Speech by FCC Commissioner James H. Quello
before the
Rocky Mountain Broadcasters Association Convention
Lake Tahoe, Nevada

July 26, 1979

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I originally intended to give you a progress report on the House Subcommittee on Communications rewrite of the Communications Act of 1934. Unfortunately, recent developments have changed the text of my remarks. As you know, a complete rewrite is no longer in the works and the primary emphasis is expected to be on common carrier matters.

There may be some amendments to the 1934 Act, however, which could improve the broadcasting services. Also, the FCC will continue its own deregulatory efforts with comprehensive radio deregulation scheduled for the September 6th meeting. However, FCC efforts are limited in scope by the Communications Act. As you know, only legislation can provide major deregulation dealing with license terms, political broadcasting, government involvement in program format and alternatives to the comparative hearing process.

I generally supported the herculean efforts of Subcommittee Chairman Lionel Van Deerlin in attempting to completely rewrite the 1934 Act. He did a prodigious amount of work, personally, to bring about change. I believe the seeds he sowed will ultimately take root. The American people will eventually determine that their overall best interests lie with a broadcasting system unfettered by needless, expensive regulation. I also believe that, ultimately, the citizens of this nation will recognize the massive opposition which arose from various quarters was motivated by something other than the real public interest. Also, I'm afraid broadcasters and the overall public may have missed a major deregulatory opportunity.

Broadcasters--particularly television broadcasters--were generally opposed to the rewrite largely because of the fee attached. While I originally supported a fee--albeit a far more modest one than was proposed in either of the House bills--I ultimately came to the conclusion that any fee should be limited to the cost of regulation and should not be a form of tribute paid to secure freedom. I strongly suspect that the initial fee proposed in the House bills played the greatest role in their defeat. The original fee proposal was so exhorbitant that the broadcasters were shocked into immediate and permanent opposition. Thus, what could have been a bold move to remove unneeded government intrusion into a very important information medium was sidetracked almost from the beginning.

I have advocated--and continue to advocate--complete deregulation of broadcasting because I believe that such deregulation is in the best interest of the American people--or, if you prefer, in the public interest. Full freedom of the electronic press is in the public interest. Removal from the statute of the so-called "public interest standard" which is really a "government oversight and intrusion standard" is in the overall public interest. I'll repeat and all broadcasters should repeat it over and over again--if broadcasting had existed in 1776 it would have been a prime beneficiary of our Constitutional guarantees of freedom of speech and freedom of the press.

The "public interest standard" has become a term of art and it is so vague and incapable of definition that it has permitted far too much latitude to the various Federal Communications Commissions down through the years. I supported Chairman Van Deerlin's initial efforts principally because he proposed to remove the "public interest standard" from the Act. His proposals would have been specific in defining those few remaining regulatory areas where government oversight was necessary and beneficial and would have left the remainder in the capable hands of broadcasters and--more importantly--the audiences they serve. That's where regulation of broadcasting really is--and that's where it belongs. And, that's why I continue to support any efforts at deregulation--both in the Congress and at the Federal Communications Commission.

Deregulation to me means removing all of the wraps except for the assignment of frequencies and the maintenance of certain minimum technical standards. In no case, in my opinion, should the government be involved in any form of "content" regulation. Needless to say, Section 315 and 312 (a)(7) should go. There is no rational support for candidates for federal office to uniquely enjoy the privilege of access to broadcasting stations except when that access is journalistically justifiable. Recently, the Court of Appeals told the Commission that it must conduct a hearing in certain cases involving proposed changes in radio formats. Again, the Court supported that decision by asserting "public ownership" of the airwaves, a concept contemplated only by the courts. Certainly, the framers of the Communications Act of 1934 didn't embrace that concept. They very deliberately provided for private ownership of broadcasting facilities--without government financial involvement.

