Luncheon Address
by
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Greetings from the FCC -- your Friendly Communications Commission -- ushering in an era of gentler, kinder regulation and, hopefully, Congressional relations. From your advance notice, I'm expected to provide a special insider's insight into policies and operations of the FCC. With a new administration that doesn't have confirmed appointments in three FCC Commission vacancies, the best I can offer is an educated guess.

The future policy of the Commission will be principally proposed by a new chairman and probably two and even possibly three new commissioners! It is possible that I'll be the only holdover from the Reagan administration -- and a democratic holdover at that! Think of it, I'll be the only one with longtime institutional memory and recall -- a quality not exactly essential to the operations of enthusiastic, hard driving, regulatory new blood. As you know, we have been operating with only three commissioners for over a year. In fact, I'll have to personally get used to operating without my awesome one vote veto power. Under present circumstances, if one commissioner chooses not to attend a meeting, there is no legal quorum for official business.

Incidentally, I remember Chairman Mark Fowler's classic remark several years ago when asked "What is the difference now that the commission has been reduced from 7 to 5 members?" His terse reply "I have two fewer rears to kiss" -- he used the more explicit term for rear, but I withheld it out of respect for this prestigious audience.

It is true that once a chairman proposes an item or agenda, he must generate the votes from a majority of his fellow commissioners to effect his proposal. Consequently, a new chairman must hope for compatible commissioners and probably should have a voice in their selection. As you probably know, a commissioner's duties encompasses the complete range of governmental responsibilities -- legislation (rule making), enforcement, judicial review and decisions and executive management.

There are many rumors as to new prospects for the commission. Four photos appeared in Broadcasting Magazine last week. I personally know three. All are well qualified communications attorneys. Although I have many good friends on the Bush transition team, I am not an insider in the selection process. Fortunately, two former distinguished FCC chairmen, Dick Wiley and Dean Burch are Bush insiders. If they are or were called upon, you can be assured of qualified, practical nominees for the FCC.

From what I have recently observed of the confirmation process, I do hope the FCC nominees will expedite the process by being relatively celibate non-drinkers with no active experience in the communications industry. It might even be helpful if they haven't appeared on recent TV or cable panels on the abortion - pro-life issue or have publicly stated positions on any controversial issue. Lawyer nominees, and I believe three of the five commissioners must be lawyers, could probably assure prompt confirmation by having no communications clients. This would assure complete objectivity with commissioners that have no experience or practical working knowledge of subjects they are to regulate. I can identify with overemphasizing this "fox guarding the chicken coop" syndrome. Some of the older members of the audience may recall my initial confirmation problems fifteen years ago (ad lib Senators Pastore, Griffin and Hart participation).

I expect a Bush administration commission to continue a marketplace deregulatory policy, but with a more moderate, less ideological approach. I hope and expect improved working relationship with Congress. I also believe we need to speed up commission processes and effect more prompt action on applications and issuance of notices.

I have served under both Democratic and Republican controlled commissions. As you know, only three of the five commissioners can come from the same party.

I was relatively comfortable with the different social and legal approaches to regulation. Fortunately, most commissioners don't decide complex policy issues by partisan democratic or republican votes. The issues are decided on the legal record and the individual commissioner's determination of logic, reason and serving public interest.

Incidentally, I tell my legal assistants that working directly for me will be a broadening experience in practical regulation. I warn them "You will see how we apply social and political solutions to highly technical legal problems." Actually, most FCC decisions are predominantly legal matters, but the most significant ones require consideration of all policy and social perspectives with an emphasis on policies expressed by Congress.

It is hard to believe that I'll be starting my sixteenth year as an FCC commissioner this month with another 2-1/2 years to go. I've seen a productive evolution from overregulation to deregulation to unregulation, to marketplace self regulation with occasional counterproductive lapses into unregulatory excess. I'm glad I was around to contribute to the long overdue deregulatory transition that elimininated tons of paperwork and over-intrusive government regulations. I'm also glad I was around to register a dissent when our actions struck me as counterproductive. Several years ago the trade press quoted me correctly stating "I do deregulation but not anarchy."

