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It's time to rewrite Communications Act, and also time to set some priorities

By James H. Quello

The Congressional rewrite of the Communications Act of 1934 is the most comprehensive and important communications project of the past 40 years. It could well develop into the most significant communications legislation of the century by clarifying and updating existing regulations and accommodating the recent progressive technological developments in broadcasting, cable, phone, land mobile, satellite transmission and fibre optics. Engineering studies and articles indicate that communications technological progress has outstripped our economic and social ability to implement it.

It's a monumental and challenging task—it's communications history in the making.

Understandably, the rewrite proposal initially received varied reviews. The reaction was favorable, unfavorable, apprehensive or neutral depending on the viewpoints, objectives, fears and hopes of the affected industries and public and trade organizations. It was hailed by some as a long overdue move and feared by others for its potential for greater government regulation or control in the already heavily-regulated communications area.

No doubt the rewrite will require more thorough soul-searching evaluation than ever before of the future economic and social impact of any proposed new or revised legislation.

Volumes have already been written, spoken and proposed. The House Communications Subcommittee must be overwhelmed by filings and opinions with many varied and adversary viewpoints. It must surely be a sensitive painstaking process to determine what recommendations and studies should be accepted, rejected or modified before embarking on a final course of action.

Despite the volumes of material and proposals on file, I'd like to register a few unofficial viewpoints of a single FCC Commissioner with a broad background in broadcast operations. (Incidentally, one who ended his career in broadcasting five years ago and will not be a "revolving door" candidate.) I will restrict my remarks and priorities to broadcasting—the area with which I am most familiar.

First, in my opinion, Congressman Lionel Van Deerlin, chairman of the House Communications Subcommittee (and father of the rewrite, with Congressman Louis Frey) has embarked on a

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James H. Quello, a Democrat, was sworn in April 30, 1974. He had been vice president and general manager of WJR Detroit and vice president of Capital Cities Broadcasting. He had started with the station as promotion manager. A native of Michigan, he served 22 years as a Detroit Housing and Urban Renewal Commissioner.

monumental historic task whose time has come. I applaud the Subcommittee's effort in initiating an all-inclusive update of the Communications Act of 1934. It can incorporate revisions and changes of the past and the proposals for the future into one comprehensive, viable and, we all hope, simplified and more understandable instrument.

I believe all interested parties should cooperate—industries, government, public and trade organizations should provide or should have provided the Subcommittee studies and proposals to assure factual, wide-ranging perspective for committee deliberation and decision making. No doubt there will be ample opportunity for further comments and invitations for further participation after the bill is introduced.

My suggested broadcast priorities for legislative rewrite would include the following:

1. Eliminate license renewal requirement for broadcast stations; however, license subject to challenge at any time for egregious violations of Commission's rules and/or policy.

2. Specify definitive standards for standing as a party in interest in renewal and transfer applications.

3. Authorize maximum monetary penalty for larger companies of at least $200,000 to provide an effective mid-range sanction between the current limited forfeiture or revocation, (also provide direct forfeiture authority over networks).

4. Enact a specific statutory fee schedule for all communications authorizations.

5. Eliminate Fairness Doctrine and the political-broadcast requirement of Section 315 of the Communications Act. Also repeal section 312(a)(7).

6. Reassert *ex parte* prohibitions in all adjudicatory proceedings and in those rulemaking proceedings which are required by statute to be decided on the record after the opportunity for hearing; specifically exempt *ex parte* restrictions in rulemaking proceedings which do not involve identifiable competing claims to a valuable privilege.

7. Authorize Commission to impose forfeitures for any violation of its rules: delete present requirements of "willful or repeated."

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to proposals put forth by the new Chairman.

A case in point can be seen in the Commission's recent vote reversing established policy concerning "significantly-viewed" signals carried on cable systems. Under the rules, CATV systems were required to carry distant signals where viewed by significantly large audiences. The rules also required these signals to be deleted where they duplicated programs on local stations.

