SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO
DISSENTING IN PART

Re: Allocate Frequencies in the 800-900 MHz Reserve Band (General Docket Nos. 84-1231, 1233, & 1234).

Today, action by the majority allocated the remaining spectrum in the 800-900 MHz reserve and, at best I can only agree with the allocation for cellular services. I dissent to the allocations made for public safety/private land mobile services, mobile satellite services and the general mobile radio service, otherwise known as flexible use.

My strongest dissent is to the majority's opinion pertaining to the spectrum needs of public safety/private land mobile services. Furthermore, my dissent is based both on substantive and procedural grounds. First the record does not demonstrate the need to allocate 6 MHz for public safety for a national plan. The reason for this lack of record is that we have no national plan either in concept or draft form. The more appropriate approach would have been to address the needs of public safety's national plan in conjunction with the allocation of the reserve 800-900 MHz bands. Furthermore, I believe that before we haphazardly allocate spectrum to the public safety/private land mobile radio services we should know what we have licensed to these services and the extent to which these frequencies are actually being used. Data submitted in the record leads one to question to what extent public safety/ private land mobile licensees are using the spectrum that they are licensed. The data reveal that in major urban areas significant amounts of spectrum licensed to the public safety/ private land mobile services actually remains unused or at best minimally used. See, Report on Public Safety Use of 800 MHz filed by Mobile Satellite Corporation (MOBILESAT), July 7, 1986. Data collected by the Field Operations Bureau documented that the Los Angeles County Sheriff's Department has several unoccupied or lightly occupied channels in both the 39 MHz and 470/473 MHz ranges. See, Limited Spectrum Occupancy Study, conducted by the FCC's Field Operations Bureau, February, 1984. This does not take into consideration the reallocation UHF-TV channel 16 from Ventura to the Los Angeles County Sheriff's Department for public safety needs. Here lies the root of the problem. We do not have an accurate accounting of what has been licensed in the 800 MHz bands and to what extent what we have licensed is being used. Yet, given this lack of critical information, the majority persists in allocating spectrum for some nebulous national plan.

I want the record to show that I am not opposing the legitimate needs of the public safety/private land mobile services. The public safety/private land mobile services should be willing to accommodate their spectrum needs by implementing

spectrum efficient technology. I only argue that such needs be critically studied and examined by this Commission. On a national level, however, I am not convinced of the need to allocate 6 MHz for a non-existent "national plan."

On a different matter, I depart from the majority's decision to allocate spectrum only at L-Band for domestic mobile satellite services. I find that forcing mobile satellite service to L-Band-only operations increases direct and marginal costs of such services and, therefore, results in reduced availability of services to the general American public, and specifically those in rural areas. Propagation loss with an L-Band-only mobile satellite system is problematic particularly in urban areas and at high latitudes, such as Alaska. The problem of propagation loss in Alaska could best be remedied by a UHF/L-Band mobile satellite system. Furthermore, I am convinced that a domestic mobile satellite service with spectrum from the reserve bands and L-Band can provide services for both commercial use and rural public safety needs, as is evidenced by the NASA experiments.

The L-Band allocation for the mobile satellite services is not without its set of problems. First, is the cost associated with L-Band-only operations. Perhaps more importantly, however, is the demand for L-Band spectrum by the aeronautical community. The Notice in this proceeding identified problems associated with an L-Band allocation to the mobile satellite services due to national and international organizations' possible use of this spectrum for Aeronautical Mobile Satellite service. In the Notice we also indicated that we were unable to specify the exact amount of L-Band spectrum which we would be able to allocate to mobile satellite services until the long term spectrum requirements for the aeronautical mobile satellite services are identified. See, Notice of Proposed Rule Making, Gen. Docket No. 84-1234, 50 FR 8149 (February 28, 1984) at para. 19. Yet, without determining the long-range need for spectrum by the aeronautical mobile satellite services, the majority proposes to allocate L-band spectrum to the mobile satellite services. To secure a place at L-Band for the mobile satellite services, we must move quickly to establish the service rules, ownership and licensing rules, and technical rules governing mobile satellite services. Such proceedings can be conducted concurrently with our negotiations with Canada regarding the 4 MHz held in reserve in the 800-900 MHz bands.

The majority voted to hold 4 MHz in reserve for a variety of possible services, such as Basic Exchange Telecommunications Radiotelephone for rural use, air-to-ground telephone service and last, but not least, a possible joint Canadian/U.S. mobile satellite system including both UHF and L-Band spectrum (see para. 157). To relegate a possible joint U.S./Canadian mobile satellite service to a laundry list of other possible services

demonstrates a lack of clear interest in earnest negotiations with Canada, and more importantly, meeting the needs of those who reside in Alaska. A more appropriate approach would have been to keep 4 MHz in reserve pending negotiations with Canada for a possible joint mobile satellite service. In the event that an agreement could not be reached with Canada within a reasonable time frame, then at that time the Commission could propose other possible uses for this spectrum. This latter approach demonstrates a clear interest in reaching an agreement. Action taken by the majority leaves me less than convinced of our intention to reach mutual comity with Canada. Again, my concern is directed toward the development of a domestic mobile satellite service capable of serving all citizens of the U.S., even those in northern latitudes, in a cost efficient and effective manner.