There is another aspect of the current Communications Act which encourages a great deal of mischief in the name of "public interest." Section 309(d)(1) provides in part that "Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which Subsection (b) of this Section applies at any

time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing...". Subsection (b) includes broadcasting. Now, it's hard to argue that the public should never have a genuine, legitimate interest in the broadcasting services in this country or that legitimate representatives of significant segments of the public should not be heard so long as broadcasting continues to be regulated by the "public interest" standard. But, the Act and the courts have permitted the Commission such latitude, under the standard, that we have removed the protection against abuse contained within Section 309. Again, the Section reads "...any party in interest ..." which is generally understood to limit participation to those who have a personal stake in the outcome of litigation. The FCC, however, has broadened this long-established legal principle to mean that anybody who claims to reside in the coverage area of a broadcasting station is to be considered "a party in interest." Thus, a single individual, at very little expense, can successfully delay and, possibly, deny the sale of a broadcasting property. It has been alleged that certain individuals have used this very broad interpretation of "standing" to extort from broadcasters whatever the traffic will bear. A broadcaster who is anxious to sell and who has a prospective purchaser waiting in the wings is sorely tempted to pay "consultancy fees" or "settlement costs" to an opportunistic petitioner simply because the alternative may well be that the sale won't be consummated. The same scenario is also applicable in the case of renewals since few broadcasters care to incur the risks and the stigma of long delays and the expense of protracted legal representation.

The objective of the Commission should be, in my opinion, to provide opportunity for legitimate public involvement without inviting the kinds of abuse I have just described. I have long advocated a rethinking of our policy on standing. I again repeat that some kind of test should be required to determine the legitimacy of those who seek standing as a party in interest in matters before the Commission. So far, my concerns have not been shared by a majority of the FCC.

Broadcasters, too, should share my concern. And, broadcasters, too, have a responsibility to demand that petitioners act in good faith in the interest of some legitimate public concern and not solely for private gain. Broadcasters faced with extortion should be willing to deal with it for what it is. Broadcasters are businessmen and I recognize the bottom line implications. However, it is rare that an extortionist wastes his efforts on those least able to pay. Those with the greatest resources and the greatest opportunity to fight this kind of abuse haven't shown much stomach for the battle. I would hope that they will do so in the future.

So, you see, the current Communications Act requires a considerable amount of amendment before it can become adequate to the task of guiding broadcasting systems of the present and the future. Without such amendment

the Commission and the Courts will doubtless continue to zig and zag as personalities and ideologies change from year to year. Broadcasters who take comfort in the defeat of the House rewrite efforts might well have cause to regret their opposition somewhere down the road.

Meanwhile the Commission continues to deal with many important items affecting broadcasting and broadcast audiences. Many of you have been discouraged from representing yourselves before Commissioners in recent months because of the ex parte rules which require certain disclosure in rule-making matters. I would hope that you will take the time to look closer at our rules and just what they do and do not prohibit.

As most of you know, since 1965 the Commission has had rules that forbid ex parte contacts by interested persons in "restricted" adjudicatory and rulemaking proceedings. I am in full agreement that such restrictions are fully warranted in order to insure impartiality in these proceedings. However, in those instances involving informal rulemaking proceedings, the Commission had not previously adopted rules prohibiting contact by interested parties.

It is my view that an informal rulemaking proceeding is a process by which we seek information relative to a specified proposed course of action. Such proceeding is not adjudicatory in nature, nor does it ordinarily involve identifiable competitors for an identifiable valuable privilege. During my tenure as a Commissioner, I have always been receptive to the greatest amount of informational input from whatever source in proposed rule-making. Presentations by concerned parties in many cases clarified the detailed lengthy written comments filed in response to the regular notice of proposed rulemaking. I, for one, valued the opportunity to "cross-examine", as it were, an individual presenting a given viewpoint. The results were more positive than a mere reading of the comparatively sterile formal pleadings.

Following the overly restrictive holding in the Home Box Office decision, which practically denied presentations of viewpoints in all in-formal rulemaking proceedings, the unavailability of the informational input has made me more keenly aware of its value.

