Summary of Comments of FCC Commissioner James H. Quello
on Title IV, H. R. 13015, "Communications Act of 1978"
before the House Subcommittee on Communications
September 13, 1978

The principal de-regulatory thrust of H. R. 13015 is laudable, courageous and timely. The Act should not get sidetracked by the anticipated opposition and understandable self-serving filings from various affected groups. Implementation of the main provisions of the Act (with some practical revisions) would provide massive de-regulation, reduced bureaucracy and a resulting reduced cost to taxpayers in keeping with the mood and will of the American people today.

151

My proposal: Implement the competitive marketplace principle and remove the major pervasive defects and massive economic wastes of broadcast regulation. Unequivocally remove all First Amendment and regulatory constraints from broadcasting. Subject broadcasting to exactly the same regulation and First Amendment constraints as its major competitor and "closest cousin"--newspapers. This would eliminate the nebulous, troublesome and outdated "public interest" standard and government-mandated public trusteeship. It would also automatically eliminate government oversight and intervention in format, news and all programming.

In return, assess broadcasters a practical spectrum usage fee (generally suggest 3-5% fee on gross revenues for TV; 2% for radio) and provide for open marketplace addition of stations that meet reasonable engineering feasibility.

This would effectively and forcefully implement the visionary main thrust of H. R. 13015--that regulation should be necessary only "to the extent marketplace forces are deficient." This certainly applies to broadcast markets today where intense competition exists and is growing apace. Broadcasters not only compete aggressively against each other, but also with all other media including newspapers, magazines, cable TV, outdoor advertising, transporation advertising, direct mail and all other forms.

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

There are many more TV and radio stations today than newspapers in every sizable market. The growth of UHF, FM, Cable, translators and the development of satellites has provided more media availability than ever before. Then, too, broadcast journalism today is mature, professional and as objective as any media. Regulatory restaints are no longer justified in today's era of competitiveness, numerous media outlets and professional journalism.

The overall public would be the important prime beneficiaries of removing all regulatory restraints, not only through reduced bureaucratic cost (I roughly estimate the FCC could be effectively reduced 40%) but even more importantly from a freer, more robust, more venturesome broadcast journalism emancipated from unnecessary, restrictive government oversight.

Comments of FCC Commissioner James H. Quello
On Title IV, H. R. 13015 Before The
House Subcommittee on Communications

September 13, 1978

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity to again appear before you---this time to present my views on several aspects of Title IV of the proposed new Communications Act.

First, I want to again laud the Subcommittee on the catalytic initiative and courage in proposing and deliberating such a monumental, challenging new Act. I particularly applaud the principal de-regulatory thrust of the new Act. I hope it doesn't get sidetracked and that it eventually prevails despite the comprehensive pro and con filings, adversary viewpoints and some understandable pre-natal problems.

As anticipated, the initial re-write proposal received varied reviews. The reaction was favorable, unfavorable, apprehensive or neutral depending on the viewpoints, interests, fears and hopes of affected industries, public interest groups, legal counsels and trade organizations. Lawyers for varied and sometimes adversary groups counseled caution, reluctant to replace a known with an unknown--reluctant to relinquish 45 years of communications legislation and interpretative judicial and regulatory case law, with which they and their clients seemed more or less comfortable.

The Subcommittee may find some solace in the paradox of common opposition to a few major re-write proposals by normally adversary groups---by short-sighted industries fighting to retain every inch of their profitable economic turf and by professional public interest groups zealously protecting their

privilege to promulgate their own private version of public interest through continued big bureaucracy and government-mandated access.

It might lead one to propose a blessing on both their well-intentioned but self-serving houses---then full de-regulatory steam ahead!

Now I'll get right to the point.

I propose clean, decisive, legislative surgery to remove the major, pervasive defects and massive economic wastes of broadcast regulation. Unequivocally remove all First Amendment and regulatory constraints! Subject broadcasting to exactly the same regulations and First Amendment constraints as its major competitor and closest cousin--newspapers. This also means eliminating the nebulous, troublesome and outdated "public interest" standard.

In return, assess broadcasters a practical spectrum usage fee and provide for open marketplace addition of stations that meet reasonable standards of engineering feasibility.

The time has never been more propitious.

