

Concurring Statement of
FCC Commissioner James H. Quello

In re: Ex Parte Policies and Procedures, Docket No. _____

I concur, with some reservations, in the action taken today by the Commission in adoption of its Order, Notice of Inquiry, and Interim Policy Statement. However, I believe that we have unduly restricted the parameters of comment by the action taken. Brief reference is made to alternative policies and procedures regarding ex parte communications in informal (i. e., notice and comment) rulemaking proceedings. In my opinion, we should seek comment on each of these alternatives. Instead, we have already decided to follow the approach suggested by the Administrative Conference of the United States. Thus, comment is restricted to what, in essence, is our pre-judgment as to the desirable alternative to be pursued.

My personal view is that we could have simplified procedures substantially by following the opinion in Action for Children's Television v. FCC, 564 F. 2d 458, which adopted the position of Judge MacKinnon with respect to ex parte communications and severely criticized the majority opinion in Home Box Office v. FCC, 567 F. 2d 9, calling it "a clear departure from established law." In Judge MacKinnon's view, party contacts should be restricted only in cases involving conflicting claims to a valuable privilege or "selective treatment of competing business interests of great monetary value." The ACT case cogently pointed out that "In light of what must be presumed to be Congress' intent not to prohibit or require disclosure of all ex parte contacts during or after the public comment stage, . . . we would draw that line at the point where the rulemaking proceedings involve 'competing claims to a valuable privilege.'" These pronouncements are practical, commonsense approaches to the ex parte problem.

It is a well-recognized fact that each Commissioner does not and cannot read and digest thoroughly every word of every filing before the various bureaus of this Commission. Therefore, it is obviously helpful to receive oral presentations of salient points from the parties on all sides of an issue.

My own experience has been that the presentations made orally by parties rarely, if ever, go beyond their filings in a given proceeding. Indeed, it's hard to imagine that a party would save his best or most persuasive arguments for ex parte presentations. If that were the case, I would wholeheartedly embrace the Commission's action in the interest of providing a complete record. The record, after all, must be the basis for any decision.

142

In an era of "government in the sunshine," I see a certain inconsistency in requiring that all contacts be reduced to writing. This requirement would seem to favor those with the necessary legal resources to assure that they are in full compliance with these new restrictions. Individuals and organizations affected by our proposed informal rulemaking might justifiably resent lack of access except through legal filings or legally approved briefs. This type of restriction, in my opinion, should be reserved for adjudicatory proceedings or rulemaking involving conflicting claims to a valuable privilege.

I believe it is necessary that this Commission take some positive approach toward clarifying our policy regarding ex parte contacts. While this action is not the approach I would prefer, I believe it will move us closer to a resolution of the problem. I am hopeful that the comments generated by this proposal will suggest variations or modifications of the interim policy which will prove to be more equitable and more practical.

Therefore, I concur.