I also dissent to the allocation of spectrum for the General Purpose Mobile Radio Service. The basis for my dissent is rather simple -- the record doesn't support the allocations. The proposal for flexible use of spectrum was addressed by fewer than half of parties participating in this proceeding. Furthermore, those who did address this issue in their comments overwhelmingly disapproved a "flexible use" allocation of spectrum. Although theoretically pleasing, this is one example of the problems that occur when marketplace theory meets the pragmatic workings of the economic marketplace. Where there are land mobile radio service users without service, the problem flows from the shortage of spectrum and the failure to implement spectrum efficient technology, not from the claim that rigid allocation categories are unresponsive to demand.

I agree with those commenters who argue the possibility of technical problems occurring due to interference and the possibility of insufficient economic incentives to manufacture equipment under a flexible use scheme. The majority realizes that in making assignments to the General Purpose Mobile Radio Service the Commission will be incurring potentially large administrative costs due to the many thousands of applications the Commission will receive (see, para. 108). To help alleviate these incurred costs, the majority would prefer to make assignments through auctions, essentially attaching property rights to spectrum. Congress so far has expressed rather strongly its sentiments regarding the auctioning of spectrum -- auctioning is prohibited. The legislative history of the 1982 Amendments to the Communications Act states that:

> The Conferees believe that implicit in the guidelines enumerated in subsection 331(a) is the principle that the Commission may not employ auctions in managing the spectrum made available for use by the private land mobile services. The Conferees are concerned that the use of an auction --

> that is, selling frequency space to the highest bidder -- or similar method which turns upon a user's monetary ability to pay for a frequency will work to the detriment of an efficient and competitive private land mobile spectrum. ... [T]he Conferees intend to specifically prohibit the Commission from employing auctions or similar economic methods in managing the private land mobile spectrum. H.R. Report No. 765, 97th Congress, 2d Session, 53 (1982).

Furthermore, in Section 301 of the Act, Congress stated:

> It is the purpose of the Act, among other things, to maintain the control of the Unites States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall, be construed to create any right, beyond the terms, conditions, and periods of the license. 47 U.S.C Sec. 301 (1983).

If Congress were to change its mind and permit the auctioning of spectrum for General Purpose Mobile Radio Service, then the needs of the financially advantaged would be pitted against the needs of those less financially advantaged. I am against such a fundamental change in the Act. The Commission's mandate to allocate spectrum in the public interest would be made subservient to the interests of those who can afford the bidding wars for spectrum.

In the event that Congress does not provide the Commission with the authority to auction spectrum, the General Purpose Mobile Radio Service presents the Commission with a quagmire of policy decisions. The policy decisions that have to be determined before assignments can be made include: the nature of interference protection criteria; information requirements for applications; the number of applications an applicant can file; how the assignment, leasing, and subleasing, or transfer of usage rights may occur; enforcement policies; and so forth. Furthermore, an assessment of the administrative resource impact must be made after concluding the policy decisions. To resolve these policy issues, further notices of proposed rule making will have to be issued, creating even further delays in the use of this spectrum. Once assignments are made, there are practical problems that must be resolved. To begin with, due to the increases in the number of possible uses for General Purpose Mobile Radio Service channels, renewals are more likely to be challenged. Moreover, because Section 309(i) of the Act prohibits the use of lotteries for renewals, the Commission would be forced to expend costly resources in hearings. These hearings could become very time consuming, not only because of the number of issues involved, but also because of the extreme flexibility of the service. There is almost no basis for

comparing applicants. In our efforts to find a discernable difference between the renewal applicant and the competing applicants we may find ourselves drawn into decisions pertaining to what services are proposed and determining those that have greater value.

I also question the majority's legal rationale supporting spectrum allocation for a General Purpose Mobile Radio Service. The Communications Act requires the Commission to allocate spectrum based on public interest considerations. Section 303 of the Communications Act requires the Commission to:

> (a) Classify radio stations;
> (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
> (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;... . 47 U.S.C. Sec. 303 (a)-(c).

The flexible use scheme happens to conflict with each of these provisions.

Another legal problem could emerge within the context of a hearing if an applicant is favored on the basis of a particular service offering. In such a situation, the Commission would lose some of the benefits of a flexible use scheme because the Commission would want to protect the integrity of its processes by requiring the applicant to effectuate the proposal by which it gained its superior status. A similar problem occurs whenever a licensee in the General Purpose Mobile Radio service selects to change its service offering. A fundamental change in the use of a facility appears to be a major modification within the meaning of Section 309(b) of the Communications Act. The Act's legislative history clearly indicates that Congress only intended to exempt as minor amendments or changes in authorizations "those types of applications which ordinarily do not generate objections, or as to which because of the temporary nature of the authorization sought any delay in acting thereon would be tantamount to a denial." Senate Report No. 690, 86th Cong., 1st Sess. 2-3 (1959). Changes in the use of spectrum certainly would give the existing customer who would face loss of service, as well as any new competitors, cause to object. Indeed, the courts have held that the cessation of existing services is a matter affecting the public interest. See, West Michigan Telecasters, Inc. v. FCC, 460 F.2d 883 (D.C. Cir. 1972). Since such changes are major amendments, petitions to deny can be filed against them, resulting in more burdensome and costly work for the Commission. All this for 2 Mhz of spectrum!

In summary and for the above stated reasons, I dissent to the allocation of 2 MHz for a general Mobile Radio Service (flexible use); the allocation of 16 MHz for public safety/private land mobile services (6 Mhz for public safety's national plan, and 10 MHz for private land mobile radio services); and retaining 4 MHz in reserve for a variety of possible uses including a possible joint venture mobile satellite service with Canada. A practical common sense allocation accommodating all reasonable needs including Canadian mobile satellite comity was and is available -- 16 MHz for private land mobile/public safety service, 10 MHz for cellular service and 6 MHz for mobile satellite service.