REMARKS BY

FCC COMMISSIONER JAMES H. QUELLO

BEFORE THE

ALABAMA BROADCASTERS ASSOCIATION

41ST ANNUAL WINTER CONVENTION

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I'm particularly delighted to be here at your annual state convention for many special reasons.

First, I could not possibly turn down the invitation of Jim Brown of the University of Alabama Communications College. You see, I knew him and liked him over twenty years ago when he was Father Jim Brown, a Jesuit priest, teaching at the University of Detroit. Incidentally, I also taught at the U of D, but as an avocation at night while my main vocation was VP and General Manager of Station WJR. I taught two courses -- Broadcast Management and the Practicalities of Broadcast Regulation. My robust interaction with the bright students of U of D plus my experience as a combat Infantry Battalion Commander in World War II prepared me for the rigors of the FCC battles.

A second reason I'm pleased to be here is your location -- Tuscaloosa, Alabama. My college fraternity originated at the University of Alabama in 1857. Mother Mu is a respected, historic chapter in the hearts of many SAEs (Sigma Alpha Epsilon).

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Third, I always enjoy a mutuality of interests with good public-spirited state associations. As you may know, I am a former President of the Michigan Association of Broadcasters and for ten years the government relations chairman.

Incidentally, Jim, you should know that I have a granddaughter graduating in communications from U of D in May either magna or summa cum laude. She also would be socially classified as a real fox -- but I expect her high academic standing will more than offset the disadvantages of her vivacious good looks in a male dominated industry.

I can't say she took after her grandpa. When I received an honorary doctor's degree from Michigan State U (my and my wife's alma mater), they threatened to flash a transcript of my college credits on the large screen as an encouragement to mediocre students. I really was too engrossed working for the college newspaper and radio station -- they were paying jobs.
In contrast, I had to pay for the privilege of going to class.
I am now a loyal alum. For over 50 years I have been a supporting member of the MSU alumni association. I also regularly contribute an affordable amount to the university not so much for what it did for me, but kinda in reparation for what I did to it when I was a student.

As fascinating as my biographical data is -- to me (the older you are, the greater you were principle), I know I was invited here to inform you about doings at the FCC.

Too bad we don't have more time. Our FCC broadcast agenda is overflowing with contentious issues to discuss. First and foremost -- a raging battle with Congress over the fairness doctrine that is out of all proportion to its effect on the public or on a station's bottom line. Second, our controversial action enforcing prohibition of obscenity on the air as required by statute, not FCC regulation. Also, the clarification of our FCC indecency policies.

Another is the U.S. Court of Appeals which held our most recent version of must-carry rules unconstitutional. The chief judge stated "The FCC has not demonstrated that the new must-carry rules further a substantial government interest as the rules must to outweigh the incidental burden on First Amendment interests conceded by all parties." Most significantly, Judge Wald's opinion concluded: "<u>We do not suggest that must carry rules are per se unconstitutional, and we certainly do not intimate that the FCC may not regulate the cable industry so as to advance substantial government interests</u>."

We will return to "Must Carry" in just a minute, but I'd like to run off other current controversial issues with strong pro and con arguments. Among them are: local multiple ownership rules; newspaper cross ownership; syndicated exclusivity; compulsory license; definition of a competitive cable market; selection and development of a compatible HDTV system; land mobile sharing of UHF TV frequencies; re-institution of the three year holding rule; enforcement of the statute prohibiting obscenity on the air and enforcement of FCC indecency rules.

Each subject could easily absorb an hour speech or an entire afternoon forum discussion.

My long held views regarding the repeal of the Fairness Doctrine are well known. I don't believe it merits such controversy and hostility. It is not a dollar and cents bottom line issue to broadcast management, but it is an important freedom of press principle for broadcasters and especially for the Radio-TV News Directors Association, the principal proponents of repeal in court. From a practical business standpoint, many of you may feel it is not worth incurring the wrath of two powerful and respected communications chairmen -- Senator Fritz Hollings and Congressman John Dingell, who were and I hope still are good friends of mine.

Again, many of you may believe broadcasters can live easily with the fairness doctrine. But in my opinion, it simply doesn't belong in a nation dedicated to freedom of the press and freedom of speech. I admit the timing of the vote was unfortunate. It seems that further argument will be unproductive because it is now a constitutional question for the federal court.

TV broadcasters might be tempted to trade off fairness doctrine repeal for legislative reform of the comparative license renewal process or for congressional action for compulsory license reform or reinstatement of must carry. However, again, it is now a court matter.

The court decision eliminating must carry is potentially disastrous for free television service to the public and for local broadcast service in the public interest. In fact, the potential harm could usurp the FCC's orderly channel allocation --- to provide community service.

I believe the flawed or miscalculated FCC rationale in the legal brief for the must carry compromise must bear primary responsibility for the adverse court decision. The Commission never provided a sufficient justification to support the compromise must carry rule. This is precisely why I issued separate statements when we adopted the new must carry rules.

I believe we should have justified our rules on our established public interest and localism policies enunciated in Section 307(b) of the Communications Act. The emphasis on the A/B switch five year educational period was an ideal, rather impractical solution that wasn't destined to carry the day. Our best trial lawyer argued the case but with a no win legal
our efforts were ordained for defeat
game plan adopted by the Commission.

