STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, CONCURRING 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); Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule (WT Docket No. 07-166); Second Report and Order

Today we set the ground rules for how some of the most valuable spectrum on earth will be used. The stakes are enormous. Will our decisions today make our nation's citizens safer in the event of an emergency? Will they increase the number and quality of wireless services available to American consumers—to ***all*** consumers, both urban and rural? Will they help correct America's dismal broadband performance?

Let's begin with public safety, because that's the most critical part of all this. As I have many times said, my first preference—by a long country mile—would have been a fully-funded, federally-funded public-safety-grade network reserved solely for first responders and built to the specifications they deem essential for their job of protecting you and me. At this late date, that is apparently not to be. In light of the options before us today, then, I believe that pursuing a shared public-private model—and trying to make it work—is the next best choice. There are no guaranteed outcomes here, but we have to find a way—finally—to get this done.

For far too long, our nation's first responders have struggled with the lack of interoperability. The terrible costs of this failure became tragically apparent in the aftermath of 9/11 and again following Hurricane Katrina. Today's item creates a framework for building a national broadband network, based on a common technical standard, that will allow universal interoperability among every jurisdiction in the country. This represents a tremendous step forward.

Our nation's first responders have struggled for too long without finding the capital necessary to build out a broadband network with the configuration and the features they so desperately need and deserve. Given where we are today, I think it is entirely appropriate to permit them to trade access to their spectrum during off-peak periods—but always with the ability to preempt commercial use during any time of need—in return for access to a public-safety-grade broadband network. This network will reach virtually all of the nation's citizens within 10 years. It will be constructed to the standards that public safety demands and expects. And it will harness the astonishing technological advances of the commercial wireless sector. If it works—and it's a ***big*** if—the American people will be appreciably safer.

Moreover, the shared network concept means that public safety will have access to 20 MHz of broadband spectrum in the event of an emergency, not just 10 MHz. This too is a difference that can save lives. Bandwidth matters; speed matters.

One additional benefit of creating a national public safety licensee is the effect it will have on the price and quality of equipment that first responders use. Today, we have thousands of public safety

agencies that deal with a handful of equipment manufacturers, so public safety doesn't have much protection against the higher prices big suppliers can charge for the tools public safety must have. Our first responders can't negotiate lower prices, nor can they drive technology development. Today's order changes that equation. It establishes a single public safety purchasing block. This will result in equipment that is both better and less expensive, exactly what our nation's first responders need. The item also ensures that the national public safety licensee—and not the commercial operator—will have the final word on which devices public safety users can attach to the network.

I appreciate my colleagues' willingness to work with me to build these many safeguards for public safety into today's order. But I also want to emphasize my belief that our work has really just begun. At the end of the day, we need to ensure that this network ***actually works for public safety.*** To me, this cannot and will not happen without strong and ongoing FCC oversight. I have believed this for years. Today we put the Commission in the middle of the public safety action—right where it should have been all along. When the parties reach a network sharing agreement, the license will be granted only if the full Commission concludes that the terms reached are in the public interest. If agreement has not been reached, the full FCC has the authority either to decide outstanding disputes or to select another commercial entity to negotiate a different network sharing agreement. After the license has been granted, there will inevitably be questions about what a particular provision means or whether it is necessary to adjust certain terms in the agreement. Again, the Commission will be at the table, and it will be there during the ensuing operation of the license, too.

Only a strong, active and involved FCC can hold the commercial licensee to the spirit, as well as the letter, of the network sharing agreement. I have no illusions that this process will be easy—but the stakes are just too high to give this effort anything other than the fullest measure of the Commission's effort.

Let's get one more thing on the table. The requirements we announce today are very demanding. Building this network will involve costs above and beyond those required to build a typical commercial network. But I think that these are the minimum process requirements necessary to ensure that the network actually works for public safety. If the stringency of the requirements we announce today means that no one shows up to bid on the commercial license, or that the two parties ultimately cannot reach an agreement that ends up being in the public interest, then I am perfectly willing to go back to the drawing board. I won't be happy if this happens, but I'm not about to cut corners if it means compromising public safety. Far better that public safety remains in control of its spectrum—and free to find another model for funding it—than for this Commission to bless a sharing arrangement that does not fully protect the nation's citizens and its first responders.

