

Dissenting Statement of Commissioner James H. Quello**In re Applications of****Greater Utica-Rome TV Services, Inc.
and
Mohawk Valley Telecasters, Inc.**

Utica, New York, the 110th television market in the United States, has no local CBS affiliate. Recognizing the need for additional over-the-air television service in this market, the Mass Media Bureau allotted Channel 4 to Utica. *Amendment of Table of Allotments (Albany, Buffalo, Iliion, and Utica, New York, and Boston, Massachusetts)*, 3 FCC Rcd. 2208 (Policy and Rules Div., 1988). At the time, the staff concluded that Utica was not "affected by the recently imposed freeze on new allotments or applications for new allotments within the co-channel separation distance" listed in the table of 30 major markets in which frequency was set aside for future HDTV use.

Relying on this ruling, Mohawk Valley Telecasters, Inc., and later, Greater Utica-Rome TV, Inc. each filed applications for the new allotment. Mohawk's initial application was returned by the staff, however, for proposing a site within the minimum co-channel separation distance to Hartford-New Haven, CT, thereby bringing it within the freeze proscription.¹ The Commission now describes the initial determination that the freeze does not apply as a "misstatement" and affirms the Bureau decision to dismiss the applications. I respectfully dissent.

While I do not question the need to preserve spectrum for use by HDTV, I am concerned that this action will do nothing to promote HDTV while, at the same time, it will deny new over-the-air service to 1.6 million people. The Commission seeks to preserve the use of Channel 3 for high definition use in Hartford-New Haven, yet does not dispute the applicants' showing that current usage of Channels 2 and 4 in New York already will have a preclusive effect. Rather than defend the co-channel separation criteria under which the applications were dismissed initially, the Commission now concludes that "it is *possible* that this channel will be used in other locations in the New York-New England area that *might* conflict with a conventional station on Channel 4 in Utica." *Memorandum Opinion and Order* at ¶ 8 (emphasis added). To me, this is too tenuous a need to bar service that the Commission otherwise determined is in the public interest.²

Even if the Commission had more persuasively demonstrated the conflict between the Utica allotment and the HDTV reserve, the purported overlap in this case is not so great as to warrant summary dismissal of the applications. The Freeze Order made clear that "[t]he Commission will consider waiver requests on a case-by-case basis . . . for licensees which provide compelling reasons why this freeze should not apply to them." And pursuant to this policy, the Commission has granted waivers from the freeze order that represented an even greater short-spacing than presented here.³ The case for a waiver is even more persuasive in this proceeding, where both applicants agreed to condition the Channel 4 grant on a directional operation providing equivalent distance protection to HDTV operations in Hartford-New Haven.

Ultimately, the public interest benefits we hope to attain by mechanically applying the freeze on these facts are entirely too speculative. On the other side of the scale, the

denial of a VHF facility in Utica precludes service to a large population. The Commission's decision in this case represents an injustice to the applicants, who were led to believe the allotment was unaffected by the freeze. It also disserves the public, who no doubt would prefer increased service today over what may or may not be an HDTV allotment in Hartford tomorrow. Accordingly, I dissent.

¹Greater Utica filed its application after the staff initially returned the Mohawk application. However, the principals of Greater Utica had indicated their intention to file for the new allotment in September 1987, as the staff acknowledged when the channel was allotted. See *Amendment of Table of Allotments (Albany, Buffalo, Ilion, and Utica, New York, and Boston, Massachusetts)*, 3 FCC Rcd. at ¶ 1. Accordingly, Greater Utica included a request to waive the freeze restriction when it filed its application. Mohawk Valley filed a similar waiver request with its petition to reconsider the staff action.

²It is worth noting that no television licensees in the Hartford-New Haven market objected to the Utica allotment.

³See *Sunbelt-South Tele-Communications Ltd.*, File No. BPCT-871028KE (Mass Media Bureau March 9, 1988).