BF

Comments of

Commissioner James H. Quello

Broadcasting/Cable Interface II

Washington, D.C.

June 1, 1988

We are drawing close to the end of the Reagan administration and everyone seems to be writing their kiss-and-tell books. Several of my broadcasting and cable friends have been after me to write my own kiss-and-tell book about the Fowler/Patrick years. However, after consulting my horoscope, I decided not to write it. I guess you can say that it just isn't in the stars. Besides, they probably could write as much about me as I would them -- the only difference is that, in my opinion, I would naturally be right . . . that is, correct. Both Mark and Dennis can legitimately claim to be right . . . certainly in the political sense.

Overall, broadcasting and cable have substantially benefited with a few notable exceptions, under the Fowler/Patrick years. I would characterize must-carry as the most notable exception. Among other important exceptions, in my opinion, were easing hostile take-over rules and proposals to grant more land mobile licenses including sharing of UHF broadcast frequencies without any demonstrated need -- in fact when available measurements actually showed a glut in land mobile grants raising concerns of inefficiency in authorizations.

Public policy historians could review the Fowler/Patrick Commissions as a tumultuous time when the courts, Congress and the Commission continued to shape public policy. We have witnessed attempts to overthrow the public trustee model with marketplace economics and theory, and Congress' antagonistic response to such attempts. We have seen a court with no or very little practical marketplace experience vote against must carry and thus negate the Communications Act's orderly allocation scheme. These decisions have given cable, a monopoly transmission pipeline, the power to prevent broadcasters from reaching a major part of the audience they are licensed to serve. I believe no must-carry also threatens universal local free TV service.

Battles among FCC Chairmen, the courts and Congress are not new. In fact, Chairman John Dingell back in 1974 warned me "Why do you want the damn job, you will be beaten up by Congress and overruled by the courts!" Regulatory battles with Congress and the courts are a time honored tradition. However, the number of FCC battles, rulings and remands seem to be unusually high the past few years caused by sincerely intended but misplaced overemphasis on free marketplace ideology. Congress initiated an unprecedented number of legislative preemptive strikes against the FCC through riders on authorization bills or introduction of legislation -- examples are minority preferences, commercial UHF for public VHF swaps, cross ownership restrictions, reinstitution of the three year holding rule and possible must carry legislation.

Some of the prestigious media oracles of the broadcast and cable industries have embraced the marketplace model and rebuked Congress and others for expressing a public interest justification for telecommunications policies. Such oracles may mean well, but aren't accurately reflecting today's statutory and regulatory facts of life. Everyone must face the fact that the public interest standard is Congressionally mandated. Until Congress or the courts rule otherwise, it is an all-important, overriding regulatory consideration. The public interest standard can't be willed away by super deregulatory Chairmen or editorialized away by Broadcasting Magazine. Through the years we have been labeled a creature of Congress or an arm of Congress. It was Congress who authorized the FCC to license in the public interest, convenience and necessity. I believe policy, as opposed to adjudicatory matters, should be formulated in a spirit of mutual constructive cooperation with Congress, the public and the affected industries.

Many who believe in the marketplace approach to public policy formulation would see little role for governmental involvement in communications matters. After all, isn't the marketplace itself better equipped to respond to consumer demands? But what about consumer interests, and the overall public interest? Responding to consumer demands is a different issue than responding to consumer interests. Interests and demands may be at odds with one another, especially when there is an effort to establish long-term public policy.

As I mentioned in my concurring statement addressing Commission action to eliminate the Carroll doctrine, "because of the Commission's licensing and allocation policies, traditional economic analysis is not necessarily an adequate measure of industrial performance." Marketplace forces and competition should not be the dominant forces in public policy formulation.

Long before the current marketplace mode of deregulation, public policy was formulated on public interest. Public interest is a broad term that encompasses not only the positive benefits of a competitive model, but also includes other societal values. Author Walter Lippmann tried to define it in understandable terms. He said public interest is "What people would do if they thought clearly, decided rationally, and acted disinterestedly." Due to the years of policy formulation based on the public interest obligations, one cannot with the wave of a magic wand, simply formulate a free market model. To do so would ignore the intent of Congress, and in my opinion, would be selling the viewing and listening public of tomorrow short.