Let me turn now to the commercial side of this auction. There is a lot in this part of the Order of which we can be proud—but here, too, there are no guarantees and some last-minute changes give me considerable pause. First, the good news. I commend the Chairman's leadership on the *Carterfone* issue. Six months ago, *Carterfone* was a term of largely historical interest—an important and venerable decision, to be sure, but hardly on the tips of most policymakers' tongues. Even four months ago, when I called for a general rulemaking on how *Carterfone* could be applied to the current wireless marketplace, I had little hope that such principles would be codified in our wireless rules anytime soon.

Now, within just the last month, *Carterfone* and wireless open access have been on the front pages of *USA Today*, the *New York Times*, and the *Washington Post*. They have been the subject of Congressional hearings and industry and academic policy forums, as well thousands of emails and letters to the Commission from citizens across the country. What a striking reminder of just how powerful a good idea can be—especially when coupled with strong Congressional oversight and grass roots activism. I find it extremely heartening to see that an academic paper—in this case by Professor Timothy Wu of

Columbia Law School—can have such an immediate and forceful influence on policy. Credit is due to Professor Wu as well as many tireless advocates in the public interest and high-tech communities for bringing this idea to the fore. As Congressman Ed Markey, who has been a true trail-blazer here, put it: *Carterfone* "result[ed in] … incredible innovation and [was] an unquestioned policy success. The FCC has a rare chance to foster similar innovation in the wireless marketplace in the upcoming auctions." Wireless *Carterfone*, in short, is an idea whose time has come.

It is especially heartening to see wireless open access getting so much attention because I am a true believer in openness and decentralization when it comes to ***all*** of the industries this Commission regulates. Whether we're talking about media ownership, the future of the Internet, video distribution, or ownership of wireless and wireline assets, I believe that reducing the power of gatekeepers and increasing the intensity of competition is the right policy call. It's the right call because it returns power to consumers and entrepreneurs and limits incumbents' power to extract monopoly or oligopoly rents. The device and application openness principles that today's Order implements for 22 MHz of the commercial spectrum will mean more choices, better services and lower prices. They will permit entrepreneurs to innovate without asking somebody else for permission—just as the developers of the fax machine, dial-up modem, and Wi-Fi router did.

Of course, as with so much of the Commission's work, the devil will be in the details. It is especially important that today's item gives consumers, device manufacturers, and other interested parties a right to seek redress if the C-block licensee seeks to discriminate against them. I believe that this case-by-case approach strikes the appropriate balance between preventing harm to the network and giving teeth to our anti-discrimination mandate. Justice delayed is often justice denied, the old adage says, and that is why I am happy that we announce today a 180-day shot clock for Commission enforcement decisions.

Even though the device and application openness principles are indeed good news, the Order does not go far enough in one important respect. We all know that America's broadband performance leaves a lot to be desired. To me, the culprit is clear: a stultifying lack of competition in the broadband market, which in the words of the Congressional Research Service is a plain old "cable and telephone . . . duopoly." A 22 MHz block of 700 MHz spectrum is uniquely suited to provide a broadband alternative, with speeds and prices that beat current DSL and cable modem offerings. Maybe this can happen yet in this spectrum, but by declining to impose a wholesale requirement on the 22 MHz C-block, the Commission misses an important opportunity to bring a robust and badly-needed third broadband pipe into American homes.

A wholesale requirement would have been sound policy for several reasons. First, requiring licensees to offer network capacity on non-discriminatory terms would have been an enormous shot in the arm for smaller companies—including those owned by women and minorities—that aren't interested in or capable of raising the huge sums necessary to build a full-scale network. Smaller entrepreneurs deserve an alternate path to wireless access. Wholesale would have been good news for them—and for consumers.

