11-15-91

In the Matter of
WXIA-TV

Complaint No. 91070126

OPINION OF COMMISSIONER JAMES H. QUELLO

On October 18, 1991, Petitioners[1] filed a pleading styled "Complainants' Demand For Voluntary Withdrawl or, in the Alternative, Motion to Recuse" ("Recusal Demand"). The pleading urges me to recuse myself because of public statements that, Petitoners assert, create the appearance of bias.[2] For the reasons detailed below, I decline to withdraw from considering this case.

As our cases establish, upon a motion to disqualify an administrative officer, the designated Commissioner "must make the initial decision whether or not to recuse himself."[3] In denying Petitioners' request, I am addressing the relevant issues in a comprehensive manner, rather than focusing on the extremely narrow question presented by the instant pleading. Hopefully, this will preserve our resources should Petitioners find it convenient to file a similar request in any of the myriad matters in which they are involved at the Commission.[4]

Petitioners further request that the Commission disqualify me from participating in the above-captioned proceeding if I should decline to recuse myself. As in all matters before the Commission, I welcome discussion and debate with my colleagues. Toward that end I have circulated this opinion to each of the Commissioners and am looking forward to receiving their comments. I also have requested the General

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[1]Petitioners include the law firms of Barnes, Browning, Tanksley & Casurella; Long, Aldridge & Norman; Savell & Williams and Venema, Towery, Thompson & Chambliss.

[2]Memorandum in Support of Recusal Demand at 1. Two speeches I delivered were attached to the pleading as "Exhibit A" and "Exhibit B." I have since given a third speech on political broadcasting matters. *See* Remarks by Commissioner James H. Quello before the Indiana Broadcasters Association, Indianapolis, Indiana, October 17, 1991 (Attachment 1).

[3]*Storer Broadcasting Co.*, 41 F.C.C.2d 792, 795 (1973); *Bell Disqualification Request*, 26 F.C.C.2d 523, 524 (1970); *Weiss v. Hanna*, 312 F.2d 711 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963); *Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1250 (D.D.C. 1984).

[4]In addition to the complaint against WXIA-TV (filed July 2, 1991), Petitioners have filed complaints against WSBF-TV, Atlanta, GA (filed August 16, 1991) and WMGT-TV, Macon, GA (filed November 5, 1991); Comments to Proposed Declaratory Ruling regarding the Commission 's exclusive authority over Section 315(b) (filed October 21, 1991); and Comments in the matter of Codification of the Commission's Political Programming Policies, MM Docket No. 91-168 (filed August 12, 1991). In addition, three of the law firms involved in the instant Recusal Demand have sought to intervene in political broadcasting audit proceedings involving WFAA-TV, Dallas-Ft. Worth (filed July 31, 1991); KTXA-TV, Dallas-Ft. Worth (filed July 31, 1991); KXAS-TV, Dallas-Ft. Worth (filed July 31, 1991) and KDFW-TV, Dallas (filed July 31, 1991).

Counsel's advice on the matter of recusal, and a copy of his opinion is attached as an appendix to this decision (Attachment 2). In any event, the question of possible Commission action is premature. As I understand the relevant law, the full Commission would be called upon to vote on the recusal demand when or if the merits of the underlying complaint are presented to the Commission after an intial decision by the Mass Media Bureau.[5] Depending on the outcome at the Bureau level, Petitioners may find it unnecessary to press the issue.

BACKGROUND

Petitioners' request, both in form and substance, reads like a judicial filing, not a petition before the FCC.[6] But as even a cursory review of the legal literature should have revealed, commissioners of independent regulatory agencies are not subject to the same recusal standards as judges. Even judges are free to express views on legal issues that may come before them.[7] Commissioners, on the other hand, are permitted — indeed, are even expected — to take a far more active role in discussing policy issues. As a result, the U.S. Court of Appeals for the D.C. Circuit has expressly rejected the judicial model. As the court stressed in the leading case on this issue, "[w]e must not impose judicial roles upon administrators when they perform functions very different from those of judges." *Association of National Advertisers v. FTC*, 627 F.2d 1151, 1168 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The court examined the policymaking function of independent agencies and found that the judicial analogy "is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies." *Id.* at 1168-69.

To suggest that it is improper for an FCC Commissioner to give speeches that address policy issues simply is incorrect. Giving speeches and formulating policy are part of the job description.[8] "If an agency official is to be effective," according to the

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[5]*Associated Press v. FCC*, 448 F.2d 1095, 1106-07 (D.C. Cir. 1971); *SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 943 (1963).

[6]Petitioners cite the legal standard for recusal in adjudications, which, as I explain below, is inapplicable to my public statements. Even under that standard, Petitioners' claims are baseless. Additionally, for future reference in matters of procedure, Petitioners should take note of Sections 1.41 - 1.52 of the Commission's rules govering the form of pleadings to be filed with this agency.

[7]*E.g.*, *Laird v. Tatum*, 409 U.S. 824, 835-39 (1972); *Antonello v. Wunsch*, 500 F.2d 1260, 1262 (10th Cir. 1974); *Goodpasture v. TVA*, 434 F.2d 760, 765 (6th Cir. 1970); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 430 (10th Cir. 1966), cert. denied, 386 U.S. 977 (1967); *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956).

[8]*See* Administrative Conference of the United States, Recommendations, 45 Fed. Reg. 46771, 46776 (1980) ("Expressing . . . opinions in interchanges with committees of the Congress, other administrative bodies, the public, and regulated groups is a desirable normality of administration, rather than an abnormality to be shunned, and is not a basis on which exclusion from a proceeding may appropriately be suggested."). *See also Association of National Advertisers*, 627 F.2d at 1176 (Leventhal, J., concurring) ("It is appropriate and even mandatory for agency heads and staff to maintain contacts with industry and consumer groups, trade associations and press, congressmen of various persuasions, and to present views in interviews, speeches, meetings, conventions, and testimony. The agency gathers information and perceptions in a myriad of ways and must use it for a myriad of purposes.")

D.C. Circuit, "he must engage in debate and discussion about the policy matters before him." *Id.* at 1169. Such "informal contacts between agencies and the public are the 'bread and butter' of the process of administration." *Id.*, quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977). Accordingly, "[t]he mere discussion of policy or advocacy on a legal question . . . is not sufficient to disqualify an administrator." *Association of National Advertisers*, 627 F.2d at 1171.

With this background in mind, it is important to note the number of significant policy questions currently under consideration regarding the Commission's regulation of political broadcasting:

— On June 13, 1991, the Commission adopted a Notice of Proposed Rulemaking to initiate a comprehensive examination of the FCC's political broadcasting policies. *Codification of the Commission's Political Programming Policies*, MM Docket No. 91-168 (FCC 91-181 released June 26, 1991). The Notice acknowledged that the Commission had not engaged in a broadly based review of this area since the 1984 *Political Broadcasting Primer*, and proposed clarifying and/or codifying the FCC's political programming policies. It suggested clarifying the Commission's policies with respect to "reasonable access" by federal candidates [section 312(a)(7)]; equal opportunities and sponsorship of negative advertising [section 315(a)]; and lowest unit charge for political advertising [section 315(b)].

