Federal Communications Commission

Separate Statement of Commissioner James H. Quello

In re: Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended.

I fully agree with the Commission's reaffirmation of the *Declaratory Ruling* and the denial of the petitions for reconsideration. I am writing separately only to clarify one issue regarding the procedures for filing complaints.

In the current *Order*, the Commission notes that "we reaffirm those procedures in their entirety." *Order on Reconsideration* at ¶ 24. Because I dissented from the procedural section of the Declaratory Ruling, I am somewhat less enthusiastic in my support. Thus, I agree with the current *Order* insofar as it dismisses petitions that would reduce due process safeguards — but I do not now endorse the procedures "in their entirety."

As I noted in my separate statement accompanying the *Declaratory Ruling*:

> [A]lthough the Ruling expresses concern with the administrative burden created by complaints, it establishes a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings.
>
> I dissent from the hastily made decision to adopt procedures because we do not yet know whether the new guidelines will help or make matters worse. Will the new procedures allow candidates to make a prima facie case and obtain quick relief or will they delay matters? Will they encourage the filing of speculative complaints, thus requiring the application of settlement limits? Will the number of complaints diminish now that the Commission is clarifying the political rules or will the volume of complaints under the new procedures create an administrative nightmare? We simply do not know.

Declaratory Ruling, 6 FCC 7511, 7516-17 (1991) (Separate Statement of Commissioner James H. Quello, dissenting in part) (citation omitted).

Although such questions apparently did not trouble the Commission in this case, we have expressed similar concerns in the past:

> Each year the Commission receives a substantial number of petitions or complaints against broadcast licensees. Although we would not anticipate that every petitioner or complainant would request discovery, it seems clear to us that if a substantial number did so it would require an inordinate amount of time and effort to determine whether the requests would properly lie for the production of such records.

Citizens Communications Center, 61 F.C.C.2d 1112, 1126-27 (1976).

Such problems were avoided, it seems to me, under our previous approach for handling complaints. The U.S. Court of Appeals for the D.C. Circuit has noted that "the FCC generally has elected to resolve factual uncertainties by conducting its own inquiry, rather than by affording petitioners discovery." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (*en banc*). "For several reasons," according to the court, "this usually will be the preferable course: the Commission's questions are likely to be more expert, the licensees' answers more uniform and comparable. In addition, licensee cooperation is likely to be fuller and more prompt." *Id.*

I have seen nothing in the record of this proceeding to dispute these points. Indeed, the Commission inexplicably found it unnecessary even to entertain comments on the procedural issue.

With respect to this issue, however, the current *Order* only dismisses petitions seeking to eliminate procedural safeguards. In that result, I can agree.

Separate Statement of Commissioner James H. Quello, Dissenting in part.

In re: Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended.

By this Declaratory Ruling ("Ruling"), the Commission is taking the important step of reaffirming our exclusive jurisdiction to enforce violations of Section 315 of the Communications Act. To the extent it does so, the Ruling is fully supported by law and represents sound policy. I can support this aspect of the Ruling without reservation.

I think it is important to emphasize that this action does not represent a new assertion of FCC authority. Section 315 never has been considered to have created a private right of action separate from our administrative processes. *See, e.g., Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980). Until recently, no one had ever sought a judicial remedy for purported lowest unit charge violations. In the two decades since Section 315(b) was enacted, the Commission has provided the sole remedy.

So in many ways this Ruling merely recognizes the obvious. It certainly is no departure from the Commission's historic view of its jurisdiction and statutory responsibilities. This necessarily means that the Commission is not "taking away" any existing remedy.

Conspicuously absent from the Ruling is any discussion of the Commission's existing complaint procedures or any suggestion that they have been in some way inadequate. Perhaps the reason for this omission is the fact that the Commission did not request comment on the question of procedures, nor did it engage in much internal analysis on this point.[1]

It has been suggested that the FCC is not obligated to provide parties an opportunity to comment on procedural issues. Whether or not this claim is true in this context, the Commission has been rather erratic in this proceeding in deciding when to solicit and when to forego public input. For example, there is no requirement that the Commission receive comments in order to promulgate a declaratory ruling, yet we chose to do so here. Also, in our *Notice of Proposed Rulemaking*, the Commission solicited advice on procedures for implementing sponsorship ID and other requirements. In all of our current proceedings, the question of complaint procedures is the only significant subject on which we did not request comment. If, as some have suggested, our current proceedings "may be the most important determinations made since the enactment of the lowest unit charge standard," this omission is exceedingly strange.

At this point, the new procedural guidelines raise more questions than they answer. For example, the Ruling encourages the use of Alternative Dispute Resolution at a time when the Commission's policy on such procedures is essentially conceptual. There is no discussion of how discovery will be limited to relevant documents or how the Commission will enforce such limits. Moreover, although the Ruling expresses concern with the potential administrative burden created by complaints, it establishes a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings.

I dissent from the hastily made decision to adopt procedures because we do not yet know whether the new guidelines will help or make matters worse. Will the new procedures allow candidates to make a prima facie case and obtain quick relief or will they delay matters? Will they encourage the filing of speculative complaints, thus requiring the extension of our abuse of process rules? Will the number of complaints diminish now that the Commission is clarifying the political rules or will the volume of complaints under the new procedures create an administrative nightmare? We simply do not know. And, unfortunately, there was insufficient interest at the Commission in taking the time to find out.

I would have preferred to adopt the Declaratory Ruling on preemption and at the same time, issue a Further Notice to explore these issues. I believe that candidates, broadcasters and other interested parties would have welcomed the opportunity to comment on the issue of procedures.

Ironically, the internal pressure to adopt procedures intensified at the very time that the Commission is clearing up the confusion that prompted this Declaratory Ruling. Along with

this Ruling and the *Report and Order*, the Commission is releasing a number of enforcement actions arising from the 1990 political broadcasting audit. Contrary to the exaggerated claims that 80 percent of television and 50 percent of radio stations overcharged candidates, the Bureau is assessing fines for overcharging in only two cases — about 7 percent of the stations audited. All together, the Bureau is issuing Notices of Apparent Liability to five of the thirty stations we examined, two for lowest unit charge violations and three for political file violations. In short, the level of rule violations by broadcasters is far below what some suggested in the wake of the audit. For this reason I wonder whether the rush to adopt new procedures may be premature.

We are doing the right thing by making clear that the Commission has exclusive jurisdiction to determine both liability and damages in complaints that implicate Section 315(b). Although I would not have taken the additional step of adopting procedures just yet, I am hopeful that they can be administered efficiently, and in a way that is fair to all concerned.

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[1]To put the issue into some perspective, the Commission adopted the Notice of Proposed Rulemaking on our political broadcasting policies last June. The Commission began examining the issue of jurisdiction in July and released the Notice of Intent to Issue a Declaratory Ruling in October. By sharp contrast, a draft order proposing new procedures was circulated less than a week ago at a time when other pressing matters were under consideration.