Second, a wholesale requirement would have leveled the playing field for companies that want to get into the network business but cannot break through the defenses erected by the massive incumbents who dominate the industry. It is not hard to see why companies with extensive networks and millions of customers are generally able to outbid new entrants, even deep-pocketed ones. After all, the incumbents are (quite rationally) willing to pay an enormous "blocking premium" just to discourage new competitors. And their existing network infrastructure gives them a huge cost advantage when it comes to building a new network. Our current spectrum rules are tilted too much toward companies with built-in, competition-killing advantages.

Moreover, due to the Commission's short-sighted decision a few years ago to eliminate spectrum caps, we have seen a wave of consolidation among wireless incumbents that has substantially increased the hurdles facing potential new entrants. And now we live in a world where the two leading ***wireless*** companies are owned in whole or in part by the leading ***wireline*** telephone companies. It is no knock on these companies to say that they may be more than a little reluctant to employ their spectrum holdings to put price and quality pressure on their wireline broadband products. What else would we expect them to do? The solution is to encourage an additional wireless competitor that has no affiliation with a wireline provider. A wholesale requirement would have given unaffiliated companies the fighting chance they need.

Third, the record in this proceeding clearly demonstrates a strong business case for the wholesale model. Some parties initially raised doubts about whether a wholesale business model could be economically self-sustaining. I believe that the record compiled in this proceeding answers that question. Several sophisticated companies and financial institutions have concluded that wholesale is indeed a viable economic model.

I think it is very good news for consumers that we adopt build-out requirements in this band that are among the strongest and most innovative that we have ever adopted. Use-it-or-lose-it provisions, along with geography-based benchmarks in the lower band, will ensure that licensees have a reasonable period to make use of their spectrum rights, while also allowing third parties a chance to provide service in areas where the original licensees are not. In one respect, I would have gone further. I believe that Commissioner Adelstein's proposal that licensees who have met their 10-year benchmark should still be subject to "triggered" use-it-or-lose it provisions—because if a competitor is willing to make use of remaining unused spectrum, it should have the right to do so. Spectrum is too valuable a resource to allow it to lay fallow.

My deepening concern this afternoon is that this auction might not end up being the stimulus to a third pipe, the right to attach devices, to run applications and to encourage the innovation and entrepreneurship that we all hope for because of some add-on provisions. The item now imposes reserve prices on each of the individual spectrum blocks, something without precedent in previous auctions and something, it seems to me, rather at odds with letting the market pick the auction block winners. The procedure in this Order carries chilling risk to the success of the auction. If some of these blocks do not fetch the bid prices stipulated, perhaps because of gaming of the worst sort, they will be re-auctioned with weaker build-out requirements. If the 22 MHz block, where we hope for *Carterfone* open access principles, fails to elicit a $4.6 billion bid, it will be re-auctioned without *Carterfone* open access. In the end, all of this micro-managing virtually hands industry the pen to write the auction rules and to constrict all the opportunities this spectrum held forth. The end result could be: same old, same old. What a pity that would be!

In closing, we came farther on some things than many thought likely a few months, or even a few weeks, ago. There is much to approve in this Order. I will concur in two parts because wholesale open access is not stipulated and also because of the concerns I have discussed regarding how the micro-managed reserve pricing scheme could subvert the higher goals of the auction.

Many individuals and groups—too numerous to mention—worked hard to assist us in our deliberations on this proceeding. I do want to thank the Bureaus and particularly commend Chief Derek Poarch and Fred Campbell for their insights, vision, constant availability and just plain dogged determination to get to a promising result. I want to thank the public safety community who gave so generously of its perspective and counsel; consumer and advocacy groups that worked to make this more consumer- and democracy-friendly, and the many entrepreneurs and business leaders who shared their perspectives on how to make this effort viable. I thank my personal staff, particularly Bruce Gottlieb, for

his tireless efforts, and also the staffs of my colleagues. I am grateful to Chairman Martin for his vision and courage, and I thank each of my colleagues for their commitment to public safety and their yeoman work on this important proceeding. This has been a truly monumental effort. I hope it works. And I pledge my ongoing commitment to make that happen.