For example, proponents of free marketeering favor auctioning of spectrum, removing the Commission from spectrum management, allowing the sale and transfer of licenses. After all, true free marketeers would argue that the public interest is best served by allowing such free market principles to operate without government oversight. Congress, the originator of the Communications Act and the current authorizing authority,

disagrees. And, to the extent the public has been able to voice its opinion on such issues as auctions, it, too, usually disagrees.

Since before the adoption of the Communications Act in 1934, a struggle existed as to how the electromagnetic spectrum was to be governed. Prior to the adoption of the Radio Communications Act of 1927, battles developed between the executive and legislative branches of government as to whom should have control over spectrum matters. Should broadcasting be governed by economic models or should it be governed by public interest principles? Eventually Congress and public interest standards prevailed in this landmark battle. Over the years many rules were imposed on those industries regulated by the Commission to assure that the public's interest was protected.

As I mentioned, the 1934 Act specifically authorized the Commission to regulate communications consistent with the public interest, convenience, and necessity. Such regulations create order in the use of spectrum, and assures that more than economic marketplace interests are served by the awarding of public licenses. It was in 1934, as it is today, the design and intent of Congress to develop a local broadcast allocation and licensing scheme that melds the business interests of licensees with societal responsibilities.

Over time, infant industries, like children, mature and outgrow rules. During the fourteen years I have served on the Commission I have supported the elimination of many such outdated rules. Unfortunately, I have seen a few excesses where the elimination or modification of our rules and policies have created chaotic business conditions that have thwarted the ability of licensees to fulfill their mandate, and have in some instances created an imbalanced playing field. Most of these excesses were neither generated nor supported by the broadcast and cable industries. They appear to be generated by an ideological rather than a practicable approach to real world marketplace issues. Some of the broadcast press who have embraced the pure free market approach to policy formulation have generated broadcast opposition. Let me give you a few examples of free market problems.

Reading the editorials in Broadcasting (May 2, 1988) would lead readers to believe that there is no need for must carry rules or for government intervention. I disagree. My viewpoints on must carry are well known.

I believe there is an undeniable government interest in making certain that TV stations licensed by the government to serve the public interest continue to have access to the public they are licensed and required to serve. I believe the obligation and right to serve the local area is required by the Communications Act and by the FCC careful allocation of channels

to the community. I don't believe any monopoly or semi-monopoly transmission pipeline should be able to prevent or obstruct the licensed station's local service to the public.

The Cable Communications Act of 1984 was enacted with must carry in place and before cable started aggressively selling over a billion dollars in advertising in competition with the local stations. Must carry was certainly a vital part of the legislative balance when the 1984 Cable Act was adopted. Elimination of must carry is a compelling reason why Congress should revisit cable legislation.

Congress should do this not to please broadcasters, but to serve the public with assured future free TV and to correct a miscalculation caused by FCC ideological avoidance of Section 307(b), the public trustee concept and localism -- the principal factors necessary to developing substantial government interest.

In my recent statement before the House Subcommittee on Telecommunications and Finance I stated:

> That the absence of must carry for local broadcast stations will have a profound -- indeed potentially catastrophic -- effect on the flow of information in our society.... The viability of local over-the-air broadcasting will depend to a large extent on the ability of a station to secure carriage on local cable systems to be able to reach the audience it is licensed to serve.

Some argue that it is unlikely that cable operators will drop local broadcast stations. I argue that the ability, the power if you will, to do so is an awesome tool -- the real threat. As a result of the Quincy and Century decisions, the marketplace has been skewed in favor of the cable industry. Restoration of syndicated exclusivity will help restore some balance to the marketplace. However, the ability to drop or reposition a local broadcast station makes cable the sole gatekeeper among 51% of the TV households. The potential for abuse of this power (legal power) is great and will probably increase in the future. It could eventually lead to program and advertising domination by pay cable at the expense of free universal TV. In my opinion, this is no time to oppose Congressional corrective action.

