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by FCC Commissioner James H. Quello

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As both the House and Senate Subcommittees continue their labors toward re-writing the Communications Act of 1934, there is increasing activity at the Federal Communications Commission to get into the de-regulating act. I'm very much in favor of the Commission exploring those areas of regulation in which it has the discretion to deregulate. I am aware, however, that much of the most burdensome regulation is embedded either in the statute itself or in court interpretation of the statute which either remove or greatly diminish any discretion the Commission might have.

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For example: It is clear that political candidate's right of access under Section 312(a)(7) is not subject to Commission discretion. Nor is the "equal time" requirement in Section 315. As to the "Fairness Doctrine," it is far from certain that the Commission has the authority to suspend it given the language of Section 315(a)(4), added in 1960, which has been widely regarded as having codified the Fairness Doctrine.

What might the Commission do among the rules and regulation which do lend themselves to revision or suspension without legislative action? The first matter that comes to mind--perhaps because it is so burdensome and because it provides so little of value--is our ascertainment requirement. Ascertainment is a product of the FCC, not the Congress.

Currently, the Commission is conducting an experiment in a few small markets, suspending formal ascertainment requirements in an effort to determine whether it would be reasonable to remove the requirement in all markets. I suppose we'll feel compelled to let the experiment run its course before reaching any conclusions about whether the requirement should be eliminated. It's unfortunate but probable that any Commission resolution of this issue--whatever that resolution might be--is several years away.

Then there are the Commission's special equal opportunity employment requirements which go beyond those administered by the national Equal Employment Opportunity Commission. The fact that the Commission has just requested five additional positions for its equal employment opportunities unit indicates that it will continue to administer and probably expand its own program.

There are the restrictions on the amount of commercial time to be broadcast each hour based upon the NAB code. The Commission might lift any oversight of commercial practices, at least in an experimental mode. The practical significance of any such deregulation, however, is likely to be minimal since marketplace factors already impose greater limitations than either the FCC or the NAB code.

The Commission could reduce or eliminate any requirement that each station broadcast news and public affairs programs. It's not clear to what extent the Commission might have discretion in this area but, in any event, most stations will find it desirable to continue to carry news and public affairs programs to meet public demand and to more closely identify with their audiences.

There are some other areas which might lend themselves to Commission deregulation but, for the most part, they are minor and more cosmetic than real in practical effect. The fact is that the Commission is limited by statute and court decisions in what deregulatory steps it can take. The major, fundamental changes require action by the Congress.

By fundamental, I mean those incursions on First Amendment guarantees--principally freedom of speech and freedom of the press--which appear to be embedded in the statute and, in the case of Section 315, even preceded the Communications Act of 1934. It is for this reason that I continue to believe that the best--if not only--hope for really meaningful, substantial deregulation rests with the Congress.

I have strongly supported the deregulatory thrust of legislation introduced by House Communications Subcommittee Chairman Lionel Van Deerlin and ranking Subcommittee Republican Louis Frey in the last session. And, although there were parts of H. R. 13015 with which I disagreed and there almost certainly will be parts of the reintroduced legislation in this session I will not agree with, I believe it's important to continue to support the general trend of the legislation insofar as it is deregulatory.

I don't believe the re-write goes far enough. I have been urging virtually complete deregulation of all broadcasting. I have to say "virtually" because it's clear that technical regulations will continue to be necessary in order to prevent unnecessary interference. Except for

technical restraints, however, broadcasting must have the same freedom and opportunity to serve the public as newspapers, magazines or any other information media. There is absolutely no logical reason why broadcasters--and the public they serve--should continue to be treated as second-class citizens insofar as the First Amendment to the U.S. Constitution is concerned.

In a letter to Edward Carrington in 1787, Thomas Jefferson wrote:

> "I am persuaded that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors, and even their errors will tend to keep these to the true principles of their institutions. To punish these errors too severely would be to suppress the only safeguards of the public liberty."