I want to say up front that cable is a very desirable service for those that can afford it. I personally enjoy the varied choices cable offers. I especially tune to CNN for their objective news reports throughout the day. I like cable. I won't stay home without it.

However, I wouldn't like it to the extent that I would pay for major sports events I now see free on television . . . or to the extent they have the <u>power</u> to drop any or even all local television stations serving my area.

Also, I want to credit NCTA with considerable statesmanship in negotiating a must carry agreement with broadcasters. However, a few aggressive cable operators without NCTA participation challenged the must carry compromise in court. With the FCC's push-over rationale, cable's able lawyer won the day.

For some ideological reason difficult to fathom, the FCC obstinately and with considerable craftsmanship avoided or de-emphasized Section 307(b), localism, and the public trustee concept that broadcasters are licensed by the government to serve their community in the public interest, convenience and necessity. With this approach, overwhelming arguments demonstrating substantial, even critical, government interest were de-emphasized or deleted in the FCC rationale.

The failure to demonstrate a substantial governmental interest was due to a flawed FCC rationale that didn't develop the many practical government interest arguments. Also, a legally-well qualified court with authority to overrule the FCC, suffered from lack of practical knowledge or experience in the real TV and cable commercial marketplace. In my opinion, the court decision perpetrated a gross marketplace inequity on broadcasters that are providing a free service to the public.

For openers, does a strong letter to the FCC signed by all 21 of the Congressmen, Republican and Democrat, on the Communications Subcommittee urging the FCC to craft must carry represent the strongest type of government interest? Who represents government interest more than the duly elected representatives of the people? The letter constituted the first time in my 13-1/2 years experience at the FCC that I have seen a letter urging FCC action signed by every member of the Communications subcommittee.

Is there a substantial government interest in must carry? Ask your congressman who is closer to the electorate and to the working marketplace than the courts. The congressional reply is an overwhelming, and in the case of the Communications Subcommittee, a unanimous yes!

I believe there is an undeniable government interest in making certain that TV stations licensed by the government to serve the public interest continue to have access to the public they are licensed and required to serve. I believe the obligation and right to serve the local area is required by the Communications Act and by the FCC allocation of channels to the community. I don't believe any monopoly or semi-monopoly transmission pipeline should be able to prevent or obstruct the licensed station's local service to the public.

The Cable Communications Act of 1984 was enacted with must carry in place and before cable started aggressively selling advertising in competition with the local stations. These are the same local stations whose programs cable takes free of charge and then charges cable subscribers monthly fees for basic service. Must carry was certainly a vital part of the legislative balance when the 1984 Cable Act was adopted. Elimination of must carry is a compelling reason why Congress should resist cable legislation.

Just ask Chairmen Hollings, Inouye, Dingell, Markey, or former Chairman John Danforth, if broadcasters are actually licensed to serve their local community in the public interest. Wear your bullet-proof vests. I'm also certain you would get a direct, almost profane response from former broadcaster, senior Congressman Al Swift.

I believe the drastically changed circumstances of no must carry require that Congress in all fairness reconsider and revisit the Cable Communications Act to restore balance to the marketplace. Congress should do this not to please broadcasters, but to serve the public with assured free TV and to correct a gross miscalculation caused by FCC ideological avoidance of Section 307(b), the public trustee concept and localism -- the principal factors necessary to developing substantial government interest.

Also -- is there a substantial government interest in assuring public broadcasters access to the public? Public broadcasting was formed by the government to provide a distinctive separate service. It is funded by the federal, and in many cases, state governments. Yet PBS informs me that 181 stations have been dropped by cable systems. I will concede some extenuating circumstances for some stations, but overall the effect has been harmful. Public stations feel and are desperately threatened by no must carry.

They should not have to depend upon plea bargaining or the generosity of a local cable company to reach the audience they are officially licensed by the government to serve. Substantial or predominant government interest? How can anyone say no!

There should be little doubt that the continued viability of independent stations that provide local news and public affairs different from network affiliates constitute a substantial government interest. _Again, isn't there an inherent, not only substantial but essential, government interest in all stations being able to serve the audience they were licensed to serve by the government_? Twenty seven independent stations are now in Chapter 11. The trend is growing. Is it caused by no must carry? No, not completely and in some cases not at all. But the no must carry threat or actuality is a contributing cause. Banks would be reluctant to loan money to stations with no must carry. Will the independent stations' viability be threatened by no must carry or even by the power of a cable company to inflict no must carry at any time? The answer has to be a resounding yes. To any practical businessman, or to any fair-minded body, no must carry or the threat of it can only aggravate an already economically pressed local independent service.

Cable operators are now aggressively competing with broadcasters for the advertising dollars that support free programming available to the public on TV stations.

According to authoritative sources, cable advertising revenues in 1987 were over a billion dollars -- and cable advertising is a relatively new phenomenon with great future growth. One study projects cable advertising revenue growth at a compounded annual rate of 18.5%.

