

SEPARATE STATEMENT

OF

COMMISSIONER JAMES H. QUELLO

**Re: Implementation of Sections 3(n) and 332 of the
Communications Act, Regulatory Treatment of Mobile Services
(GN Docket No. 93-252)**

In this *Fourth Report and Order* we establish the generic rules for determining whether certain types of management and joint marketing agreements will be deemed attributable for purposes of the Commission's spectrum ownership caps in the Commercial Mobile Radio Service (CMRS). In so doing, this Commission is required to balance the potential for anti-competitive behavior against the business needs faced by the smallest potential players in a new industry, the "Designated Entities" (DEs), in a highly competitive capital and technical market.

This *Fourth Report and Order* deems resale agreements non-attributable for PCS, cellular and SMR services; however, management and joint marketing agreements will be treated as attributable in all cases for the purpose of applying the CMRS ownership limits. I can support this distinction only because the scope of the attribution of management and joint marketing agreements is limited to those exercising actual control in the same geographic market. Also, service mark and trademark licensing agreements and interoperability agreements are not deemed to be marketing agreements so they are not attributable.

I support *this Fourth Report and Order*, with some qualifications, in large measure because I whole-heartedly support the overarching goal of this Commission to foster a competitive market in the provision of the most advanced communications technologies, that is, in Commercial Mobile Radio Services such as Personal Communications Services (PCS). I am concerned, however, that we do not give with one hand by providing incentives for DEs to participate, while taking away with the other by limiting the flexibility that DEs require in raising capital and building and managing their systems.

I believe that the challenges that confront the DEs are real and substantial. They could well prove insurmountable unless this Commission is ever vigilant to guard against erecting additional road blocks to the construction of the much ballyhooed information superhighway.

As a fundamental premise, I believe that participation in new technologies such as PCS will be a big money undertaking. Licensees will expend large amounts of money not only to acquire

the license under the new scheme of competitive bidding but then, if they are the winning bidder, will immediately disgorge more money to acquire equipment and build the infrastructure. They will then need to market and operate their system.

In addition to access to financial resources, potential competitors -- especially the Designated Entities -- need access to technical and management expertise. The overwhelming majority of commenters contend that such non-equity interests should not be attributable. I agree with the almost universal majority of the commenters that discern substantial and proven benefits in permitting, indeed, in encouraging, management and joint marketing agreements. This Commission has other and more than adequate means available; in fact, we have other rules in place to guard against potential, but as yet merely speculative, anti-competitive behavior.

I am fully aware that the Department of Justice responded with filed comments that raise the specter of anti-competitive concerns. These comments were fully considered, as are all comments under the Commission's rules of procedure and the Administrative Procedure Act. I do not believe, however, that any particular comments should be accorded undue weight. Conversely, we should not disregard any properly filed comments based on their source. To argue that the commenters are "interested parties" is to state a truism. That a party filing comments is interested in the outcome of the proceeding is a reflection of the proper functioning of our administrative processes. Thinly veiled *ad populum* assertions obscure the issue; they do not denigrate the validity of concerns expressed in a party's comments.

It is for this Commission to establish policy and concordant regulations on matters within our jurisdiction. The purpose of the notice and comment process is to fully inform an independent regulatory agency such as the Federal Communications Commission in the exercise of such policy making functions.

Where policy objectives conflict, I believe that the Commission should retain maximum flexibility in setting forth our rules. Here, we balance the goal of deterring anticompetitive behavior against the goal of providing incentives for wider participation in the ownership of entities providing advanced communications services. I support this *Fourth Report and Order* because the decisions made herein are an integral part of the overall effort by this Commission to facilitate the introduction of advanced communications services into the economy for the benefit of American citizens. I remain concerned, however, that we may have disallowed management tools that have proven valuable in the past and would have been beneficial to Designated Entities in operating their systems successfully over the long term.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Implementation of Sections 3(n) and 332 of the Communications Act, Fourth Report and Order (GN Docket No. 93-252)

Today, we adopt rules that will treat certain types of management and joint marketing agreements as attributable interests in Commercial Mobile Radio Service (CMRS) licensees for purposes of the Commission's spectrum ownership caps. While I support the Commission's endeavors to deter anticompetitive behavior in the wireless communications industry, I am concerned that the Commission, by this decision, does not create uncertainty in the capital market at a time when businesses, and in particular, businesses owned by designated entities (DEs) are attempting to form strategic partnerships and alliances for the provision of these services.

In June 1994, the Commission adopted its "Competitive Opportunity Plan" and provided additional incentives in an attempt to ensure that designated entities have at least a realistic opportunity to participate in providing broadband Personal Communications Services (PCS). At that time, I indicated that the Commission's auction rules decision balanced the various goals of Section 309(j) of the 1993 Omnibus Budget Reconciliation.¹ I was particularly encouraged by the rules' flexibility as a means of: (1) enhancing the ability of capital markets to clearly evaluate the incentives created for investment in businesses owned by designated entities and (2) increasing the probability of participation by designated entities as PCS applicants. Unfortunately, I am concerned about the potential for confusion between designated entities and possible strategic partners that could result from this decision.

The majority of commenters opposed the attribution of management agreements--primarily because of the potentially adverse impact on designated entities. Despite these concerns, the Commission has opted, for public interest reasons, to deter anticompetitive behavior by wireless providers by attributing certain types of agreements for purposes of the spectrum cap. I hope that this decision does not adversely impact a designated entity's ability to form strategic alliances or to acquire

¹See, Separate Statement of Commissioner Andrew C. Barrett, Implementation of Section 309(j) of the Communications Act-- Competitive Bidding (PP. Docket No. 93-253), June 29, 1994.

necessary capital for the provision of wireless services.

Management agreements will likely play a critical role for designated entities that seek access to resources that will enable them to compete effectively in the marketplace. We have attempted to set forth those agreements that will not be deemed attributable under the CMRS spectrum cap. Despite our sensitivity to the need for clarity, I hope that these rules do not erect another de facto barrier to entry for designated entity participation.

Finally, I believe that the Commission must balance its policy objectives with sufficient regulatory flexibility for designated entities. I support this item today as an effort to advance the introduction of new wireless services in the marketplace. However, I hope that the Commission will endeavor to make certain that these attribution rules do not hinder capital formation and strategic alliance initiatives.