

877

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

June 15, 1995

Re: Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service (MM Docket No. 94-131) and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (PP Docket No. 93-253)

I would like to make a few brief comments today on the issue of auctions versus lotteries for pending applications. Before I do so, I want to congratulate Barbara Kreisman and her staff for their diligence and hard work in reducing the backlog of MDS applications. This Commission unanimously agrees that the three items today will go a long way toward making this service a reality, which will benefit the American public by bringing a wireless competitor to cable television.

Where we disagree is on the decision of how to treat pending applications during a time of transition from one licensing methodology, lotteries, to another, auctions. I will not belabor the relative problems or benefits of lotteries or auctions because this should not be a philosophical debate.

We have before us approximately 100 applications for five sites that were filed many years before this Commission received auction authority. Such auction authority, I might note, was received during my tenure as Chairman. We were specifically granted discretion at that time, however, to determine how to process what I will call "pre-filed and accepted" applications for various communications services. But for our own administrative inability to process thousands of MDS applications in a timely manner we would not be faced with the problem of what to do with these applications that have been languishing in regulatory "Limbo" for over four years.

The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and our rules at that time.

As this Commission has faced this issue in other services, such as Cellular Unserved for example, I have consistently maintained -- and will continue to conclude -- that unless directed otherwise by Congress, we should exercise the discretion we have been given to treat pending applicants fairly which means processing their applications under the rules extant at the time of filing. In this instance, this means that we should, as I believe the majority will decide, lottery the pending 100 applications for the five MDS sites and then proceed to auction new applications.

In summary, I believe that it would be inequitable and administratively burdensome to force applicants for MDS station licenses, who filed their applications many years ago in reliance upon the lottery rules then in effect, to participate in an MDS auction, which -- unlike a lottery that can be held almost immediately -- cannot be held until the end of this year, which would, yet again, delay service to the public.

Long before it became fashionable to talk about "serving our customers," I have endeavored to decide the matters before us by using common sense and fairness based on the facts. I do not believe it is our function to justify desired outcomes through legal technicalities. The fact that something is legally permissible does not make it right or fair.

I have uncharacteristically spoken at some length today because I want to convey my deep-seated conviction that pending applications should be treated fairly by processing them under the rules in effect at the time of filing.