This action would most effectively and forcefully implement the visionary main thrust of H. R. 13015---that regulation should be necessary only "to the extent marketplace forces are deficient." In other words, wherever the market is open and competitive, regulations should be abolished. This certainly applies to broadcasting markets in this country where intense competition exists and is growing apace. Broadcasters not only compete aggressively against each other, but also with all other media including newspapers, magazines, outdoor advertising, transportation advertising, direct mail, etc.

's time to remove regulations and allow competitive market forces to operate. This would provide massive de-regulation, reduced bureaucracy and a resulting reduction in government costs---all in keeping with the current trend and mood of the American public. Then too, the public would benefit from a freer, more robust, more venturesome broadcast journalism emancipated from unnecessary restrictive government oversight.

The views expressed here and the supporting arguments to be presented are my own and do not represent an official FCC view. I fully realize that court interpretations and a continuing variety of adversary viewpoints are formidable considerations for legislative action or reform. I am also fully cognizant that present FCC decisions and deliberations must be based on the current Communications Act and existing case law and not on proposed legislative action or re-write. However, I am proposing substantial revision from the unique perspective of over four years FCC service and over twenty-five years in broadcasting. Also, I note that Henry Geller, respected communications lawyer and new head of the National Telecommunications and Information Administration, is a staunch advocate of First Amendment rights. He was quoted by Les Brown of the New York Times: "The more we let radio and television be the way print is, the better off we are. Let the marketplace answer whether there should be more networks, not the FCC." I also agree with Mr. Geller's statement in the August 1978 issue of the RTNDA publication where he was quoted: "I think the Fairness Doctrine does impose First Amendment restraints. I think as I testified recently before the Congress, that if you scrap the public trustee scheme entirely in order to accomplish goals through other means--means of spectrum usage tax or others---that that's very worthy of exploration and

that's what re-write is about." I repeat the quote here as a reminder there are knowledgeable people of worthy purposes questioning the propriety of the public trustee concept as applied to current broadcast regulations.

I believe government or court mandated First Amendment restrictions and also the government-mandated public trustee concept are outdated and no longer justifiable in today's competitive technological, economic and journalistic climate in communications.

In fact, broadcasting was not initially formulated as a public trusteeship. It was actually conceived as an advertising supported, risk capital, commercial enterprise. No government funds were appropriated to finance pioneer broadcast service or to initiate commercial service. Much has been said of the people's airwaves or the public trustee concept---perhaps too much because by sheer continued repetition over the years it has become accepted as a fact. However, 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."

As a former newsman, I have always hoped that some day broadcasting would be treated the same as other journalistic and advertising media. With the continuing debate and various court interpretations, it seems this can only be achieved by bold, innovative legislative action. 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 with today's massive competition in all communications media.

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. Then, too, broadcast journalism today is mature, professional and as objective as any media. Regulatory restraints are no longer justified in today's era of competitiveness, numerous outlets and professional journalism.

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 should hardly apply in today's abundance of radio-TV media compared with newspapers. Economic reality is a 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.

I believe the public would be served by abolishing Section 315 including the Fairness Doctrine and Section 312(a)(7). The Fairness Doctrine is a

odification 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. Even with some programming deficiencies, a government cure with censorship overtones is worse than the industry disease.

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 citizens 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. The Constitutional freedoms were instituted for the benefit of the citizenry--the total public--rather than the media. It is the public that stands to gain from an all media freedom of the press.

Section 315 and Section 312(a)(7) guarantee access to broadcasting in order to seek political office. This is not required of newspapers and magazines because of the Constititional guarantees accorded only to print journalism. Clearly 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---I see no reason to assume broadcast journalists o executives are any less responsible or

diligent. Broadcast journalists have earned and rightfully 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'd like to emphasize that my plea is not for freedom from program regulation for broadcasters. I am appealing for freedom from program regulation for the public at large. My experience in broadcasting and with the FCC leads to the firm belief that far too much programming provides no useful function except to satisfy some rule or regulation of the FCC. I have an equally firm belief that much controversial programming which could be of great service to the public is avoided by licensees wary of government requirements.

It is ironic that the regulated--while vociferously complaining about their over-regulated status--are often the last who wish to see this yoke lifted. It is well recognized that regulation carries with it a measure of protection from competition and without regulation there is no such protection. I believe that there are areas of telecommunications which do not readily lend themselves to a totally competitive environment (like telephones), but I don't believe that broadcasting is one of them. It is obvious to anyone familiar with the industry that competition is already very strong in many markets and it could be an even stronger force without the regulatory

constraints which have developed over the years. The public stands to benefit from this potential but not until it is given full opportunity to develop.

