Summary of Comments of
FCC Commissioner James H. Quello
on HR 13015, "Communications Act of 1978"
before the
House Subcommittee on Communications
July 18, 1978

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TITLE I

Total deletion of regulation over cable television may be ill-advised. Bill should provide for assertion of jurisdiction in specified areas or under certain circumstances.

TITLE II

No objection to five Commissioners. Section 215(a) unduly emphasizes Office of Consumer Assistance and requires in essence that office become an advocate for consumer interests. Provision for the office should not be statutorially mandated. Conflict of Interest rules ambiguous as to definition of telecommunications entities in which financial interests are prohibited -- changes suggested. In general agreement with Section 237 as to ex parte proceedings. Question the scope of Section 511(e) as to keeping transcript of "any" oral presentation. Question the wisdom of Section 251(f)(3)(A)(ii) which could permit public disclosure of confidential information if "relevant in any proceeding". Question the provisions of Section 253 as to absolute authority of chairman in certain respects.

TITLE V

Approve Section 531 giving Commission authority to handle its own litigation -- will aid substantially in our enforcement efforts. Section 542, "General Forfeitures", suggests change in the standard "willful and repeated". Question the adequacy of the $20,000 limitation in Section 542(b)(2). Question deletion of the "payola" provision as to radio stations, in Section 546 of the Bill. Suggest payola provisions should also apply to radio, the greatest source of the problem.

TITLE VII

Essential control and responsibility over telecommunications policy is placed in the Executive Branch. Erodes authority of the independent regulatory agency responsible therefor, and implicitly weakens control of Congress in these areas. Increased Executive control carries serious political risks which should be evaluated. Question extent of NTA's authority as "arbiter of dispute" among government agencies Commission could be rendered virtually ineffective. Under Section 704 authority of Commission to carry out its functions could be seriously impaired by placing entire spectrum allocation function in NTA. Commission apparently excluded from participation in international conferences -- unwise. Is NTA to be Commission's spokesma before Congress? Agree with placement of loan programs under entity other than Commission, as provided in Section 708 and 709.

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Mr. Chairman, Members of the Subcommittee, I am pleased to have the opportunity to present my general views concerning the Communications Act of 1978. Shortly after release of the draft of the Bill I stated publicly that I agreed with most of the far-reaching and visionary provisions of the new Act with its drastic revision of the FCC as it is organized today. I further stated that the new Act would provide for massive de-regulation, reduced bureaucracy and a resulting reduced cost to taxpayers. Those comments were based on an initial reading of the Bill and an empathetic belief that the present Communications Act needed comprehensive review and updating. However, my comments hereinafter will be limited to what is intended as constructive criticism of portions of the Bill which hopefully may be of some assistance to you.

My overall reaction at present with respect to the Bill generally is that it substantially reduces the responsibilities and functions of this Commission. To an extent this may be desirable, and I will treat these matters in more detail. I am much concerned over the transfer of certain Commission functions and responsibilities to a separate and independent establishment in the Executive Branch of the Federal Government to be known as the National Telecommunications Agency. My comments on major areas of concern in Titles I, II, V and VII follow:

TITLE I

Section 102(b)(1) purportedly removes federal jurisdiction over cable television by denying jurisdiction over intrastate telecommunications if "there is no use of the electromagnetic frequency spectrum in the direct distribution of such service to consumers". While I have had no input from Commission staff concerning this matter, it is my frank opinion that total abdication of jurisdiction over cable television may be ill-advised. For example, I believe the problem of pole attachments will continue to require federal intervention under certain circumstances and I believe the recently enacted legislation providing such jurisdiction demonstrates such continuing need. Another area in which some regulatory control over cable television is required is the potential for interference to other telecommunications devises. Thus, it seems to me that rather than deleting all federal jurisdiction over cable television, the Bill might well provide for assertion of jurisdiction in specified areas or under certain circumstances.