— On August 1, 1991, the Commission granted a declaratory ruling request regarding the permissible format for certain political newscasts under the Communications Act. *King Broadcasting Co.*, FCC 91-246 (released August 22, 1991). By this decision, the Commission reversed its earlier ruling and found that a proposed format involving interviews and speeches by presidential candidates qualified as "bona fide news events" under Section 315(a)(4) of the Communications Act.[9] The ruling is intended to encourage more in-depth coverage of campaigns, emphasizing serious discussion of issues as opposed to 30-second "sound bites."

— In July 1990, the Commission initiated an audit of the political broadcasting practices of thirty radio and television stations in five major markets (not including Atlanta or WXIA). The stated purpose of the audit was to "assess the broadcast industry's compliance with the political programming law, particularly the obligation to charge candidates the 'lowest unit charge'" for political advertising. The Mass Media Bureau issued a report on the audit in September 1990. *See Public Notice, Political Programming Audit*, Mimeo 4728 (September 7, 1990). Commission investigation of possible violations revealed by the audit is on-going.

— On October 10, 1991, the Commission issued a Notice of Intention to Issue a Declaratory Ruling regarding the FCC's authority to preempt federal and state judicial efforts to enforce Section 315(b) lowest unit charge requirements. The Notice described the recent proliferation of litigation in this area and said that "the

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[9]The Commission's action followed the remand of our earlier decision by the Court of Appeals. *See King Broadcasting Co. v. FCC*, 860 F.2d 465 (D.C. Cir. 1988).

Commission is now considering issuing a declaratory ruling to clarify its role in resolving these political broadcasting controversies." *See* Notice at 3.

The convergence of so many significant policy questions involving our political broadcasting rules has led to understandable interest and concern among broadcasters, political candidates and the public. During my tenure at the Commission it is unprecedented to have in progress simultaneously this number of important and far-reaching proceedings that go to the heart of our political broadcasting policies. I therefore was not surprised to receive invitations from various groups to address this subject. I accepted these invitations.

The three speeches,[10] with some minor variations based on evolving events, addressed the same themes, focusing on the major policy issues identified above. For example, I noted that "[p]olitical candidates want a clear statement of their access rights and of the meaning of 'lowest unit charge.'" AWRT Speech at 1. I added that broadcasters also "want certainty about what is required of them under our rules." *Id.* Acknowledging that these were "reasonable requests," I described the Notice of Proposed Rulemaking as intending "to codify and clarify the Commission's political programming policies." *Id.* I made no prediction about the outcome of the rulemaking, other that to say that the Commission is "in the process of sorting out the comments" and that "[w]e expect to conclude the proceeding before the end of the year, in time for the 1992 political season." *Id.* at 2.

I also discussed the political broadcasting audit, and suggested that press reports that it revealed widespread violations of the political broadcasting rules were erroneous. In this regard I noted that the audit report "makes no final determinations with respect to any specific violations by individual stations." *Political Programming Audit* at 1. Instead, I indicated that "the Mass Media Bureau is in the process of making that final determination" and that where stations are cited for possible violations, "the stations will be given an opportunity to respond to specific allegations set out in Notices of Apparent Liability." AWRT Speech at 3. I also pointed out that the audit report "had the unintended effect of creating a litigation boomlet" and that candidates have sued broadcasters in state and federal courts and in some cases have even challenged license renewals over alleged lowest unit charge violations. To the extent the FCC's actions in the audit "added to the confusion" over our political broadcasting rules, I suggested that it "is incumbent upon the Commission to help clear things up." *Id.* at 3. Accordingly, I concluded that "by clarifying our rules, the Commission can make it less necessary in the future for parties to resort to litigation." *Id.* at 4.

The issue on which I expressed my most detailed opinions involved the Commission's jurisdiction to enforce Section 315(b). For example, I endorsed the

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[10]Remarks by Commissioner James H. Quello before the American Women in Radio and Television, Inc., Louisville, KY, October 2, 1991 ("AWRT Speech") (Petitioners' Demand, Exhibit A); Remarks by Commissioner James H. Quello before the Minnesota Broadcasters Association, Austin, MN, October 11, 1991 ("Minnesota Speech") (Petitioners' Demand, Exhibit B); Remarks by Commissioner James H. Quello before the Indiana Broadcasters Association , Indianapolis, Indiana, October 17, 1991 ("Indiana Speech") (Attachment 1, hereto)

Commission's decision last July to file a brief in state court litigation asserting exclusive jurisdiction over determinations of liability. *Id.* I described a federal district court opinion that found exclusive jurisdiction in the Commission, and called on the FCC to issue a declaratory ruling on the issue of jurisdiction. *Id.*

After the Commission issued its Notice regarding a possible declaratory ruling, I noted that interested parties were invited to comment on the issue and said "I am looking forward to reviewing the comments in this proceeding." Minnesota Speech at 2. In the Minnesota and Indiana speeches, I expressed "my strong view that we must clarify the rules and assume the necessary jurisdiction to enforce them." *Id.* at 5; Indiana Speech at 6. After discussing the provisions of the Communications Act along with FCC and judicial precedents regarding the Commission's authority to enforce Section 315(b) and to order rebates, I stated that "I am placing the burden of proof where it properly belongs, on those who seek to deprive the Commission of the jurisdiction provided by Congress and the federal courts." Indiana Speech at 1-2.

In addition to these broad policy issues, I discussed the Commission's declaratory ruling in the matter of King Broadcasting.[11] Generally, I endorsed the Commission's decision to allow greater licensee discretion to encourage new formats for political programming. *See, e.g., id.* at 7.

"In the meantime," I concluded, "broadcasters can minimize their troubles by providing fair and equal opportunities to all qualified candidates; charge the lowest unit charge for comparable use of the station. Station executives would do well to have written directives that emphasize enforcement of the lowest unit rate for all political candidates." *Id.*

Based on these speeches, Petitioners advance the rather odd proposition that a "disinterested observer" might conclude that I have "adjudged the facts as well as the law" of their complaint against WXIA-TV. Quite frankly, I am at a loss to understand how even an *interested* observer — such as the Petitioners — could extract such a conclusion from my remarks since I never mentioned WXIA or any other specific complaint currently at the Commission. In fact, until Petitioners filed their Recusal Demand, I was not aware that they had filed a complaint against WXIA.[12] Nor would I be aware of the complaint in the normal course of events, since such issues are handled initially by the Mass Media Bureau.[13]

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[11] *King Broadcasting Co.*, FCC 91-246 (released August 22, 1991). At this point it is difficult for me to recall the extent to which I actually discussed the King ruling in each of the three speeches, or how much of the intended discussion was cut short due to time constraints. In any event, my intended remarks are set out in the texts of each of the speeches, which were released to the public.

