

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Office of Commissioner
James H. Quello

January 31, 1997

The Honorable John D. Dingell
Ranking Member
Committee on Commerce
2322 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Dingell:

Thank you for recent letter regarding FCC jurisdiction over hard liquor advertising on broadcast television. As you may know, I expressed my general views on this matter in a press statement on November 18, 1996 (copy attached). I continue to believe that the FCC does not possess either the jurisdiction or the expertise to resolve this issue. While I have commended Chairman Hundt's efforts in addressing this issue, I do not support engaging the FCC's rulemaking or hearing processes in what I fear would become an ineffective or possibly counterproductive effort.

In response to the specific questions in your letter, I offer the following observations in explanation of my views:

1. I am unable to locate in the Communications Act any provision giving the Commission the ability to censor specific programming or advertising. On the contrary, Section 326 of the Act expressly withholds from the Commission the power of censorship over radio communications.
2. I am unable to locate in the Communications Act any provision giving the Commission the express ability to prohibit or limit broadcasters' ability to air commercial advertising. However, those who support FCC action may assert that the Commission arguably could prohibit broadcasters from airing hard liquor advertising by relying on Section 307 of the Telecommunications Act which directs the Commission to consider the public interest in licensing broadcasters.

969

It is my present view that the Commission does not possess sufficient express authority under its statutory mandate to pursue the complex facts or balance the competing interests necessary to resolve this issue. The First Amendment's protection of commercial speech and the specific provisions in the Communications Act proscribing censorship are well known. Crucially, the FCC has never before taken action concerning TV advertising without a specific mandate from Congress. In sum, absent a more specific mandate from Congress, this controversy appears to be outside the FCC's jurisdiction and expertise.

3. It is uncontestable that commercial speech enjoys a degree of First Amendment protection. For example, in the recent case 44 Liquormart Inc. v. Rhode Island, the Supreme Court unanimously reaffirmed the alcohol industry's commercial free speech rights, granting price advertising for alcohol the same First Amendment protection given other legal products and services.

On the other hand, the First Amendment does not convey unlimited rights to any speaker, commercial or otherwise. I am deeply concerned about striking a proper balance between free speech and the protection of our children, but I believe that Congress, not the FCC, should strike the public interest balance.

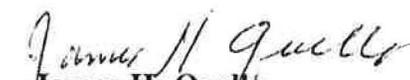
4. In addition to considerations discussed above, to censor specific advertising before it actually airs would appear to be inconsistent with the First Amendment ban on the prior restraint of free speech.
5. Please refer to responses to questions 1 and 2 above.
6. I am unaware of any instances in which the Commission has prohibited any type of advertising without specific statutory instruction. Given the difficult factual questions involved and the necessary balancing of various public policy and constitutional issues, it is my view that Congress is the appropriate forum for addressing this matter.
7. I am unaware of any legal authority for the FCC to undertake the exercise of rendering expert judgments or evaluating claims concerning the harmfulness of liquor advertisements. The FCC has no established expertise in this area, and this is neither the time nor place for this Commission to try and learn about such matters, particularly given the other immense challenges now confronting this agency.

The Honorable John D. Dingell
January 31, 1997
Page Three

8. I am all too aware of the high level of Commission resources that may be drawn into a debate over appropriate social policy with respect to protecting children. In view of the Commission's recent experience in this regard, I do not support committing any Commission resources to attempting to render expert judgments or evaluating claims concerning the harmfulness of liquor advertisements. I am concerned that if the Commission took on this exercise, we would be distracted from fulfilling our general mandate and implementing the Telecommunications Act of 1996.
9. Historically, the line distinguishing the expressed views of the Commission or individual Commissioners, as opposed to impermissibly intimidating licensees, has been somewhat vague. In this matter, without any linkage to licenses, I continue to urge individual television licensees to carefully consider the public interest in deciding whether to air hard liquor advertising on their stations.

I share your concern regarding this important topic, and appreciate the opportunity to express my views on the Commission's role in this matter. Please feel free to contact me if you have further questions or concerns.

Sincerely,


James H. Quello
Commissioner

Attachment

November 18, 1996

**PRESS STATEMENT
OF
COMMISSIONER JAMES H. QUELLO**

Re: Liquor Ads on TV

The distilled spirits industry's decision to abandon its longstanding voluntary commitment not to advertise hard liquor on TV has thrust upon government the need for responsive action. In my view, the issue is not whether something must be done, but rather who can most capably do it.

As I said in October, I commend Chairman Hundt for his vigorous efforts in speaking out on this problem. But I believe that, in the final analysis, this issue is not one on which the FCC possesses either the jurisdiction or the expertise to resolve. And it is because I want to see this issue responsibly and effectively settled that I would not support engaging the FCC's rulemaking or hearing processes in what I fear would ultimately be an ineffective, and possibly counterproductive, effort to devise a regulatory solution.

Reduced to its essentials, this controversy over liquor advertising on television has set free speech and the public health on a collision course. Establishing an appropriate balance between them involves consideration of complex scientific and social information that is outside the FCC's expertise. The FCC has no expertise on whether or in what forms distilled spirits advertising is likely to entice young people into drinking. Still less are we expert in knowing whether differences can be drawn between the effects of beer and wine advertising and the effects of hard liquor advertising. And this is neither the time, the place, nor the controversy for this Commission to try and learn about such matters. The widespread public concern about this situation demands a more appropriate hand to resolve it.

The issues raised by hard liquor advertising constitute a very difficult legal and factual no-man's-land -- one that only Congress can effectively cross. Congress, not the FCC, is the duly-elected representative of the people. Congress, not the FCC, has the resources and the authority to hold factual hearings and make findings on the harm caused by advertising distilled spirits. Congress, not the FCC, can specify how and why such advertising should be treated differently than beer and wine advertising. The courts will be the final arbiter of any decisions that are made in this difficult area, and that places a particular premium on the need for Congress, not the FCC, to take the lead in deciding what course of action would best serve the public interest.

I therefore suggest that Congress make legislation on the televised advertising of hard liquor a priority when it returns in January. In the meantime, I continue to urge individual television licensees to carefully consider the public interest in deciding whether to air distilled spirits advertising on their stations.