

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

Released: July 28, 1995

Re: Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Frequency Band by the Private Land Mobile Radio Service (PR Docket No. 89-552); Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services (GN Docket No. 93-252) and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding 220-222 MHz (PP Docket No. 93-253)

This item is the result of a very long, very contentious proceeding. The Wireless Bureau has made several proposals in an effort to encourage the growth of the long-delayed mobile communications services in the 220 MHz band. Once again, however, the most contentious matter is the issue of auctions versus lotteries for pending applications. That is, how to treat fairly the comparative handful of pending applications -- thirty-three in this proceeding -- in a mobile service that already has existing licensees determined by lottery, has since been reclassified as a Commercial Mobile Radio Service (CMRS) and, therefore, is potentially subject to competitive bidding.

This Commission has repeatedly faced this issue during the on-going transition phase from Private Radio licensing by lottery to CMRS licensing by auction. I do not dispute the utility of auctions for new applicants in new services but I continue to believe -- as I have stated each time before¹ -- that Congress intended for us to exercise discretion² to weigh the equities on a service by service basis rather than to reflexively use auctions in each and every case.

The indisputable fact is that these few remaining applications have been on file far too long through no fault, action, or inaction on the part of the applicants. Instead, it is this Commission that has failed to take the requisite action. In this case, the FCC has failed to request the financial data that would "complete" the applications. Had we done so in a timely manner, these few remaining applications would have been processed by lottery as were the existing four commercial nationwide licenses and the 3,800 licenses for non-nationwide stations.

This Commission must consider carefully the projected revenues foregone as we decide whether to lottery or auction pending applications. We do not, however, have reliable data upon which to draw. The auction proponents have strained mightily to make these licenses appear to be similar to nationwide narrowband PCS so as to maximize projected

¹ See, e.g., MO&O, Cellular Unserved Areas, 9 FCC Rcd 7383 (1994); Report and Order, Amendment of Parts 21 and 74 . . . in the Multipoint Distribution Service (MDS), __ FCC Rcd __, 60 Fed.Reg. 36524 (July 17, 1995).

² See 47 U.S.C. §§ 309 (i)&(j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule) 107 Stat. 312, 397 (1993); See also H.R. Rep. 103-213, 103d Cong., 1st Sess. 498-499 (1993) (Conf. Rep.).

revenues but their efforts are unconvincing. The NPRM is replete with references to "substantial" revisions in this service but the truth is that 220 MHz band services will remain essentially what they were, albeit with wide-area licenses distributed by auctions that have a few minor categorical restrictions such as paging and trunking restrictions removed. These strike me as distinctions in an evolving service not substantial differences. We could have done as much by reconsideration without the churn and attendant uncertainty of a protracted rulemaking proceeding were it not for the goal of auctioning whatever spectrum resources remain unlicensed.

Overall, I believe that the proposals have much to commend them and I support this Commission's efforts to transition to an auction licensing methodology. It was while I was Chairman that Congress granted the FCC auctioning authority. I do not think, however, that the worthy goal of licensing by auction should be at the expense of long-standing applicants that have been subjected to administrative delay and indecision through no fault of their own. It is this Commission that created the regulatory limbo of pending applications. It seems to me the height of bureaucratic inequity that this Commission would not only impose on this handful of applicants the costs of a four-year delay in processing their applications, but then increase these costs by requiring them to bid at auction because of the delay.

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a One of the considerations enunciated in the Budget Act for this Commission to weigh in exercising the Congressionally granted discretion to determine how to process pending applications is the relative speed of service to the public. I continue to believe that lotteries are the most expeditious means to license the very few remaining applicants and, thereby, authorize timely service to the American consumer.

Although this Commission has become quite proficient at conducting auctions, they remain labor- and time-intensive events. There is an ever lengthening queue of services being sent to the line-up for auctions. Before we send yet another service to the auction block, I believe that we should clean up the backlog so that pending and future applicants to this Commission will continue to believe in the stability of the licensing process by having their expectations adjudged under the regulations extant at the time of filing, absent a truly significant revision in the service such as reallocation of the band for other services that are different in kind and not merely ancillary to those for which they applied.

As difficult as it may be for this Commission to repeatedly face the same issue, I believe it is now clear that there exists a genuine and material difference of opinion among the Commissioners on the issue of lotteries versus auctions for pending applications. This is not cause for reticence or recrimination. It is, in fact, how policy is actually made by a regulatory body composed of members with differing backgrounds, skills, and opinions. It is, indeed, the essence of regulatory decision-making. Collegial bodies should be able to disagree without becoming disagreeable. For my part, I would face the matter squarely and tentatively conclude in this item at this time that pending applications should be subject to lotteries and future applicants to auctions.