

Federal Communications Commission

**Dissenting Statement of
Commissioner James H. Quello**

**In the Matter of
Standards for Assessing Forfeitures**

In the past year, the Commission has engaged in an "attic to basement review" of our radio ownership policies, initiated a similar inquiry with respect to television, reformed the comparative hearing process, and adopted broadly gauged deregulatory initiatives applicable to common carrier and private radio services. The common theme of these various actions is to "provide a minimally intrusive regulatory framework to expedite and foster service to the American public."¹

Yet at the same time, the *Memorandum Opinion and Order* approved here increases the base fine for most rule violations by more than six times. What is wrong with this picture?

The apparent contradiction between the Commission's new enforcement policies and the deregulatory initiatives is particularly striking in the case of broadcasting. Our current review of the television rules, for example, is based on findings that "[t]elevision will be a smaller and far less profitable business" and that "small market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark."² In March, we relaxed radio ownership rules, in part, because the financial "outlook for small radio stations, which comprise the bulk of the radio industry, is particularly bleak."³ Before the Commission adopted the new radio rules, the Mass Media Bureau prepared an Overview of the Radio Industry which found that small radio stations — the bulk of the industry — are in "profound financial distress."⁴

It is noteworthy that, at least in the context of ownership rules, the Commission concluded that the public interest demands easing the economic pressures facing the broadcasting industry. We found, for example, that "[t]he industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability" and that this ability is "substantially threatened."⁵ Accordingly, the Commission adopted ownership changes in order to promote efficiency and reduce administrative costs. Our hope is that consolidation may save about 10 percent of stations' general and administrative expenses.⁶

It is acutely ironic that the Commission would impose harsher penalties across the board while simultaneously launching various crusades to save the broadcasting medium. In doing so, the Commission is sending the strange message that "we love broadcasting — it's just broadcasters we can't stand."

Of course, the irony extends not just to broadcasting, but to virtually all the services we regulate. The Chairman's recent report to the President listed deregulatory initiatives for wireless cable, satellite services, specialized mobile radio services, cellular telephone services, private land mobile radio services, equipment authorization rules, experimental authorization processing, common carrier complaints, and amateur operator requirements, among other areas. The report suggests that "streamlining rules and removing unnecessary regulatory barriers will . . . create major savings to industry" and estimates that reducing paperwork burdens will save \$4 million per year.⁷

But the Commission is prepared to take away, as well as to give. In 1991, for example, the Commission collected approximately \$1.35 million in forfeitures.⁸ If, under the new forfeiture guidelines, our collections are tripled, we will take in over \$4 million in fines. This probably is a conservative estimate.

In essence then, the Commission's actions, taken as a whole, are not so much deregulation as a shift of regulatory burdens from certain licensees to others. Some may argue — with some force — that the burdens are justified, since they fall only on those who violate our rules. But this assumes that the burdens are proportional to both the magnitude of the "crimes" and the economic strength of the malefactors. Such an assumption is unwarranted, and I am concerned that we are engaging in regulatory overkill.

The forfeiture levels under the new guidelines have been multiplied for all licensees, regardless of the size of the station or the market involved. But as the Mass Media Bureau pointed out last January, "[r]adio today is a world of large haves and little have nots." It noted that "at least half of the 10,000 stations lost money — primarily stations doing less than \$1 million in revenue. These small stations have operated at the margin for years."⁹ Moreover, conditions are worsening. Since 1988, according to the Bureau, average AM profits have dropped by half and average FM profits have fallen by one-third. For a station in financial trouble, adding several

thousand dollars to a fine may make the difference between a profitable and an unprofitable year. And as we recognized in *Revision of Radio Rules and Policies*, "many stations have had to cut back significantly on staff and programming as they struggle to conserve resources."

Most recently, the Commission adopted a *Notice of Proposed Rulemaking* proposing to relax our television ownership rules. The *Notice* was based on the recognition that "[p]rofits of broadcast television stations . . . have declined steadily in recent years" and that outside the major markets, "losses apparently have become the norm."¹⁰ The Commission should not add unnecessarily to these problems.

The majority suggests that the forfeiture guidelines are not a firm policy, and that the Commission has the discretion to modify fines that are excessive under the circumstances of a specific case. But our experience with the guidelines suggests that this solution is more theoretical than real. The Commission has declined to reduce forfeitures for stations even where they demonstrated financial hardship, including significant net losses. *E.g.*, *Springtown Educational Broadcasting Foundation*, DA 92-496 (released April 24, 1992); *Southern California Broadcasting Co.*, FCC 92-221 (adopted May 15, 1992).

Finally, I want to emphasize that I fully support the decision of Congress to increase the Commission's forfeiture authority. In fact, I have advocated such an increase for years. Congress recognized that the existing fines and penalties had not been increased since 1934, when the Communications Act was adopted.¹¹ Given the huge size of some communications industries, the Commission clearly must have the ability to make its orders and penalties meaningful.

Nevertheless, we should consider whether it is necessary to increase the amount of our fines in every case or in routine cases, given the current economic climate and state of marketplace change. Ultimately, the purpose of issuing a forfeiture is to obtain compliance with the Communications Act. I question whether it is necessary to multiply the Commission's "base forfeiture amount" by six times or more to secure compliance from a licensee who may be in a precarious financial situation.

Accordingly, I would have voted to reconsider the *Standards for Assessing Forfeitures*.

¹*Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program* (April 28, 1992). The Report responded to the President's January 28, 1992 request to federal agencies to "evaluate existing regulations and programs and to accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth." Chairman Sikes stated on March 12 that the Commission would review all regulations that "impose needless costs on consumers and substantially impede economic growth." *Statement of FCC Chairman Alfred C. Sikes* (March 12, 1992).

²Office of Plans and Policies Working Paper #26, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996, 3999 (1991); *Review of the Policy Implications of the Changing Video Marketplace*, 6 FCC Rcd. 4961 (1991).

³*Revision of Radio Rules and Policies*, MM Docket 91-140 at ¶ 9 (1992).

⁴Memorandum from Roy Stewart to Commissioners, *Overview of the Radio Industry* (January 29, 1992). Among other findings, the *Overview* revealed that at least half of all radio stations are losing money and that 0.5% of all stations account for 50% of industry profits.

⁵*Revision of Radio Rules and Policies*, MM Docket 91-140 at ¶ 10.

⁶*Id.* at ¶ 11.

⁷*Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program* (April 28, 1992).

⁸The forfeiture amounts were supplied by the Office of the Managing Director.

⁹*Overview of the Radio Industry* at 1.

¹⁰*Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221 (adopted May 14, 1992) ("In 1989, at least 25 percent of stations in the top ten markets experienced losses; aggregate losses occurred in most markets below the top 100; and at least 50 percent of independents in all market classes below the top ten experienced losses.").

¹¹Budget Reconciliation Act, HOUSE CONF. REP. NO. 101-386 at 435.