

**STATEMENT OF COMMISSIONER MIGNON L. CLYBURN
CONCURRING IN PART; DISSENTING IN PART**

Re: *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, GN Docket No. 14-177; Establishing a More Flexible Framework to Facilitate Satellite Operations in the 27.5-28.35 GHz and 37.5-40 GHz Bands, IB Docket No. 15-256; Petition for Rulemaking of the Fixed Wireless Communications Coalition to Create Service Rules for the 42-43.5 GHz Band, RM-11664; Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services, WT Docket No. 10-112; Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations, IB Docket No. 97-95*

When I voted to approve the first order allowing mobile flexible use in the upper microwave bands, I commended the Commission for shifting from the conventional model of exclusive, indefinite licenses to trying novel approaches such as use or share rules for these bands. I said that applying creative policy to the spectrum bands above 24 GHz would unleash innovation, spur additional competition, and incite boundless creativity.

Unfortunately, my excitement for this proceeding is now subdued because, by adopting this Order, the Commission's majority turns its back on promoting competition and innovative spectrum policy. Last year, the agency adopted a pre-auction limit so that no entity could acquire more than roughly one-third of the spectrum in the 28, 37, and 39 GHz bands. There was substantial support from the commercial wireless industry for limits in those bands, including two of the top four nationwide wireless carriers, smaller carriers, and consumer advocates. In the first Further Notice, the Commission also proposed to impose a similar limit on the amount of spectrum any one entity could acquire in the 24 and 47 GHz bands. Many commenters support this proposal as well.

In an attempt to understand the majority's decision to reverse course on these pre-auction aggregation limits, allow me to start with the current state of the industry and the Communications Act's mandates. The commercial wireless industry is highly concentrated. For antitrust purposes, the U.S. Department of Justice, or DOJ, uses the well-known Herfindahl-Hirschman index (HHI). DOJ classifies markets with an HHI of less than 1500 as unconcentrated and markets with an HHI of over 2500 as highly concentrated. The HHI index for the commercial wireless market has been increasing every year. It is now over 3100.

Spectrum is a critical input to competition in this market. For this reason, Section 309(j) of the Communications Act requires the Commission to design auctions to prevent the excessive concentration of licenses and disseminate licenses among a wide variety of applicants. A pre-auction spectrum aggregation limit is a neutral way to prevent the largest wireless companies from acquiring so much spectrum that smaller companies cannot offer competitive options to consumers. This is why I strongly supported the Commission's adoption of spectrum aggregation limits in the incentive auction and in this proceeding.

So why does the majority reverse those decisions here? Their primary reason is that we are making 4950 megahertz of millimeter wave spectrum available for flexible mobile use. Relying on this amount of spectrum is not enough to ensure licenses are distributed widely through the industry. Companies have said that wide blocks consisting of 100s of megahertz of spectrum are necessary to attain

the data speeds and capacity requirements of wireless 5G uses. Given the importance of these spectrum bands to the future of the commercial wireless industry, the large wireless companies have the same incentives to acquire dominant holdings here as they did with low-band spectrum. Removing spectrum aggregation limits will likely lead to even greater concentration in the market, therefore, I am unable to support this policy reversal.

Second, today's Order declines to permit use or share in almost all of the Part 30 bands. Last year, when we proposed this policy, we spoke about the potential benefits of this approach. Given the limited signal propagation characteristics, the likely use case of millimeter wave spectrum is targeted, geographically-limited coverage, instead of traditional cellular-like deployment. That means these spectrum bands are ideal candidates for a use or share approach and this could help us maximize the efficient use of spectrum. The primary reason the majority refuses to permit this innovative spectrum policy is that a "majority of commenters opposed the idea of any use-or-share mechanism." The Order then cites 14 comments. But the public docket of this proceeding shows there are at least 16 other parties who support use or share. The Order also says "that there is only one terrestrial operator on the record as supporting use-or-share." But this finding ignores the fact that NCTA, the Wireless Internet Service Provider Association, and the Fixed Wireless Communications Council all support use or share. Together, those associations represent hundreds of communications companies, many of which are interested in using these bands to provide terrestrial mobile services. In short, the majority misreads the record.

In addition, although the majority is quick to trumpet the importance of cost/benefit analyses in other contexts, the Order presents no real cost/benefit analysis on this issue. The Order simply lists general difficulties that might arise from implementing a use or share regime that a spectrum database would coordinate. But when you consider that the industry is making substantial progress towards implementing a similar approach in the 3.5 GHz band, this argument rings hollow.

While the majority would have you believe that the record clearly supports its decision to not permit use or share, a fair and objective review of the record tells a much different story. The established commercial mobile wireless providers would prefer the Commission use the same licensing approach that accompanied traditional cellular deployment – exclusive, long-term licenses. Even though this spectrum band is not conducive to traditional cellular deployment, the majority once again demonstrates in this proceeding that they will take whatever steps are necessary to give large established wireless providers whatever they want.

Despite my strong disagreement on those two important issues, I concur with the other portions of the item. I thank my colleagues for agreeing to my edits on several issues including: the size of the blocks in the 24 GHz band, declining to prohibit use or share in the 37.0 to 37.6 GHz, and seeking comment on the proposal to impose operability on the 24 GHz band.

I have consistently said, that to fully realize the promise of 5G technology, we should take an all-of-the-above approach. By all-of-the-above, I mean ensuring that low-income communities in urban and rural areas benefit as much or more than more affluent communities in urban, rural, and suburban areas. I also mean that both satellite and wireless communications should be part of the evolution towards 5G services and that we should allocate sufficient unlicensed and licensed spectrum. This is a delicate balancing act but it is one we must always strive to achieve.

I want to thank Don Stockdale, Julie Knapp, and Tom Sullivan and the staff at the Wireless Telecommunications Bureau, Office of Engineering and Technology, and International Bureau for their hard work on this item.