I disagreed with the majority of commissioners on several major issues such as must carry, repeal of the three year holding (anti-trafficking) rule, disclaiming of the public trustee concept for broadcasters, repeal of UHF Impact Policy, UHF-land mobile sharing without a demonstrated need for more spectrum, limited spectrum allotment for HDTV, broadcast spectrum auctions, flexible use, the initial financial interest and syndication proposal, and others. I have also expressed concern and shifted burden of proof on the significant telco-cable NPRM and expressed reservations about replacing our current comparative process with random lotteries.

Despite expressions of misgivings in some quarters about marketplace competition replacing regulation, we still haven't deregulated either the FCC or the FCBA out of business. As upcoming attorneys you will be glad to know that the communications marketplace is brimming with billable hours and legal-lobbying controversy in broadcasting, cable, telephone and satellite fields. Let me reel off a few of the more significant issues: the Fairness Doctrine; must carry; telephone price caps; MFJ implementation; syndex; broadcast cross-ownership waivers; telco-cable cross-ownership; trunking standards for public safety spectrum; network-cable cross-ownership; networks providing sales representation for their affiliates; reinstating the three year rule; comparative renewal reform; enforcement of obscenity and indecency rules; prohibiting U for V swaps;

development of compatible terrestrial HDTV; DBS; MMDS; EEO regulation; lottery process for broadcast spectrum; auction; flexible use and negotiated interference rights for broadcast spectrum; transfer fees; possible ban on beer and wine advertising, etc. There are many other issues and daily items requiring legal analysis that are voted by circulation. It's obvious there is enough contentious litigation to go around.

Some uncharitable souls even profess that law firms have incentives to generate crisis and regulatory contention. Surely such base motivation is far beneath such an august profession -- one of the world's oldest or close to being the world's oldest, I am told. I was recently mailed a copy of part of a will that demonstrates the continuing problem of unfavorable private, if not public, perception of the legal profession. Even I have to smile while I read this and I quote:

> "No attorney or firm or group of attorneys, nor any bank shall for any reason whatsoever receive any money, property or valuables from my estate as I have already, while living, involuntarily contributed far more than my share to the benefit of this crooked bunch of miserable bastards who prey upon the misfortunes of others."

This outlandish quote containing some bare element of truth should take care of the usual deprecating lawyer stories for the day. Oh yes, I was considering working in a laugh line like

"Airbags are redundant in a lawyer's car." My loyal legal assistant suggested I could refine and immensely popularize the statement with a simple one word substitution -- commissioner for lawyer. Good suggestion, also with some bare element of truth. However, I decided not to use it today. I'll save my other two or three standard lawyer stories for a more appreciative non-lawyer audience.

Before I discuss a major telecommunication issue which promises to generate billable hours into the next century, I want a long pause for a commercial message regarding the failed salary adjustment for Congress, judges and federal executives -- yes, it included the FCC.

This is only the second captive influential audience I have addressed since that over-publicized controversy so please pardon my taking advantage of this opportunity to present a program length commercial.

First, let the record show that TV, radio and cable personalities and newsmen have a right to propose controversial actions -- they even have a first amendment right to be wrong!

However, I would like to exercise some candid first amendment rights of my own. I find it the ultimate in unconscionable self appreciation and insensibility for higher paid TV and cable personalities, national news anchors and talk show hosts, many of whom make 10 to 25 times more than a senator

or congressman to indulge in a messianic binge against a salary adjustment to keep pace with inflation for congressmen, key government officials and judges. The initial salary increase was not proposed by Congress . . . . It was recommended by an impartial, well-qualified non-political bipartisan commission of civic leaders headed by the highly respected Lloyd Cutler. The Quadrennial Commission recommendation was supported by outgoing President Reagan and President Bush.

Last week a second objective, unimpeachable panel of prominent government leaders of all political persuasions headed by Paul Volcker, highly respected former Federal Reserve Chairman, is again recommending a substantial salary adjustment to keep pace with inflation. The proposal is for 50% over two years linked to a ban on honorariums and campaign fund reform.

Are lavishly paid personalities and anchors who utilize government licensed airwaves to accommodate an insatiable quest for ratings, money and power really performing more valuable service than those that grant and manage communications licensees, pass laws and govern the nation? I think not.

