

**Separate Statement
of
Commissioner James H. Quello**

May 24, 1995

**Re: Daniel R. Goodman, Receiver; Dr. Robert Chan
Petition for Waiver of Sections 90.633(c) & 1.1102 of the Commission's Rules**

I concur in the result of this *Memorandum Opinion and Order* but write separately to express my dissatisfaction, indeed perplexity, with the rationale. I believe that this is a simple matter of a routine request for waiver of our construction rules that ought to be granted as a matter of administrative discretion based on equity and common sense. The *MO&O*, however, goes on at length to argue in excruciating detail against the relief that is ultimately granted. I find it unnecessary, unseemly, and unproductive to engage in such regulatory *sturm und drang*.

Indeed, petitioners are granted herein no more relief than that already provided as a class to other licensees that did not even allege, must less demonstrate, petitioners' equitable *bona fides*. Ultimately, petitioners are granted an extension of time to construct that gives them only the same amount of time as that given to all other 800 MHz conventional Specialized Mobile Radio (SMR) licensees.¹ Whither the expenditure of superfluous legal analysis?

This matter comes before the Commission upon a petition for waiver by a Receiver in Bankruptcy for approximately 4,000 individuals. The petition is supported by a sister agency, the Federal Trade Commission, which met in extraordinary session to request that the Federal Communications Commission grant the petition so as not to jeopardize on-going enforcement actions that had culminated in judicial proceedings. Essentially, the Petitioner Receiver in Bankruptcy is asking the FCC to allow him to do his job, i.e., prevent waste of the underlying assets during judicial proceedings.

¹ See *Third Report and Order*, GN Docket 93-253, 9 FCC Rcd 7988 (1994) at 177-184.

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The Petitioner is working closely with the FTC to salvage whatever assets remain and, thereby, alleviate the financial injury to the 4,000 licensees. Grant of the instant petition constitutes a large part of the defrauded parties' prayer for relief. If the instant petition for waiver is not granted, the majority of the 4,000 licensed radio stations will not be built; therefore, the licenses would be cancelled for failure to construct. This would have the practical effect of delaying service to the public and the pecuniary effect of loss of almost twenty-eight million dollars (\$28,000,000).

Upon review, *inter alia*, of the foregoing facts and circumstances, the FTC brought suit in U.S. District Court against putative "application mills". The suit alleges fraudulent trade practices against four companies that prepared applications for radio licenses and allegedly contracted to operate such systems on behalf of the class in bankruptcy. The District Court, in granting a preliminary injunction, made a finding that complainants have shown a substantial likelihood of success on the merits.

The MO&O makes much of the assertion that the licensees have other means of legal redress. Obviously, these licensees -- which the District Court has found to have made a *prima facie* showing as defrauded parties -- are actively pursuing legal remedies in other fora. This Commission has been asked, and has the authority, to halt vitiation of the remaining assets, *viz.*, the radio licenses, during the pendency of the legal proceedings. I believe that we should exercise such authority because it is the right thing to do. In legal parlance, it is the equitable decision.

Furthermore, although I am not a lawyer, I do not think the *Baker* decision² is determinative precedent for the decision at hand. Notwithstanding the similarity of the facts and the procedural posture in *Baker* to those in the instant matter, *Baker* is distinguishable on the following grounds:

1. The *Baker* decision adjudged potential licenses, that is, applications to be submitted for a licensing lottery and did not involve, as here, licenses already granted by this Commission. The alleged fraud in *Baker* occurred before the investors entered the FCC process. Goodman/Chan, however, involves extant licenses with the investors allegedly being deceived as to the construction and operating requirements. While waiver of the filing deadline in *Baker* may have resulted in an "unfair"

² Robert A. Baker, Memorandum Opinion and Order, No. 64400-AL (Common Carrier Bureau) (rel. April 18, 1986) rev. den., FCC 86-197 (April 21, 1986).

lottery process, grant of the construction deadline waiver in Goodman/Chan will further the FCC's goal of providing new communications services to an unserved public.

2. The *Baker* decision was decided under a different licensing procedure and a different regulatory structure. The advent of auction authority and the creation of the Commercial Mobile Radio Service (CMRS) have significantly altered this Commission's practices and procedures. Although maintaining the integrity of our licensing scheme is important, we must not lose sight of our fundamental role of deciding what is in the public interest. Strict enforcement of the construction guidelines would harm the public interest by delaying competitive provision of communications service to unserved communities.
3. The FCC should not make decisions in a vacuum. Anyone who has read my previous statements knows that I firmly believe that the essence of regulatory practice is to weigh all legitimate factors and do "substantial justice" as opposed to blind reliance on legal technicalities. Cooperation and deference (what the lawyers refer to as 'comity') to opinions and recommendations of other federal agencies -- such as the Federal Trade Commission in this instance -- the courts, and state enforcement agencies, are often essential in determining and furthering the public interest. By blithely ignoring the recommendations and requests of other agencies, the FCC may unwittingly hinder their efforts.

These factors militate against application of the legal precedent of the *Baker* decision and in favor of granting the requested waiver of the construction deadlines without further ado. At the risk of overstating the obvious, in granting the four month extension, we are only affording the 4,000 individuals represented by the Petitioner the same construction period already granted to other licensees.

In summary, I believe granting the waiver of the construction deadlines under these circumstances is consistent with treatment afforded other licensees; would speed delivery of communications service by radio to the public; would not compromise efficient use of the spectrum; supports our own enforcement efforts and those of a sister federal agency; affords comity to another federal agency that specifically requested same; would mitigate the fraud perpetrated by unscrupulous application mills on unsuspecting citizens; and is otherwise in the public interest. In light of the foregoing, I would grant the requested relief without what I perceive to be detailed legal analysis in search of an issue.