[12] Although I mentioned in the speeches that there have been license challenges arising from allegations of lowest unit charge violations, I did so based on my general understanding that this was true. I have since learned that WXIA was one of the challenged stations. In any event, I have neither formulated nor stated a position on the merits of the license challenges.

[13] *See, e.g., Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1248 (D.D.C. 1984), where the court found no basis for disqualification or recusal of a commissioner in a matter that was "negotiated and recommended to the Commission by its career staff without any participation by [the Commissioner]."

In short, there is not the slightest basis, either in law or in fact, for me to withdraw from considering the WXIA complaint if it rises beyond the Bureau level, or any other political broadcasting matter currently before the Commission. The specific legal and factual reasons for my decision are detailed below.

LEGAL STANDARD FOR RECUSAL

The law governing recusal of administrative officers is exceptionally well defined. Recognizing the multiple functions of independent agencies, the cases establish a different standard for commissioners when acting in a wholly adjudicatory role as opposed to a quasi-legislative role. The leading case dealing with matters of policy established that "a Commissioner should be disqualified only when there is a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." *Association of National Advertisers v. FTC*, 627 F.2d at 1170. With respect to adjudications, *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), cited by Petitioners, held that a commissioner should be recused if "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."

Petitioners' discussion of the legal question is remarkable, in that it ignores entirely the line of authority regarding a commissioner's policymaking function. This oversight is astonishing, since my challenged remarks focused entirely on rulemaking and declaratory ruling proceedings pending before the Commission. Petitioners' discussion of the test for recusing commissioners in their adjudicatory role, such as it is, ignores nearly two decades of legal development that has defined and narrowed the holding in *Cinderella Career and Finishing Schools*. Given the large body of applicable precedent in this area, Petitioners are indeed fortunate that FCC proceedings are not governed by Rule 11 of the Federal Rules of Civil Procedure.[14] As demonstrated below, recusal in this case is wholly unjustified under either standard.

Recusal in the Rulemaking Context

In *Association of National Advertisers*, the court examined the rulemaking function of independent regulatory commissions and compared the role of a commissioner to that of a legislator. It noted that "any suggestion that congressmen may not prejudge factual and policy issues is fanciful. A legislator must have the ability to exchange views with constituents and to suggest public policy that is dependent upon factual assumptions." 627 F.2d at 1165. Agency rulemaking, the court pointed out, represents the delegation of the congressional power to make laws, and a commission "could not exercise its broad policymaking power . . . if administrators were unable to discuss the wisdom of various regulatory positions." *Id.* at 1165, 1170. Accordingly, the court clarified that it "never intended the

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[14]Rule 11 provides sanctions for the filing of pleadings that are not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Rule 11 also provides sanctions for pleadings that are filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Cinderella rule to apply to a rulemaking procedure" because such an approach "would necessarily limit the ability of administrators to discuss policy questions." *Id.* at 1168.

The facts of *Association of National Advertisers* illuminate these general principles and create a sense of dejá vu about Petitioners' demand. There, after the FTC issued a Notice of Proposed Rulemaking regarding television advertising directed at children, a group of advertisers filed petitions to recuse the agency's chairman. The petitioners, relying on the *Cinderella* case, argued that the chairman had prejudged the inquiry as shown primarily by a speech he had given about children and advertising. It was undisputed that the speech described the FTC's authority for asserting jurisdiction, cited FCC findings that children lack the ability to understand advertisements, and discussed relevant legal precedents. *Id.* at 1171. The FTC chairman also warned his audience that "any action taken against children's advertising would bring opposition from affected economic interests." *Id.*

The court characterized the chairman's remarks as "discussion, and perhaps advocacy, of the legal theory that might support exercise of the Commission's jurisdiction over children's advertising." *Id.* But it declined to equate such advocacy with prejudgment. To be impartial, the court reasoned, "does not mean uninformed, unthinking, or inarticulate. The requirements of due process clearly recognize the necessity for rulemakers to formulate policy in a manner similar to legislative action." *Id.* at 1174. Recognizing that a contrary rule might encourage frivolous challenges, the court concluded that it would "eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future action." *Id. See also Center for Auto Safety v. FTC*, 586 F. Supp. at 1248 (court should not encourage "challenges to officials based . . . upon their philosophical or ideological leanings").

The D.C. Circuit this year reaffirmed *Association of National Advertisers* in *C&W Fish Co. v. Fox*, 931 F.2d 1556 (D.C. Cir. 1991). In that case, fish wholesalers had sought to invalidate a Department of Commerce rule banning the use of drift gillnets. Among other things, the fishing industry argued that the Assistant Administrator of the National Oceanic and Atmospheric Administration had prejudged the issue because he had been "an outspoken advocate of the drift gillnet ban." *Id.* at 1564. For example, shortly after taking office, the Assistant Administrator was quoted as saying that "'[t]here's no question that this kind of gear [*i.e.*, drift gillnets] should be eliminated. . . .'" *Id.* (citation omitted). Such categorical statements, according to the court, "do not even approach a 'clear and convincing showing' that [the Assistant Administrator] had an 'unalterably closed mind.'" *Id.* at 1565. Indeed, on numerous occasions the courts have held that an administrator should not be disqualified simply because he or she "has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute."[15]

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[15]*Housing Study Group v. Kemp*, 736 F. Supp. 321, 332 (D.D.C. 1990); *See also Consumers Union of the United States v. FTC*, 801 F.2d 417, 426-27 (D.C. Cir. 1986); *Harry and Bryant Co. v. FTC*, 726 F.2d 993, 998-99 (D.C. Cir.), *cert. denied*, 469 U.S. 820 (1984); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1208-09 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Assn. v. Donovan*, 453 U.S. 913 (1981).

Measured by this body of law — and compared to the facts presented in prior cases — my comments on political broadcasting issues were rather mild. For example, in *United Steelworkers of America v. Marshall*, the affected industry attempted to invalidate a new rule governing workers' exposure to lead because of a speech given by the Administrator of OSHA during the rulemaking proceeding. In an address to "a group . . . passionately interested in the proceedings,"[16] Dr. Eula Bingham described her maneuvers within the government on behalf of a new rule, detailed her firm conclusions on various controversial issues, and invited her listeners to show political support. A few sentences from the speech give an idea of its overall tenor:

> Brothers and Sisters . . . .
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> Now I want to tell you that we are going to have a lead standard. I am determined, Secretary Marshall is determined, and I'm convinced that the President is committed. I can tell you that Secretary Marshall have been through the palace guard once to see him about a standard, and if we have to go through that palace guard again, we shall . . . .
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> I have told some people that I have never aspired to be an economist, but I tell you I can smell a phony issue when I see one. And to say that safety and health regulations are inflationary is phony . . . .[17]

The rule was published two weeks later. Nevertheless, the D.C. Circuit emphasized that the Administrator's remarks were "legally harmless" and failed to meet the test for bias under either *Association of National Advertisers* or *Cinderella Career & Finishing Schools*. *United Steelworkers of America*, 647 F.2d at 1210.