In this regard, I believe the Commission's current must-carry survey is an important step towards assessing the marketplace. There has been criticism from both cable and broadcast interests regarding some aspects of the survey. While most of the criticisms are off the mark, I think the language soliciting information about channel repositioning should have been uniform for both the cable and broadcast surveys. Nevertheless, the data provided by these surveys will assist the Commission in its assessment of the current marketplace. The Commission has the ability to cross check its cable and broadcast data to ensure its reliability.

Most importantly, however, I believe it will provide an initial "snapshot" of the post Quincy market environment. Markets are dynamic and ever changing. As cable continues to emerge as a competitor for local advertising and national programming, patterns of repositioning and noncarriage will change. The Commission's survey is the first attempt at monitoring this rapidly changing market. I believe it is a useful, worthwhile endeavor notwithstanding some imperfections that the Commission can take into consideration.

As advertising, especially local advertising, becomes more competitive, cable operators will have the power to drop local stations that compete most vigorously for advertising revenues and for program contracts. In this situation the cable operator can have a strangle hold on broadcasters' economic viability and cause a reduction in the amount of local news and information broadcast to the community -- a Section 307(b) issue.

I believe that must carry is essential to assure an equitable marketplace for free TV. I also believe a flawed or miscalculated FCC legal rationale played a significant role in the court's adverse decision. As I stated before the House Telecommunication Subcommittee,

> the Commission majority obstinately and with considerable craftsmanship avoided or de-emphasized Section 307(b), localism, and the public trustee concept that broadcasters are licensed by the government to serve their community in the public interest, convenience and necessity.

Since the Commission failed to properly justify must-carry rules, Congress has the right, and in this case perhaps the responsibility, to reimpose some form of must-carry. Again, I have read editorials that have criticized the efforts of Congress to intervene in this matter. It is the right and responsibility of Congress to assure that the public trustee and universal free service framework for broadcasting is maintained. When the court remanded the initial must carry proposal to the Commission, Congress reacted vigorously by sending the Commission a letter signed by all 23 members of the Communications Subcommittee urging the Commission to craft must-carry rules. I think this unprecedented Congressional action manifests substantial government interest in itself -- Who represents government interest more than those who are duly elected representatives of the people? Those who believe that Congressional intervention is undesirable are forfeiting the best and perhaps the only remaining chance of reinstating must-carry and restoring balance and equity to the marketplace. This would ensure the future continuation of free over-the-air broadcasting for major sports and local news and public affairs programming.

Another example of the free market approach with questionable public interest ramifications is the recent inquiry into FM translators. Another editorial in Broadcasting (April 11, 1988) stated that "broadcasters need to be protected by the free enterprise system, not protected from it."

Allowing thousands of low power FM stations by easing our FM translator ownership and operation rules spells the potential for disaster in terms of the Commission's orderly spectrum allocation scheme and the economic viability of local radio broadcasters. If this anarchic allocation represents free enterprise, then I would say that broadcasters need to be protected from it. I voted for the inquiry only to establish a more complete record to eliminate translator abuses and to justify the tightening of existing FM translator rules. Abandonment of our FM translator rules would essentially gut the economic viability of commercial local radio broadcasting and seriously damage local service. We should impose a heavy burden of proof on those seeking to expand our existing translator rules.

Auctioning of spectrum, although as now proposed by the Chairman would not include broadcast frequencies, is yet another example of the free marketeer approach to public policy formulation. Personally, I don't see how a free marketeer could make the distinction between broadcast and non-broadcast industries when examining the issue of auctions. What may not apply to broadcasting in the first phase of any auction proposal could, and I predict would, easily include broadcasting at a later time. I find it oxymoronic that a pro business administration would impose the additional cost of spectrum to the cost of doing business, especially those seeking to establish new businesses. More importantly, the use of auctions

or any other economic means to manage spectrum favors the haves over the have-nots and is inconsistent with the Communications Act. I'm afraid the auctioning of spectrum further removes the Commission from its statutory responsibility of orderly spectrum management.