The new Commission policy proposed by Chairman Ferris provides that the CATV systems not be required to observe the nonduplication rules in carrying significantly-viewed distant signals. The new approach permits exceptions, but only where a local TV station petitions the Commission for a waiver. This shifting of the procedural burden to the TV stations was strongly supported by Commissioner Fogarty because of his view that regulation, especially in the case of newly expanding media, should foster and not frustrate development.

It can be expected that the views of Fogarty and Ferris and to a degree Tyrone Brown will coincide on a number of vital issues and will thus generally require one additional "yes" vote to win acceptance as Commission policy. And, of course, President Carter will have another FCC seat to fill come June 30 when Margita White's term expires.

With the stage being set for the future adoption of new directions in communications policy, Fogarty's views become most significant. For example, the TV network inquiry proceeding, which following a holding period, is presently being reorganized and restructured at the staff level, will without doubt become a headline attraction in the months ahead. Fogarty is already on record expressing his serious concern over the allegations which have been raised charging the existence of network dominance adverse to the public interest. The preservation of licensee responsibility and discretion remains a key concern to Fogarty, and in viewing the existing system, the Commissioner has stated his conviction that stations cannot make truly independent choices with regard to their programming service unless they have the opportunity to select competitive programs from a variety of sources.

Again, the consistent lines of Fogarty's regulatory philosophy is apparent in his continuing efforts to preserve and promote diversity and competition in the television industry. This approach brought before a receptive court of fellow Commissioners can be expected to have substantial effect on the shaping of Commission policy in the "greening" of the Ferris administration. □

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8. Eliminate time-consuming and expensive comparative hearings for new or available facilities. Provide for lottery or other direct method of selection from among all basically qualified applicants.

9. Specifically define the parameters of Commission's regulatory jurisdiction over cable television.

10. Foster the goal of UHF parity with VHF television through Congressional directive.

"This process of license renewal appears to be a very expensive, time consuming method of ferreting out those few licensees who have failed to meet public interest standards of performance."

An additional priority

If it weren't an almost impossible task, an additional priority for legislative consideration would be: "Define and clarify the term 'public interest'." Licensees are now required to operate in the "public interest." It may serve some purpose to keep the phrase deliberately ambiguous so that Congress and the FCC can apply broad interpretations and implementations to the many facets of broadcast regulation as it develops. However, without a clear definition, it is a source of continual uncertainty to the regulated industries. I have asked experienced executives at the FCC for definitions. They varied according to individual interpretations and philosophy. In some of my speeches, I use a quote from the late Walter Lippman who defined public interest in good practical terms. He said: "Public interest is what people would do if they thought clearly, decided rationally, and acted disinterestedly."

I personally defined it over four years ago in oversimplistic terms as it applied to common carrier regulations: "The best service to the most people at the most reasonable cost."

The Supreme Court in the NBC Chain Broadcasting case stated "the standard of public convenience, interest or necessity governing the exercise of powers delegated to the Commission by Congress is not so vague and indefinite as to be an unconstitutional delegation of legislative authority. The standard is as concrete as the complicated factors for judgment in such a field of delegated authority permit and is limited by such standards to guide determinations as the purposes of the Communications Act of 1934."

Defining (public interest)

The terms "public interest" or "public interest, convenience and necessity" are more easy to visualize than define. The rewrite committee might better concentrate on other important problems more amenable to definitive solution.

There are valid reasons and logical arguments for listing the ten priority broadcast proposals. I have selected the first seven proposals as subjects for detailed explanation and logical reasoning.

First, broadcast licenses should be issued with no fixed expiration date, but should be subject to challenge any time for serious violations.

Every three years, broadcast licensees must prepare lengthy applications for license renewal. These applications are then reviewed by the Commission which must find that renewal is or is not in the public interest. The applications are further subject to challenge from members of the licensee's audience under a very loose application of the principles of standing as a party in interest.

For most licensees, the triennial shipment of paper to Washington, D.C. is ritualistic, time-consuming, expensive and non-productive. In the vast majority of instances, the Commission makes the public interest finding that permits renewal and the three-year cycle begins anew. In a few cases, renewal is delayed by objections from members of the public. In very few cases, the licensee is forced into a hearing to determine whether he is fit to remain a licensee. And, there are instances where other parties file "on top" of the licensee in an effort to gain the license for themselves.