As I noted, my comments pale by comparison. The primary thrust of all three speeches was to describe on-going proceedings and to invite interested parties to file comments. The strongest positions I took involved my concern over the proliferation of litigation and the Commission's jurisdiction over political broadcasting complaints.[18] In that regard, I endorsed the Commission's decision to file a brief asserting FCC jurisidction over questions of liability and approvingly described a federal court decision finding exclusive Commission jurisdiction. After noting that the Commission initiated a proceeding contemplating a possible declaratory ruling on the subject of jurisdiction, I said that I was "looking forward to reviewing the comments in

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[16]647 F.2d at 1208.

[17]Consolidated Brief of Industry Petitioners and Intervenors at 25-27, United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir., filed Aug. 15, 1980)

[18]The Commission's exclusive jurisdiction over political broadcasting matters is hardly a novel proposition. *See, e.g., DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990); *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980); *Daly v. CBS, Inc.*, 309 F.2d 83 (7th Cir. 1962).

this proceeding." Such remarks hardly suggest that I have an "unalterably closed mind" as the cases require.[19]

But, of course, Petitioners do not allege that I have prejudged any of the pending policy matters. Rather, the Recusal Demand intimates that my comments about rulemaking proceedings prove that I am biased with respect to the WXIA complaint. It is a position that is difficult even to restate without sounding somewhat ridiculous. Suffice it to say that it is an argument that the Supreme Court settled long ago. It is textbook law that administrators who advocate and enact a policy are not precluded from ruling on individual cases that arise under that policy. In *FTC v. Cement Institute*, 333 U.S. 683 (1948), for example, the Court held that FTC Commissioners were not disqualified from participating in an adjudication because they previously had reported to Congress that the type of trade practices under investigation violated the law. The Court found that if taking policy positions were grounds for disqualification of the FTC members, then "experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress."[20] By the same token, the fact that I have taken a preliminary position regarding the Commission's jurisdiction on political broadcasting questions says nothing about how that jurisdiction should be exercised in a given case.

Recusal in the Adjudicatory Context

The cases governing recusal in the adjudicatory context are irrelevant to the speeches I gave on the Commission's political broadcasting policies. However, I discuss these precedents to underscore the lack of merit in the Recusal Demand. As the following discussion makes clear, the law relating to adjudicatory proceedings does not support recusal even under Petitioners' rather bizarre reading of my public statements.

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[19]In addition to the judicial precedent I have cited, there are a number of instances in which FCC Commissioners have declined to recuse themselves. This body of law — also ignored by Petitioners — further supports my decision not to withdraw. *See, e.g., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 4 FCC Rcd. 2711, 2736 n.102 (1989), *aff'd sub nom. United Video v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989); *Miami Valley Broadcasting Corp.*, 78 F.C.C.2d 684, 765-66 (1980); *ITT World Communications, Inc.*, 77 F.C.C.2d 877, 887-88(1980); *Storer Broadcasting Co.*, 41 F.C.C.2d 792, 795 (1973); Chronicle Broadcasting Co., 40 F.C.C.2d 775, 782 (1973); *Bell Disqualification Request*, 26 F.C.C.2d 523, 524 (1970); *Assignment of an Additional VHF Channel*, 1 R.R.2d 1572, 1577 (1963). *See Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150, 155-65 (1971) (Separate Statement of Commissioner Nicholas Johnson).

[20]333 U.S. at 702. *See also Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 493 (1976) (a decisionmaker need not be disqualified "simply because he has taken a position, even in public, on a policy issue related to the dispute in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances'"); *United States v. Morgan*, 313 U.S. 409, 421 (1941).

Petitioners rely almost exclusively on *Cinderella Career & Finishing Schools* as the applicable law governing recusal in the adjudicatory setting.[21] In that case, the Chairman of the FTC gave a speech that referred to a specific case while it was pending and gave his views as to the merits.[22] But it gets worse: A hearing examiner had issued a 93-page opinion dismissing charges that Cinderella Career & Finishing Schools had engaged in false, misleading and deceptive advertising. The full Commission — without explanation — reversed the hearing examiner's factual findings.[23] While the case was on review, Chairman Dixon gave a speech in which he concluded that the exact advertising practices at issue were deceptive. There is still more: Chairman Dixon had repeatedly been found to have prejudged FTC cases before the *Cinderella* decision.[24] In fact, the court noted "Mr. Dixon's flagrant disregard of prior decisions" and said that it would "spell out [the law] for him once again . . . in the fervent hope that this will be the last time we have to travel this wearisome road."[25] Finally, it is important to note that the same court had no problem with the FTC issuing a press release describing "suspected violations" by Cinderella Career & Finishing Schools so long as the release acknowledged that guilt had not yet been established. *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

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[21]Petitioners cite a total of four cases in their Recusal Demand. Of these, *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965) and *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962) were both cited by the court in *Cinderella Career and Finishing Schools*, and add nothing to Petitioners' argument. Petitioners cite only one case decided after 1970 — *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974). Although Petitioners cite the case only to establish a boilerplate point of law, *Kennecott Copper* was a poor choice for their purposes. There, the court found no prejudgment even where an FTC commissioner publicly identified *by name* a pending complaint against Kennecott Copper as a possible violation of law. *Id.* at 80.

[22]*Cinderella Career & Finishing Schools*, 425 F.2d at 589-90. *See Association of National Advertisers*, 627 F.2d at 1172 n.52 ("In *Cinderella*, Chairman Dixon had referred specifically to the adjudication pending before the Commission and had prejudged precise factual issues.").

[23]*Cinderella Career & Finishing Schools*, 425 F.2d at 585. *See American Home Products Corp. v. FTC*, 695 F.2d 681, 686-87 n.8 (3d Cir. 1982) (*Cinderella* "concerned the power of the Commission, sitting as a reviewing body, to reverse factual findings of a hearing examiner without explaining the reasons for doing so. *Cinderella Career* has no bearing on a case, such as the present one, in which the Commissioners not only endorse the findings of the ALJ . . . but thoroughly explain their view of the evidence.").