The potential scenario for a no must carry communications market is nothing but disastrous for local broadcast service and eventually for continued free major sports events and fine quality programs. Let's consider this fictional but very possible operating scenario for an aggressive, but very legitimate, cable operator.

This scenario would be completely legal under the court's inequitable marketplace decision on "no must carry."

Take any large or medium size television markets. Assume it is 45-50% cabled.

First, the cable operator could originate, not merely transmit, local news and public affairs. This could be accomplished without any public interest requirements -- without any FCC accountability or limitations. The cable transmission pipeline into the home does not require broadcast spectrum.

With its own local CNN type news and public affairs service in place, the cable system would be in a better position and have the legal power to drop most of the local TV signals competing with it for advertising dollars. Cable operators would only be restrained by their own calculation on how many to drop and how much money advertising profit they could accumulate without causing a public outcry or a Congressional uproar.

Cable would have the power to drop local independents and replace them with superstations. Perhaps as an act of statesmanship or charity, they would continue to carry some of the struggling, least competitive local independents. Cable also would have the legal right or power to drop local network affiliates and import networks from other cities. This could be promoted as broadening the service. The result? The most productive and profitable semi-monopoly imaginable! You would have a cable audience monopoly in the 45 to 50% cabled portion of the market. With most of the local stations locked out and with cable ostensibly providing its own comprehensive local news, advertisers would be forced to spend a major portion of their advertising and marketing budget on cable. Without cable, the advertiser would be locked out of 45-50% of the most attractive portion of the market -- those able to afford cable which consists of the wealthier audience with upward mobility and more spendable income.

With huge advertising revenues cable could well afford the reasonable current copyright fees for importing distant signals.

Cable would thus be in the envious position of having the best of all worlds -- fees from subscribers, dramatically increased revenues from advertisers, no public interest or government accountability. It all spells huge profits with unregulated monopoly power!

Installation of an A/B switch to bring in all local signals would alleviate the situation, but with local cable news and 36 to 104 channels available on cable, the incentive to install the switch would be negligible. In an ideal world everyone would have a convenient A/B switch. In a practical world, why bother?

With no access to the cable half of the market, local stations, specifically licensed by the government to serve the community, would suffer decreased audiences and greatly reduced revenues. The inevitable result? Local stations would not have the economic viability to continue comprehensive or quality local service. Local program choices would diminish and diversity of broadcast ownership would be threatened and in some cases disappear. The FCC's longtime assiduous allocation of broadcast spectrum to serve the public interest would be disrupted or nullified.

Then too, cable with its lock on the higher income TV audience and with the power to charge for both cable service and advertising, could easily outbid broadcasters for major sports events and the most attractive entertainment program. In many cases with concentration of control, cable could practically dictate the price to be paid.

This is speculation at this point, but without must carry or upwardly revised copyright fees for all programs, cable has the legal right and cable has the <u>power</u> to make it happen.

The scenario portion of this speech with a cable system potentially dominating the marketplace is speculative at this time. But the fact that cable has the legal right, the <u>power</u>, if you please, to make it happen represents a gross inequity in marketplace competition. I respectfully submit that a more level marketplace playing field is essential, to preserve public interests.

Cable with its unregulated transmission pipeline monopoly lock on 45-50% of the TV audience and its ability to charge for both cable service and advertising, could easily outbid free broadcasters for major events. With concentration of control, cable could also practically dictate program prices. All this would hardly serve the public interest as intended by the communications Act. Under existing conditions, cable dominance is possible in due time. It could lead to a bonanza for lawyers filing restraint of trade and antitrust suits.

I respectfully suggest that the most practical course of action at this time is for the Congress to hold comprehensive hearings on must carry and perhaps on compulsory license. They could hear all sides both pro and con on the cable broadcast issues.

The hearings would merit widespread media coverage. Congress would have a convincing record for the court. The court has traditionally displayed more deference for a congressional record than a regulatory agency record.

As for me, I would testify there is more than a substantial public and government interest in assuring that all people, not only the higher income personages, can continue to see major sports events, movies, and syndicated features on free over-the-air television as intended by Congress.

During my confirmation hearings in March 1974, Subcommittee Chairman Senator John Pastore insisted that I pledge to him that the world series, the super bowls and major sports, news and major entertainment programs will continue to be available on TV free to all the American public.

Now more than ever it is time to re-emphasize the honoring of that pledge.

My longtime association with Senators and Congressmen led me to believe -- that the public interest and government interest are inextricably intertwined. Also, I believe the duly elected representatives of the people are the logical and by far the most authoritative source to define substantial government interest.

I'm willing to give odds that the court will show due deferènce to a congressional record and a congressional finding.

A quote from one of our greatest presidents seems apt for the cable-broadcasting issue. I'm not a lawyer so my approach to communications problems is more journalistic than legalistic. Bottom line: I try to determine issues on the basis of practical reason and justice. So I find great solace and guidance in a quote expressing President Franklin Roosevelt's view of the role which administrative agencies should play in government. The president said

> "<u>A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism</u>."

All of us applaud the goal of substantial justice. Congress with its varied constituencies, different philosophies and country-wide representation seems to be in the best position to implement substantial justice and define and implement substantial government interest.