

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
APPROVING IN PART, DISSENTING IN PART**

Re: *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, Order on Reconsideration and Second Report and Order*, GN Docket No. 12-354

The 3.5 GHz experiment has been touted as a potential new approach for spectrum allocation, enabling expanded use of certain bands where incumbents – often federal government agencies – are already using the frequencies. While I praised the concept of opening up this underused spectrum for additional uses, I expressed serious concerns about several sections – most important being the licensing structure of the Priority Access Licenses (PALs).¹ At the time, I noted that this structure was problematic and needed to be fixed.

The 3.5 GHz framework is based on a three-tiered hierarchy for spectrum access.² For this grand experiment to work, however, all three prongs need to be fully functional. Sadly, the Commission refuses to fix the PALs assignment mechanism, which is fundamentally flawed and undoes years of successful spectrum auction policy.

Specifically, PALs should be available in any census tract – even if there is only one entity interested in priority access. Not only does the record on reconsideration support this,³ but throughout this proceeding, many smaller wireless providers and entrepreneurs, including those in rural America, have told me that they seek priority and interference protection for their particular business plans. Further, many have stated that the certainty provided by a PAL is necessary to secure the funding needed to develop and deploy offerings in this band. I have also spoken to many GAA proponents who are supportive of providing PALs in any market in which they are sought, so long as the process does not preclude GAA use, which it does not.

The arguments put forth against resolving this issue are not compelling. A lack of multiple auction participants does not mean that the available GAA spectrum is sufficient to meet everyone's needs and, therefore, PALs are not necessary. Different business models have different spectrum needs. Some entities may be fine with GAA spectrum while others need quality and availability assurance. Issuing PALs to one entity will also not lead to inefficiencies or spectrum warehousing, as any spectrum that is not "in use" by a Priority Access licensee can be accessed by GAA so it doesn't necessarily lay fallow. Another argument is that multiple auction applicants in a market are likely, because established wireless providers tend to look for nationwide footprints. However, this is an "experiment" not a standard auction for exclusive use licenses, and I am not convinced the licensing rules will entice providers to

¹ *Amendment of the Commission's Rule with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, 4144 (2015).

² Incumbent users would be fully protected and guaranteed access, the Priority Access licensees would be next in priority, followed by the General Authorized Access (GAA) users who obtain access when there are no operating incumbents or PALs.

³ See, e.g., Petition for Reconsideration of CTIA, GN Docket No. 12-354 (July 24, 2015) ("CTIA Petition for Reconsideration"); Posting of Joan Marsh, Reaching a Sound 3.5 GHz Framework (Apr. 11, 2016 11:44am), attached to Letter from Stacey Black, Assistant Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-354 (Apr. 12, 2016) (Joan Marsh Blog Post); Opposition of The Wireless Internet Service Provider Association, GN Docket No. 12-354 (Oct. 20, 2015) (WISPA Opposition); Petition for Reconsideration of Motorola, GN Docket No. 12-354 (July 24, 2016).

express interest in multiple PALs in more than 74,000 census tracts. Finally, the argument has been made that priority access should not be permitted for free. But as I and others have stated,⁴ we can use our well-established auction processes to resolve this issue.

Unfortunately, some at the Commission have decided that the statute prevents this.⁵ However, there is a good argument to be made that a PAL is, by its very nature, mutually exclusive to GAA use, because these license types cannot coexist on the same frequencies.

And this point is consistent with our decision in the Incentive Auction order that only one application for a license is sufficient to meet our mutual exclusivity rules.⁶ In coming to this decision, one of the justifications was that broadcast and wireless use are mutually exclusive.⁷ While some may argue that the Incentive Auction is unique because it was mandated by law, Congress did not change our rules in regard to how we conduct our forward auctions. The Spectrum Act says that spectrum should be allocated for wireless use “through a system of competitive bidding under [309(j)]”⁸ and that auction revenues should be used, in part, to compensate broadcasters that surrender their licenses in the reverse auction, but this language in no way demands a special interpretation of our mutual exclusivity rule.

Moreover, even if there is mutual exclusivity for a first auction, there is no guarantee that it will exist in future auctions. Therefore, an entity that invests in and constructs a network based on priority access may not even be able to participate in a future auction to maintain its status. This could result in stranded investment. Some argue that the investment is still worthwhile because they would continue to have access to GAA spectrum, but, as I indicated before, some industry participants have clearly stated that GAA is not sufficient. Instead, they want functioning licenses that this sharing model was supposed to offer.

An equally disturbing problem with the current structure – and subject to numerous petitions in this item – is the lack of renewability and short license terms for PALs.⁹ It has been made clear by numerous wireless providers that the short license terms and lack of renewal, along with the auction structure, will inform their business decisions as to whether they should apply for PALs or whether it is even worth investing in and developing this band. The fact that Commission staff would not even entertain discussions on changing the lack of renewability and licensing term is so telling about how this Commission is run and the unwillingness to listen to worthwhile ideas.

Fundamentally, such a decision undoes decades of successful spectrum policy by the Commission. For example, the Commission has touted internationally the need for longer license terms

⁴ See, e.g., Petition for Reconsideration of John M. Peha, GN Docket No. 12-354 (July 24, 2015); Ex Parte Letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-354 (Apr. 27, 2016); see also WISPA Opposition.

⁵ Section 309(j)(1) of the Communications Act states that “if . . . mutually exclusive applications are accepted for any initial license . . . , the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding.” 47 U.S.C. § 309(j)(6)(E). The statute continues that nothing should be “construed to relieve the Commission of the obligation . . . to avoid mutual exclusivity in application and licensing procedures.” *Id.* § 309(j)(6)(E).

⁶ *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6760 ¶ 470 (2014).

⁷ *Id.* at 6761 ¶ 471.

⁸ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6401(b)(1)(B), 126 Stat. 222 (2012).

⁹ See, e.g., CTIA Petition for Reconsideration; Response of T-Mobile, GN Docket No. 12-354 (Oct. 20, 2016); Joan Marsh Blog.

and renewability as prerequisites for a successful spectrum action and widespread wireless deployment. In fact, this exact subject was raised by a number representatives of foreign nations during my visit to the ITU Plenipotentiary in 2014. At the time, certain countries were leaning towards short license terms and a reauction of licenses because they wanted another round of cash down the road. But such a policy misses an important concept relevant today: there will be a lack of interest in spectrum licenses upfront if there is no predictability and certainty regarding investments made by those seeking the licenses.

And I want to make it clear, to the extent that people suggest that this unproven and flawed experiment should be replicated in other spectrum bands, such as millimeter wave frequencies, that is a proposition that I will not support.

I also am unable to support some of the delegations in this item. For example, decisions about how to define PAL interference protections and contours and how congestion will be handled will be made by the Office of Engineering and Technology and Wireless Telecommunications Bureau when the applications are filed by SAS administrators. While I have confidence in the abilities of staff to do such analysis, such decisions that are crucial to the workings of the band should be voted on by the Commission.

In conclusion, I am unable to support these portions of the order. Although a compromise offer was put on the table by the Chairman to allow for one free PAL when there was no mutual exclusivity, it did not fix the problem and just wasn't enough to excuse all of the other flaws in the licensing process. Basically, by rejecting commonsense and generally supported changes to this "experiment," we have created a tier of licenses where there may be little to no incentive to participate. As it stands now, the band plan for 3.5 GHz is like a three-legged stool that could topple over because one key component is missing. Therefore, I must dissent on the two portions already discussed.