SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN, CONCURRING

Re: *AirCell, Inc., Petition, Pursuant to Section 7 of the Act, for a Waiver of the Airborne Cellular Rule, or, in the Alternative, for a Declaratory Ruling*, Order on Remand

I write separately – and concur in this item – because I am concerned with the manner in which the Commission analyzes harmful interference. The Commission has not developed a consistent methodology for such analyses, instead using a case-by-case, *ad hoc* approach. Not only does this approach cause a great deal of uncertainty for spectrum users and markets alike, it also creates another problem: the appearance of results-oriented decisionmaking.

Too often, a person reading a Commission order could be left with the impression that the Commission first makes a decision on whether to license some new technology and then creates a justification *post hoc* by manipulating the way it judges harmful interference. In this Order, for example, the Commission chose an interference threshold level of -117 dBm from a range of permissible choices after all testing had been conducted. This threshold level just happened to work perfectly when applied to the limited set of test data that the Commission retained (the Commission rejected the remaining test data). While I in no way wish to suggest that the Commission did, in fact, manipulate its methodology in order to achieve a desired result, there is a real risk that someone reading this item might be left with that impression.

The Commission's recent Order on Multichannel Video Distribution and Data Service (MVDDS) suffers from the same problem. *See Amendment of Parts 2 and 25 of the Commission's Rules To Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, ET Docket No. 98-206, RM-9147, RM 9245 (rel. May 23, 2002). There, the Commission seemed determined to license MVDDS, adopting interference standards that assured that conclusion. In the Commission's process of analyzing the degree of interference MVDDS would cause, the definition of harmful interference appeared to change, yet consistently allowed for MVDDS operation. In the end, as I noted in my separate statement on that Order, the interference rules the Commission ultimately adopted appeared completely arbitrary. *See id.*, Statement of Commissioner Kevin J. Martin, Dissenting in Part and Approving in Part. Among other things, the Order set EPFD levels that were not keyed to guaranty any specific level of interference protection and that would allow an increase in interference to DBS of more than 30 percent in some instances. *See id.* An objective person reading this Order could reasonably conclude that the Commission was determined to allow MVDDS to share DBS spectrum and developed interference rules to support that decision.

Orders such as these not only exacerbate regulatory uncertainty, they risk undermining public confidence in the Commission's work. We can and should do better. At the very least, we should develop a consistent framework for judging harmful interference. In particular, we should adopt a policy of identifying what degree of interference will be considered harmful prior to conducting engineering tests of how much interference a new service causes.