In June 1978, the Commission adopted an interim policy with respect to ex parte presentations. Contacts by interested parties would still be permitted, whether pre-arranged or spontaneous. However, if pre-arranged, the contacting party would be expected to provide a memorandum of the subjects he wished to discuss, the memorandum to be associated in the public docket. Should the discussion go beyond the contents of the memorandum, on other matters of significance to the issues in the rulemaking, the Com-missioner or staff member would either request a supplemental memorandum

om the contacting party or would himself prepare a supplemental memorandum containing the necessary further details. In the case of spontaneous oral presentations, such as a communication occurring at a professional or social function, the Commissioner or staff member involved would be required to put the substance of the pertinent conversation in writing together with a statement of the circumstances in which it took place. This would then be associated with the public docket.

Obviously, this interim procedure has had an adverse chilling effect on Commission contacts and discussions with parties interested in rulemaking proposals. Concern with this lack of contact has also been expressed by other Commissioners.

I would like to suggest the following: In my opinion, most persons interested in establishing personal contact concerning the substance of a proposed rulemaking are parties who have filed comments in the proceeding. Usually, their comments merely clarify the legal and factual information filed in the docket. You should know that any interested party who has filed comments in a rulemaking proceeding can feel free to contact me to advance his views, and can submit as his "memorandum for the file" a copy of his filed comments -- this is, of course, assuming that the comments do not go beyond the matters expressed in the comments filed in the docket. Should the party's comments extend beyond the views expressed in the formal filing, a supplemental memo covering such additional information should be no great burden on the contacting party.

Our interim ex parte policy was not designed to discourage contacts relative to the merits of an informal rulemaking proposal, but merely to insure that those presentations which dealt directly and substantively with the merits or outcome of a particular proceeding were available to all interested parties and subject to comment. It seems to me that if an individual is willing to go to the trouble of flying across the country to make a presentation, then the mere preparation of a summary of his comments should not be an intolerable burden. Also, it is highly illogical that anyone will conserve his best arguments for a private presentation. Remember that if anyone has filed comments in the rulemaking proceeding and intends to speak only to the matters raised in the comments, then the memorandum need be no more than a copy of such filing.

At this point, I believe the Commission is now overdue in reconsidering its present interim policy. Frankly, I hope the Commission will give consideration to relaxing the ex parte restrictions in informal rulemaking proceedings to the extent of again permitting communications going to the merits of a proposed rulemaking without the present requirement of a quasi-legal memorandum for

the file. However, I would be agreeable to a cut-off date prior to actual Commission consideration of the rulemaking proposal, beyond which no last minute contacts would be permitted. Admittedly, this does not square with the HBO holding. However, neither did the subsequent opinion of the Court of Appeals in the Action for Children Television case, which countered the extreme views set forth in the earlier HBO case.

Of course, I could go on and on because there are many important broadcast issues. I have touched upon the important matters of standing and ex parte contacts where more interest and action on your part could aid in the solution. I have also brought you up to date on legislation and would leave you with this thought -- continue to work on an urgent basis for any broadcast legislative changes, particularly radio deregulation, you feel should be incorporated into the Act. If they are highly controversial, I suspect they may be dropped. But I also suspect that this may be your last good shot at substantial broadcast legislation for some years to come. I hope broadcasters and the real overall public haven't missed a major opportunity to get a much-needed deregulatory foot in the door.

The massive legislative efforts of the past year have strong, constructive connotations. More people than ever before are now aware that regulation should be necessary only to the extent marketplace forces are deficient -- if the market is open and competitive, regulations should be abolished. This certainly applies to broadcasting where competition is intense and growing. Government officials need reminding that broadcasters compete aggressively against each other and against all other media including newspapers, magazines, outdoor advertising, transportation advertising and direct mail. The time is here to remove regulations and allow competitive market forces to work --- this would provide massive deregulation, reduced bureaucracy and resulting reduction in government costs in keeping with the current mood of the American public. Also, the public would benefit from a freer, more robust, more venturesome broadcast journalism emancipated from unnecessary and wasteful government oversight.

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

I believe full freedom for broadcasting is a great and achievable goal --- justice, logic and time are on your side --- but only with more fulltime dedication and purpose on your part.