[24]In *Texaco, Inc. v. FTC*, 336 F.2d 754, Chairman Dixon "castigated Texaco as one of a number of companies engaging in price fixing and price discrimination" while the case was pending before hearing examiner after remand by the Commission. *See Antoniu v. SEC*, 877 F.2d 721, 725 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990). In *American Cyanamid v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court reversed an FTC decision to prohibit production and sale of the "wonder drug" tetracycline where Chairman Dixon, as counsel for a senate subcommittee, previously had investigated the same facts and issues involving the same parties.

[25]425 F.2d at 591.

In other words, the holding of *Cinderella Career & Finishing Schools* is limited to a very narrow set of facts. As courts have held without exception, recusal is unwarranted unless petitioner can show that an administrator made specific comments tending to show prejudgment of both the facts and law of a given adjudication.[26]

Although Petitioners purposefully, if incorrectly, adopted the *Cinderella* standard for their Recusal Demand, they have been fairly casual about citing some statement to show prejudgment of the WXIA complaint. Petitioners acknowledge that my speeches were, as they put it, "couched in terms of proceedings before other tribunals." Recusal Demand at 6. But, apparently realizing that this fact creates some tension with their chosen legal standard, assert that my comments "are dispositive of the merits of several matters currently pending before the Commission." *Id.* I can only assume that Petitioners intend that the "several matters" to which they allude includes the WXIA complaint. For example, Petitioners note that I "discussed the Federal Court component of the WXIA-TV cases," Recusal Demand at 6, but this creates something of a logical problem: There is no "Federal Court component" of Petitioners' FCC complaint against WXIA.[27]

Petitioners futher suggest that I "specifically disapprove[] of the remedy" they are seeking against WXIA based on the following statement: "Candidates have even challenged license renewals over allegations of lowest unit charge violations." Recusal Demand at 6. Of course, the easiest response to this example is simply to ask, "What's your point?" The statement does not contain even the slightest prejudgment and Petitioners' reference to it ignores settled law that describing a pending adjudication is not evidence of bias.[28] Petitioners also misstate the context of the statement. After mentioning the proliferation of litigation as an "unintended effect" of the Mass Media Bureau's Audit Report (and noting that this phenomenon included license challenges), I concluded:

> To the extent we have added to the confusion it is incumbent upon the Commission to help clear things up.

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[26] *E.g., Antoniu v. SEC*, 877 F.2d 721, 725-26 (8th Cir. 1989); *Committee of 100 on the Federal City v. Hodel*, 777 F.2d 711, 721 (D.C. Cir. 1985); *American Medical Assn. v. FTC*, 638 F.2d 443, 448-49 & n.4 (2d Cir. 1980), *aff'd*, 455 U.S. 676 (1982); *Kennecott Copper Corp. v. FTC*, 467 F.2d at 80. *See also Harry and Bryant Co. v. FTC*, 726 F.2d at 998; *Association of National Advertisers*, 627 F.2d at 1168 ("We never intended the *Cinderella* rule to apply to a rulemaking procedure. . . .").

[27] Although there may be a "Federal Court component" to Petitioners' broadly based litigation strategy, actions by federal district courts in Georgia are not "dispositive" of any matter before the Commission. Petitioners are correct that I referred to the decision of the U.S. District Court for the Northern District of Georgia that dismissed various candidates' lawsuits and held that the Commission's jurisdiction over Section 315(b) issues is exclusive. However, my comments focused solely on the issue of jurisdiction. There was no discussion of the underlying merits, legal or factual, of any complaints that have been, or might properly be lodged at the FCC.

[28] *American Medical Assn. v. FTC*, 638 F.2d at 448-49; *Kennecott Copper Corp. v. FTC*, 467 F.2d at 80; *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

> Hopefully, by clarifying our rules and by issuing a declaratory ruling, the Commission can help make it less necessary in the future for parties to resort to litigation.

See, e.g., Minnesota Speech at 4. Petitioners apparently confuse my general concern with litigiousness in the field of political broadcasting with having a predetermined position on a given complaint. Any fair reading of my comments will readily dispel such a notion.

Ultimately, it is evident that the Recusal Demand is driven not by any belief that I have prejudged the WXIA complaint, but by Petitioners' generalized assertion that I am "biased against claims filed by campaigns against stations for violations of §315 (b)." Recusal Demand at 7. Also, Petitioners seem to be upset that I have spoken out about "the fees that candidates are paying to obtain assistance in forcing broadcasters to comply with the law." *Id.* Of course, neither concern is relevant to the administrative complaint against WXIA. To the contrary, Petitioners appear mainly to be interested in preserving their option to engage in a nationwide campaign of litigation.

Petitioners' suggestion that I oppose enforcement of Section 315(b) is nothing more than a smokescreen. As my public statements attest, my concern was not whether Section 315(b) should be enforced, but how. That is one reason I gave an extended legal analysis, citing FCC cases, showing the Commission's authority to order broadcasters to pay rebates under Section 315(b). Indiana Speech at 2-3. I also noted that "[p]olitical candidates need a clear statement of their access rights and an updated meaning of 'lowest unit charge.'" *Id.* One of my main points was that Commission action is the most effective way to define and enforce candidates' rights under the law. Ironically, my statements endorse the process of filing an FCC complaint, such as the one submitted by Petitioners against WXIA.

Also interesting is Petitioners' attempt to avoid any discussion of their financial interest in this area. They assert that it is not an "issue for . . . appropriate consideration" the amount of "fees that candidates are paying to obtain assistance." Recusal Demand at 7. (Or, as the Wizard of Oz more artfully put it, "Pay no attention to the man behind the curtain . . . .") Not only does this argument eliminate any pretense that the Recusal Demand has anything to do with WXIA, it misses completely some of the Commission's traditional public interest concerns.

As the Commission has made clear in a number of recent initiatives, there is a strong public interest in "eliminating the profit motive" in filing petitions to deny and other challenges against broadcast licensees.[29] For example, the Commission limited the amount of payments that could be made to settle license challenges because the prospect of "private financial gain" encouraged "the filing of abusive petitions to

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[29] *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 5 FCC Rcd. 3902, 3904 (1990).

deny."[30] We found that "[t]he filing of abusive petitions to deny as a vehicle to extort large settlement payments . . . can harm the public interest in several ways."[31] First, the time and expense involved in defending against such challenges creates "an incentive to settle even frivolous challenges," often "for consideration unrelated to the original dispute."[32] Second, defending against a frivolous challenge "is wasteful and inefficient because such resources might have been devoted to programming and other services."[33] Third, we were concerned about "damage to the credibility of the Commission's processes caused by the widespread perception that these processes are being abused."[34]

Accordingly, we imposed limits on the amount of payments that can be made to settle new licensing proceedings, comparative renewal proceedings and petitions to deny.[35] The Commission adopted these limits "not because [we believed that] renewal challengers [or other petitioners] are, as a class, abusers of our processes."[36] We recognized the necessary and legitimate function of such participation. But we also recognized the effect that financial incentives can have on the filing of license challenges.

