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Statement of FCC Commissioner James H. Quello
In Re: Applications of WPIX, Inc. for Renewal of License and Forum Communications, Inc. for construction permit for new Television Broadcast station

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It is with extreme reluctance that I append this statement to the final Decision. It is not unusual for the Commission to split its vote on matters before it and for Commissioners to issue separate statements explaining and supplementing their individual views. However, the joint dissenting statement of the minority is so sharply critical of the majority position that it amounts to a diatribe requiring some response. The lengthy, ostentatious joint dissent appears only to have whetted the zeal of the dissenters to the extent of even further criticizing the majority opinion and further debating the case through individual statements.

Out of the protracted years of litigation in this case and from the acrimonious statements of the minority, emerges a familiar and inescapable conclusion -- "...inadequacies of the mechanism for comparing the incumbent licensee and the new applicant are symptomatic of the defects inherent in the comparative renewal process itself." Report & Order (Docket No. 19154), 66 FCC 2d 419, 429(1977). We noted in that Report & Order that the FCC had recommended to Congress the elimination of comparative renewal hearings, but until such time as the Congress acts in this area ---"the Commission will continue to resolve these renewal proceedings in a manner consistent with the policies and practices set forth in prior comparative renewal cases." Such was the procedure in this case.

As reflected in prior comparative renewal cases, the Commission's focus will initially be upon program service rendered by the renewal applicant during the preceding license term, including all elements of the licensee's past performance that bear upon its service in the public interest. And as the Court in McClatchy Broadcasting Company stated, "....where that interest lies is always a matter of judgment and must be determined on an ad hoc basis." 239 F. 2d 15 (DC Cir., 1956). The final determination of the Commission majority to renew the license application of WPIX, Inc. was based on such judgment after careful review of the record. The vehement protestations of the dissent minority does not invalidate nor weaken such judgment.

The highly unusual, lengthy joint dissent amounts to a complete reargument of the elements of the proceeding. I do not choose to again debate the many facets of this proceeding. These matters were fully discussed by all Commissioners and the majority voted its consensus of judgment based on the record. To again argue the minutiae of facts, conclusions and implications would not stifle the shrill protests of the minority. However, I do intend to treat some of the general

allegations raised by the minority statement by setting forth some of my personal philosophies which entered into my judgment in this case.

First, I wish to emphasize my firm conviction that the license renewal of WPIX(TV) was legally correct and morally mandated. A reversal of the Administrative Law Judge's decision by this Commission could lead to justifiable charges of bureaucratic oppression.

Further, I am appalled by a regulatory process that places a long term, highly respected licensee in jeopardy through an opportunistic challenge that pits "paper" promises versus actual long term performance. I question the rationality and justice of a regulatory process that subjects a pioneer licensee with an excellent overall record to the punitive expense and the stigma of lengthy hearings for a relatively minor transgression.

I'm especially concerned with the basic unfairness of even considering the harsh ultimate penalty of license revocation (which in this case would amount to an estimated 75 million dollar fine) because of a demerit assessed for a dereliction whose seriousness has been exaggerated out of context and proportion -- this type of charge couldn't possibly warrant even an indictment, let alone conviction, in a civil or criminal proceeding. The record definitely establishes that the conduct in question consisted of inaccurate and hyped promotion of the news - not the substance of the news. The record also establishes that top management and ownership was not involved in this promotional puffery, but took corrective action when it learned of this unauthorized, unwise, promotional practice.

WPIX(TV) is a pioneer station with a long record of renewals and public service. Over sixty civic leaders and public service organizations testified before the Administrative Law Judge to the excellent program service and the civic and social consciousness of the station. This significant testimony lauding the long term, overall public service performance of the station seemed to be perfunctorily glossed over in Commission deliberations. I think this testimony is of utmost importance in establishing the broadcast record and reputation of the station by those local individuals most qualified to judge -- the viewers and listeners.

The Administrative Law Judge who conducted over 100 days of testimony, who studied the exhibits and who was the only judicial entity directly exposed to the demeanor and attitude of the witnesses, unequivocally found WPIX(TV) fully qualified to remain a licensee.

