

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

Re: Memorandum Opinion and Order addressing eight petitions for reconsideration of the Commission's allocations in the 800/900 MHz reserve to public safety and the general purpose mobile radio service and in the L-band to the mobile satellite service.

I am dissenting in part to two sections of the Memorandum Opinion and Order adopted by the majority addressing petitions for reconsideration of the Commission's allocation decision in the 800/900 MHz reserve -- the 16 MHz allocated to Public Safety/Private Land Mobile Radio Services and the 2 MHz for General Purpose Mobile Radio Service (GPMRS).

Public Safety/Land Mobile

In the allocation decision the majority gave 6 MHz to public safety services essentially for a national public safety plan and 10 MHz to the private land mobile services. The bases for these allocations were staff studies projecting the future needs of private land mobile radio services and public safety services, as well as Commission records of licensed stations.¹ I have long held that the Commission's allocation decision pertaining to public safety/land mobile was erroneous and now my position is further substantiated by newly released FCC data. Today, in adopting the Second Memorandum Opinion and Order the majority is attempting to evade the rationale relied upon in the allocation decision. In justifying the allocation decision, the majority states in Footnote 10 of the attached Memorandum, Opinion and Order that "the reason for the allocation was the projected growth of demand for the private land mobile service." I would like to know on what basis is the "projected growth of demand" estimated? In justifying the allocation decision in the Report and Order in this proceeding, the majority relied significantly on the FCC's Future Private Land Mobile Telecommunications Requirements (Future Needs studies) and FCC data on the number of authorized stations in the private land mobile services. It is important

¹ See Report and Order, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 61 RR 2d (1986) at paras. 27, 29 and 41. Also See Future Private Land Mobile Telecommunications Requirements: Final Report, Planning Staff, Private Radio Bureau, FCC, Washington, D.C., August, 1983 and Report on Future Public Safety Telecommunications Requirements, PR Docket No. 84-232, 50 Fed. Reg. 32239 (August 9, 1985).

to note that the Commission assumes that our data files reflects the number of channels in use. In fact, the Commission has evidence to the contrary. 2/

Since the allocation decision, new FCC data previously unknown to me, and I assume also unknown to my colleagues, were revealed.³ These data reveal significant amounts of unused 800 MHz channels in several major urban areas. The Commission has made available these data for public comment in General Docket 85-172 and the comments currently are being reviewed. These FCC studies, however good or bad, reveal and emphasize a more fundamental problem -- significant inaccuracies in the Commission's data base used in developing the Commission's allocation decision. The Commission's data base may accurately account for the number of licenses and channels issued, however, it does not account for the number of licenses and channels that are operating. Furthermore, external marketing research data suggests the Commission's Master Frequency File may exaggerate the actual number of licensed channels by a magnitude of 2.5

2 The Private Radio Bureau's Future Needs studies were controversial and were critically reviewed by the Office of Plans and Policy and the Office of Science and Technology. Projected needs were revised downward and the study was never brought to the Commission for a vote. Instead, it was released as a staff report.

To further illustrate the problems associated with the Commission's data files, it should be noted that the Commission has reclaimed 2000+ SMR channels for failure to construct or meet loading requirements. This reclamation program is applicable only where others have applied for frequencies in those communities. If there were no other SMR applicants in the selected communities, then the Commission would not have detected the unused channels. The reclamation effort should be congratulated and it clearly demonstrates the inadequacies of FCC data that documents channels licensed rather than actually used. The reclamation program provides further evidence that the paper documentation of licensed stations is insufficient in assessing the use of spectrum.

3 See FCC Public Notice, "Comments on Petition for Special Relief and FCC Staff Documents," Gen. Docket No 85-172 (March 27, 1987).

times.⁴ The result is an artificial indicator of the use of spectrum as my colleagues and others equate channels licensed with channels used.

The majority by today's action believes that "the degree of actual usage of the 800 MHz frequencies in 1985 [and 1986] ... has no direct bearing on the validity of our basis for establishing this allocation." (See Footnote 10) I disagree with the majority. I believe that the newly revealed data have a direct bearing on the allocation decisions for private land mobile radio services including public safety services. Such data strongly question the basis upon which the Commission made its private land mobile allocations and the data directly question the need for land mobile spectrum. Unfortunately, the time to file petitions for reconsideration in this proceeding had passed before the data were revealed. ARINC and the mobile-satellite applicants filed comments in General Docket No. 85-172 indicating that the new data are applicable to the allocation decisions effecting private land mobile services. I agree with these commenters to the extent that they argue that the new data should be considered in addressing the reconsiderations of the allocation decision. Failing to consider the revealed Commission data in this Memorandum Opinion and Order further illustrates the majority's error in allocating spectrum to the private land mobile services including public safety services. The majority should be reminded that pursuant to Section 1.429 of our rules, a petition for reconsideration based on facts not previously known to the Commission will be granted where (1) the facts relied on relate to events which have occurred or circumstances which have changed and 2) the facts were unknown to the petitioner at the time and could not have been discovered through ordinary diligence. ARINC and mobile satellite commenters, I believe, have presented a sufficient case for reconsideration of our decision under Section 1.429 of our rules. The internal Commission studies regarding the need for additional land mobile spectrum is obviously relevant to this proceeding. There was also no way for the petitioners to have known of this data at the time of our first decision. Indeed, the Commission itself was not aware of its existence. Finally, the importance of the data is demonstrated by the Commission's decision to commence an inquiry on the matter. I fail to see how we can simply dismiss this matter in the proceeding before us. In my mind, it would be an error in judgement and law to deny or grant in part or fully these petitions while the Commission is currently examining the comments in General Docket No. 85-172 addressing the newly revealed data.

⁴ See "How Big Is the Mobile Communications Market? Mobile Communications Business, Vol. III, No. 7, July, 1987, pp 16-17.

General Purpose Mobile Service Allocation

I am dissenting to the language in paragraphs 21 and 22 stating that auctions would be ideally suited for GPMRS and that the new service has merit and is in the public interest. I have stated previously that I do not support the auctioning concept. I recognize the Communications Act of 1934 as amended and the intent of Congress prohibits the use of auctions in allocating spectrum.⁵ As I stated previously, if Congress were to change its mind and permit the auctioning of spectrum for GPMRS, 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.⁶

I agree with the Land Mobile Communications Council's argument that the "flexible" allocation to a general purpose mobile radio service may, in fact, not be in the public interest. If this service is in the public interest, then I find it inconsistent with the Commission's marketplace approach to allow this spectrum to remain fallow. Efforts have been made to secure auction authority from Congress, however, we have not, and I might add, I hope we do not, obtain such authority. In the absence of authority to auction spectrum, the Commission, true to our marketplace approach and the assumed demand for this service, should be developing licensing procedures for the GPMS. In the absence of such procedures I can only assume that the majority is allowing this spectrum to remain fallow in an effort to secure auction authority or that there is little or no public demand for this spectrum. As I stated in my dissenting statement to the Report and Order in this preceeding, the record doesn't support the allocation to GPRS.

⁵ See H.R. Report No. 765, 97th Congress, 2d Session, 53 (1982) and also 47 U.S.C. Sec. 301 (1983).

⁶ See Separate Statement of Commission James H. Quello Dissenting in Part, General Docket Nos. 84-1231, 84-1233 and 84-1234, 61 RR 2d (1986).