This process of license renewal appears to be a very expensive, time-consuming method of ferreting out those few licensees who have failed to meet public interest standards of performance. I strongly recommend that the statute be changed so as to no longer require license renewal.

Some would contend that license-renewal time offers the Commission the

only real opportunity it has to review the overall performance of its licensees. However, I believe greater responsiveness to legitimate public needs comes about through the requirements of the ascertainment process—that the licensee make a diligent, positive and continuing effort to discover and meet the problems, needs, and interests of the service area. I envision that the Commission would continue to have authority to require certain reporting from licensees but only where it can be shown that the information sought is worth the burden to both the licensee and the government.

The performance of licensees could be subject to challenge at any time, provided that the basis for challenge meets some reasonable threshold standard. Qualifications for achieving standing as a party in interest should be more equitable and definitive than at the present time. The present practice of accepting bold, assertive and self-serving conclusory statements in support of license challenge is wasteful and unproductive. The right of the people to petition for redress of grievances is incontravertible, but the right of individuals to cause expenditure of government funds and resources in pursuit of self-serving goals should be subject to reasonable constraints.

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I realize that any challenge must be considered to determine its legitimacy, but I believe ways can be found to quickly eliminate those without merit by establishing certain standards which must be met. Such a system, were the Commission not faced with requirement of reviewing every license every three years, would enable us to take a more comprehensive in-depth look at a smaller number of stations based upon information received and perhaps coupled with some random and/or systematic sampling.

Past considerations of the renewal issue have included the argument that a licensee "in perpetuity" would greatly weaken the competitive spur in the Communications Act. It must be remembered that broadcasting stations are private business enterprises subject to the risks and opportunities of entrepreneurship. Broadcasters have no incentive to offend or alienate potential audiences; on the contrary, it just makes good business sense to attempt to serve as much of the potential audience as possible and as well as possible. All media and particularly broadcasting require public acceptance to succeed and even survive.

Regulation is supposed to be a rather imperfect substitute for competition where competition either doesn't exist or is restrained by certain market forces. In the vast majority of the broadcasting markets in this country, broadcasters not only compete among themselves but with all other media including newspapers, magazines, outdoor, direct mail, etc.

Therefore, it would seem reasonable to remove as much regulation as possible in order to permit competitive forces to operate.

Eric Sevareid, who said so many things so well over the years, once commented: "I have never understood the basic legally governing concept of 'the people's airways.' So far as I know there is only the atmosphere and space. There can be no airway, in any practical sense, until somebody accumulates the capital, know-how, and enterprise to put a signal into the atmosphere and space."

Minority ownership

Various minority spokesmen have criticized the comparatively little minority ownership of broadcasting properties. They ask for an opportunity to participate to a much greater extent in such ownership. I agree there is too little minority participation in ownership, and I continue to support efforts to provide more opportunity. During a conference on minority ownership at the FCC, I suggested that the Commission should prevail upon the Small Business Administration to review its policy against granting loans for acquisition of broadcast properties. I will encourage any legitimate non-discriminatory means of improving opportunities for minorities to participate in broadcast ownership.

At the present time, the major deterrent to minority ownership seems to be inadequate finances. The greatest potential for progress is devising means to make funding available to those who are interested in ownership participation. The NAB proposal of tax certificates for broadcast owners or corporations who sell to minorities seems to offer an attractive inducement.

Opportunities to inject new ownership into broadcasting have rarely come about through the renewal process. The real opportunities here appear to be in the transfer process. Just to satisfy my curiosity about the availability of broadcasting properties once funding is available, I queried our Broadcast Bureau Transfer Branch about the number of transfer applications we have received over the past three years. It turns out that in 1975, there were 967 applications, 1,210 in 1976, and 1,385 in 1977.

In each of those years, slightly more than half of the applications involved *pro forma* transfers; that is, there was a change in control but not a change in overall ownership. And, of the totals, perhaps a half dozen transfers each year involved non-commercial stations. Discounting both *pro forma* and noncommercial transfers in 1977, broadcasting stations—AM, FM and TV—changed hands at an average rate of nearly two per day, including Sundays and holidays.

