August 24, 1992

To: Chairman Sikes

From: Commissioner James H. Quello

Subject: Political Broadcasting Declaratory Ruling on Abortion Ads

In a letter ruling on August 21, 1992, the Commission's Mass Media Bureau denied two requests for declaratory rulings regarding political advertisements that depict aborted fetuses. Although the Bureau usually consults with the Commissioners before ruling on requests involving sensitive content-related issues, this procedure was not followed in this case. This was unusual, given the extent to which the divisive issue of abortion has been in the news of late.

The controversial questions raised in the petitions are matters about which I believe the full Commission should be consulted. While I generally agree that the advertisements in question cannot properly be classified as indecent, it is important to acknowledge that they contain graphic and shocking images that, at the very least, are unsuitable for children.

The sensitive legal issues raised here require careful consideration. In a 1984 staff opinion, the Commission suggested that political broadcasting rules do not require licensees to accept candidates' ads "if the broadcaster reasonably believes the advertisement contains obscene or indecent material." *Letter from Chairman Mark S. Fowler to Hon. Thomas A. Luken* (January 19, 1984). More recently, in answer to a similar request for a declaratory ruling regarding political advertising, the Bureau wrote that each "broadcaster must exercise his/her independent editorial judgment in determining whether the particular material . . . contains such 'value' as to deem it non-obscene." *Letter From Roy J. Stewart to David Wm. T. Carroll* (June 12, 1992). However, the Bureau's most recent letter ruling appears to single out the issue of abortion as the one area in which broadcasters do not have this editorial discretion. This selectivity could undermine our rules.*

I agree with the Bureau, that broadcasters should be allowed to add disclaimers when candidates insist on airing the advertisements in question. However, had I been consulted, I would have made clear that licensees also may state that "this station is required by federal law to transmit the following paid political advertisement without editorial changes." Other neutral disclaimers also may be appropriate.

I understand that this ruling may lead to some further confusion. I would recommend that parties with questions about the Bureau's ruling should seek expedited review from the Commission.

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*The Supreme Court recently emphasized that content-based distinctions create serious constitutional problems, even when the speech in question is unprotected by the First Amendment. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

cc: Commissioner Marshall
Commissioner Barrett
Commissioner Duggan
Terry Haines
Bob Pettit
Roy Stewart
Milt Gross

August 24, 1992

To: General Counsel

From: Commissioner James H. Quello

Subject: Procedure for Editorial Changes in Circulation Items

As you may be aware, the Commission's recent decision in *Request for Ruling on Advance Payment of Political Advertising of Beth Daly, Great American Media, Inc.* was released without an opportunity by this office to review editorial changes. Consequently, citations to the decision in my separate statement were inaccurate, and a corrected statement had to be prepared. To avoid such problems in the future, please advise me of the following:

1. What is the normal procedure for clearing substantive editorial changes with all Commissioners' offices prior to release?

2. Why was this procedure not followed in the *Beth Daly* decision?

3. What steps have you taken, or will take, to ensure that proper procedures are followed in the future?

I am looking forward to discussing these issues with you at your earliest convenience.

cc: Chairman Sikes
Reneé Licht
Diane Hofbauer

August 24, 1992

To: Roy Stewart

From: Commissioner James H. Quello

Subject: Political Broadcasting Declaratory Ruling Request

On July 30, KFVS-TV, Cape Girardeau, Missouri, filed a declaratory ruling request with the Commission regarding our political broadcasting rules. Among other issues, the requests asks whether broadcasters may include language in their political broadcasting contracts that says in the event of a dispute, the parties agree to go to the FCC. As I understand it, the licensee requested a similar declaratory ruling from the staff in September 1991. No action has been taken to date.

In this latest request, the licensee recounts a conversation with a staff lawyer from the Mass Media Bureau in which the staff member reportedly made a threatening reference to the Commission's revocation authority under Section 312(a)(7) of the Communications Act. In response to this conversation, the licensee has revised its political advertising practices under protest, and requested Commission review.

Based on the foregoing, I would like you to advise me of the following matters:

1. Why has there been no action on the September 1991 declaratory ruling request?

2. Is the Bureau currently working on issues raised in the most recent declaratory ruling request?

3. Can you provide an estimate on when a draft response might be available?

4. Is the petitioner's description of its conversation with the Bureau staff accurate? Under what conditions does the staff typically remind licensees of the Commission's revocation authority? What guidance does the Bureau provide to its staff attorneys to avoid having such reminders perceived as threats?

I am looking forward to discussing these issues with you at your earliest convenience.

cc: Chairman Sikes
Milt Gross