

Concurring Statement
of
Commissioner James H. Quello

In Re: Kansas City Television, Debtor - In Possession
Licensee of Television Station KZKC(TV), Kansas City, MO
Notice of Apparent Liability Adopted June 23, 1988

Reluctantly, I must concur with the majority's decision regarding the disposition of the Notice of Apparent Liability issued against KZKC. I agree that our actions here are governed by the Court's teachings in Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). I supported the decision to stay release of the Notice of Apparent Liability. See Order, FCC 88-274, released August 5, 1988.

I continue to believe that the actions of KZKC constitute actionable indecency. My preference would be to move forward with the fine and take the risk in court. It is not clear to me that the Court's decision absolutely precludes all evening enforcement of our indecency rules. The Court provided no bright line separating daytime, evening and nighttime viewing. Logic tells me that there is a greater probability that unsupervised children will be viewing television at 8:00 PM than listening to the radio at 10:00 PM or midnight.

Nevertheless, I cannot ignore the legal risks raised by the majority. In its present posture, there is a significant possibility that the case would be reversed in court. Moreover, even if we were to establish new safe harbor provisions, as suggested by the Court, there is a significant problem with retroactive application to the instant case. Given the difficulty the Commission has had with the courts in its attempt to enforce our indecency policy, I believe we must go forward with the strongest possible case. The legal difficulties with this proceeding make it an inappropriate vehicle to serve as the first case enforcing indecency on television.

I remain committed to enforcing our indecency and obscenity policies. Our obligation to enforce these policies is statutory and cannot be ignored. I trust the Commission will conduct a rulemaking expeditiously, in order to determine when there is a reasonable risk that children may be in the audience. Clear unambiguous rules are essential if we are to give parents and broadcasters guidance regarding this important policy.