

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL,
DISSENTING IN PART**

Re: Service Rules for the 746-764 and 776-794MHz Bands, and Revisions to Part 27 of the Commission's Rules (Guard Bands), WT Docket No. 99-168, *Second Report and Order*

I support the decision in this *Second Report and Order* to establish firm technical rules for the "Guard Bands" in the 700 MHz band designed to protect very important public safety radio operations in the adjacent bands. The additional time spent in seeking comment on the technical issues has yielded valuable information demonstrating that allowing cellular architectures in the Guard Bands would present an unacceptable risk of interference to public safety licensees. The enhanced coordination difficulties would also be too much to ask taxpayer-supported public safety agencies to overcome. Therefore, I will generally defer to the judgments and recommendations of our engineering experts in the Wireless Telecommunications Bureau and the Office of Engineering and Technology on these technical and coordination issues, absent clear and convincing contrary showings. None being presented here, I accede to the judgment that cellular architectures would pose an unacceptable risk to public safety. I do so, exclusively, on technical and coordination grounds.

However, I part company from my colleagues' decision to set-aside these Guard Band licenses for a single flavor of commercial user -- the "Guard Band Manager" (GBM). Guard bands are a valid spectrum management tool used to protect adjacent spectrum from unacceptable interference, and with public safety frequencies at issue, one can easily see the importance of employing them. Of course, if we were unwilling to accept even minimal interference from the Guard Bands, we would disallow any providers from operating therein. Yet, the Commission has accepted with some merit that it is spectrally efficient to allow some operation in the band, for services that can operate under strict technical limitations. I agreed with that prior decision, but what is bewildering is the majority's decision today to allow only one — government-designed — type of commercial provider in the Guard Bands. The majority does not assert, as it could not possibly, that it has done so because only GBMs can operate safely in the band. Instead, having hatched its prized creation, like Dr. Frankenstein, the Commission wants to incubate the creature in its own sheltered nest. I am not flatly opposed to the band manager concept as a way to facilitate the privatization of some of our licensing functions and to make more spectrum available to end users. I do believe, though, that granting them exclusive territory in these Guard Bands is unwarranted and ill advised for a number of reasons.

First, the set-aside is unnecessary to protect public safety, which was the sole purpose for establishing the Guard Bands in our previous Order. The additional interference protections and procedures adopted here adequately further that purpose. There is no reason to conclude that a GBM can meet the specifications, but no other imaginable commercial licensee could. Moreover, disallowing cellular architectures diminishes the threat of interfering uses resulting from a proliferation of carriers in the band, which as a practical matter severely narrows the number and type of viable applicants and users that might seek this spectrum. Finally, the further step of regulating various aspects of the commercial relationship between Guard Band licensees and end users may cost us credibility when it comes to judging our ability to adopt, implement and enforce our technical rules.¹

¹ In addition to meeting our technical restrictions designed to protect public safety, the Order provides that Guard Band licensees (1) must make the licensed spectrum available to third parties only through "leasing" the spectrum and act only as a "spectrum broker," not as a wireless service provider (Order at ¶¶ 27 and 54); (2) are required to lease the "predominant amount of their spectrum" to non-affiliates (*Id.* at ¶ 59); (3) are limited in the first auction to one of the Guard Band Manager licenses in each market for competitive reasons (*Id.* at ¶ 62); and (4) are prohibited from imposing on end users "unduly restrictive requirements" on use of the licensed frequencies, such as requiring an end user to purchase telecommunications equipment only from one manufacturer or vendor, to require use of a particular technology, or to impose operating rules that would have the same practical effect (*Id.* at ¶ 66). I fear that

Second, restricting the Guard Bands to one form of licensee smothers the development of innovative uses of the band, employing different business models and technology. I regret that rather than extending our prior successes in employing greater licensee flexibility and fully competitive auctions in order to promote the highest and best use of commercial spectrum, we are leaning back from these principles. As a consequence, potential licensees with new and innovative ways to use these guard bands will either be excluded from the auction or be forced to modify their business plans (in a very short time period) to qualify as a GBM. It is the auction process and the market that should pick the winning and losing business models for the provision of spectrum-based services. If any entity can comply with the technical rules, they should not be shut out of the auction or forced to re-tool quickly their business.

