CONCURRING STATEMENT OF
COMMISSIONER JAMES H. QUELLO

RE: Amendment of Part 90, Subparts M and S, of the Commission's Rules.

I am concurring with the action taken by the majority regarding the amendment of Part 90, Subparts M and S of the Commission's rules. Although I believe that overall this item serves the public interest, I do have concerns not only with specific aspects of the amendment to Part 90 rules, but also with what the Report and Order fails to address.

I am concerned with the section of the amendments that allows partial assignment of channels. The amendments allow licensees to buy and sell channels while at the same time it also establishes a waiting list for available channels. The opportunity to buy and sell channels allows individuals to circumvent the waiting list process, and I am not sure such a free market process is in the public interest. Furthermore, the buying and selling of SMR channels suggests an "economic" means of managing spectrum that is inconsistent, in my opinion, with the intent of Congress. The legislative history of the 1982 Amendments of the Communications Act, states that the conferees intended to "specifically prohibit the Commission from employing auctions or similar economic methods in managing the private land mobile spectrum." (See, H.R. Rep. No. 765, 97th Cong., 2d Sess. 53 (1982.)) By creating both the waiting list approach and the economic means of obtaining channels, the Commission is

creating a two-class system where those who can afford the additional cost of purchasing spectrum are pitted against those whose business plans cannot afford the added cost of bidding for spectrum. Finally, by allowing the buying and selling of channels, the chances of channels becoming available for waiting list applicants may be nonexistent. In this scenario, the Commission essentially has withdrawn itself from spectrum management -- an action that is blatantly inconsistent with Section 301 of the Communications Act.

I am also concurring to the amendment that allows individuals and the federal government to be end users. The amendment to Part 90 appears to undercut the "need for spectrum" rationale articulated in the Commission's allocation decision in General Docket Nos. 84-1231, 84-1233, and 84-1234; and runs counter to the rationale for UHF/Land Mobile sharing (General Docket No 85-172). In these proceedings, the majority argues that the need for additional spectrum for private land mobile radio services is based on the notion that the demand from existing users exceeds the available spectrum. Adding new categories of end users only exasperates the alleged demand for spectrum, making it more difficult and more costly for traditional SMR end users. The record in this proceeding fails to justify the inclusion of individuals and the federal government as SMR end users.

Another example of inconsistent Commission rationale can be found in General Docket 83-26, the creation of an additional Private Radio Service (57 R.R. 2d 559 (1984)). In this proceeding the Commission failed to allocate spectrum in the 900 MHz band for a low-cost personal radio communication service. In justifying its decision, the Commission argued that:

> ...the available spectrum at 900 MHz was insufficient to satisfy all existing requests, and the public interest required that the available spectrum be allocated to traditional private land mobile and cellular services and to a mobile satellite service. (Ibid.)

Furthermore, the Commission argued that:

> Since there has been substantial investment by the industry and public in the expectation that this land mobile reserve would be available to accommodate future land mobile growth, diversion of the reserve for other uses could significantly increase the cost of existing services to the American public. (Ibid. at 564)

By today's action, the Commission is doing what it opposed doing in the personal radio service -- allowing individuals eligibility status in the 800-900 MHz bands. If allowing individuals access to the 800-900 MHz reserve bands would have significantly increased the costs of existing land mobile radio services in 1984, then wouldn't that argument hold true in 1988? Although allowing individuals to be end users in the SMR service may serve an overall public interest, the amendment to Part 90 fails to provide sufficient evidence to refute the earlier Commission claim that such an action would increase the costs of traditional land mobile services. Once again I am bothered by the apparent inconsistency in logic used to formulate public policy.

Another concern I have focuses on the regulatory status of private carriers in light of changing end user eligibility. I believe that the private carrier status of SMR licensees could be in jeopardy by essentially gutting the distinction between private and common carrier services as specified by Congress in the 1982 Amendments to the Communications Act. In the 1982 Amendments Congress prohibited private land mobile licensees from reselling for profit interconnected common carrier services if private radio licensees wished to retain their private carrier status. The intent of such action, according to the legislative history of the 1982 Amendments, was to assure that "frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service." (See, H.R. Conf. Rep. No. 765, 97th Cong., 2nd Sess. 56.) Common carrier status for SMR licensees was dismissed by Congress on the basis that the Part 90 eligibility requirement for end users was sufficient to remove the SMR licensee from the stigma of being a form of "public offering." (See, comments of General Electric Company at page 3.) In the 1982 Amendments to the Communications Act, Congress frequently refers to the "eligible users" of the private land mobile radio services. (See, 47 U.S.C. Section 153(gg) and Section 332(c)(1).) Even the legislative history accompanying the 1982 Amendments to the Act referenced the private land mobile radio licensee's option to offer their services or facilities to "eligible users." (See, H.R. Conf. Rep. No. 765,

97th Cong., 2d Sess. 54.) By allowing individuals to become end users in the SMR service, the Commission may be altering significantly the dispatch nature of this service.

