

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Further Notice of Proposed Rulemaking, GN Docket No. 12-354

To those familiar with spectrum policy, it should be no surprise that federal incumbents aren’t the most efficient users. The 3.5 GHz band is a case in point—relatively minor use of that band along the nation’s coasts has left the majority of this spectrum under-utilized for decades. Now it’s time to put it to work for consumers. As I observed when we launched this proceeding,¹ a simple test must guide our approach: What works? Can our proposals for the 3.5 GHz band be implemented in the real world? Can consumer products be brought to market in a timely manner? We must approach the 3.5 GHz band from a practical perspective, not merely a theoretical one.

When viewed through this lens, today’s item is a mixed bag, and I therefore will be voting to concur. I am pleased that our proposals have improved in some respects over the course of the last sixteen months. For example, while the 2012 NPRM proposed that the Commission set aside the entire category of tier two priority access authorizations for a small and defined set of preferred users, today’s item moves in a different direction. It liberalizes access to the band and proposes that any entity should be eligible to hold a priority access authorization. The item finds that open eligibility will promote more intensive use of the band and promote investment in new small cell technologies that could make 3.5 GHz a success. That’s the right approach.

Unfortunately, much of this item is “*déjà vu* all over again” as Yogi Berra once put it, and represents a disappointing lack of progress. The foremost problem involves exclusion zones. Back in 2010, when the National Telecommunications and Information Administration (NTIA) first identified the 3.5 GHz band for possible commercial use, the agency drew enormously large protection zones around the federal incumbent users. It developed these zones based on its analysis and modeling of a specific type of commercial use—one that involved high-power, high-site, macro-cell deployments.

In light of NTIA’s determination, our 2012 NPRM declined to pursue a macro-cell approach for the 3.5 GHz band. Instead, we sought comment on low-power, small cell deployments.² Because this kind of network architecture is vastly different from traditional deployments, we noted that some key NTIA assumptions would “not apply and would need to be revisited.”³ We indicated our view that those 2010 exclusion zones could be reduced significantly in light of our small cell proposal. And we asked commenters to perform and provide the technical analyses that would be necessary to do so.⁴

They did. The private sector took up the Commission’s call and supplied us with detailed and unchallenged technical analyses showing that NTIA’s 2010 exclusion zones can be dramatically reduced for small cell deployments.⁵ The calculations performed by Qualcomm have been particularly helpful.

¹ See *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550–3650 MHz Band*, GN Docket No. 12-354, Notice of Proposed Rulemaking, 27 FCC Rcd 15594, 15658 (2012) (Statement of Commissioner Ajit Pai).

² See, e.g., *id.* at 15597, para. 6.

³ *Id.* at 15633, para. 118.

⁴ See, e.g., *id.* at 15629–34, paras. 109–18.

⁵ See, e.g., Letter from John W. Kuzin, Senior Director of Government Affairs – Regulatory, Qualcomm, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-354 (Apr. 15, 2014) (Qualcomm *Ex Parte* Letter); see also Qualcomm Comments at iii, 17 (Feb. 20, 2013).

They show that NTIA's exclusion zones, which reached a maximum of 346 miles, can be reduced to less than 10 miles for small cell deployments.⁶

But unfortunately, the FCC has not done its part. Today's item does not incorporate the un rebutted technical evidence showing that the 2010 exclusion zones can be dramatically reduced while still protecting incumbent federal users—evidence we asked parties to submit. In fact, the Commission refuses even to seek comment on that analysis and simply proposes to codify the 2010 exclusion zones. Instead of going where the facts take us, the Commission double downs on where they don't. To be clear, the Commission does not simply seek comment on this issue. It proposes to adopt those zones as rules.

This is surprising for two basic reasons. First, I have yet to hear from anyone who believes NTIA's 2010 exclusion zones are appropriate for the type of small cell uses we're proposing for this band. Indeed, even NTIA did not propose that the Commission adopt those zones for small cell use cases. Its Fast Track Report included the express caveat that NTIA would "need to revise the analysis" for any use case other than the high-power one it studied.⁷ Similarly, the 2012 PCAST Report explained that those zones would be necessary for high-power, wide-area uses but concluded that low-power uses greatly minimize the need for exclusion zones and could even eliminate them entirely.⁸

Second, I have serious concerns about what the item's proposed exclusion zones mean for the success of the 3.5 GHz band. I noted at the outset of this proceeding that a decision to adopt those zones would mean that 60 percent of the U.S. population would be prohibited from using 3.5 GHz devices. I explained that this was particularly troublesome because the substantial majority of spectrum-limited markets in the U.S. would fall within those zones. And now the record indicates that the band simply "would not be commercially viable" were the 3.5 GHz band only available for consumer use outside of those 2010 zones.⁹

So, to summarize: The entity that drew the 2010 exclusion zones did not recommend that they apply here; PCAST found that they are not needed for small cell deployments; the unchallenged record evidence shows that they're unnecessary to protect federal incumbents; and no one that I'm aware of believes that they make sense for the use cases we're considering. Nonetheless, we once again propose to codify them.

Going forward, the success of the 3.5 GHz band depends on shrinking the proposed exclusion zones. I hope interested parties take advantage of the Commission's characterization of this proposal as a "starting point" and, once again, share their ideas and analysis on how to accomplish that goal.

Beyond the exclusion zones, I have additional concerns regarding some of today's proposals. For instance, I question the proposal to impose a hard, 30 MHz cap on the amount of priority access spectrum that any one entity can hold. Similarly, I question the item's proposal to carve out 20 MHz of spectrum as a set aside for certain groups of preferred users. I am skeptical that these attempts to pick winners and losers will serve the public interest.

Notwithstanding these concerns, I look forward to learning from the record that will be compiled as a result of today's item. And I hope we meaningfully improve our proposals so that American consumers will be able to benefit from the 3.5 GHz band. In this sentiment, I take inspiration from another of Yogi Berra's wise aphorisms, "It ain't over 'til it's over."

⁶ See Qualcomm Comments at 17 (Feb. 20, 2013).

⁷ See NTIA, *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 1–7* (2010).

⁸ 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 at 7 n.33* (July 20, 2012); see *id.* at 51.

⁹ See, e.g., Qualcomm *Ex Parte* Letter at 1.