Third, I am concerned that reserving the Guard Band to GBMs is not entirely faithful with Congress' direction. We re-allocated this spectrum, pursuant to the 1997 Balanced Budget Act, for "commercial uses."² Nevertheless, the *Notice* in this proceeding sought "comment on the extent to which, consistent with the statute, the spectrum here can and should be available for private mobile and private fixed radio services."³ There has been some genuine doubt as to whether spectrum secured for private internal use complies with the statute's commercial use requirement.⁴ Sufficiently concerned with the language of the statute, the Commission has developed a new approach to the Band Manager concept and now, according to the government, GBMs shall be in the "business of leasing spectrum."⁵ To its credit, the majority does not, however, restrict GBMs to serving only private wireless users, and will permit them to lease spectrum to a wide range of customers, including network operators that provide fixed or mobile internal communications services or commercial radio services to end users.⁶ But, let's look closer: (1) the prohibition on cellular architectures tends to favor private and other types of spectrum users that traditionally deploy non-cellular technology and are experienced in coordinating among various site-based licensees, including public safety operations; (2) we originally conceived the Band Manager concept as a mechanism for auctioning spectrum allocated to private radio services;⁷ (3) the purpose of

these limitations on a Guard Band licensee's business will also tend to restrict eligibility and participation in this auction.

² 47 U.S.C. 337(a)(2); Reallocation of Television Channels 60-69, the 746-806 MHz Band, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953, 22962-63 ¶ 20 (1998) ("The Budget Act requires that we assign this portion of the band for commercial use by auction. Private organizations or industry groups, however, will have the opportunity to seek the desired spectrum by participating in the auction.").

³ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *Notice of Proposed Rule Making*, 14 FCC Rcd. 11006, 11014-15 ¶ 15 (1999) (emphasis added). Several commenters in this proceeding suggested that our band plan should include spectrum allocated for use by the private wireless industry and licensed to Band Managers through auction.

⁴ See Order at ¶¶ 36-41 (dedicating significant ink to these "statutory considerations" and concluding that the business of leasing spectrum as a GBM constitutes a "commercial use" even if private users are permitted to lease spectrum from GBMs.)

⁵ Order at ¶¶ 2 and 41.

⁶ See Order at ¶ 41. As Commissioner Furchtgott-Roth points out, it is unclear whether GBMs are permitted to provide service directly to the "public" or only through a separate affiliate. See also Order at n. 61.

⁷ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No. 99-87, *Notice of Proposed Rule Making*, 14 FCC Rcd 5206, 5247-49 ¶¶ 88-95 (1999) ("[A] Band Manager would be eligible to apply for a private radio license, with mutually exclusive applications subject to resolution through competitive bidding. The Commission's principal role would be to allocate spectrum for private services, establish the size and scope of the Band Manager license, and conduct auctions if mutually exclusive applications are received. As a condition of the Band Manager license, the Band Manager would be required to restrict its

the requirement that GBMs lease the predominant amount of their spectrum to non-affiliates is to “ensure that we conduct a useful test of the Band Manager concept and obtain the full benefits of this new licensing approach, a core feature of which is leasing spectrum to third parties” (Order at ¶ 59); and (4) most telling, again, the result here is that only GBMs can bid for Guard Band spectrum. Thus, when viewed in totality, it is evident that this exclusivity is principally designed to substantially increase the likelihood (if not guaranty) that the spectrum ultimately lands in the hands of private users. This raises some question as to whether we have acted within the full spirit of Congress’ statutory objective.

I would have preferred that the guard band auction be open to all eligible businesses that are willing to comply with our technical rules. Accordingly, I respectfully dissent to the decision in the *Second Report and Order* to license the 700 MHz Guard Bands exclusively to Guard Band Managers.

operations to the offering of internal communications services and/or capacity to an identified class of private radio eligibles.”).