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A better way of handling license renewal challenges

By James H. Quello

Whenever I speak to broadcasters or cable groups, the question is inevitably asked "How do you find the transition from industry to being a Commissioner"? A complete answer to this comprehensive question could be a text in itself.

First, I couldn't have picked a busier, more challenging time to join the Commission.

In the past ten months since I've become a Commissioner, we have thoroughly deliberated, heard oral arguments, issued policy statements or rulemaking (some rules still in progress) on such key broadcast issues as:

1. The Fairness Doctrine
2. Program access for political candidates
3. Newspaper-broadcasting cross-ownership
4. Primetime access
5. Re-regulation of pay cable
6. Children's tv programming
7. Advertising of state-approved lotteries
8. Violence and sex on tv

Key matters currently under consideration include re-regulation of CATV, network re-runs, simplification of FCC regulations for radio—and, a matter of utmost interest to broadcasters—a policy statement on negotiations with citizen groups by broadcast licensees.

Now, back to the matter of impressions of the Commission.

First, I'm impressed with the knowledge, even-handedness and competence of the staff. And I'm overwhelmed (but frankly, sometimes underwhelmed, too) by the legal complications of FCC. At last count, we had 270 lawyers working at the FCC!

As I said, I'm very impressed with their thoroughness and expertise, but I'm somewhat distressed by backlog and time lag.

However, I now realize that industry and business are necessarily much more autocratic than government; the boss, whether president or general manager, generally exercises more direct control in decision-making than officials in the more-democratic

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processes of government. Business is probably more direct and efficient; government is more thorough and democratic, and in FCC decisions or rules, much time is necessarily consumed in assuring legally correct and defensible decisions.

The Commission is a full-time, eight-day-a-week job for the conscientious. The regular weekly commission meetings are in addition to hearings, oral arguments, conferences and appointments. At the regular meeting there are usually 30-50 items from 4 pages to 60 pages in length for the Commission's action. Most of the work is quasi-judicial. Staff recommendations are prepared after painstaking study and careful deliberation citing legal precedents.

I was quoted in the *Wall Street Journal* as saying, "After several months on the Commission, I now realize that FCC stands for *F*rom *C*risis to *C*risis." The *Journal* pointed out that one of the problems with all regulatory agencies is that they run from one crisis to another, putting out emergency fires, with no time for full deliberation or advanced planning. This is only sometimes true—but as the saying goes, "When you're up to your hips in alligators, it's difficult to remember that your initial objective was to drain the swamp."

Another well-publicized quote referred to during my nomination: My old friend, Congressman John Dingell, said "Why do you want the damn job? You will be beaten up by Congress and over-ruled by the Courts!" This is also true at times, but I've learned the FCC still has the authority, delegated to it by Congress, for critical regulations in communications—and the responsibility is sometimes awesome. In some hearings or oral arguments, both sides seem equally convincing and right; decisions are difficult, so you "call 'em as you see 'em"—applying reason and justice.

In many cases, I believe I can bring a special understanding of the *practical* impact on broadcasters of key decisions or proposed FCC rules or policies. And, I have to admit, there seem times when legal requirements or interpretation seem to obstruct the application of reason and common sense in our deliberations. But I have to remind myself that my approach to FCC problems is more journalistic than legalistic.

[illegible] quote in the Wall Street [illegible] early this year was on the [illegible]ject of utmost concern to broadcasters—petitions to deny and agreements with citizen groups. My quote resulted in my being personally questioned at the regional public meeting the FCC held in the Departmental Auditorium in Washington.

In case you haven't read it, the quotes were: "It's blackmail," and later, "We license a broadcaster to serve the public—all of it—what we have now is program dictatorship by a small group of activists. These groups come in and say, 'Give us what we want or we'll file a petition to deny your license'. Broadcasters have got to have enough guts to stand up and say, 'no.'" But you can only say "no" to program ultimatums when you are doing a conscientious job in affirmative-action minority employment, in overall ascertainment of community needs and in programming to meet those needs. I want to be proud of the industry; it shouldn't be necessary for the FCC or the various activist groups to prod anyone into affirmative-action employment and programming; it's 1975!

Unfortunately, problems are caused [illegible] the few broadcasters who, through ignorance, carelessness or sometimes even defiance, don't do their required homework in affirmative-action minority employment and programming.