In the context of our political broadcasting rules — contrary to Petitioners' claims — it is wholly appropriate for the Commission to consider the incentives that may be involved in the decision to seek a judicial rather than an administrative remedy. Such questions are directly relevant to whether the Commission should or should not assert preemptive jurisdiction for many of the same reasons noted above.[37]

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[30] *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd. 3911, 3912 (1990).

[31] *Id.*

[32] *Id.*

[33] *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 5 FCC Rcd. at 3909 n.22.

[34] *Id.* at 3903.

[35] *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd. 2901 (1991); *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 5 FCC Rcd. at 3909 n.22; *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd. at 3912 (1990).

[36] *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 5 FCC Rcd. at 3903.

[37] As another side issue, Petitioners assert that my statement that I had "'heard' that the lawyers 'have received more than 2/3 of the money received in settlements with broadcasters'" was "based upon undisclosed *ex parte* communications" and that "[m]any" of these assertions are wrong. Recusal Demand

Also, as I pointed out in my public comments, the "rush to the courts" (as opposed to the Commission) has created an "uncertain legal climate" that may encourage broadcasters to "cut back on providing access to candidates." Indiana Speech at 6. As I asked at the time, "[w]ould it serve the public interest to create strong disincentives for broadcasters to accept political ads? I don't think so." *Id.*

In short, it is clear that Petitioners' Demand is based on my approach to various broad policy issues, not on anything tied to the WXIA complaint. As such, the legal standard governing recusal in the adjudicatory context is wholly inappropriate. Even under that standard, however, nothing I have said would justify recusal.

CONCLUSION

This is a long opinion for such an obviously frivolous request. But I decided that it would be better to issue a detailed analysis once rather than respond each time a litigant decides to throw together a slapdash recusal request. I sincerely hope that this is the end of the matter.

Finally, I want to emphasize that I take seriously my oath of office to uphold the Constitution, the Communications Act and to serve the public interest. Part of my job

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at 6-7. (In point of fact, I said that I had heard that "*in some cases*, the lawyers *and consultants* — not the candidates — have received more than 2/3 of the money," Minnesota Speech at 6, but Petitioners' distortion of my comments is minor compared to the other problems with this argument.) In the first place, my hearing such a thing in a non-restricted proceeding does not implicate the Commission's ex parte rules. *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd. 3011 ¶¶ 13, 20 (1987); 47 C.F.R. §§ 1202(a), 1204(a)(8) (1990). More significantly, Petitioners' concern about violations of the ex parte rules seems, at best, inconsistent. On June 3, 1991 certain of the Petitioners met with my staff and on October 9, 1991 attorney Robert S. Kahn met with me and members of my staff to discuss political broadcasting matters. I understand that similar meetings took place with others at the Commission. At the October 9 meeting, my staff asked Mr. Kahn about the political broadcasting litigation and how much of the settlements actually was paid to candidates. Mr. Kahn declined to answer at that time. But in a telephone call placed to my staff on October 11, 1991, he complained that my information on that point was inaccurate. Although he did not say how much of the proceeds actually went to candidates, Mr. Kahn said that his law firm collected a contingency fee amounting to one-third of the payments made by broadcasters. (In response to Mr. Kahn's concerns, I altered my speech to say that I had heard in some cases that "a large proportion of the money" was paid to lawyers and consultants. Indiana Speech at 6.) Given the extent of contacts initiated by Petitioners on this issue, it requires an abundance of nerve for them to complain about ex parte communications.

These developments notwithstanding, there may yet be a question of whether the Commission's ex parte rules have been violated. At the October 9 meeting, I discussed the possibility of the Commission issuing a declaratory ruling on the subject of jurisdiction. Despite my focus on that issue, Mr. Kahn persisted in bringing up the facts underlying his complaints against television stations in the state of Georgia. I found this unremarkable at the time, since I understood that there was on-going litigation in federal court over the complaints. But with the filing of the instant Petition, I am now aware that the facts Mr. Kahn was eager to discuss also are the basis for a formal complaint that is pending in the Mass Media Bureau. Section 1.1208(c)(1)(i)(B) of our ex parte rules makes clear that the filing of a formal complaint is a restricted proceeding. Ex parte presentations are prohibited in such proceedings. *Id.* § 1.1208(a). A copy of this decision has been forwarded to the offices of the General Counsel and the Managing Director. *id.* at § 1.1214. Based upon these facts, I will leave it to them to determine whether our rules have been violated and whether sanctions may be warranted. *See id.* at § 1.1216.

includes speaking to the public about policy issues that come before the Commission. So long as I am in this office, I will continue to do so.

Remarks by Commissioner James H. Quello
Before the
Indiana Broadcasters Association
Indianapolis, Indiana
October 17, 1991

POLITICAL BROADCASTING RULES

In my early years in Washington, I said FCC stands for From Crisis to Crisis. It is truer today than ever. There has been a veritable explosion of contentious issues and mind-boggling technological developments in communications. I could list several dozen but just for openers consider: finsyn, telco, attic-to-basement broadcast improvement, DAB, HDTV, DBS, MFJ restrictions, retransmission consent-must carry and political broadcasting rates.

The most immediate crisis for broadcasters in many states seems to be clarification and codification of the FCC political broadcasting rules. I was amazed when several Kentucky TV executives and AWRT officers two weeks ago in Louisville and the Minnesota Broadcasters Association last week urged prompt Commission clarification stating it was currently more important to them than the controversial retransmission consent issue. All together broadcasters in over a dozen states have been confronted by demands for refunds and the prospect of extended litigation. And the threatened litigation is spreading.

So the principal thrust of my speech today will treat the more immediate and urgent problem of political advertising rates rather than the suggested "Broadcasting: Yesterday, Today and Tomorrow." Responding to the urgency of the situation, the FCC last week placed on a short track a Public Notice stating our intention to issue a declaratory ruling with respect to exclusive authority of the FCC to determine whether broadcasters have violated the lowest unit charge requirement of Section 315(b). Parties were invited to comment on this issue by October 21st. To expedite action, no provisions were made for reply comments. All parties are well informed on the subject as the proposed declaratory ruling is a timely addition to the general Notice of Proposed Rule Making issued last June 13th designed to clarify and codify the overall Commission's political programming practices.

Some of the Commissioners, including me, suggested we broaden the Notice to invite comments on whether or not the FCC should assume total jurisdiction. Moreover, the prevailing sentiment at the Commission is that it would be advisable for the courts to stay any ongoing proceedings pending the outcome of the Commission proposal to determine jurisdiction. I am looking forward to reviewing all the comments in this proceeding. I am placing the burden of proof where it properly belongs, on those

who seek to deprive the Commission of the jurisdiction provided by Congress and the federal courts.

