act § 6701(a)(3), codified at 47 U.S.C. § 923(j)(2).

[9] *AWS-3 NPRM*, 28 FCC Rcd at 11482, para. 2.

[10] *See* Letter from Julius Genachowksi, Chairman, FCC, to Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, at 1 (March 20, 2013), *available at* http://go.usa.gov/2VR5; *see also* Testimony of Commissioner Ajit Pai, Hearing before the U.S. Senate Committee on Commerce, Science, and Transportation, "Oversight of the Federal Communications Commission" at 2–3 (Mar.

And it's far from certain whether clearing the 1755–1780 MHz band was ever seriously considered under the Spectrum Act standard. As the Commission readily acknowledges in this *Order*, NTIA charged the Commerce Spectrum Management Advisory Committee (CSMAC) working groups with "addressing sharing issues" related to the spectrum at hand, not clearing.[11] It also directed those groups to use NTIA's Fast Track Report "as the bases for beginning" their discussions,[12] even though that Report was prepared to assess the feasibility of sharing, not clearing.[13] And on the heels of this directive came the PCAST Report, which largely dismissed clearing as an option, as I noted at the time.[14] These decisions beg the question of whether the law is effectively a dead letter.

None of this is to say that clearing and relocating federal users is easy. Federal agencies are focused on achieving their missions. And they often lack incentives to relocate and clear spectrum for commercial use. But whatever the challenges, the statute favors clearing, not sharing.

The fact that NTIA has yet to publicly determine that clearing these bands is not feasible puts us in a tight spot. We have a statutory deadline to auction and license the AWS-3 band, so we need to move forward with service rules so that wireless operators can begin planning their bids. But coming up with service rules requires a fair degree of clarity on the status of federal holdings. Getting that clarity, in turn, requires extensive communications with federal users, with NTIA as the go-between. So we end up in a game of telephone, made worse because we typically have to accept the government's say-so on the details of federal use.[15] I hope we may find a better way, but for now we must muddle through.

I thank my colleagues on both sides of the aisle for accommodating some of my suggestions, such as including in this item a mechanism that will allow us to monitor the progress being made by those

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12, 2013) (calling on the Commission to "commence the notification-and-auction process now to preserve our ability to auction the 1755–1780 MHz spectrum paired with the 2155–2180 MHz spectrum"), *available at* http://go.usa.gov/2Vj3.

[11] *Order* at para. 9.

[12] *See* U.S. Department of Commerce, National Telecommunications and Information Administration, Framework for Work within CSMAC, *available at* http://go.usa.gov/KMXC (NTIA Framework); *see also* U.S. Department of Commerce, An Assessment of the Near-Term Viability of Accommodating Wireless Broadband Systems in the 1675–1710 MHz, 1755–1780 MHz, 3500–3650 MHz, 4200–4220 MHz, and 4380–4400 MHz Bands at 2-3–2-4 (Oct. 2010), *available at* http://go.usa.gov/KM9z (Fast Track Report).

[13] Fast Track Report at 1-4 ("NTIA and the Federal agencies performed this Fast Track Evaluation . . . to evaluate four bands by October 1, 2010, to determine if any spectrum in these bands could be made available on a geographical sharing basis for wireless broadband use within five years."); *see also id.* ("This Fast Track Evaluation provides the analysis results for these candidate frequency bands and recommends the necessary actions that would be required to accommodate broadband wireless services on a shared basis.").

[14] *See* Statement of Commissioner Ajit Pai on the Report of the President's Council of Advisors on Science and Technology (July 20, 2012), *available at* http://go.usa.gov/KMaQ.

[15] In fact, the majority of the CSMAC members stated that "because only limited technical data was shared about Federal systems with the working groups, participants were not able to fully engage in the type of informed discussion of the analysis and underlying assumptions necessary to verify the accuracy of the information." *See* Separate Statement Concerning Working Group Reports for the 1755–1850 MHz Band (Aug. 29, 2013) *available at* http://go.usa.gov/KM9P. I should note as well that NTIA's Fast Track Report deferred making any recommendations regarding the 1755–1780 MHz band, and when NTIA later assessed the full 1755–1850 MHz band—reaching the conclusion that repurposing the entire 95 MHz would cost $18 billion over 10 years—NTIA did not evaluate the possibility for clearing just the 1755–1780 MHz band. *See* U.S. Department of Commerce, An Assessment of the Viability of Accommodating Wireless Broadband in the 1755–1850 MHz Band (Mar. 2012), *available at* http://go.usa.gov/KM9G.

federal incumbents that are relocating. As we move closer to auctioning this spectrum, I look forward to working with my colleagues to ensure that federal incumbents provide thorough, substantive, and substantiated transition plans. Potential licensees must have adequate information about the nature and extent of incumbent operations in order to value the spectrum and formulate bids.

Finally, I cannot approve of the *Order*'s adoption of an interoperability mandate on AWS-3 licensees given that the *AWS-3 NPRM* never proposed such a rule.[16] Nevertheless, because that mandate only spans the 1710–1780 MHz and 2110–2180 MHz bands, and because international standards to cover those bands are already being developed, I hope that error will be harmless.[17]

Many thanks to the team that negotiated for countless hours with their executive branch counterparts, drafted this item, and worked with my office over the past several weeks, including Richard Arsenault, Valerie Barrish, Peter Daronco, Connie Diaz, Nese Guendelsberger, David Horowitz, Bill Hueber, Julius Knapp, John Leibovitz, Paul Malmud, Gary Michaels, Tom Mooring, Brian Regan, Ron Repasi, Bill Richardson, Genevieve Ross, Blaise Scinto, Roger Sherman, John Spencer, Joel Taubenblatt, Jeffrey Tignor, Tom Tran, Brian Wondrack, Janet Young, Nancy Zaczek, and Stephen Zak. I hope your tireless efforts are rewarded with a successful AWS-3 auction later this year.

[16] At best, the *AWS-3 NPRM* sought comment on possible technical or operational rules that would protect certain services "from harmful interference." *See AWS-3 NPRM*, 28 FCC Rcd at 11517, para. 85; *Order* at para. 225. But that section proposed to adopt the same technical requirements for AWS-3 that apply to AWS-1, and AWS-1 has no interoperability mandate. Neither that paragraph, nor any other portion of the *AWS-3 NPRM*, discusses or proposes an interoperability rule.

[17] Of course, expanding that mandate to other spectrum bands may be positively harmful, and there is no emergency, to my knowledge, that could countenance such a violation of the Administrative Procedure Act.