On the other hand, I am concerned with possible abuse of the license challenge processes. I'm concerned that some groups representing only a small segment of the total community want to impose their own program tastes and philosophies on stations under threat of petitions to deny. Even if authorized, the FCC itself wouldn't dare even suggest the program demands made by some of the citizen groups. We would be charged, and rightly so, with violating First Amendment rights. Then too, agreement or no agreement, the licensee cannot delegate or abrogate responsibility for programming in the public interest.

I'm also concerned that many petitions to deny are filed with this Commission from various localities all using almost identical language to point out identical alleged deficiencies. I believe a "boiler plate" approach to such a serious proceeding is ethically questionable and should not be encouraged by actions of this Commission.

My personal feeling is that all representative community groups should be consulted (including activist groups) in the regular, mandatory process of annual ascertainment; programming and [illegible] decisions should be based [illegible] overall ascertainment and not [illegible] basis of demands of one or two groups that may represent only a small fraction of total population served.

However, everyone must recognize that the filing of a petition to deny is wholly proper and lawful. The right of any private citizen in this country to petition his government for redress is embedded in the Constitution. The rights of parties in interest (and that includes public interest groups and members of the general public) to participate in Commission application and adjudicatory processes is specifically endorsed in communications law (specifically Section 309(d) (1) of the Communications Act.) Thus, even though petitions to deny may create some very difficult administrative problems for the Commission, may clog its decisional-making machinery, and may result in literally hundreds of thousands of dollars of expense to broadcast licensees and applicants, the Commission must nevertheless be quite careful in adopting any remedies designed to lessen our problems of administration or to reduce some of our workload, lest we thwart the intent of law—and the Congress whose statutory directions we must follow.

I have always been intrigued with the ultimate question that occurs to me every time I consider a petition to deny—and that is this: Would the overall public in the community of license and in the area reached be really served if this station were taken off the air? Being also concerned about the impact of our decisions from a human standpoint, I also ask myself: What would be the probable effects of such an action upon station employees, suppliers and their families in the community where they live? Does the petitioner provide an assurance that a new and different licensee would do a better job as a broadcaster or would establish a better community reputation, or would fit into the fabric of the total community any better than the present licensee? And finally, has the petition presented facts which if true would justify imposing the heavy burden and staggering costs of a hearing upon a licensee company? These are hard, tough questions—which may well account for the fact that consideration and the preparation of rulings on petitions to deny are usually very difficult and time-consuming for the staff and for the Commissioners.

I am sure that broadcast licensees, communications lawyers, members of the staff, as well as individual Commissioners, are well aware of the very difficult administrative and decision-making problems created by petitions to deny. As of last month, there were more than 200 such petitions pending at the Commission, some of which were more than three years old—and they are currently being filed a a rate which is greater than our capacity to respond, at least with our present staff and facilities.

Petition backlog

Some time ago, I asked one of our staff members about how many petitions to deny the Commission had *acted upon* during a particular one-month period of time and he responded, as I recall, with a total of five. I thought that that was pretty good and that if the Commission could reach decisions and formulate opinions on five petitions each month, we might be able eventually to reduce the backlog. I was rudely awakened from this pleasant thought be being reminded that during that same month, some 18 *new* petitions to deny had been *filed*. It was pretty clear that we had lost some ground.

There is no question but that if present conditions continue, the processing of applications for renewal of license and for new broadcast facilities (which are subject to petitions to deny) will be brought to a virtual standstill, unless the Commission (with the help, I trust, of the Bar, the Congress and the public) comes up with some satisfactory answers. Additional staff and facilities would be helpful. There may be some other measures that could be taken.

The long-range answer probably lies in some legislative changes—possibly a revised declaration of what is "in the public interest" by our lawmakers. Perhaps the Commission itself ought to begin thinking about that possibility. At the same time, from a practical standpoint, such legislative reform appears questionable at this time.

In the meantime, there are some other interim procedures that might help reduce the amount of time required (which is another way of saying administrative delay) for the processing, consideration and decisions with respect to petitions to deny. For example, there are some very specific statutory requirements that a petition to deny must meet, including the following:

...tition must be served ...the applicant (licensee).

...e petition must show that the petitioner is a "party in interest."