Reporting in September, 1977, the staff noted: "Average receipts during the past five calendar years have ranged from a low of 81 applications per month (1975) to a high of 101 per month last year. Staff has averaged 103 disposals per month thus far in calendar year 1977, the highest disposal rate for this service in the history of the Commission." Thus, it seems that opportunities for broadcast ownership do exist once the financial hurdle has been overcome.

Back to my initial basic point—I believe that a broadcasting license once granted, should continue in effect until transferred or revoked. No other utility, industry, monopoly or non-monopoly must apply for a governmental renewal of license every three years to stay in business.

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Who's a 'party in interest'?

Definitive and equitable standards should be established by statute to determine qualification for standing as a party in interest. Too often, broadcasters, immediately prior to filing of an application for renewal or assignment of license, are confronted for the first time by persons claiming to represent a group or coalition of local organizations concerned with the manner in which the licensee is fulfilling its responsibility to meet their needs and interests. While the membership, purpose and local representation of church groups, educational associations, civic organizations or professional societies with whom broadcasters regularly meet are known locally and are rarely in dispute, the same cannot be said for many "citizen groups" or "coalitions" which appear at renewal time demanding that the licensee accept its proposals or face a petition to deny.

Under the present system, a great deal of time and effort is expended by the FCC and by contending parties in cases devoid of any legal or factual merit. Many cases are frivolous from conception through disposition. Some overzealous parties, under the guise of representing some significant sector of the public, freely indulge in petitioning against license renewal of broadcast licensees with knowledge that, even without merit, such petitions (1) require a costly defense to be mounted by the licensee and, (2) result in delay of renewal, in some cases well beyond the normal renewal period. Forearmed with this awareness, some citizen groups can promote their own private version of public interest by extracting self-serving concessions from licensees who presumably choose the least expensive option available to them.

There are some instances where petitioners feel aggrieved but fail to perceive the difference between an offense subject to legal resolution and a social or philosophic disagreement. Such persons easily fall victim to blandishments of those whose only view of justice is that which results from litigation.

Unfortunately, the consideration of even unfounded allegations takes time, manpower and money—all of which could be spent in more productive ways. In 1966, the United States Court of Appeals for the District of Columbia Circuit held that responsible representatives of the listening public may have standing as parties in interest to contest renewal applications (*Office of Communications of United Church of Christ v. FCC, 359 F. 2d, 994*). However, while the court was of the opinion ". . . . . some mechanism must be developed so that the legitimate interests of listeners can be made a part of the record," it also recognized that any expansion of standing to include citizen groups might encourage "spurious petitions from private interests not concerned with the quality of broadcast programming" who "may sometimes cloak themselves with a semblance of public interest advocates."

'Broad discretion'

In that much-quoted 1966 landmark case, Judge Burger, writing for the majority, also stated "such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations may well be useful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representative of broad as distinguished from narrow interests, public as distinguished from private or commercial interests."

The logic of Judge Burger's statement is irrefutable, but it can't possibly be interpreted to mean that standing is to be automatically conferred upon any viewer or listener in the area. Judge Burger made another significant statement in that decision—a statement rarely quoted, which encouraged the FCC to establish standards. He said: "The Commission should be accorded broad discretion in establishing and applying rules for such public participation, including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs in vindicating public interest."

I believe Congress could correct the abuses of questionable standing by a brief one paragraph amendment. Accordingly, I recommend that Section 309(d)(1) of the Communications Act be amended to include the following language at the end of that section:

"Parties who seek standing to file Petitions to Deny, alleging they also represent local organizations, must substantiate by affidavit their relationship with each cited group and provide information concerning the group's address, the names of its officers, date of formation, its purpose, the size and location of its membership, and whether (if so, how) the group authorized the filing of a Petition to Deny."

Limitation of the right to file a formal Petition to Deny does not deprive any individual or organization of the right to file complaints relative to the performance of a broadcast licensee.

