DISSENTING STATEMENT OF
COMMISSIONER JAMES H. QUELLO

Complaint of Dianne Feinstein, John Seymour, and Thomas Hayes

In this Memorandum Opinion and Order, the Commission denies a motion for stay of an Order issued by the Chief of the Mass Media Bureau finding that a prima facie case of a violation by KABC-TV of the Commission's lowest unit charge requirements was established by complainants Dianne Feinstein, John Seymour and Thomas Hayes. The Commission then orders KABC-TV to comply with the procedures and timetable for discovery set forth in the Bureau's Order. At issue are advertisements aired during the 45 days before the June 5, 1990, California primary. The reason given for denying the motion is that KABC-TV has not met the legal requirements for a stay. I do not disagree with the technical application of the legal guidelines for granting a stay to the case before us. I do, however, strongly disagree with this Agency's continued application of clearly flawed procedures, in particular discovery procedures, for lowest unit charge cases generally, and to the case involving KABC-TV in particular. I therefore cannot support this or any other decision by this Commission which relies on these procedures.

As to my general disagreement with the procedures for handling lowest unit charge cases, I have previously set forth in some detail my longstanding concerns. In the Declaratory Ruling, Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements, 6 FCC Rcd. 7511 (1991), I dissented to the decision to adopt new procedures for handling lowest unit charge complaints by candidates. In general, I expressed concern with adopting new procedures for handling lowest unit charge complaints without notice and comment, with minimal internal analysis, and without even a mention of the Commission's existing complaint procedures. I was further concerned that adopting procedures under such circumstances would serve only to make matters worse, specifically:

> 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 reiterated these concerns in my Separate Statement in the Order on Reconsideration 7 FCC 2d 4123 (1992), of the Declaratory Ruling.

Likewise, in the first case to apply the Commission's new lowest unit charge procedures, I dissented to the majority's decision to uphold a discovery order issued by the Mass Media Bureau. In that case, Complaint of Lawton Chiles, Bob

Martinez, and Bill Nelson Against Station WTVT(TV), 7 FCC Rcd 6661 (MMB, 1992), review denied, 8 FCC Rcd 131 (1992). I dissented on the grounds that the discovery order was procedurally deficient, overlooked key requirements for making a prima facie case, and perpetuated a cumbersome and counterproductive process. Of the numerous deficiencies noted in my dissent, perhaps the most important was the manner in which the majority relied on average market data to establish a prima facie case of a lowest unit charge violation. The use of average market data in the WTVT case was problematic in that it ignored the influence of class of advertising time on lowest unit charge determinations and it focused primarily on average rates in a market rather than the rates of a specific station. Thus, the scheme adopted by the Bureau and affirmed by the Commission assures that the highest ranked stations in the market will be subject to complaints while lower ranked stations will be insulated from liability, regardless of whether they have in fact overcharged candidates. Finally, I noted that the majority decision in WTVT reinforced my previous concern "that the Commission has created unworkable procedures that will further confuse this difficult area of our rules." I noted the likely time frame for completion of the discovery phase of the WTVT case (one year), and the 80,000 pages of documents provided to date by the complainants.

My early concerns with the ill-conceived lowest unit charge complaint procedures have been borne out in several respects: (1) in the lengthy delays in processing these lowest unit charge complaints, which are due, in large part, to the complexity of the procedures; (2) in the filing of speculative complaints; and (3) in the resulting administrative nightmare. Since the adoption of these discovery procedures in 1991, the Bureau has issued a decision after completing discovery in one case (the WTVT case), found that a prima facie case was established in two cases, including against KABC-TV, dismissed two complaints, and 12 cases have been settled by the parties. In the decision in WTVT, after more than two years and tens of thousands of pages of documents, the Bureau found that WTVT had overcharged candidates by $1175. 9 FCC Rcd 1593 (1994). In the meantime, at least 27 lowest unit charge complaints -- all of which were filed by a single law firm -- are languishing in an administrative black hole.

Also in the meantime, I am well aware that a significant number of broadcasters are settling complaints with candidates represented by the law firm referenced above. These settlements, I must believe, are a result of broadcasters' fear of the low hurdle for establishing a prima facie case of a violation, and the ensuing delay and expense of the subsequent discovery procedures.

I cannot in good conscience vote to allow discovery to proceed -- despite the legal posture of this case -- given the significant questions that have been raised regarding the Bureau's finding of a prima facie case. Specifically, KABC alleges that the Bureau permitted the complainant-candidates to withdraw one type of average market date ("SQAD") after KABC demonstrated that those data, contrary

to the allegations of the complainants, demonstrated that the complaint should be dismissed. According to KABC, the Bureau then accepted the complainants second attempt to prove their claims by permitting them to submit another type of industry-wide data ("SCOOP"). Thus, KABC argues, it appears that the Bureau intends to allow complainants to "shop around" for the average market data that best fits their claims, and intends to ignore any conflicting data. While the substantive allegations by KABC are not now technically before us, I cannot ignore for purposes of procedural convenience, the arguments of KABC.

I intend to pursue these issues further if, and when, this case reaches us in what the majority views as the appropriate procedural vehicle.These procedural rules, as painfully evident in this case, clearly harm broadcasters by making it all but impossible to avoid costly and expensive discovery once a complaint is filed. These procedural rules clearly do not further the enforcement of our lowest unit charge rules given that the only case reaching conclusion found only a $1175 overcharge of hundreds of thousands of dollars in candidate charges. These procedural rules also do not further the cause of candidates, whose complaints are languishing in an administrative black hole. These procedural rules have furthered the cause of only one party: the law firm that is profiting from the procedural monster the Commission has created.

For these reasons, I dissent.