Speech by FCC Commissioner James H. Quello
Before the
West Virginia Association of Broadcasters
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As you know, several years ago I could have greeted you as "Fellow Broadcasters"--but for some time now I have been cast in the traditional adversary role of FCC Commissioner. (Quote story three biggest lies--"I'm from the FCC and I'm here to help you.")

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However, I don't want to cast myself in an antagonistic role, but a constructive one based on 30 years of coping with the practicalities of broadcasting. I believe I'm fortunate to have an insider's understanding of the foibles, faults and virtues of broadcasting--and broadcasting, because of its universal impact and its inherent potential for controversy, receives a major portion of Commission prime time. But more on broadcasting later--now back to my opening greetings.

If this were just Virginia instead of West Virginia, I could greet you as "Fellow Virginians." I have been a taxpayer in your neighboring state for over three years and I like it there. In fact, everyone tells me being a Virginian is the best thing in the world--next to being a West Virginian! And second out of fifty isn't bad.

Anyway, only West Virginia has Greenbrier. I've been here once before and have wanted to return ever since. So, thanks for providing the opportunity of revisiting this beautiful spot where the atmosphere is relaxing and the tennis superb. For relaxation and a sense of humor is what a Commissioner needs these days. August is traditionally the month in Washington to enjoy some R and R which normally means Rest and Rehabilitation. However, R and R this summer has meant "Reversal and Remand" for the FCC.

This Commission under the energetic, knowledgeable chairmanship of Dick Wiley has generally been acknowledged as probably the hardest working in history. Chairman Wiley has bitten every tough bullet in sight--every tough issue has been brought before the Commission for full deliberation and decision, yet the Commission is besieged with unprecedented reversals and criticisms from courts, committees, industry and citizen groups. Much of the criticism is unwarranted and several significant court reversals are being appealed.

The latest effort to generate public pressure for more government direction in programming and broadcast employment is a well meaning but unobjective and out-dated report by the U.S. Commission on Civil Rights, titled "Window Dressing on the Set" (women and minorities in television). The Commission released 1500 copies of the 181 page report which was generously reported by media including TV. An AP report said it cost taxpayers $321,419. The Civil Rights Commission criticized the TV industry on the stereotyped portrayal of minorities and women in drama and news programs and the alleged under-representation of the same groups in decision-making positions. It accused the FCC of doing nothing about the stereotyped programming and the discriminatory employment practices that led to that kind of programming.

The broad based report dealt with programs from 1969-1974. The very latest data in the report was 1975. It is now August 1977. There has been dramatic progress in the last two or three years in employment and programming. It is readily apparent to the public when they turn on TV. Also, the majority of all TV entertainment characters are stereotyped including white males. As for employment, the FCC is the only independent Federal agency to impose EEO requirements on the industry it regulates--with more exacting requirements than the national EEOC. As to top decision-making positions--executives for those key positions must be selected on the basis of experience and proven managerial ability, not on a basis of a quota to provide opportunity. More and more minorities and women have been gaining this experience and ability and more are becoming eligible for decision-making positions in the promising years ahead.

It is difficult to correct the alleged deficiencies in entertainment and news programming without government intrusion in programming which would raise serious First Amendment and Section 326 questions. Many people believe the government cure would be much worse than the industry disease. Of course, the Civil Rights Commission states it is not advocating direct censorship. It seems to be suggesting an implied threat approach such as the FCC Chairman was incorrectly accused of in the "Family Viewing" case--as you know, the Court disapproved and the decision is being appealed.

I must take issue, too, with the over-simplistic conclusions contained in a Common Cause study released this week of industry and consumer representation before all federal regulatory commissions. (Incidentally, Common Cause is an organization I respect and I value most of their well-considered opinions.)

However, in this latest report Common Cause concludes "the study does document a disturbing fact about the meeting practices of regulatory commissioners as a whole--the regulatory commissioners surveyed met with representatives of industry ten times more often than they did with consumer representatives."

First, the commissioners and most others I know, have an open door policy. I, for one, have been willing to see or meet with consumer advocate representatives or groups. There are many in Washington offices--I'm as available as the nearest phone.

More important, I must reject the presumption that commissioners are unduly influenced by an appointment or meeting. The mere logging or reporting of a meeting doesn't reflect the debate, disagreements and rejections of proposals.