I'm also concerned that local disc jockeys and talk show hosts used a serious national issue as an audience building promotional gimmick. They, too, have first amendment rights but I believe station editorial policy should be determined by station executives and responsible newsmen. It is relatively

easy to defeat an impossible 50% salary adjustment especially when only one side of the complex issue is vigorously promoted.

Mike Royko, The Chicago Tribune's widely syndicated columnist, aptly said it all in responding to Pat Buchanan's charge that congressmen were making much more than the average American. Royko wrote:

"The fact is, the average congressmen is not the average American. He is better educated, smarter, reads more, watches fewer game shows and soap operas on TV, knows more about law, foreign affairs, national problems, and assumes greater responsibilities. So why shouldn't a congressman be paid as much as weak-hitting utility infielder?"

"In the big federal spending picture, a raise for congressmen is just pocket change. Yet the average person becomes outraged at the thought of a public official -- any public official -- wanting a pay hike."

"We demand good judges, yet we pay them less than they could earn chasing an ambulance. We want good governors to manage our states, but become indignant if they ask to be paid more than the manager of a small factory."

"Isn't it kind of goofy that the president of the United States -- the most powerful man in the world when he's awake

-- is paid less than a mediocre point guard in the National Basketball Association? Or a network anchorman? Or some local disc jockeys?"

As for myself, with a moderate lifestyle, I have no problem living well on my government salary. I like my job. But the salary level simply does not reflect the complexity or importance of commission responsibilities.

It also strikes me as ironic that the media resurrected Ralph Nader, who is notorious for his over-regulatory zeal.

Thinking it over, Mr. Nader, a self proclaimed public advocate with his newly established expertise in appropriate compensation rates, could be the ideal chairman for a civic or public study committee to recommend reasonable compensation rates for TV-radio newsmen and personalities working for or utilizing the facilities of licensees with statutory obligations to serve the public interest. Mr. Nader could cause another public furor by recommending that overall public interest might be better served by restricting salaries of national personalities to some reasonable level -- say only a mere 5 times the salary of congressmen and senators. This is the type of socialization a great majority of Americans would support. Just imagine the questions at referendum -- Is (news anchor) (talk show personality) (etc.) worth $1 to $4 million dollars a year -- 10 to 20 times more than your senator or 5 to 10 times more than the president of the United States?

I think it would be easy to predict the outcome. This could free millions of dollars for more worthwhile quality programs, children's educational presentations, and informative documentaries. Perhaps a public referendum on reasonable compensation for individuals who derive their fortunes from using the public airways would represent the ultimate in public participation in a vital process. Of course, as a strong first amendment advocate I would personally oppose this intrusive type of proposal. However, the recent public furor demonstrated that populist compensation issues affecting government regulated entities cannot be denied once they are publicized.

I'll resist identifying the dozen individuals or programs relentlessly opposing the salary adjustment. Suffice it to say, that I repeatedly saw Ralph Nader interviewed on TV and cable networks. Also, most late night talk shows couldn't resist cheap shots -- laugh lines prepared by their writers. One late night talk show host, who from all I read makes far more in a week than a congressman makes in a year, wisecracked and I'm paraphrasing: "You heard that Washington is the murder capital of the world -- well, if they had passed the pay raise last week it would also be the robbery capital of the world! Are congressmen really worth $135,000 a year? Maybe the group as a whole would be. But how could congress go on strike? How would we know when they are not working?" Are congressmen or even commissioners worth much less a year than what insensitive comedians make in 1 week? Some may even characterize this type of lavishly paid comedian as an insensitive, overpaid smart ass!

However, let the record show this type or any type comic has a first amendment right to be an insufferable smart ass!

Seriously, congress and the media failed to emphasize enough that this was a catch-up increment recommended by an impartial, nongovernment commission to keep government pay abreast of inflation. Now it is again recommended by another prestigious panel. It should have been and should be repeated over and over again -- an inflation adjustment, not a pay raise per se. Of course, inflation adjustments should not have been neglected until they reached an inflammatory, impossible 50% -- small annual rates over a 5 or 6 year period would have been acceptable. The federal compensation commissions were formed for the express purpose of avoiding the embarrassment of a public body voting itself an increase. No one is required to vote his or her own pay raise. Even compensation for board chairmen or presidents of publicly held companies is voted by their boards of directors.