In the only federal court decision that is directly on point, the United States District Court for the Northern District of Georgia dismissed complaints filed by eight political candidates who alleged that they had been overcharged for political advertising by broadcasters. The court found that the complaints presented a federal question and noted that "enforcement of the [Communications Act] and vindication of the public interest are vested in the Federal Communications Commission. Pointing to the "pervasive statutory and administrative scheme to enforce Section 315," the court cited cases in which the Commission has ordered rebates. Consequently, it dismissed the complaints and held that the Commission provides candidates an exclusive remedy for violations of Section 315(b) of the Communications Act.

For the reasons stated by the court, I don't believe the FCC would be properly discharging its responsibility by relinquishing the enforcement of the lowest unit charge law to various state courts. You can't have 50 different state courts interpreting FCC rules. Congress established the FCC as the expert agency. It is up to us to effectuate the federal statutory policy that Congress intended. Interpretation of Section 315(b) is the FCC responsibility under the Communications Act. Political candidates need a clear statement of their access rights and an updated meaning of "lowest unit charge." Broadcasters need an updated certainty of what is required of them under our rules.

I have heard some claim that the Commission lacks the necessary authority to enforce the lowest unit charge provision of Section 315(b) by ordering rebates. Frankly, I am puzzled by the argument. As a general matter, Section 303(r) of the Communications Act empowers the Commission to "prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of the Act." Additionally, with respect to political broadcasting, Section 315(d) provides that the FCC "shall prescribe appropriate rules and regulations to carry out the provisions of this section." Given the complex administrative framework Congress created for political broadcasting, the D.C. Circuit has ruled that the FCC has unusually broad authority to fashion remedies under Section 315(d). In Chisholm v. FCC, for example, the court noted that this was "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." Consistent with this clear line of authority, the U.S. District Court for the Northern District of Georgia recently held that "the ability to order refunds of overcharges is within the purview" of the Commission's enforcement authority under Section 315(b) of the Communications Act.

Not surprisingly, the Commission in the past has relied on this broad grant of authority to order rebates of overcharges in violation of Section 315(b). In both Southern Arkansas Radio Company and Atlin Communications, Inc. in 1990, the Mass Media Bureau ordered licensees to repay candidates for apparent overcharges. This is not something the Bureau can do on its own if the law is not clear. In fact, our rules require the Bureau to refer to the Commission any enforcement action "presenting novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines." [47 C.F.R. Section 0.283(c)(6)]. The reason the Bureau could order rebates is because there existed "outstanding precedents" affirming that authority. Indeed, following a series of similar rebate orders in the early 1980s, the Commission expressly affirmed the Bureau's ability to order refunds. In Alpha Broadcasting Corporation, 102 F.C.C.2d 18 (1984), the Commission upheld the Bureau's overcharge calculations and held that the licensee "must rebate those overcharge figures which are specified [by the Bureau]."

Given this history, I am a little surprised that anyone would still have questions about the Commission's authority in this area. In fact, in our 1988 Public Notice on lowest unit charge obligations, the Commission even gave several examples in which candidates would be entitled to rebates. It would be strange indeed for anyone to suggest that the law provides candidates with a legal entitlement but that the Commission lacks any authority in the matter.

In addition to our anticipated declaratory ruling on jurisdiction, the Commission is currently considering proposals to clarify and codify the Commission's political programming policies. Our rulemaking proceeding proposes codifying the Commission's policies with respect to "reasonable access" by federal candidates, equal opportunities and sponsorship of negative advertising, and lowest unit charge for political advertising. Our Notice recognizes that advertising sales practices have drastically changed over the years and that such changes affect how the political rules apply to broadcasters. This is one of the few instances in which changes in commercial practices literally change the meaning of the law -- as in the case of "lowest unit charge."

An effort to update and clarify our rules is long overdue. The Commission has not issued a comprehensive statement regarding our political broadcasting policies since the 1984 Political Broadcasting Primer. In the meantime, as broadcasters and their lawyers will tell you, we operate during the political season under something of an "oral tradition." With the rush of last minute advice regarding very specific situations, there is rarely time for any kind of written ruling. Most inquiries are by

telephone with the Commission's Political Broadcasting Branch of the Mass Media Bureau.

This approach, while in some ways necessary because of the hectic pace of the political season, places enormous demands on the FCC staff and fails to create a clear set of rules for the broadcast community as a whole. So it is imperative that we codify our political broadcasting requirements, to the maximum extent possible. For situations that are very fact-specific -- perhaps too specific to cover with a general rule -- we should issue an updated Primer to give the industry and candidates a written set of clear guidelines on how to comply with this complex law.

We are now in the process of sorting out the comments filed in the general rulemaking proceeding. We expect to conclude the entire proceeding before the end of the year, in time for the 1992 political season.

The rulemaking also should help resolve some of the uncertainty caused last year by the political audit of broadcasting stations. A year ago last July, the Commission audited 30 radio and television stations in five major markets across the country. The stated purpose of the audit was to "assess the broadcast industry's compliance with the political programming law, particularly the obligation to charge candidates the 'lowest unit charge'" for political advertising.

The results of this audit were widely reported, but not so well understood. Although the audit found that many candidates paid more for non-preemptible broadcast time than did commercial advertisers for preemptible time at the stations surveyed, it did not conclude that these stations were violating the law. It did find that a principal reason for the difference was that candidates typically purchased the more expensive non-preemptible ads, while commercial advertisers rely on less expensive preemptible spots. It is important to note that the lowest unit charge requirement only requires stations to provide the most favorable rate in a given advertising category. It does not require broadcasters to sell non-preemptible time at preemptible prices. Consequently, the audit report made clear that the Commission had not yet determined the extent to which -- if at all -- the audited stations violated the law. The Commission will review each case before any fines are determined. Based on the preliminary information I have received, I understand that a few fines will be proposed.

Most broadcasters I have known through the years place the highest priority on regulatory diligence and civic service. I believe broadcasters who earnestly tried to comply with the complex changing rules or honestly erred should not be subjected to harsh penalties, lengthy litigation, costly discovery

processes, which totally preoccupies and disrupts broadcast operations and disserves the public. Unfortunately, the FCC audit report has become something of a political cause celebre--through over-interpretation by the press and by those seeking to use it for their own ends.

The FCC report had the unintended effect of creating a litigation boomlet among former candidates suing broadcast stations. As I noted earlier, candidates in at least two states have filed contract claims against broadcast stations claiming violations of the lowest unit charge requirement. Additionally, in California, Governor Pete Wilson and Lt. Governor Leo McCarthy are suing 22 TV stations for what they believe are overcharges under the law. Litigation has been threatened in other states as well.