TITLE II

I am not at all offended by the provision of Section 212(a) that the Commission shall be composed of only five Commissioners. Frankly, I can advance no reason why seven Commissioners should be preferred over five. I believe five Commissioners with diverse backgrounds would be desirable. From constant personal experience I can state unequivocably that fewer voices in discussions of Commission agenda items would substantially

simplify our deliberations while still providing a satisfactory diversity of philosophies and opinions.

Section 215(a) establishes an Office of Consumer Assistance as a statutory requirement. It may well be that excessive emphasis has been placed on this function by the Bill. The Commission in establishing its Office of Consumer Assistance limited its function to an informational and assistance role. Section 215 of the Bill requires in essence that the office become an advocate for consumer interests. In order to assess needs, interests and problems of consumers in connection with matters within the Commission's jurisdiction and in order to recommend how programs and activities of the Commission affecting consumers may be improved, the Office of Consumer Assistance would require wide expertise in all of the varied functions regulated by the Commission; much of its effort would be duplicative of the work already required of the Commission's Bureaus. Obviously, an expanded and highly trained staff would be mandated to effect the policy directives of Section 215. I recommend the Commission be permitted to exercise its independent judgment as to the extent of functions performed by this office based on future conditions and developments.

As to the Conflict of Interest Rules and Requirements, the continuing problem, as evidenced in our legislative proposal to amend Section 4(b) of the Act of 1934, is with the myriad of companies having only a tangential or incidental interest in communications but which are nevertheless subject to our regulatory jurisdiction. I find this same problem still unresolved

under the provisions of HR 13015 in that its definition of "telecommunications entities", in which financial interests are prohibited, is still too broad--i.e., "any business concern or other entity which is subject to regulation by the Commission under this Act or which is substantially affected by the regulatory activities of the Commission" (see Section 231(a)(2)). There are many corporations which have interests in entities which are "substantially" regulated by the FCC. In some cases, those interests are significant in terms of dollars but insignificant in terms of the corporations' primary or controlling interests. In such cases, I don't believe there is any conflict--nor any appearance of conflict--which should result in the prohibition of owning stock in that corporation. In other words, where it is apparent that no conceivable action by the Commission could significantly affect the fortunes of the corporation and, thus, the price of its stock, I fail to see any useful purpose in banning ownership of that stock by Commissioners or Commission personnel. A simple and direct solution to the problem would be to change one word in the language--"or" should be changed to "and". The definition would then refer to a two-pronged standard, "any business concern or other entity which is subject to regulation by the Commission under this Act and which is substantially affected by the regulatory activities of the Commission." Alternatively, I respectfully suggest that the definition should be changed to conform generally with our legislative proposal, i.e., prohibit financial interests in broadcasters, communications, common carriers and entities "a substantial part of whose activities consist of the manufacture or sale of apparatus for" telecommunications. Further, there is still a need for

a provision that investment in mutual funds, holding companies, or other investment companies is not prohibited unless their investments are concentrated substantially in one of the prohibited areas.

The ex parte problem is treated in Section 237 and presents a more workable solution than what has been required by recent judicial opinions. My reading of Section 237 (b) indicates that we have been left some discretion as to the specific ground rules with respect to ex parte contacts in any rule making proceeding of the Commission. Assuming an ex parte contact in a rule making proceeding, it seems to me that written "notice" of such communication should merely state the fact unless the communication goes beyond the scope of comments filed by the offending party, in which case a memorandum covering such expanded discussion should be communicated. Further, I would presume that such "communication to any other person" would be satisfactorily filled by filing such notice of communication in the official docket of the rule making proceeding.

With regard to record keeping, it's unclear to me just what Section 511(e), Title V, requires. It says: "A transcript shall be kept of any oral presentation with respect to a rule or order specified in subsection (a)". Subsection (a) refers to "...any rule, or any order having the applicability and effect of a rule..." If Section 511(e) refers to formal presentations in the form of oral argument or panel presentation before the Commission, I believe that is quite reasonable and useful. If, on the other hand, it refers to any oral presentation, I think it is unnecessarily burdensome.

