

May 8, 1975  
Teleprompter

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DISSENTING STATEMENT OF  
COMMISSIONER JAMES H. QUELLO  
IN WHICH COMMISSIONER ABBOTT WASHBURN JOINS

The Commission majority has now finalized its efforts to assess sanctions against TelePrompter for reasons other than a violation of Commission rules, and in the process has set a precedent for radical departure from the existing regulatory scheme of permitting localities to review the character qualifications of cable television operators. While disclaiming any intent to penalize, the majority has overridden the considered judgment of the Johnstown franchising authority and has determined that TelePrompter cannot operate a cable television system serving that community. In so doing, the majority, in my opinion, has cut several corners in justifying its precedential action.

In its Cable Television Report & Order of 1972 the Commission discussed the matter of "applicant qualifications" (para. 179), and stated in pertinent part, "Some governmental body must insure that a franchise applicant's qualifications are consistent with the public interest, and we believe this matter is appropriate for local determination." (Emphasis added). No reservation was expressed to provide for Commission review of local character qualification judgments. Yet the majority has now preempted the local authority's sole responsibility to determine qualifications of its franchise applicants, thus casting substantial doubt on the validity of the alleged dual regulatory scheme for cable, and on past policy and/or precedent, all of which have held essentially that the Commission will not sit in review of the determinations of local franchising authorities.

The majority in part bases its action on the concept of the so-called Root doctrine<sup>1/</sup> in order to conclude that the Commission's processes have been violated. The doctrine establishes the right of a court to vacate its judgment if procured by fraud. To construe the principle so that it is also applicable to administrative agencies as well as to the courts is reasonable. However, to attempt to stretch the fabric of the Root doctrine to also encompass administrative agencies once removed from the actual misconduct exceeds the doctrine's elasticity. The fraud -- in this case bribery -- was perpetrated on the Johnstown franchising authority, and only the City of Johnstown would have the option to review the tainted franchise and to set aside its award if it so determined. There was no judgment or decision of the Commission resulting from the TelePrompter fraud which could be vacated. The City of Johnstown recognized its rights under the Root doctrine, held public hearings to examine the character qualifications

1/ Root Refining Co. v. Universal Oil Products 169 F2d 514 (3rd Cir. 1948) Cert. denied 335 US 912 (1949).

of TelePrompter, and thereafter issued TelePrompter a new cable franchise. In my opinion, this Commission should not overrule the reasoned judgment of the City of Johnstown, and cannot overrule such judgment on an exaggerated construction of the Root doctrine.

To date the Commission has issued no judgment, order, or any authorization giving TelePrompter special authority to operate its Johnstown cable system, nor has TelePrompter been under any obligation by our rules to seek operating authority unless it added signals, or until such time as its franchise expired or was terminated, or by March 31, 1977, whichever occurs first. Yet the Commission ordered TelePrompter to file an application for a certificate of compliance (authority to operate) in advance of any of these provisos, in derogation of its own cable rules. Thus, the Commission majority sought premature jurisdiction over TelePrompter in order that it might superimpose its own character qualification evaluation over the judgments specifically delegated to Johnstown as the local franchising authority. The majority premises this radical departure from its own rules on the novel argument that Johnstown was not "lawfully" carrying television broadcast signals prior to 1972 by virtue of the fraudulently obtained franchise. Since it was not, its carriage is not grandfathered and it would, accordingly, be obligated to obtain a certificate of compliance in order to continue operation.

In actual fact, the carriage of broadcasting signals on the Johnstown cable system was lawfully commenced in 1961. At that time the Commission had no regulation requiring notice of approval to commence CATV operations, and subsequent regulations of the Commission have grandfathered existing signal carriage. The validity or lack of validity of the 1966 franchise in no way affected the legality of the broadcast signals provided by TelePrompter to its subscribers, in my opinion. However, it is clear that this is the only basis on which the majority could justify its requirement that TelePrompter file an application for certificate at an earlier time than specifically provided by the cable television rules adopted in 1972.

The majority has charged straight ahead, looking neither right nor left, in seeking to enforce its determination that TelePrompter shall not reap the fruit of its ill-gotten gains. This, in spite of the fact that criminal sanctions have already been assessed and those persons who were party to the wrongdoing are no longer with the corporation. The majority refuses to give weight to a completely new franchise granted in April, 1975 by an untainted City Council after extensive public hearings, and approved by a Mayor who voted against TelePrompter in 1966. In short, the majority continues to beat a dead horse.

While I do not in any way condone TelePrompter's reaping of the fruits of its illegal conduct in obtaining the 1966 Johnstown franchise, I am firmly in accord with the policy expressed in the Cable Television Report & Order that the matter of franchise applicant's qualifications is one appropriate for local determination. If this Commission is to reserve the right of review of local franchise procedures, it should clearly enunciate such intent and provide for comment thereon by state, county, and local governmental entities.

The tragic consequence of the majority's action in this instance is that the concept of dualism which we have embraced in the rules has been capriciously ignored. The principle of joint responsibility has been displaced in the interest of convenience. The role of the franchising authority, by this action, has been made subservient to the role of the Commission. It is now we who must sit in ultimate judgment over matters which our rules acknowledge are best left to local determination.

It has been said that man's reach must exceed his grasp in the interest of progress. In this instance, the Commission's grasp has exceeded its reach.

Therefore, I dissent.