Commissioners who (1) have been sponsored by responsible civic, educational or government leaders, (2) thoroughly checked by the FBI for character and honesty, (3) appointed by the President, (4) confirmed by the Senate, are not likely to be misled or unduly influenced by executives or industry committees. I frankly tell industry representatives they are presenting viewpoints to further or protect their own economic and private interests--just like I would if I were on the other side of the desk or conference table--however, Commission decisions must be determined by what's best in the overall, long-term public interest.

Most of the industry appointments were the result of industry competition--one industry presenting its viewpoint in disagreement with another industry. (Cable vs broadcasting; cable vs phone or utility companies; educational TV vs commercial; land mobile vs UHF interests; private line opposition to AT&T or consumer reform bill; varied interests in WARC, etc.) These presentations were made pending notices of inqury or rulemaking and not in any adjudicatory process.

Also, industry representatives are not all self-seeking ogres bent on undermining the public interest. Most are responsible, educated, civic-conscious, successful citizens who realize their proposals must serve overall public interest in order to best serve their own economic interests. Then, too, there is considerable disagreement among many intelligent individuals and organizations of sincere intentions and worthy purposes as to what does constitute public interest on any given issue.

In its critique of agency practices, Common Cause is --among other things--seeking to require the logging of all meetings and phone calls by agency officials. This, it is claimed, will help to restore public confidence in government. I would like to suggest, however, that it would have just the opposite effect. Such a requirement carries with it the implication that agency officials must be watched very closely lest they give in to their baser instincts--or, at least lest they subconsciously succumb to industry blandishments. Such scrutiny, I submit, is usually reserved for those in society regarded as least capable of responsible behavior and least deserving of public trust.

The FCC recently has been the subject of several court reversals. A very significant case was the reversal of the FCC cross-ownership decision by the Appeals Court. In our decision, we did not require divestiture of cross-owned facilities except in a limited number of instances where media in a community were almost exclusively under the control of a single entity. We reasoned that wholesale divestiture was unnecessary since, in most markets where cross-ownership exists, monopoly conditions do not exist and the public has access to many sources of information. My own feeling was that the Commission was, in a sense, reversing its own previously established policy and that such a reversal should not cause harm to its licensees unless the public was in danger of some recognizable harm. The policy reversal arose out of the fact that newspapers were encouraged to establish broadcasting facilities in the early days of both radio and television since they had both the necessary financial resources and the relationship with the community, to establish the new broadcasting services. I believe it is clear that newspapers support for broadcasting facilities is generally no longer required and, thus, I was in favor of a prospective ban on cross-ownership to further the Commission's policy to diversify. The court concluded, however, that diversity was so important that it would not be enough to look only to those egregious cases selected by the Commission. The court decided that "...divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." The Commission has petitioned the Supreme Court to review this one in the belief that our decision is legally sound and that the record will justify our position.

Also in March, the Court of Appeals presented us with a decision setting aside our cable television program exclusivity rules as they applied to feature films and sports events. The Commission has sought, over the years, to preserve certain exclusivity rights for broadcasting insofar as some feature films and sports events were concerned. We were concerned--and continue to be concerned--that fractionalization of audiences resulting from pay cable/broadcasting competition might have the effect of making the choicest programs available only to pay cable subscribers. The court concluded, in the Home Box Office case, however, that we had gone beyond our jurisdiction and could not restrict pay cable access to feature films and sports events.

The court also concluded, in the Home Box Office case, that the Commission had improperly engaged in "ex parte" contacts with interested parties during the program exclusivity rulemaking. In other words, the court said that commissioners, their personal assistants and other Commission personnel who are regarded as "decision making" should not have engaged in informal, oral conversations with parties interested in the outcome of the rulemaking or,

at least, we should have placed summaries of those conversations in the public record. The court concluded that a determination of the program exclusivity rules amounted to "...informal official action allocating valuable privileges among competing private parties." In such instances, the court had already ruled that the "ex parte" rules should apply.

The Commission has sought Supreme Court review of the Home Box Office decision---exempting only the feature film rules which, we concluded, would be most difficult to sustain. Of special Commission concern, however, was the "ex parte" ruling since it would seem to have been cast so broadly as to preclude informal contacts in virtually any rulemaking. These informal contacts are very valuable in helping me understand all of the nuances of an issue and I don't believe depriving commissioners of any sources of information in rulemaking (similar to legislative proceedings) would serve overall public interest. I am interested in hearing all sides of any issue in as much detail as time permits and, quite often, an informal presentation is most conducive to getting at the facts of a matter. It is certainly possible to prepare summaries of such informal chats for the public record but this might be inefficiently time-consuming.