Section 251(f)(3)(A) relates to prohibition of disclosure of information concerning trade secrets, confidential data, etc. The Section provides that such information may be disclosed "if such information is relevant in

any proceeding under this Act". While permissive, rather than mandatory, it seems to me that confidentiality of such information is endangered by the above quoted language in Section 251 (f)(3)(A)(ii) which conceivably envisions public disclosure if "relevant in any proceeding" under this Act.

I am concerned with the provisions of Section 253, "Authority and Functions of Chairman". The Section provides the chairman with absolute authority by statute to exercise all executive and administrative functions of the Commission without the consideration or approval of the other Commissioners. The chairman is given exclusive authority to determine the agenda composition for all meetings to the exclusion of other Commissioners' interests or requests. My general concern should not be construed as nit-picking -- it is my belief that all Commissioners, appointed by the President and confirmed by the Senate, are on an equal footing with respect to statutory functions. To the extent that the Chairman initiates an action which is counter to the views of other Commissioners, the Bill excludes the right of a Commission majority to challenge or even discuss such action. The Commission has functioned well over the years under the present provisions of the Act with respect to the functions of the chairman ---matters of major significance have been the subject of collegial consideration and determination rather than by individual direction.

TITLE V

I note that Section 531 of Title V gives the Commission authority to handle its own litigation, with certain special provisions with respect to representation before the Supreme Court. I commend the Subcommittee

for the inclusion of this provision. In my opinion, this will aid substantially in our enforcement efforts.

Section 542 treats the subject of "General Forfeitures". As this Subcommittee may remember, prior to release of the draft Bill I submitted informally a paper expressing my views as to a few broadcast priorities for the re-write effort. In that paper I treated the subject of forfeitures in some detail. One of the points I raised questioned the standard of "repeated" violations. Since Section 542(b)(1) again provides for liability for forfeiture penalty based on the standards of willful or repeated violations, I would like once again to briefly comment on the standard "repeated". Let me start by recognizing the constructive knowledge licensees are assumed to have by virtue of required possession of the rules pertaining to the service in which they operate, as well as subsequent publication of later rules in the Federal Register. I suggest that any single violation of our rules should be subject to a forfeiture at the discretion of the Commission. This would avoid the continual argument as to whether one course of conduct over several days constituted a single violation or repeated violation. This, in my opinion, is more determined by the specific circumstances of a given situation than by a mere calendar of days. Forfeitures might be more realistically assessed if they were based specifically on the nature of the offense rather than on the number of days on which the offense occurred. Accordingly, I respectfully suggest that the term "willfully or repeatedly" be amended to read "willfully or otherwise".

With respect to the monetary limitations of $20,000 or $5,000 per individual as provided in Section 542(b)(2), I again emphasize my concern as to the adequacy of the limitation of $20,000 as a maximum penalty. While the amount is adequate for many situations where the offense is relatively minor or the broadcasting station or other offender is rather small, where the large broadcaster is involved and the offense is serious, a mere $20,000 forfeiture is relatively insignificant. Accordingly, I suggest that the Bill provide for a maximum forfeiture of at least $200,000. Alternatively, the Bill might provide for a maximum forfeiture equivalent to a specified percentage of the station's gross income, thus fitting the penalty to the station's financial status.

In Section 546 of the Bill, the so called "payola" provision is retained for television broadcasting stations but deleted for radio stations. Frankly, I am at a loss to understand this provision, since the payola problem primarily exists in radio broadcasting rather than television broadcasting. It has been the Commission's experience that by far the largest amount of payola occurs in connection with payments by record companies or distributors to persons connected with radio stations. By the elimination of radio broadcasting from the payola requirements the Bill may invite a plethora of new "arrangements" between broadcasting personnel and record companies or distributors. Although I favor the proposed general "de-regulation" of radio, I believe the "payola" provision should somehow also apply to radio.