I would guess that most large broadcasters may view my proposals with at least mild alarm since they are best able to cope with the maze of regulations and restrictions which we impose. They are able to maintain counsel, hire expert personnel and buy or produce programming to satisfy the public and the government. Presumably, they would prefer "business as usual" to any wide-ranging de-regulatory scheme which might contain the seeds of greater competition. My proposals, then, are not calculated to garner wide support among existing licensees. Rather, they are meant to establish a climate whereby the American public can receive more, freer and better broadcasting service. I believe it is a proper goal of the Communications Act of 1934 and of the First Amendment to the Constitution and I believe it is a proper goal for the new Communications Act.

Broadcast licensees should be assessed an appropriate annual spectrum fee and then assigned licenses without expiration dates. At present, broadcast licensees must prepare lengthy applications for license renewal every three years. These applications are than 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 the very loose application of the principles of standing as a party in interest.

For most licensees, the triennial shipment of pounds 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 many instances where other parties file "on top" of the licensee in an effort to gain the license for themselves.

The process of license renewal appears to be a very expensive, time consuming method of ferreting out those few licensees who have failed to meet a subjective "public interest" standard of performance. With adoption of a free marketplace concept similar to newspapers, license renewal would no longer be required. The enormous savings in time and money could be used for more constructive purposes in programming and news.

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 public acceptance or rejection in the area served by the broadcaster.

What rules would then govern broadcasters? The same law and rules as newspapers or other businesses or professions--criminal codes, libel, slander laws, anti-trust laws, EEOC requirements, SEC requirements, etc. There is no need for discriminatory singling-out of broadcasting for special restrictive regulations--broadcasters generally are as responsible, dedicated and every bit as socially-conscious as other Americans--in media, industry, professional or government groups. Most feel a self-imposed public trusteeship. The few incompetents and miscreants fail and lose their business or jobs or run afoul of the law as in any other profession or business.

Also I believe news objectivity and overall fairness and efficiency are better assured through professional broadcast and print journalists and through professional program executives. Many government-appointed officials, regardless of how well meaning, are handicapped by lack of experience and little understanding of media operations or the practicalities and economics of running a communications business.

Past considerations of the renewal issue have included the argument that a license "in perpetuity" would greatly weaken the competitive spur in the Communications Act. It must be remembered that broadcasting stations, although licensed, are also private business enterprises backed by private capital, 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 practically all of the broadcasting markets in this country, competition not only exists but is intense and growing. As stated before, broadcasters not only compete among themselves but with all other media including newspapers, magazines, outdoor advertising, direct mail, etc. Therefore, it would seem reasonable to remove as much regulation as possible in order to permit competitive market forces to operate.

Various minority spokesmen have favored a three-year renewal in the mistaken belief that the process would provide additional opportunity for minority ownership. 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 affirmative efforts to provide more opportunity. During a conference on minority ownership at the FCC, I initially suggested that the Commission should prevail upon the Small Business Administration to review its policy against granting loans for acquisition of broadcast properties. The review resulted in a policy change and some SBA funds are now available. 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 last spring 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 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 non-commercial 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. <u>No other utility, news medium, industry, monopoly or non-monopoly must apply for a governmental renewal of license every three years to stay in business.</u> Neither should the Broadcaster!

The principal difference between broadcasting and competing media is that broadcasting requires a government allocation of broadcast spectrum or license. The spectrum is a potentially valuable privilege. Spectrum value varies with the license type, power, location and entrepreneural service and dedication of the license. With today's prolific competition, a broadcast license can no longer be accurately characterized as a monopoly or a potentially unregulated monopoly. Most broadcast allocations have been assiduously developed over the years into valuable economic enterprises. I believe a reasonable spectrum usage fee or resource allocation charge is appropriate. I suggest for openers, and subject to study and refinement, a 5% fee on gross revenues for television and 2% for radio. I readily admit the difficulty of proposing any fee formula that will gain universal acceptance, but I believe a fee is justified and should be studiously and firmly promulgated by forthright legislation. In my opinion, the fees previously imposed by the Commission, but rejected by the court, caused no undue hardship on the profitable broadcast and cable industries or on any other licensees. The proposed higher spectrum fees would not impose an undue burden. It's primarily a matter of making fees legal and definite.