(c) The petition must show that a grant of the application would be "prima facie" inconsistent with the public interest, convenience and necessity.

(d) The petitioner must be specific and his allegations of fact, except for officially noticed facts, must be supported by an affidavit.

(e) The supporting affidavit must be by a person or persons with personal knowledge of the facts stated in the petition.

It would seem to me the Commission should find that these statutory prerequisites are met before it assumes the burden of processing and ruling on a petition to deny. The Commission should not process a document as a petition to deny when under the Communications Act the document is legally defective. I believe we should first determine whether a petition to deny at least meets the threshold requirements of the law. Only after that determination is made should a petition to deny be *accepted for filing* and ...nsee or applicant involved be req...ed to respond. This is not a new idea. For years and years, the Commission has refused to accept or consider any license application which on its face was contrary to the provisions of the law or did not meet the requirements of our rules, regulations and forms. I believe we should consider the possibility of applying similar appropriate "threshold" tests and standards in the case of petitions to deny.

I also appreciate and understand the problems that members of the public face in filing petitions to deny against broadcast applicants and licensees. Their funds are usually limited and they sometimes proceed without the guidance and advice of experienced counsel. But, in all good conscience, I cannot extend these sympathies to the point of disregarding the requirements of the law. For the Commission to not administer the requirements of Section 309(d)(1) of the Communications Act is, in my view, just as contrary to public interest as refusing to administer other sections of the statute. Perhaps we can eliminate some of the problems ...delays occasioned by petitions to ...simply by being more careful in our threshold requirements.

Some activist groups, both in their ...ch to dialogue and in their peti...ns, seem to assume the bad faith of the broadcast licensee. Proceeding from that assumption, they sometimes make unsubstantiated allegations which only have the effect of d... Such tactics can only enhance any bad faith which might exist in the relationship between the broadcaster and community groups. Instead, I would urge those responsible activist groups who believe they see a genuine unmet need in the operation of a broadcasting station to approach the broadcaster assuming his good faith until given evidence to the contrary.

Accepted procedures

It should be pointed out that there are accepted procedures for correcting broadcasting deficiencies well short of petitions to deny. The Complaints and Compliance Division of the Broadcast Bureau very actively pursues citizens' complaints to ensure compliance with the Commission's rules. Forfeitures are regularly assessed against errant broadcasters, and license renewals are sometimes denied. Those citizens who feel aggrieved have ample means of seeking review of those grievances and of redress where their grievances are found to be meritorious.

If a petition to deny is filed, then the Commission must find means of expediting action. Some type of interim procedures might be helpful.

One such interim step has already been suggested, i.e., that all petitions to deny be first fairly and objectively examined by the Commission to determine whether they meet the requirements of the law as to both form and substance. If a petition does not, it should promptly be dismissed, without prejudice to the right of the petitioners to resubmit their complaints informally, as already provided for in the rules. On the other hand, if the petition to deny demonstrates compliance with the requirements of the statute, is specific in its facts (not general charges) and is properly supported, it should promptly be accepted, and interested parties (including the applicants and licensees affected) should thereupon be afforded an appropriate opportunity to respond.

As another possible interim measure, we might require, as a prerequisite to the acceptance of a petition to deny, a showing that there has been an exchange of views between the licensee or applicant and the complaining group. Suppose, for example, we were to require that every complaint or charge contained in a petition to deny must first be the subject of a discussion (or an attempted discussion) between the petitioners and the licensee or applicant. Perhaps such a requirement would result in avoiding the necessity of filing a petition to deny at all in several cases. We have already urged that such dialogues occur, although we have not, as yet, made them a specific prerequisite to the filing of a petition to deny. The shifting of some of the burdens of handling complaints of the type normally advanced in a petition to deny, *from* the Commission *to* the licensee and the petitioners would seem to me to hold some potential for reducing somewhat the administrative and decisional-making burdens at the Commission.

Long-range solutions or legislative reform seem impractical—but in the final analysis the foregoing is probably the only real, effective, long-range solution. In the interim, there are some other measures that the Commission might institute that are consistent with the statutory requirements of the law. I am sure there may be long-range and interim solutions other than the ones mentioned. I hope both broadcasters and citizen groups are interested in helping the Commission find solutions to these important administrative and decision-making problems. You can be assured that every meritorious suggestion will be given careful and thoughtful consideration. □