

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON
IN WHICH COMMISSIONER JAMES H. QUELLO JOINS

Today the Commission decides two more UHF impact cases, essentially identical to Jefferson-Pilot Broadcasting Co., 53 FCC 2d 262 (1975). There the Commission fixed its blind eye on the facts of record (as well as the facts of life) and in doing so could see no reason why it should sacrifice a future hope of UHF service merely to obtain a real and present VHF service. So also here, the Commission with gaze fixed upon the future far away, ignores the immediate and relevant reality.

The facts of the two cases decided today are slightly different but they present the same issue. In Daily Telegraph Printing Co. (WBTW-TV), the licensee, a VHF, CBS affiliate in Florence, South Carolina, has asked us for permission to relocate its tower and upgrade its plant in order to expand service into Cumberland County, North Carolina. WRDU-TV, a UHF, NBC affiliate in Raleigh-Durham, North Carolina, objects that WBTW's proposal will have an adverse impact on the viability of this UHF station. The Review Board rejected this submission and found that the competitive impact on WRDU would be negligible, and that nearly half a million people with the present ability to receive only two off-the-air signals would acquire a third television broadcast signal of at least grade B intensity.

In South Carolina Educational Television Commission (WITV), et al., four Charleston, South Carolina, VHF stations ask us to seek remand of a pending appeal from a prior denial of permission to relocate their separate transmitting antennas to a single, two thousand foot tall

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tower. The Review Board concluded that this proposal, inasmuch as it would place three grade B signals over Florence, South Carolina, would have an unacceptably great impact on the potential development of channel 15, the UHF frequency allocated to Florence. The construction permit for WPDT, the only station ever to apply for channel 15, was granted in 1965 and turned in in 1969. The station never went on the air, nor are there pending any applications for this frequency. Over one hundred thousand people in Florence are unable to receive a viewable signal from an ABC affiliate; they would receive at least a grade B signal from WCBD-TV, the ABC affiliate in Charleston, if this tall tower proposal were granted.

Cases in which our UHF impact policy comes into play require the answer to two separate questions. First, it must be determined that a proposal will have no substantial adverse impact on the probability of UHF development; second, it must be shown that substantial public interest benefits will accrue should a proposal be granted. Triangle Publications, Inc., 29 FCC 315 (1960), aff'd sub nom., Triangle Publications, Inc. v. FCC, 291 F.2d 342 (D.C. Cir. 1961); Cosmos Broadcasting Corp., 21 FCC 2d 729 (1970), aff'd sub nom., Eagle Broadcasting Co. v. FCC, 514 F.2d 1852 (D.C. Cir. 1975). As it has been implemented, this policy has meant that even large public interest benefits in expanded VHF service are not allowed unless, in limine, it is demonstrated that there will be no significant impact on UHF prospects (however faint such prospects may be). To my mind, this formulation is not merely untenable, it borders on the ridiculous. It places UHF impact on the same footing as, for example, due process or equal protection of the laws which, as basic rights secured

by justice, "are not subject to political bargaining or to the calculus of social interests." See, J. Rawls, A Theory of Justice 4 (1971). Except for such fundamental values, whose worth, we say, is beyond price, no social policy ought to be exempt from cost-benefit analysis. (And, I suppose, even those basic values are not wholly free from cost-benefit determinations.) Social policies that cost more than they are worth ought to be junked. So, in cases where the present value of an immediately promised, new VHF service outweighs the present, discounted value of a future UHF service ^{*/}, there is no question in my mind that the VHF proposal ought to be granted.

But even granting the correctness of the present UHF policy, I think the Commission misapplies it in both of today's cases.

In Daily Telegraph Printing Co., I would affirm the Review Board's finding that WRDU's future is not vitally tied to greatly expanded viewership in Fayetteville and the rest of Cumberland County, N.C. The Commission has produced not a shred of evidence to rebut the Review Board's finding that "WRDU's prospects for survival and economic viability rest with its ability to compete with WRAL and WTVD in its principal communities," 36 FCC 2d 2, 13, and that "there is simply no basis for concluding that any increase in ratings or national or regional sales accruing to WBTW as a result of this proposal will come at the expense of WRDU." Ibid.

^{*/} The present value of the future UHF service would, of course, recognize discounts not only for the deferred realization of future benefits, but also the risk that they would not in fact be obtained.

Likewise, in the WITV case, the tall tower proposal can hardly have an impact on UHF where, as here, the frequency allocation is patently uneconomic. See my dissent in Jefferson-Pilot Broadcasting Co., 53 FCC 2d 262, 266 (1975). Our conduct toward Channel 15, Florence, is not unlike that of a mother baboon with a dead infant. She carries it around with her, she tries to nurse it and play with it, and to solicit other members of the troupe to play with it. Alas, as she eventually discovers, wishing and pretending will not change hard facts.

A majority of my colleagues have unofficially resolved to rethink the UHF impact policy--in the course of a general rulemaking proceeding. Insofar as that resolution promises a more sensible approach to the question of UHF impact in particular, or to economic protectionism in general, I commend it. But I am somewhat dismayed that it should be thought necessary to engage in a prolonged rulemaking before applying this sensible impulse to concrete cases as they arise. Certainly I think it will come as a poor comfort to the citizens of North and South Carolina to know that the Commission's foolishness in denying them new service today will not necessarily be visited on the inhabitants of Hackensack, New Jersey, a year from today.