The free market approach was also the dominant theme in the overactive buying and selling of broadcast properties in 1985 and '86. I have been an outspoken advocate of reimposing the three-year rule. I do not believe it is in the public interest to have highly leveraged licensees whose first obligation becomes servicing debt rather than the public. I also believe the turmoil caused by hostile take-overs with resultant job displacement, disruption in long-term programming and sometimes greenmail payments doesn't serve public interest. After all broadcast licenses are a public trust -- they should not be bought and sold like commodities. Again, the public interest is the principal concern -- a public interest finding is necessary to approve transfer of control. Is it in the public interest to approve a transfer when a fast turnover for profit is the principal motive? I think not.

With respect to buying and selling on the cable front, the Commission should examine closely the issue of concentration of control and vertical integration. To what extent are the difference in programming prices paid by MSOs and independents driving the independents out of business? Cable is not only

in the position of controlling what video signals are received by the cable subscriber, but also it is flexing its muscle by becoming a significant player in the production of programs carried on cable systems.

Does the free market approach spell relief for the cable industry? Later this summer the Commission will release its report on cable/telco cross ownership. The free market approach would advocate the entry of telephone companies into the cable business and vice versa. The more cable assumes the power of a local monopoly the more it should either be regulated as a monopoly or become a player in a competitive marketplace via overbuilds and telcos. However, the problem of controlling telco cross subsidy is mind boggling. The nation is years away from being served via fiber-optics in the home so this issue may not be imminent.

Before I finish my comments, I feel compelled to say a few words about syndicated exclusivity. After adopting the syndicated exclusivity rules, an editorial appearing in Broadcasting praised it as "The Miracle on M Street." It was a thoroughly argued and negotiated miracle. It was righting a previous wrong in a moderate statesmanlike way. Reimposition of syndicated exclusivity rules was necessary to ensure property rights and to restore a balanced playing field between cable and

broadcast interests. In 1980, when the Commission in a narrow 4-3 vote eliminated the rules, I dissented stating --

> ... the elimination of syndicated exclusivity is inequitable, not needed, not wanted by a significant number of cable TV owners and operators, and is counter to long-term public interest.

I opposed the "time diversity" argument and recognized that a world void of exclusivity rules would be an endless recirculation of tired syndicated programming and an unfair infringement on local contract rights. Restoration of syndex served to validate my 1980 statement. The Commission's action on syndicated exclusivity is an excellent example of the need for carefully crafted government regulatory policy to provide fair balance in the marketplace.

In short, public policy formulation should be an open process where reasonable practical answers are given to difficult questions. Our rule-making procedures provide the opportunity for public comment. Likewise, the comment and interest of those elected to represent the public should also be heard. In my opinion those whose responsibility it is to serve as the eyes and ears of the industry should listen carefully to the public affected and the industries involved to determine truth and to advocate actions that best serve the public's interest.

I was glad to be an active player with Dennis and Mark, who made great strides to create a competitive, deregulated market for all FCC regulated industries. However, I remain concerned that from time to time, too great an emphasis has been placed on a textbook's ideological model for free markets than on a more practical approach acknowledging the undeniable statutory public interest standard that can be utilized to better serve both the public and the communication industries. That concern seems to be shared by a majority of Congressmen and Senators of both parties .... Just ask members of the Communications Committees or Subcommittees whether or not broadcasters are licensed to serve public interest! Competition should not be a goal in itself, but a means to improve service to the public. Again, everyone must face the fact that the public interest standard is Congressionally mandated -- I repeat it can't be willed away by super deregulatory Chairmen or editorialized away by Broadcasting Magazine. The Commission should foster competition by using marketplace principles consistent with the the Communications Act in assuring that the public interest is served. I believe our policies should ensure a viable, free, over-the-air local broadcast system. Such a universal local broadcast system is essential for the proper functioning of a democracy and to assure that all Americans continue to be the best served and the best informed in the world.