I again emphasize that the Commission's present liberal approach to standing encourages the filing of frivolous, unsupported or vindictive Petitions to Deny and results in standing being routinely granted to groups of doubtful representativeness and purpose so long as they provide a local resident as a "front man." The ease of achieving standing also provides the leverage used by groups which threaten the filing of a Petition to Deny to coerce acceptance of their demands. The above amendment should minimize or terminate possible abuses.

I am pleased that the Congress has recently enacted the Commission's forfeiture proposal which, among other things, increases the maximum forfeiture authority to $20,000. This amount is adequate for many situations where the offense is relatively minor or the broadcasting station is rather small. Where a large broadcaster is involved and, the offense is very serious, the Commission could still be faced with a decision to either impose a forfeiture which is too small to be meaningful or invoke the ultimate sanction, denial of license renewal or revocation. In the case of a major television facility with revenues of several million dollars annually, that choice becomes either a slap on the wrist or removal of the license—which is the equivalent of, perhaps, $50–60 *million* penalty.

A wide disparity

That kind of disparity can lead to some gross inequities and irrational decisions. That is not to say that there are never situations warranting license removal. However, I believe this severest of penalties should be reserved for only the most serious violations or derogation of license responsibility.

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To remedy this situation, I propose a new Section 510 to be added to the Communications Act as follows: "Where the Commission has determined after a full hearing that an application for renewal of a broadcast license should be granted pursuant to Section 307(d), or that an order for revocation of a broadcast license should not be issued pursuant to Section 312(a), but that the licensee has engaged in conduct of the kind specified in Section 312(a), it may, taking into account the gravity of the conduct and the financial condition of the licensee, impose a monetary penalty in an amount not to exceed $200,000."

Note that this penalty would be levied only after a full and complete hearing subject to judicial review and after the Commission has made specific findings with respect to the substantiality of the misconduct and its reasons for imposing a large monetary penalty. If a more explicit statutory limit were desired, however, Congress could further restrict the maximum monetary penalty to a percentage of the broadcast station's gross revenues. Under this proposal, such a monetary penalty could be imposed only for conduct defined in Section 312(a) of the Communications Act.

The recent legislation provides for a statute of limitations of one year or the beginning of the license term, whichever is longer. Since I am recommending that the three year license term be eliminated, I believe that a three year period in which to impose a forfeiture would be appropriate and more practical. Numerous times under present rules, the one year statute of limitations period has expired preventing the Commission from levying justifiable forfeitures. This in turn causes a penalty problem of "too little or too much." A three year statute of limitations would be more flexible and in the long run would better serve the cause of justice.

Also, the FCC should be granted jurisdiction providing for direct forfeiture authority over networks.

As you are aware, the Commission's fee schedule program is in a shambles following the order of the U.S. Court of Appeals for the District of Columbia Circuit that the Commission recalculate its 1970 and 1975 fee schedules and refund money which it collected that exceeded the permissible statutory standard [*National Ass'n of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Electronics Industries Ass'n v. FCC, 554 F.2d 1109 (D.C. Cir. 1976); National Cable Television Ass'n v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976)*].

Shortly after this decision, the Commission's General Counsel and Executive Director, in a joint memorandum to the Commissioners, noted that it would be extremely difficult for FCC to comply with the court order. The Commission interpreted the court decisions to require that fees not only be based on costs but also on the "value conferred" upon individuals or organizations paying such fees. However, resultant exhaustive studies and analyses concluded that we were unable to determine the value that the Commission's actions conferred upon payor applicants. Accordingly, the Commission on December 22, 1976, notified both House and Senate Legislative and Appropriations Committees that it was issuing an order suspending all fee collections, effective Jan. 1, 1977.

Review of fee schedule

Pursuant to joint request of both Houses of Congress, the Comptroller General (GAO) was requested to review the FCC schedule and related matters with a view toward specific changes

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necessary in the Commission's accounting system and alternatives to the fee schedule which would meet the criteria established by statute and by the Court. In a Report of the Comptroller General of the United States, dated May 6, 1977, GAO concluded that sufficient guidance is contained in the recent court decisions from which a proper fee schedule can be established for services provided by government agencies. GAO further concluded that the FCC can make a good faith effort to recalculate its fee schedules and to refund only the excess portions of the $164 million collected in fees from 1970–1976.