Next, we come to two court decisions dealing with the FCC's role in influencing program content. This is an area where the Commission has traditionally been reluctant to enter because of some very obvious problems relating to the First Amendment to the U. S. Constitution and its freedom of speech guarantees and Section 326 of the Communications Act which was derived from the First Amendment. No member of the Commission wants to be cast in the censor's role but we are often under considerable public pressure to take one kind of action or another aimed at reducing or eliminating programming which some persons find offensive or to promote programming found by some to be desirable for one reason or another.

In the now-celebrated "Family Viewing" case, for example, the Commission was very aware of the First Amendment implications of any rule regarding excessive sex or violence on television. Yet, we were being bombarded by public and congressional complaints and demands for some kind of action to curb such programming. It was this situation which prompted Chairman Dick Wiley to meet with network executives in an effort to make them aware of the problem and the public concerns in this regard. The networks generally responded in a very responsible manner and decided--without any FCC rule or policy statement--that the public interest and their own interests would be best served by a voluntary effort to reduce sex and violence on television

before 9 p.m. when the largest numbers of children were likely to be in the audience. Of course, this solution to the problem was not totally satisfactory: there were those who felt that any depiction of sex and/or violence should be banned altogether and, at the other extreme, those who felt that any interference with programming decisions except on a purely artistic basis was too much. Logic would tell you, therefore, that a position somewhere in the middle which relied upon voluntary action by those responsible for programming the networks might be most reasonable. A California court, however, concluded that the contacts between the Chairman of the FCC and the network executives at least potentially contained an element of coercion by government, and, therefore, the whole "Family Viewing" concept--at least as it was developed in this instance--was improper. An appeal of that court ruling is pending.

In yet another celebrated case which involved the FCC and programming decisions, the Commission was reversed when it attempted to draw some lines delineating the kind of language suitable for broadcasting. In the Pacifica case, you may remember, the Pacifica station in New York City broadcast a George Carlin record consisting of an alleged comedy monologue which repeatedly used seven words which depicted sexual or excretory organs or activity. Carlin characterized these words as words which "could not be used on television"--a characterization with which the Commission wholeheartedly agreed. At least the Commission said that such words should not be used at times when children might be in the audience. The courts said, however, that both Mr. Carlin and the FCC were wrong--that the words could indeed be used on television--or in this instance on radio--and that to ban them prospectively was a violation of the First Amendment and its interpretations by the U. S. Supreme Court. The Appeals Court reasoned that, first, the words did not appeal to a normal person's prurient interests and, second, that they might well be used in a context which was innocent or educational. We may seek a Supreme Court review of that one, too.

I have raised a few representative issues today to give you a little of the flavor of Commission life and of the kinds of decisions we are regularly faced with. I've spoken at some length of court reversals which represent only a tiny fraction of the Commission's deliberations. Lest my comments be misunderstood as an indictment of the courts, I should point out that we are upheld in most of our decisions. And, let me assure you that I do not take adverse decisions from the Appeals Courts as a personal affront. I like to think that I have reached that stage of maturity where I can disagree with someone without calling into question his sincerity, sagacity or sanity.

The courts are, after all, the bedrock of our system of justice. They must deal regularly with emotionally-charged, complex issues, the resolution of which

often has very great impact upon our daily lives. To be sure, like all human institutions, they are subject to error and abuse from time to time. I have said that I believe the courts have generally been drawn too far into a policy role in social innovation. I believe the tendency toward litigation as a substitute for legislation has sometimes taken the courts well beyond their intended legitimate function in our society. I recognize, of course, that the courts cannot operate in a social vacuum but I am still of the opinion that social innovation is more appropriately the province of public representatives in the Congress. Regulatory agency rules and policy should be a legislative function, not a judicial prerogative.

Now, perhaps, you can better understand my opening comments about getting away from Washington for a while and gaining new perspective. Here in the Greenbrier--between the tranquility of the green hills and the hustle of the tennis courts--there is a refreshing change of atmosphere and pace. Of course, there are decisions to be made--but they tend to be such uncomplicated choices as whether to drop back for a topspin forehand or move forward for a volley--decisions not likely to be appealed or reversed.

So thanks for inviting me and best wishes for a litigation-free fall and winter.

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