

**DISSENTING STATEMENT OF
COMMISSIONER GEOFFREY STARKS**

Re: *Amendment of Part 90 of the Commission's Rules*, WP Docket No. 07-100

Our public safety organizations face some of the most difficult circumstances in living memory. Millions of Americans have taken to the streets to protest for justice. Throughout California and the Pacific Northwest, crews are battling devastating wildfires. The tropical storms and hurricanes this season have ravaged certain regions of the United States. And the COVID-19 pandemic has claimed more than 200,000 lives so far this year, with 3 months still to go.

That's the context for today's decision. At a time when our public safety organizations are stretched to the limit and their communications needs are increasing, the Commission is adopting with no notice and comment an approach that is not only unwanted but runs contrary to years of public safety spectrum policy.

For nearly 20 years, the Commission has struggled to make efficient use of the 4.9 GHz band. At first glance, the band looks like a prime candidate for reallocation because of its apparent underutilization and mid-band location. But according to the National Public Safety Telecommunications Council, the band contains almost 4,000 incumbent fixed public safety sites and over 2,000 geographic licenses, each of which entitles the licensee to use the full 50 megahertz of 4.9 GHz spectrum throughout its entire jurisdiction.¹ In addition, while 4.9 GHz may be "mid-band" spectrum, it's far from a prime candidate for 5G in the United States. Indeed, the countries that are most actively using the 4.9 GHz band for 5G are Russia and China, and the major telecom equipment manufacturer of 4.9 GHz equipment is Huawei. We shouldn't be surprised that, in contrast to our other mid-band spectrum proceedings, we've received far less interest from commercial wireless users and providers.

Moreover, today's decision pursues an approach that comes out of the blue. Since this proceeding first began, the FCC has considered many different options to increase spectrum usage in the 4.9 GHz band while protecting critical public safety operations. It's black letter law that agencies must provide adequate notice and an opportunity to comment before adopting a rule.² But at no point have we ever proposed effectively delegating the Commission's spectrum authority over the band to state governments. I therefore already had serious concerns about whether the draft order circulated three weeks ago satisfied the Administrative Procedures Act.

If the original draft put us on the edge of a precipice, the current one drives us off the cliff. The final Report and Order now disqualifies states from participating in the State Lessor model if they engage in "911 fee diversion," a concept that another item on today's agenda frames for debate. This proceeding has never sought comment on that issue or anything like it, and there is no way that commenting parties, and the governments, public safety organizations and citizens that will be adversely impacted, would have

¹ Comments of the National Public Safety Telecommunications Council, WP Docket No. 07-100 at 8 (filed July 6, 2018).

² See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' ... The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a 'logical outgrowth' of the rule proposed.' The object, in short, is one of fair notice.") (internal citations omitted).

reasonably known to comment on the idea.³ This approach is facially deficient as a matter of administrative law.

Beyond serious procedural flaws, this decision is likely to have serious policy consequences. By pushing management of the 4.9 GHz band to the states, the majority risks creating dozens of inconsistent approaches to this valuable spectrum resource. States have vastly different interests and levels of spectrum expertise, and will undoubtedly take different approaches to issues like interoperability, security, and interference protection. As a result, public safety usage of the 4.9 GHz band may actually become less efficient, secure, and reliable—even as commercial interest remains meager at best.

I recognize that the 4.9 GHz band presents a difficult challenge. But I wish that we had withdrawn this item to work on fully addressing the public safety community's concerns. This isn't the moment to take chances with critical public safety spectrum. I dissent.

³ See, e.g., *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) (“[A rulemaking] must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking. Indeed, unfairness results unless persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake.”) (citations and internal quotation marks omitted); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 533 (D.C. Cir. 1982)) (“[A] final rule is not a logical outgrowth of a proposed rule ‘when the changes are so major that the original notice did not adequately frame the subjects for discussion.’”).