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**Concurring Statement of
Commissioner James H. Quello***

**In re Request for Ruling on Advance Payment
of Political Advertising of Beth Daly, Great
American Media, Inc.**

I concur in the Commission's decision because it may help bring some clarity to the often confusing area of political broadcasting law. The ruling that broadcasters can demand no more than a one-week advance payment adopts what has long been informal policy in this area. And hopefully, the explanation regarding when licensees must provide credit to political candidates will provide some guidance.

But I have some serious reservations about going along with this decision. It is important to note that the Communications Act does not require either compelled credit or limits on advance payment, as the *Memorandum Opinion and Order* suggests. While the statute gives the Commission the discretion to issue this ruling, I believe we will need to carefully monitor these policies to ensure that experience under them does not conflict with the letter and intent of the Act.

Credit Policies

In this decision, the Commission for the first time holds that our political broadcasting rules require broadcasters to offer credit to political candidates in certain circumstances. After summarizing nine objections raised by broadcasters to this new policy, the Commission dismisses the concerns as arising from "misunderstandings and erroneous assumptions." *Memorandum Opinion and Order* at ¶¶ 3-4.

Perhaps some confusion is understandable on this point, since the Bureau announced the new mandate with only the following explanation:

[I]f a candidate or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies.¹

In this *Memorandum Opinion and Order*, the Commission takes several pages to explain what

we rather defensively suggest was clear from the Bureau letter. The explanation is fortunate, for it is the only reason that I can concur in the result.

Expanding on the Bureau's letter, the *Order* emphasizes that "most, if not all, campaign committees are temporary in nature, and . . . may not qualify for credit for this reason." Consequently, "[a]s a practical matter, under these policies there may be only a limited number of instances in which a station will be required to extend credit to a candidate" and "[s]ome political campaigns . . . are not ongoing business concerns and thus may not qualify for credit under a station's customary credit requirements."² In other words, this new policy is unlikely to have any effect at all.

To the extent some licensees would be required to offer credit under this ruling, I tend to agree with the petitioners who suggest that this would undermine the Act's command that opposing candidates be treated equally. The *Order* acknowledges, for example, that candidates may be subjected to reasonable distinctions³ despite our rule that "no licensee shall make any discrimination between candidates."⁴

Such reasonable distinctions could involve denying credit to campaigns that are in "an unstable financial condition," have "an uncertain credit history" or that are "new, advertising with the station for the first time." *Memorandum Opinion and Order* at ¶ 5. Such differences are not unreasonable, according to the Commission; Section 315 requires "equal opportunities" to use broadcast facilities, but does not alter the fact that one candidate in a race may be able to afford more time than his or her opponents.

Despite the Commission's attempt to sound neutral, the new credit policy does more than simply recognize that some candidates will be better positioned than others to take advantage of the statutory guarantee of equal opportunities. The policy magnifies and institutionalizes the typical differences between candidates. In doing so, it places the Commission's thumb squarely on the side of the scale favoring incumbents and more well-heeled candidates.⁵ Those who are better off now can receive a benefit that can be denied to their less fortunate opponents — mandatory credit for broadcast advertising buys.

This result obtains even when a station applies its credit policies "even-handedly to all"

and is not seeking to favor a particular candidate. As the *Order* acknowledges, "[a]pplying the same credit policies to all candidates may result in credit being extended to some candidates but not to others." *Id.* at ¶ 8.

I simply cannot believe that this "rich get richer" approach is what Congress had in mind when it adopted the nondiscrimination requirements of the Communications Act. The *Memorandum Opinion and Order*, which seeks to ensure that broadcasters do not offer commercial advertisers more favorable credit terms than political buyers, actually approves significant discrimination between candidates. The Commission would be better off if it simply recognized that candidates — regardless of their particular financial circumstances — have more in common with each other than they do with commercial advertisers.⁶

These concerns would lead me to dissent if I believed that the credit policy would cause significant discrimination between candidates. But since the *Memorandum Opinion and Order* clarifies that virtually no station will be compelled to offer credit to candidates, I can concur.

Advance Payment

I do not agree with the Commission that the seven day advance payment policy "flows directly" from Section 312(a)(7) of the Communications Act. Nothing in the statutory text or legislative history even hints at a bar on stations asking for more than a one-week advance payment for political spots.

Indeed, the Commission's interpretation conflicts with the nondiscrimination requirement, since it limits advance payments for political time regardless of a station's policies regarding advance payments for commercial time. If a station requires more than seven days' advance payment for commercial advertisers, it nevertheless is obligated to apply preferential policies to candidates. Also, the advance payment policy articulated in this *Order* will permit significant discrimination between candidates, because it requires stations to adjust their prepayment policies to reflect those applied to "similarly situated commercial advertiser[s]."⁷ This will allow the application of different prepayment periods to candidates in the same race, depending on their respective financial situations.

Nevertheless, I concur in the result for two reasons: the seven-day requirement is a bright line that is easily understood and the *Order* merely affirms a longstanding informal policy.

Conclusion

Our political broadcasting rules are sufficiently complex. We should avoid making them needlessly difficult. This is especially true where, as here, our policy pronouncements are unlikely to have any practical effect. If experience with these policies does not clear up the confusion, or if it reveals significant disparities between candidates resulting from neutral but discriminatory credit policies, I would favor immediate reconsideration.

*This separate statement has been revised since the *Memorandum Opinion and Order* on this matter was released on August 14, 1992. Although the substance of the *Memorandum Opinion and Order* and this statement remain the same, the concurring statement released on August 14 was based on an earlier version of the *Order*. A final edited version of the *Memorandum Opinion and Order* was not circulated to this office prior to release. Some relevant changes are noted below.

¹Letter from Milton O. Gross to Beth Daly (February 6, 1992).

²*Memorandum Opinion and Order* at ¶ 6 & n.18.

³The draft *Order* discussed at some length the ability of stations to make "reasonable distinctions between candidates" and noted that it is "implicit in Section 315(a) that candidates may be treated differently." Although much of this language was deleted, the final *Memorandum Opinion and Order* acknowledges that Commission policy prohibits only "impermissible discrimination," and notes that "[a]pplying the same credit policies to all candidates may result in credit being extended to some candidates but not to others." *Id.* at ¶ 8 (emphasis added).

⁴47 C.F.R. § 73.1941(e). See 47 U.S.C. § 315(a) (candidates are entitled to "equal opportunities" to use a station's facilities).

⁵The Commission may find it difficult to reconcile its assurances that "[a]n incumbent may not have an advantage over his or her challengers in qualifying for credit if the campaign committee

buying time on his or her behalf is a new legal entity" with its statement that only "[s]ome political campaigns . . . are not ongoing business concerns." Compare *Memorandum Opinion and Order* ¶ 6 with *id.* n.18.

⁶The Commission attempts to compare candidates to commercial entities that are established "only for a temporary time or purpose," such as a seasonal fireworks merchant. *Memorandum Opinion and Order* at ¶ 5. However, with respect to advertising credit and political campaigns, I am skeptical that there is such a thing as "a similarly situated commercial advertiser." *Id.*

⁷This language and analysis did not appear in the initial draft and was added to the edited version of the *Memorandum Opinion and Order* at ¶ 11.