The replacement of WPIX(TV) by a new, untried owner, with untested program proposals, whose broadcast showing consisted only of paper promises, would not guarantee the same level of service and would cause serious disruption during the transition period. Also, not only the licensee, but the lives

and careers of many other employees, suppliers and their families could be adversely impacted.

I am and have always been an advocate of minority ownership. However, I'm sensitive to exaggerated impressions or representations of minority ownership (in this case a token 5.7% for Forum) for the deliberate purpose of gaining an advantage in a contested application.

In another context, I also believe the involvement of about 46% of WPIX stockholders in the actual operation of the station represents a laudable initial step in ownership - management integration.

I can't think of any industry, business or profession, and it applies to government, too, that can be totally free of employee or employer error or bad judgment. In broadcasting, errors have great public visibility, more than in most other industries or professions - and there are dozens of daily decisions that possess inherent potential for human error. There are daily perplexing decisions in programming, program promotion, news, sales, advertising, personnel and talent relations, engineering, public service, etc. Any licensee could be "unfair" game if licenses could be usurped at drastically unfair bargain prices with a formula of first finding or developing a basis for complaint against an incumbent licensee followed by a competitive application. This inequitable, opportunistic process should be discouraged by the Commission and corrected by legislation. The recently proposed Communications Act of 1978 takes an important, much needed, initial step in rectifying this regulatory inequity by eliminating license renewals for radio and eventually for television. This would eliminate opportunistic challenges at license renewal time.

No other industry, utility, business, non-monopoly or monopoly must apply for a governmental renewal of license every three years to stay in business - and then risk challenges from predators seeking to acquire professionally managed, well developed, valuable properties for no compensation -- ostensibly to better serve public interest. The recent re-write of the Communications Act deliberately and wisely deletes the term "public interest, convenience and necessity" to eliminate the potential for inequities in subjective interpretations of "public interest."

The recent 8 - 0 decision vote of the Supreme Court in the newspaper cross-ownership case (FCC v. National Citizens Comm. for Broadcasting, 46 LW 4609, (U. S., June 12, 1978)) also contained significant statements regarding potential inequities of forced diversification. Justice Thurgood Marshall in his written decision for the Court stated that the Commission rationally concluded that forced dissolution of existing co-located combinations, although fostering diversity, would disrupt the industry and cause individual hardship, and would or might harm the public interest in several respects. Justice Marshall also stated that existing newspaper-broadcast combinations had a long record of service in the public interest and concluded that their replacement by new owners would not guarantee the same level of service and would cause disruption during the transition period.

The Court further recognized that "while diversification of ownership is a relevant factor in the context of license renewal as well as initial licensing, the Commission has long considered the past performance of the incumb ent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the 'proven product' and grant renewal if the incumbent has rendered meritorious service."

The written opinion of the Supreme Court also stated:

> "In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding - and avoiding losses to - licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the Courts have recognized that a licensee who has given meritorious service has a "legitimate renewal expectanc(y)" that is "implicit in the structure of the Act" and should not be destroyed absent good cause.

It's clear from a fair reading of the record that "good cause" has not been shown to destroy that "legitimate renewal expectanc(y)" in this case. To have decided otherwise upon the rather lengthy record before us would have represented a very significant departure from past policy and equity. It would have signalled a wide-ranging, unwarranted, ad hoc restructuring of broadcasting in this nation through the challenge process.

Much has been made of the "news practices" complaint by the challenger; much too much. Again, those practices applied only to the promotion of the news, not the substance. There was no attempt to distort, slant, falsify or

misrepresent the substance of the news. While some of those promotional practices might reasonably be characterized as poor judgment or over-zealousness, it has not been shown that "...the public (was) deceived about a matter of significance." Letter to Chairman Staggers, 25RR2d, 413, 420 (1972). Furthermore, management acted in a responsible manner to correct those practices which were deemed to be of a questionable nature. Despite rather strident claims to the contrary, there is nothing on the record to even suggest the harsh, oppressive penalty advocated by the Commission minority.