Representative Jim Cooper was on target with his quote in The Washington Post:

> "I never met a constituent who ever turned down a pay raise for themselves or who ever liked a pay raise for someone else. I never met a constituent who liked his salary published in the newspaper, and I never met a human being who wanted the nation at large to vote on their pay. It's among the most sensitive matters."

Finally, killing the salary adjustment did not serve public interest because it doomed much needed reforms on eliminating congressional honoraria, limiting outside income and changing campaign fund laws. This important quid pro quo was underpublicized or not mentioned.

Now back to our regularly scheduled program. The vital topic with the most far-reaching implications for the future of communications in America and incidentally billable hours for the FCBA and upcoming communications lawyers, is the telco-cable proposal. This complex ongoing FCC proceeding may result in recommending that Congress lift the statutory ban against telcos offering cable television services in the phone company service area. I issued a statement during the ongoing proceeding to generate reply comments on my concerns and to announce a shifting of the burden of proof. Your question could well be "Isn't it unusual for a commissioner to issue a statement during the comment period in an ongoing FCC proceeding?"

Initially, I voted for the Further Notice of Inquiry and Notice of Proposed Rule Making recommending to Congress that it eliminate the existing telco-cable cross ownership restrictions. The Commission's proposal suggests that telephone entry would be permissible in situations where it merely acquired an existing cable system.

Reviewing the initial round of comments and considering the long-term implications on the telecommunications marketplace lead me to believe that it may be appropriate to place a heavier burden of proof on telephone company entry in certain circumstances. I see little upside to replacing one unregulated monopoly (cable) with another larger monopoly with limited regulation. My initial thought is that telephone entry into cable should be limited to providing a competitive alternative, not merely replacing existing cable operations. However, there is a probability that only one system will eventually survive in the practical marketplace.

If the marketplace ultimately reverts to a one wire environment, then the Commission should carefully examine the regulatory structure to ensure access by local broadcast stations. Thus, I must depart from the Commission's tentative decision to the extent that it does not adequately focus attention on the potential impact of telco entry on free over-the-air broadcasting.

A key question is whether telco entry will be a threat or boon to preserving free universal TV service. In my opinion the crucial public interest issue is the preservation of free local television service to all the public. Only broadcasting, not cable or phone fiber, has a government licensed obligation to provide TV service to the public. Broadcasting is the principal source of local news and government affairs, of vital local services like traffic, road, weather, school closing reports

and emergency bulletins. And only broadcasting has a program-issues public file requirement for license renewal and for public inspection. I have repeatedly stated that no unregulated transmission pipeline monopoly, cable or phone fibers, should be able to obstruct or prevent a broadcaster from discharging his government mandated requirement to serve the public on the very channels assigned by the government. To preserve universal free local service, the FCC may have to require fiber video transmission systems to provide a basic antenna service to transmit local broadcast signals at no charge.

The ultimate implementation of nationwide telco entry is probably years away. Both the potential and problems are mind-boggling. For example, should the phone company monopoly be prevented from cross subsidization? How will Congress or the FCC allocate joint costs among the various services provided by one line into the home? Would public interest best be served by restricting telcos to common carriage? Will the unlimited capability of fiber transmission require a restructuring of telecommunications in America? Will satellite develop into a viable competitor to fiber? Will fiber with its potential for providing a dazzling variety of services without spectrum needs (phone, TV, radio, data processing, home shopping, etc.) require a complete re-writing of the Communications Act? These contentious questions provide an initial insight into the complex problems of telco entry.

Of course, my views are tentative and I plan to review all comments and reply comments before reaching a final conclusion. Depending on your viewpoint the Commission's proceeding may be visionary or premature. Some industry experts estimate that it will be 15 to 20 years before the nation is "wired" with fiber optic cable. I think the Commission must continue to review the implications of this complex issue as the possibility of telco entry comes closer to reality.

All of which brings us back to the state of telecommunications and, particularly, the broadcasting and cable industries. There are major unresolved complex legal issues and undeployed technologies requiring judicial decisions and direction . . . and there probably always will be. As a commissioner whose approach to regulation is a little more journalistic than legalistic, I find great solace and guidance in the words of President Franklin Delano Roosevelt as he reflected on the role which administrative agencies should play. That great president said:

> "A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

I hope all your future billable hours will be for worthy causes resulting in substantial justice. Good luck!