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Concurring Statement
of
Commissioner James H. Quello

Re: Settlement Agreement in the St. Simons Island, Georgia FM Proceeding. (MM Docket Nos. 81-306, 81-307, and 81-309).

I concur in the decision to approve the settlement in this case. However, I must part company with the majority's sweeping approach. The breadth of the majority's opinion is yet another step in the Commission's attempt to turn our comparative process into a private de facto auction. See Rebecca Radio of Marco, 4 FCC Rcd 830, 835 (January 19, 1989) (Quello, dissenting).

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The majority holds that Section 73.3525 of our rules encompasses third party settlements. While I would agree that Section 311(c) of the statute does not expressly preclude third party settlements, it is incorrect to conclude that our rules routinely encompass these types of settlements, absent a waiver. Indeed, a careful reading of 73.3525(a) demonstrates that the rule was intended to apply only to entities that had applications pending before the Commission. See Order, 53 R.R.2d 823 (1983); Report and Order, 20 R.R.2d 1613, 1614 (1970); Report and Order in Docket No. 12504, 20 R.R. 1669, 1672 (Jan. 13, 1961). Construing Section 73.3525(a) to encompass third party settlements makes a mockery of the Commission's administrative process. For example, there is no need to comply with the Commission's rules governing filing deadlines because

any party can join a comparative hearing at any time for the purpose of reaching a settlement. In particular, the rules governing amendments to applications become superfluous if third parties can become part of the comparative process at any time. See 47 C.F.R. § 73.3522. Moreover, the majority's construction renders our rules governing the requirements for the acceptance of applications a nullity. See 47 C.F.R. § 73.3564. The interpretation of Section 73.3525(a) is at best strained and is simply inconsistent with our carefully structured applications procedure.

There is also the question of whether the settlement agreement is consistent with the Commission's policy to grant construction permits only to qualified applicants who have a bona fide intention to construct the proposed facility. See Scott & Davis, 54 R.R.2d 868, 869 (1983). The majority attempts to distinguish this case from Scott & Davis because Dale Bell retains a 49 percent interest in the partnership. However, WBC Corporation will have de jure control over the license. Moreover, it is the partnership, not Dale Bell that intends to build and operate the station. Bell's lack of control, when coupled with the option agreement that may force WBA Corporation to purchase her interest, does not support the contention that she intends to build and operate the station. In addition, I am simply not persuaded that the "financial uncertainty" and obligation to contribute towards expenses during the one year

holding period is sufficient evidence of "intent" to outweigh the obvious fact that she is transferring de jure control of the construction permit to WBC Corporation. This is especially true where Bell is borrowing the money from WBC Corporation to pay expenses during the one year holding period.

I am not convinced that this situation is not a sale "for profit." While Bell's option agreement cannot be exercised prior to one year after program tests have commenced, the option agreement itself gives Bell present legal rights. For example, Bell might have legal recourse in contract against WBC Corporation for any action that would undermine the value of the option. This is not the case where a seller simply desires to retain an equity interest with no legal expectancy of subsequent sale for "profit" to the buyer.

On balance, the settlement before us does not comply with our anti-trafficking policy. See 47 C.F.R. § 73.3597. The majority reads Section 73.3597(d)(2) to allow the holder of a construction permit to transfer a controlling interest in the construction permit to a third party so long as the seller retains an equity interest in the facility and contributes a proportionate share towards capital investment and expenses for at least one year. The majority, however, ignores the obvious "for profit" arrangement that is based on the option agreement between the parties. In my opinion, this business structure

pushes the technical limit of Section 73.3597(d)(2)(d) and, most certainly, undermines the spirit of the provision. I simply cannot accept such a strained construction of our rule.

I absolutely disagree with the majority's assertion that there is "no meaningful distinction between a nonparty paying Steele to dismiss his application and an ordinary settlement agreement among competing applicants." See Memorandum Opinion and Order at para. 26. It is precisely this logic that leads to the creation of a private auction, thereby undermining the entire comparative process and our public interest responsibilities. I would remind the majority that the Commission does not have auctioning authority under the existing statutory scheme. The sweeping language of the Commission's decision is a blatant attempt to turn our settlement process into a private auction.

Nevertheless, I am willing to approve the settlement on a rather narrow, limited basis. Unlike Rebecca Radio of Marco, which involved a third party settlement after designation but prior to an evidentiary hearing, the parties have litigated the instant case for approximately ten years. They have faithfully prosecuted their applications through the agency and court of appeals. I find this distinction important. Third party settlements in cases that have been subject to lengthy proceedings do not raise the spectre of a de facto auction. I

doubt very much that most applicants would be willing to wait a decade or more simply to find a third party to purchase their applications or unbuilt construction permits. In other contexts, the Commission has treated applicants that have gone through the hearing process differently from applicants attempting to settle prior to a hearing. See First Report and Order in BC Docket No. 81-742, FCC 89-108 (released May 16, 1989) (allowing settlement agreements for expenses after an Initial Decision, but preventing payment prior to the Initial Decision). Viewed in this light, approving the settlement on the facts in this case does not set a dangerous precedent for the private de facto auctioning of spectrum. The settlement does promote the public interest, however, by avoiding further proceedings in this case, thereby facilitating service to St. Simons Island. Accordingly, I would be willing to waive the requirements of Section 73.3597 and approve the settlement. See e.g., In Re: RKO General, Inc., 3 FCC Rcd 5057, 5063 (1988). This approach is preferable to the majority's broad and sweeping construction of our rules and most importantly avoids construing them in such a manner as to create a de facto auction under the guise of a settlement.

I recognize this approach allows settlements only in cases that are lengthy, where the Commission has already expended significant efforts. While some may argue that it wastes the Commission's resources, I find it preferable to the majority's

approach which undermines our applications process and leads to a de facto auctioning of broadcast licenses. After all, the Commission's fundamental obligation under the Communications Act is to select licenses for broadcast stations. Efficiency and speed of selection should not be the sole criteria for our administrative process. Our duty to choose those who serve as public trustees of full service broadcast facilities goes beyond that of a mere auctioneer.

Because the issues raised in these cases goes to the very heart of our licensing process, we should address them in the context of a rulemaking. Unfortunately, the Commission has not solicited public comment on the extraordinary procedures employed in the instant proceeding as well as those in Rebecca Radio of Marco. I again request that the Commission commence a rulemaking proceeding. See Petition for Rulemaking filed by National Association of Broadcasters, February 22, 1989. This issue is too important for us to develop on a case-by-case basis. A rulemaking would allow us to consider all the policy implications of this novel procedure. Hopefully, we will commence such an examination as soon as possible.