In that same letter, Jefferson went on to say:

> "The way to prevent these irregular interpositions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people."

Then, he continued in what has become a popular quotation:

> "The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, and be capable of reading them."

Jefferson, himself, was sometimes the victim of outrageous attacks by the press. He very often disagreed with what was written and published.

But, he recognized that freedom of the press is not divisible. Either the press must remain free or this new form of government would be in jeopardy.

I believe that we can all concede that "press" as Jefferson would have used it in these times would certainly include broadcasting. In fact, it wasn't until broadcasting came along that, in a literal sense, could it be said in fact that "...every man (c)ould receive those papers, and be capable of reading them." Literacy was no longer required in order for broadcast information to be understood. Broadcasting eventually provided the means Jefferson sought to "contrive that those papers should penetrate the whole mass of the people." How paradoxical it is that modern-day proponents of selective government intrusion into broadcast programming cite the ready availability and pervasiveness of broadcasting as a reason for government interference.

Section 312(a)(7) of the Communications Act of 1934, as amended in 1960, states:

> "The Commission may revoke any station license or construction permit--for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Does that sound like press freedom to you?

Then, of course, Section 315(a) provides, in part:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."

Again, does that sound like the Constitutional freedoms Jefferson was talking about?

Then, we go on down to Section 315(a)(4) and we find that:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

That, of course, is the foundation of the so-called Fairness Doctrine. And, who makes the judgment of fairness? In the first instance, the licensee is given the opportunity to make that judgment. But, the government retains the right to make the final judgment.

The Fairness Doctrine is a codification 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. Government has a difficult enough job of mandating even good government 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. There have been no government innovations or contributions to the advancement of the state of the art. Even with some programming deficiencies, a government cure with censorship overtones is worse than the industry disease. No matter how they are weighed, the supposed benefits of the Fairness Doctrine, the personal attack and editorializing rules, etc., do not outweigh the detriments in

governmental interference in the journalistic affairs of broadcasting. No matter how well intended, no matter how evenhanded, the FCC's role in this area, when all the gloss is removed, is simply censorship. As a practical matter, the most positive step might be to stop using the term "Fairness Doctrine" and restyle the Section 315 rules "Government Censorship Doctrine."

And, what is the so-called "public interest" which is the underpinning of all regulation? The public interest is what the FCC and the courts say it is. Yesterday, the public interest might have mandated the renewal of a broadcast licensee under a given set of facts. Today, that same set of facts might mandate a denial of renewal. Can anyone imagine that the government--and the power over the electronic press that it has come to wield--does not exert a significant chilling effect upon broadcast programming and journalism?

While the Communications Act does not mandate "ascertainment of community needs and interests" in the formal sense required by the FCC, formal ascertainment has been imposed under the public interest standard. The broadcaster is told that he must meet with certain groups and organizations within the community, attempt to ascertain what they consider (or desire) to be the community's needs and interests and then design his programming to reflect those needs and interests. Can anyone imagine that the government could so intrude upon the printed press in such a fashion? The fact is the printed press or any journalistic medium automatically ascertains community

needs and interests. In broadcasting, it is the government requirement that it be done and done in a prescribed fashion that's wrong; not the concept of ascertainment.

Even without non-technical regulation, of course, broadcasting would be subject to the same government oversight that newspapers and magazines experience. The Equal Employment Opportunities Commission isn't likely to go away. Neither will the IRS, the SEC, the EPA, the libel and slander statutes nor the civil or criminal courts. One would think that all of these entities--and more--would be sufficient to protect against a press which has done a far better job of informing the people than the government ever has.

In conclusion, I again emphasize 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. Some government officials don't seem to realize and must be reminded that broadcasters not only compete aggressively against each other, but also with all other media including newspapers, magazines, outdoor advertising, transportation advertising, direct mail, etc. It's time to remove regulations and allow competitive market forces to operate. This would provide massive de-regulation, reduced bureaucracy and 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.

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