One immediate beneficial effect of open market competition would be elimination of government involvement in news and programming--where it never belonged in a free society.

There are many areas requiring continued government direction and surveillance but not a major news and information medium in a government conceived in and dedicated to the principles of free speech and a free press.

I want the record to indicate that I advocate government involvement in appropriate areas--government involvement and direct action was required to attain such desirable goals as social security, minimum wages, FDIC protection for savings, civil rights, medicare and public health, anti-trust rules and environmental protection. Government must continue a vital role in solving problems in energy, national security, urban decay, equal rights and lagging economy.

Also there is a continuing need for consumer activist participation against products, organizations and services that mislead or bilk the consumer. Broadcasting should benefit from such interest but on the very same basis as any other news media. Broadcasting needs full, unfettered, press freedom to report, clarify, editorialize and advocate on all events and controversies subject to the same marketplace constraints and criticism as newspapers or magazines...this includes expanding its already active role in exposing consumer frauds and unsavory corporate, public and governmental practices.

The argument that removing the public interest standard would permit broadcasters to eliminate news, public affairs or meaningful programs is indeed specious. It would be contrary to all industry trends and to broadcasting self-interest to eliminate or minimize news and information programming. Broadcast journalism and public affairs are increasing in importance. I believe the major impact of TV and radio on the American way of life today is in news and news analysis--not in entertainment programs. I think most people agree that broadcasting today is most remembered and

respected for its hours of exceptional journalism--and that the greatest benefit most Americans derive and expect from broadcasting is information. Recent research indicates more Americans are getting initial news from TV and radio than from newspapers. This potential for molding public opinion poses an enormous responsibility and opportunity. No practical broadcaster will ignore the audience mandate for comprehensive objective coverage of news and public affairs. I firmly believe that full First Amendment rights will generate more top level management emphasis on news and public affairs. Owners, executives and broadcast managers of the future will more and more assume roles of publishers and editors-in-chief. With full press freedom, stations and networks will have added incentive for editorializing and for larger news staff capable of more investigative and detailed "on the spot" reporting.

Once more, I believe in freedom of speech and freedom of the press for all media. This freedom best serves the overall public unfettered by government pressure or by citizen activists groups demanding special broadcast consideration for their own private social and political philosophies through government-mandated access. I further believe newsmen have the right to be wrong and that news executives have the responsibility of seeing that they are not wrong too often. I believe newsmen have the right and obligation to seek the truth--the facts. I also believe freedom of speech applies to government officials---they should be able to criticize the press, especially the broadcast press, without raising the ominous spectre of censorship because of possible regulatory oversight.

In conclusion, I repeat that with today's intensely competitive broadcast news and advertising media, there is no logical reason for the special discriminatory regulation of broadcasting.

The laudable de-regulatory thrust of HR 13015 should be specifically implemented by granting broadcasting full First Amendment rights and removing all regulatory restraints. The overall public would be the important beneficiaries through massive de-regulation, reduced litigation, reduced bureaucracy and a resulting reduced cost to taxpayers. With elimination of renewals, petitions and unnecessary rulemakings, the FCC staff (which included 352 attorneys at last count) could be systematically reduced by probably as much as 40%. The principal remaining broadcast function would be engineering spectrum allocation and enforcement. The bureau reduction could be gradually accomplished through attrition via transfer, resignations and retirement.

The reduction in bureau staff and government expenses would be in keeping with the mood and will of the American public today. I believe this total proposal would pass convincingly today in any objective public referendum.

Moreover, removing the government restraints of Sections 315 and 312 would free broadcast journalism, foster more comprehensive and independent reporting and better serve the American people.

My many lawyer friends may, understandably enough, express considerable concern with the problem of replacing or scrapping 45 years of case law and legal precedents. As a non-lawyer whose approach to government regulation is more journalistic than legalistic I find truth and solace in a quote from that great President, Franklin D. Roosevelt, who said:

> "A common sense 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 remainds a higher aim for our civilization than technical legalism."

Thank you, Mr. Chairman and Members of the Subcommittee for the opportunity to be heard on this vital aspect of HR 13015.