

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Policies Regarding Mobile Spectrum Holdings*, Report and Order, WT Docket No. 12-269

Today's order effectively replaces our centuries-old belief in the American free market system, as embodied in the Commission's auction process, with one that seeks to produce a specific outcome to benefit a select few. I am sure some will assert that this market manipulation is all in the "public interest," but I can't agree with such an argument or the resulting outcome.

At the heart of the item is an enormous thumb the agency places on the scale of future secondary market transactions involving low-band spectrum and, most concerning, the upcoming Broadcast Incentive Auction. Substituting the proven success of market-based spectrum allocation with the Commission's subjective judgment goes against the spirit and, more importantly, the letter of the law. It also will result in consumer-harming inefficiencies, and could readily lead to a failed Incentive Auction. Accordingly, I strongly dissent.

The Spectrum Act directs the Commission to set up a market mechanism to determine the highest valued use of the 600 MHz band.<sup>1</sup> A free and unfettered market is critical to the Incentive Auction. It will determine whether broadcast or wireless broadband is the best economic use of this spectrum and it will allocate new licenses among wireless providers. The revenues raised should also fund the First Responder Network Authority, the Next Generation 911 program and deficit reduction, among other Congressional priorities. With revenue so intrinsic to success, the statute specifically prohibits the Commission from excluding certain parties from participating in the auction, but it allows rules of general applicability for spectrum aggregation to guard against undue spectrum concentration in any market.<sup>2</sup> The language in the law was a hard-fought compromise. It was intended to prevent the exact circumstances now contained in the order: specifically targeting the two largest nationwide wireless providers. The item blatantly disregards the statute and sadly adopts the concept that the ends justify the means.

Throughout this rulemaking process, some companies have insisted that the Commission tip the scales in their favor in the upcoming Incentive Auction. We are told that the government must use this opportunity to correct a "historical accident" that has resulted in some providers claiming they need more low-band spectrum. And the order falls for this argument by effectively creating a set-aside within the Incentive Auction for these parties. Specifically, the item states that once the final stage rule is met, any bidder that is a nationwide service provider and holds 45 megahertz or more of spectrum below 1 GHz will be precluded from bidding on a certain amount of "reserved" spectrum. In contrast, the non-restricted bidders are free to bid on all available spectrum—reserved and non-reserved—regardless of their total spectrum holdings.

But what some call correcting a "historical accident,"<sup>3</sup> I call corporate welfare for certain multinational companies with large market capitalizations and access to global capital markets. In some cases, the companies also have strong backing by foreign governments. Why, with so much riding on the

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<sup>1</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 126 Stat. 156, 224-230 (2012).

<sup>2</sup> *Id.* § 6404, 126 Stat. at 230.

<sup>3</sup> *See, e.g.*, Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Tammy Duckworth, Member, U.S. House of Representatives (Apr. 17, 2014); Kate Tummarrello, *FCC Chief Defends Plan to Limit Large Carriers in Auction*, THE HILL, Apr. 17, 2014, <http://thehill.com/policy/technology/203822-fcc-chief-defends-limits-in-airwave-auction>.

success of this auction, would the Commission add to the complexity and risk lowering auction revenues in order to allow a favored few to buy this spectrum at below-market rates? If this set-aside is so critical to wireless competition, why may it only be triggered if the Commission hits a certain revenue target?

Over the years, wireless providers have made deliberate and strategic decisions regarding when they should and should not participate in various auctions (including low-band spectrum auctions), when and where to invest and build, whether to focus on urban or rural markets, and what mergers or secondary market transactions to enter into. Where the various companies are today is a direct result of such decisions, not by accident. Some companies now want a spectrum subsidy to acquire the same kind of low-band spectrum that they passed on previously in favor of high-band frequencies.

Free market spectrum auctions award licenses to those who value the spectrum the most and will put it to its greatest use. In attempting to equalize outcomes between competitors, unintended consequences may result and consumers may not receive the benefits of the best the marketplace has to offer. Even if these set-asides do not tank the Incentive Auction, we will never know the full opportunity cost of these decisions, *i.e.*, the counterfactual. How much money could the auction have raised without intervention? Would non-favored companies, if allowed to bid freely and win, have provided consumers with superior products or services? We will never know the extent, but those societal losses are real. Today's action also penalizes American consumers who subscribe to the wireless providers confined to unreserved spectrum. Why should those consumers endure slower Internet speeds due to network congestion to satisfy an arbitrary policy goal?

There can be no justification for going down this path of picking winners and losers in the auction process. If the concern is spectrum concentration in a market, the spectrum screen addresses that issue. If rural markets are the top concern, as some claim, then why distort the highly competitive urban markets? If the concern is warehousing, that can be addressed through our build out rules that require licensees to invest in a network and serve customers by a date certain. If the claim is competitive foreclosure, show me the evidence, not abstract theoretical possibilities.

I hope that we will reverse course and hold a free and open auction in which all parties can compete for spectrum licenses equally. But as we go forward, licensees who obtain "reserved" spectrum should not look to me for any type of special relief, including any extensions of build out deadlines or sign off when they seek permission to "flip" their licenses.