Quite often, just the threat of litigation is enough to get a broadcast station to raise the white flag. One lawyer, who represents a large number of candidates, was recently quoted as saying that 10 TV stations already have paid about $600,000 in settlements! With the amount of money at stake, you can bet there will be more lawsuits -- or at the very least the threat of them. Candidates have even challenged license renewals over allegations of lowest unit charge violations.

These developments prompted Jeff Baumann, Executive Vice-President and General Counsel of the NAB, to state last week that "this whole rash of frivolous lawsuits reinforces the need for the FCC to take decisive action to gain control before the situation is totally out of hand." I couldn't agree more. The only thing on which the opposing sides can seem to agree is that the FCC's audit report was the catalyst for all of the litigation. To the extent we have added to the confusion it is incumbent upon the Commission to help clear things up.

Hopefully, by clarifying our rules and by issuing a declaratory ruling, the Commission can help make it less necessary in the future for parties to resort to litigation.

The "State Broadcaster Associations" in their comments to the Commission succinctly stated

> "However, the Associations would like the Commission to consider this overriding principle when it reassesses its political time rules and policies: Rules that are too complicated, either as written or as interpreted and administered, are less likely to efficiently serve their intended purposes. Such rules tend to divert and exhaust, unnecessarily and counterproductively, the resources of the persons who are subject to the rules, the persons on whose behalf the rules were promulgated, and the agency charged with administering the rules. The class action litigation

presently occurring in state courts well illustrates these points. The Commission's interpretation of the broadcaster's obligations has been a moving target of imprecision and inadequate notice over the years. As a result of this perpetual uncertainty, many stations, who have tried in good faith to stay on top of those Commission interpretations, have lately been thrown into a costly ring of litigation which threatens to swallow up the entire federal scheme of the political time rules. There is now the potential for endless fact-specific, sworn-testimony litigation over who said what to whom about the time buy alternatives available to advertisers and candidates. Whose interests are served by this? Such litigation leaves the Commission with two alternatives: clarifying and simplifying these rules once and for all, or risking the destruction of the entire scheme of political time regulations."

Because of these concerns, I believe, it is absolutely essential that we clarify the rules and assume the necessary jurisdiction to enforce them. Some, who would attempt to politicize the issue, have suggested that the FCC is trying to deprive candidates of a legal remedy. What rubbish! Candidates have survived under this law for decades without needing an avalanche of litigation. And in the end, who is served by the rush to courts? To the extent licensees risk liability in an uncertain legal climate, they will cut back on providing access to candidates -- and, frankly, I can't blame them. Neither the courts nor the Commission has ever fully defined what is meant by "reasonable" access for federal candidates and the law does not guarantee access by state and local candidates. Would it serve the public interest to create strong disincentives for broadcasters to accept political ads? I don't think so.

There is also a significant question whether the litigation helps candidates at all. Consider this: It is taking place years after the fact -- and, if truth be told, years after many failed campaigns. The only effective remedy -- and the one on which we have relied for years -- is to get a prompt administrative ruling from the Commission. Such rulings can be obtained during the campaign, when it can do some good, not years later when it serves mainly to line the pockets of assorted lawyers and consultants. I have heard that in some cases, the lawyers and consultants -- not the candidates -- have received a large proportion of the money received in settlements with broadcasters. I simply cannot believe Congress had this in mind when it adopted the lowest unit charge requirement. Also, the candidate would get more direct and prompt financial redress if the FCC determined liability and rebate without opening extended litigation and paying outside lawyers and consultants hefty contingency fees.

In the meantime, broadcasters can minimize their troubles by providing fair and equal opportunities to all qualified candidates; charge the lowest unit charge or the charge for comparable use of the station. Station executives would do well to have written directives that emphasize enforcement of the lowest unit rate for all political candidates.

We must also remember that stations should have broad discretion in how they present campaign programming. As matters stood before the recent KING decision (back-to-back speeches or interviews), a debate was the main type of specialized campaign programming that a station could sponsor on its own. Valuable as they are, debates are not the only legitimate way of getting candidates' views to the voters. The sometimes low viewership for debates suggests that audiences can tire of the format where there are few alternatives. In fact, there may be a lesson in the Reagan-Mondale debate in which the last half hour was interrupted by a technical failure. It was reported at the time that Reagan won the first 30 minutes, Mondale the second 30 minutes and the American public the final 30 minutes.

Well, it may be too much to expect for television to accurately reflect how politics really works. After all, as Art Buchwald once asked, "Have you ever seen a politician talking to a rich person on TV?" But I suppose we have to accept the fact that there will always be some perception-gap between television and reality. Still, we at the Commission will continue to do our best to assure fair treatment for all qualified significant candidates.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

November 7, 1991

IN REPLY REFER TO:

The Honorable James H. Quello
Federal Communications Commission
Washington, D.C. 20554

Re: WXIA-TV
Complaint No. 91070126

Dear Commissioner Quello:

You have requested my opinion as to whether, under applicable law, remarks made by you, and relied upon in a motion that you recuse yourself from the captioned proceeding, require your disqualification from considering the matter. After reviewing the remarks relied upon in the complainants' motion, it is my opinion that you are not required to disqualify yourself from consideration of this case should the matter be heard by the Commission en banc.

The referenced complaint is an adjudicatory, as opposed to a policy making, matter. In the adjudicatory context, a Commissioner must disqualify himself whenever it would appear to a disinterested observer that he "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Cinderella Finishing Schools v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). However, "preconceptions regarding the law no more invalidate agency action than they do action in court." City of Charlottesville v. FERC, 774 F.2d 1205, 1212 (D.C. Cir. 1985).

The complainants' request that you recuse yourself is based on remarks made by you in an October 2, 1991 speech in Louisville, Kentucky, an October 11, 1991 speech in Austin, Minnesota, and remarks attributed to you in the October 7, 1991 issue of Broadcasting. In all three instances, it is my opinion that a disinterested observer would interpret your remarks as reflecting the belief that complaints of violations of the lowest unit charge provision of section 315(b) of the Communications Act of 1934, as amended, should be heard by the Commission, not the courts.

In my view, the remarks relied upon by complainants do not in any way indicate that you have expressed a view or made a judgment on the individual merits of any particular case that may come before

the Commission. Although, in the October 2, 1991 speech, you expressed your agreement with the views of an NAB official that the "rash of frivolous lawsuits reinforces the need for the FCC to take decisive action to gain control before the situation is totally out of hand," given the context of your remarks, a disinterested observer would, in my opinion, take your acceptance of that statement merely to indicate that it was "frivolous" to bring such actions in court rather than before the Commission.

Thus, in my view, disqualification is not required in this case where your remarks merely expressed your general legal views on preemption and related section 315(b) enforcement issues.

Sincerely yours,

Robert L. Pettit
General Counsel