TITLE VII

Turning now to Title VII which creates a National Telecommunications

Agency. I agree with the basic concept that a national telecommunications policy should be developed. As I recall, the many hearings held last year on the matter focused on the lack of a national telecommunications policy, primarily in its international context, and a clear interest was evidenced in pinpointing responsibility for international negotiations. I agree that the Agency might well have primary responsibility for development and implementation of national telecommunications policy but not sole responsibility therefor. However, while the concept appears desirable, the mandate to NTA giving it primary responsibility for development and implementation of national telecommunications policy, plus serving as "arbiter" of disputes which arise in connection with these matters, while serving as principal advisor to the President on telecommunications, represents a dramatic shift in the functions of FCC (and proposed CRC). This places essential control and responsibility over telecommunications policy in the Executive Branch. It seriously erodes the authority of the independent regulatory agency responsible for telecommunications and, in my opinion, implicitly weakens control of Congress in these areas.

There has been concern in the past with creating a "Czar" of telecommunications and the concomitant opportunity for manipulation of the media which could follow from direct policy control by an Administration. Congress has always insisted that major decisions of national policy be made by a collegial body with diverse political representation and subject to Congressional oversight. In my opinion, this increased Executive control carries with it

serious political risks which the Congress should carefully evaluate. Frankly, I believe the current checks and balances are more desirable, although perhaps less efficient than the centralizing of power and control.

Insofar as NTA would be the "arbiter of disputes" among government agencies, I question whether it is the intention of the Bill that NTA perform this function with respect to others in the Executive Branch only, or would it also apply where the dispute is between, for example, the Commission and NTA? Should NTA's powers be so pervasive, then the Commission could be rendered virtually ineffective.

Section 704 delineates NTA's functions. This Section would take away much of the power now belonging to the Commission by giving NTA authority to "exercise principal responsibility for allocation of the electromagnetic frequency spectrum for various uses", and makes no distinction between government and non-government uses. In my opinion, the authority of the Commission to carry out its functions could be seriously impaired by placing the entire spectrum allocation function in NTA. As an example, Section 412(1) of the Bill requires the Commission to assign spectrum and distribute licenses to ensure each community is provided with the maximum fulltime local television and radio broadcasting services. Yet NTA is given principal responsibility for allocation of spectrum. Conceivably, NTA might not make available to the broadcast services the spectrum necessary for the Commission to carry out that mandate. Further, it would appear that NTA, rather than the Commission, could decide whether and how much the UHF band might be transferred to land mobile radio uses and could also determine the

U. S. position on the use of this band and others during international negotiations. Finally, I would note that no criteria is established for guiding NTA in its decisions.

Para. 5 directs NTA to "prepare and manage U. S. participation in international telecommunications conferences, in consultation with the Secretary of State ..." This mandate completely ignores the vast expertise the Commission has gained in this area over a period of more than 40 years. Certainly, the Commission should at least be consulted, and in my opinion should continue to participate with respect to international conferences. I think it would be extremely unwise to exclude those who have the operational experience.

Paragraph 7 would have NTA "communicate the views of government agencies with respect to telecommunications matters to the Commission and to the Congress". Is NTA to be the Commission's spokesman before Congress?

Sections 708 and 709 provide for rural telecommunications loan programs and minority ownership loan programs administered by NTA. I agree wholeheartedly with the placement of loan programs under the administration of an entity other than the Commission. I raise only one question with respect to the minority ownership loan program set forth in Section 709. This program is designed to increase diversity of ownership of television and radio stations, and permits low interest loans to minority individuals, defined in Section 702(5) as any citizen of the U.S. who are black, hispanic or native American. I question whether ethnic background or race can be the sole criteria established for such loans. In light of the recent Bakke case, it seems to me that such limited criteria would be subject to judicial challenge.

This concludes my comments on Sections I, II, V and VII of the Communications Act of 1978. I applaud the Subcommittee's efforts and success in initiating and bringing to fruition an all-inclusive update of the Communications Act of 1934. The task was monumental and I am sure the pressures were great and varied. I am frankly amazed that the draft Bill was brought to life in such a short time. I would like to qualify my observations presented to you this morning to the extent that they represent preliminary views derived from my reading of the document. I will of course continue to analyze the various portions of the Bill with a view toward forming a more final cohesive judgment. I hope that my comments today will be of some value to the Subcommittee in its continuing deliberations.

Thank you.