The new chairman of the Commission directed a thorough review of the fee, program, and on Jan. 11, 1978, the Commission determined to move ahead in attempting to design a new fee schedule and to deal with the refund program. We propose to construct a methodology for determining and applying in the fee-setting process a "value to the recipient" factor. Such methodology will be a key not only in determining what the proper fee should have been with respect to the 1970 and 1975 schedules, but also will be the cornerstone of our efforts to construct a new fee schedule. Whether the final product will withstand further challenge and judicial scrutiny is of course a matter of conjecture.

In my opinion, the government suffers in the long-run to the extent that protracted litigation of the fee schedule problem will result in continued delay in assessments and collection of fees for a substantial period of time. Rather than continuing in an aura of uncertainty, the Congress may wish to provide additional legislative guidance. Congressional action could take the form of amending the Independent Offices Appropriations Act of 1955 or enacting new legislation in lieu thereof. In either case, it seems to me most desirable that if general statutory standards are specified, the standard "value of the recipient" as expressed in the 1955 act should be eliminated, defined, or reworded so as to avoid the obvious ambiguity that has resulted in the present posture of implementation.

In my opinion, the fees previously imposed by the Commission, but rejected by the Court, caused no undue hardship on the broadcast and cable industries or on any other licensees. It's primarily a matter of legalizing fees.

As a former newsman, I have always hoped that broadcasting would be treated the same as other journalistic and advertising media. With all the continuing debate and various court interpretation, it seems more like an ideal to strive for than a practical reality to be achieved. However, in my opinion, the time has finally come to grant full Constitutional rights of freedom of the press and freedom of speech to broadcasters. This would end years of discriminatory treatment which is no longer justifiable in today's technological, economic and journalistic climate. However, in my opinion, broadcast journalism today is mature, professional and as objective as any media. Regulatory restraints are no longer justified in today's era of competitiveness with numerous outlets and professional journalism.

Freedom of the press

In my opinion, the time has finally come to grant full Constitutional rights of freedom of the press and freedom of speech to broadcasters. This would end years of discriminatory treatment which is no longer justifiable in today's technological, economic and social climate.

There are many more TV and radio stations today than newspapers in every sizable market. The growth of cable, translators, UHF, FM and the development of satellites has provided more media availability than ever before. Future potential is practically unlimited.

The scarcity argument justifying governmental intervention in broadcasting seems more specious today than when it first crept into court decisions years ago that limited First Amendment guarantees for broadcasters.

There are limitations upon the numbers of businesses of any kind in a given community. Limited spectrum "scarcity" arguments once embraced by the courts can hardly apply in today's abundance of radio-TV media compared with newspapers. Economic reality is a

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far more pervasive form of scarcity in all forms of business whether in broadcasting, newspapers, auto agencies or selling pizza. It is a fact that not everyone who wants to own a broadcasting station in a given community can do so. It is also an economic fact that not everybody who wants to own a newspaper, an auto agency or a pizza parlor in a given community can do so.

The Public would be served by abolishing Section 315, including the Fairness Doctrine, and Section 312(a)(7) from the act. The Fairness Doctrine is a codification of good journalistic practice. Its goals are laudatory. However, I no longer believe government is the proper source for mandating good journalistic or program practice. I believe the practice of journalism is better governed by professional journalists, editors and news directors. Programming is best done by professional program directors, producers and talent.

There is little doubt that, if TV and radio had existed in 1776, our founding fathers would have included them as prime recipients of the Constitutional guarantees of freedom of the press and freedom of speech. After all, they were guaranteeing these freedoms so that a well-informed public and electorate could vote on issues and candidates—free of any semblance of government interference or control.

Equality with newspapers

Section 315 and Section 312 (a)(7) guarantee access to broadcasting for federal office. This is not required of newspapers and magazines because of the Constitutional guarantees accorded only to print journalism. Somehow print journalism, with its guaranteed "freedom of the press" has risen to the task of informing the electorate and uncovering illegal or unethical practices without government interference or regulation. As most former or present newsmen, I believe broadcast journalists rightfully have earned and deserve all constitutional freedoms.