The intent of the 1982 Amendments to the Act was to clarify the distinction between private and common carriers. To the extent that the action in this proceeding removes from the category of "eligible users" everyone except foreign governments and their agents, the Commission may have crossed over the line devised by Congress to separate private from common carrier service. Furthermore, because SMR licensees can participate in intercategory sharing, federal government and individual end users who currently are not Part 90 eligibles will be eligible for channels in business and industrial/land transportation categories through exercising the option of intercategory sharing. In essence, the eligibility issues presented in this proceeding "bleeds" over into other service categories further blurring the distinction between private and common carrier service.

Allowing the federal government and individuals to be end users in the SMR service raises a fundamental economic issue. Assuming the demand for SMR services exists in the major urban areas[1/] and given the fact that there is a finite amount of SMR spectrum, by allowing additional categories of end users access to this service we are increasing the cost of the service

to existing SMR and other Part 90 private mobile radio users. Is today's action in the public interest when the possibility exists that federal government use of SMR services may increase traditional SMR service end users' costs?

The National Telecommunications and Information Agency (NTIA) argues that access to SMR frequencies is consistent with the federal government's privatization interests and could lead to more efficient federal spending and use of the spectrum. I agree with those who argue that it is arbitrary and capricious for the Commission to essentially reallocate part of the SMR spectrum to federal government users without a showing of need. Where is the need? The record in this proceeding does not establish a need to enlarge SMR end-user eligibility to include the federal government. It is ironic that in this proceeding a lack of record permits the de facto partial reallocation of SMR spectrum to the federal government, while the Commission labored over an extensive record of alleged need for SMR spectrum in the allocation proceeding in General Docket Nos. 84-1231, 84-1233 and 84-1234, and the UHF/Land Mobile proceeding (PR Docket No. 85-172). By allowing the federal government to be an SMR end user, the Commission may be contributing to the government's inefficient use of its own spectrum. Perhaps it would have been best to retain the existing policy of considering waivers regarding the federal government's access to SMR channels.

Another issue regarding the federal government's eligibility status centers on the fact that the government will now be able to compete, albeit indirectly, with private sector licensees and applicants in bidding for SMR channels under the partial assignment rules. Because the federal government cannot be a licensee in the SMR service it is unable to directly bid for SMR channels, however, there is nothing to prohibit the federal government from subsidizing a licensee's bid for spectrum. The net effect of this scenario is the possibility that the government, as a player in the commercial market place, could drive up the purchase price of SMR channels.

I am pleased that the Commission has decided to maintain loading standards, however, I am concurring with the lessening of loading requirements for both channel reclamation and intercategory sharing. The loading standards have been useful in reclaiming channels in the 800 MHz bands. Under Subpart S licensees have to meet a 60 mobiles per channel use in three years and 80 mobiles per channel at five years or their channels will be reclaimed. They must also meet an 80 mobiles per channel use if they wish to seek additional channels through intercategory sharing. By lowering loading standards in major urban areas, the Commission is facilitating SMR access to channels in other categories. These "other" service categories may or may not be operating under the same market incentives as SMR licensees, and as a result of the lowering of loading

requirements for intercategory sharing, the non-SMR categories of service may find their spectrum gone before they have the opportunity to develop their systems. Loading standards have been useful in reclaiming channels in the 800 MHz band. Due to the maturing of SMR services at 800 MHz, loading standards may not be as essential as they once were. Because we are now beginning SMR service in the new 900 MHz band, I would have preferred holding the loading standards, at least in the top urban areas, to those that are currently existing under Subpart S (60 mobiles at 3 years and 80 mobiles in 5 years).

While concurring with this item, the areas of partial assignments, eligibility and reducing loading requirements deserve special attention. We may be attempting to do exactly what Congress has prohibited the Commission from doing -- developing economic means of managing spectrum and possibly removing ourselves from spectrum management. Finally, by tampering with eligibility, the Commission may be setting the stage for new rounds of court actions attempting to distinguish private carriers from common carriers.

1/ The Report and Order in General Docket Numbers 84-1231; 84-1233; and 84-1234 (51 Fed. Reg. 37398 (October 22, 1986) at para. 41) allocated spectrum to private land mobile services based on the showing of need by existing services.