

June 30, 1978

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DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE
IN WHICH COMMISSIONER JAMES H. QUELLO JOINS
IN RE REIMBURSEMENT OF EXPENSES FOR PARTICIPATION
IN COMMISSION PROCEEDINGS

"God Bless Those Who Sue My Clients"
-- Anonymous Attorney

It seems to me that, in its zeal to help everybody, the Federal Government has been playing musical money -- shuffling money from citizen to citizen until finally it is consumed by a giant bureaucracy. With this notice, the FCC has joined the game.

Unfortunately, the Commission's timing is atrocious. Everyone is concerned about inflation and undue big government spending. Taxpayers are beginning to revolt against frivolous government programs. This is hardly the time to propose a new spending program which may ultimately benefit only the lawyers.

The Commission is also the wrong entity to propose reimbursement. Commissioners aren't elected and don't have to answer directly to the taxpayers about their use of public money. Members of Congress who do can better decide whether some citizens should cross-subsidize the participation of others.

I recognize that "this is only an inquiry." I have heard that phrase many, many times during my life at the Commission. But, we are making a commitment, even if it is a weak one, and resources which we desperately need to do our job will be spent on this proposal. A lot of people will expect the Commission to meet this commitment and will be disappointed if the Commission doesn't keep its promise.

I don't think that the Commission can keep this promise. Apart from the serious legal question about the Commission's authority

to reimburse fees,¹ the practical impediments are substantial.

Obviously, we cannot reimburse the expenses of every person or group who could have standing in Commission proceedings. We would have to pay off everyone in the country at some point! So, if we don't run a lottery or give out token amounts of money, we will have to act as judges to pick the most worthy participants. We will have to figure out ways to decide who most needs money, who really represents the public, whose participation will be most meaningful and of the most quality, and how much that participation should be subsidized. If we are true to the spirit of full public participation, we will need a kind of reimbursement program fairness doctrine to be sure we are subsidizing a full spectrum of viewpoints.

I expect we will slow our processes considerably with comparative reimbursement proceedings. In fairness to those who will count on government money, we shouldn't start the comment period in rulemaking matters until we decide who will get the money. This means, of course, that we may delay proceedings while we solicit and act on reimbursement applications.

We will also need staff for the reimbursement effort. Once we have developed standards, including a possible fee schedule for lawyers and other experts, we will have to process reimbursement applications and audit expense claims.

I would much prefer that the Commission devote its limited resources to the substance of the issues before us rather than to collecting paper. If we need more data in some cases, we can contract research projects designed to provide the data we need. If we

¹ See Greene County Planning Bd. v. FPC, 559 F. 2d 1227, 1237 (2d Cir. 1977) (En banc), cert. denied, 434 U.S. 1086, 98 S. Ct. 1280 (1978) reaffirming Greene County Planning Bd. v. FPC, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

need more specialized expertise on our staff, we can hire the appropriate people.

I don't want to fritter away the limited resources we do have on reimbursement claims. I want the staff to help me carry out my job -- representing the public interest. It has done a good job in the past. If we want it to do an even better job, we should give it the resources, not siphon them to selected parties in adversary proceedings.

Finally, I am opposed to this inquiry because I can see a hydra growing already. The item suggests expanding the program from rulemakings to adjudicatory proceedings. During the meeting, one Commissioner proposed including small businesspersons as well as citizens groups in the program. I can see a lot of hands out for government money, and I wonder where will it end. In my opinion, it should not have begun.

I dissent.

June 29, 1978

CONCURRING STATEMENT OF COMMISSIONER ABBOTT WASHBURN

Notice of Inquiry on Reimbursement of Public Participants
in FCC Proceedings

No one will dispute the value of public participation in Commission proceedings. The positive aspect of broad participation is to build a more complete record for the Commission, to make the Commission more aware of interests which otherwise might not be fully aired in the regulatory process, and to lead to better decision-making by the Commission.

While the goal is noble, the proposal to reimburse expenses raises troublesome questions. For example, generating wider public participation through reimbursement by the Commission may not be clearly within our legal authority.

It has been my position that the Commission ought to have some indication of Congressional guidance before proceeding to reimburse litigants out of appropriated taxpayer's funds. It is the Congress' responsibility to appropriate public funds. If public participation is to be financed by appropriated funds, the public's elected representatives are the ones best suited to determine whether and to what extent this should be done. Responses to this Notice may cause me to change my present view. That remains to be seen. In any event the responses will provide the Commission and the Congress with useful information to help in reaching a decision as to whether such a program is needed at the FCC, and if so, how it should be designed.

Among the questions requiring answers are:

Who would determine eligibility for reimbursement?

On what standards?

In which FCC proceedings would funding be made available?

For how long? And at what rate?

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Notice of Inquiry in the Matter of Reimbursement of Expenses for Participation in Commission Proceedings

I am very pleased that the Commission has reversed its earlier position refusing to consider the need and alternatives for fostering greater citizen representation and participation in our regulatory process.^{*/} While it may be that ultimate authority and the funds for a citizens' reimbursement program will have to come from Congress, that argument does not relieve this Commission of the responsibility to assess immediately our own regulatory needs and to make any necessary legislative proposals to Congress. This Notice of Inquiry begins that long-needed and long-avoided process and gives substance to the Commission's long-stated commitment to furthering citizen involvement in our proceedings.

^{*/} See Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings, 61 FCC 2d 1143 (1976); Statement of Commissioners Benjamin L. Hooks and Joseph R. Fogarty, Concurring in Part; Dissenting in Part, id. at 1151.