I believe that removing the government restraints of Section 315, including the Fairness Doctrine, and Section 312(a)(7), would free broadcast journalism, foster more comprehensive and independent reporting, and better serve the American people.

I am concerned with the severe restrictions on fact-gathering and the decision-making process of the Commission as a result of court opinions in *Home Box Office* and *Action Television*. The Commission is now revising its own procedures to alleviate this problem without seeking legislative help. However, if further court interpretations result in continuing restrictions the Commission may seek legislative guidance or possible legislation to provide authority to seek out all pertinent information in all informal rule making proceedings.

Title V of the Communications Act of 1934—entitled Penal Provisions—Forfeitures—requires that the Commission determine that a violation has been committed "willfully or repeatedly" (Section 503(b)) before a forfeiture can be imposed. It is difficult if not virtually impossible to prove willfullness in almost any area of human endeavor since it is necessary to enter the mind of the violator and accurately assess motive. Thus, the Commission is left with the "repeatedly" requirement.

The question of whether a violation which occurs more than once is "repeated" for the purposes of this section has concerned me from my first week as a Commissioner. The fact that an offense was committed more than once because the licensee was unaware that it constituted a violation should not, in my opinion, constitute a repeated violation for purposes of levying a forfeiture. It seems to me that a requirement to find "repetition" leads to the use of subterfuge by the FCC and to legal gameplaying which often diminishes respect for the law.

Encouraging compliance?

It's apparent that the salient point in assessing forfeitures against licensees is that such forfeitures either encourage obedience to the rules or they do not. Applied even-handedly, I believe that forfeitures do encourage compliance.

We are frequently faced with interpretations and litigation as to whether the same act committed or omitted—and constituting a violation of Commission rules—on more than one day—is a single offense or a "repeated" violation. Questions arise as to whether "repeated" means simply more than once or whether the offense must be repeated after the licensee has first been warned that the conduct or omission constitutes a violation. Difficulties in interpretation arise, for example, where a licensee fails to notify the victim of a personal attack within seven days as required by our rules. It may be impossible to show willfulness, e.g., the licensee may not have interpreted it to be a personal attack. Can it be "repeated"? Well, certainly if it happens a number of times.

But some agree that each day the licensee fails to send the required notice could be a separate offense—and, therefore, it is "repeated" for forfeiture purposes. The other side of the argument is that there is only one duty to notify and that the offense is committed only once—when the seventh day passes without such notification. And, of course, on the eighth and succeeding days, giving notice would not comply with the seven-day rule so how could failure to give notice on those days be considered as "repeated" violations?

It seems to me these time-consuming legal exercises are unnecessary. Respect for our rules could be increased by a single and straightforward requirement that any violation of our rules is subject to a forfeiture. This simply recognizes the constructive knowledge licensees are assumed to have where rules are published in the Federal Register. Moreover, licensees are required by rule to obtain copies of rules pertaining to the service in which they operate. Additionally, the Commission and trade publications give wide dissemination to significant rule changes.

I do not anticipate that such a change in the law would really affect the way in which we apply forfeitures. It would merely simplify the requirements and make the process less subject to debate—before the Commission and the courts. The Commission presumably would continue to tailor the forfeiture to the nature of the offense and the offender as it has done in the past.

Moreover, in view of the fact that Section 312(a) of the Act permits revocation of license "for willful or repeated violation of, or willful or repeated failure to observe any provision of this act or any rule or regulation of the Commission . . ." imposition of the far less serious sanction of a forfeiture—tailored to the offense and the circumstances—should be available simply for failure to abide by the Commission's rules. Sensible revisions to "willful and repeated" would afford a certainty and precision in our enforcement efforts which would benefit all concerned.

As a non-lawyer whose approach to government regulation is more journalistic than legalistic, I find considerable solace and truth in a quote from that great President, Franklin D. Roosevelt, who said:

"A commonsense 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 backwards to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

My concluding thought is that regulation can be most effective when conducted in that spirit. □