ABSENCE OF MALICE, BUT STILL IN WONDERLAND

Speech By Commissioner James H. Quello

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I am happy to be with you today in this chocolate capital of the world, Hershey, Pennsylvania. In reading the program for today's events, I see that the title you accorded my speech today is "Washington . . . An Alice in Wonderland World." To be truthful, at first thought I was tempted to take some poetic license and re-title my speech "Malice in Wonderland" or perhaps "Malice in Blunderland." After hearing my remarks, some may believe my poetic "license" should be revoked. I abandoned the title because it unfairly characterizes the many positive aspects of the deregulatory FCC under the direction of Chairman Fowler. In all fairness, I believe the FCC is absent any malice; however, the Commission, on a few vital issues, has made what I consider to be blunders creating something less than a "wonderland" for many of you. I have to confess I even contributed to some of them. Like Alice who tumbled down the rabbit hole, the path down the road of deregulation has also had its share of pitfalls. Some of these pitfalls is what I would like to touch on today.

Now, I would like to leave the "Alice in Wonderland" analogy for fear that you may attempt to draw similarities between the characters of Lewis Carroll's book and those of us at the Commission. Hopefully, my comments may be more fully explored regarding specific concerns you have during the question and answer session this afternoon.

In my opinion, some of the more controversial blunders made by the Commission include: failure to appeal the Quincy decision on must-carry; expediting and facilitating hostile takeovers by establishing the trusteeship concept in the transfer of licenses that contributed substantially to the media merger mania; repeal of the anti-trafficking rule; requiring only a simple personal certification of financial ability to operate a broadcast station; failure to select a single AM stereo standard; and allocating many more radio stations to an already over-saturated marketplace. I would like to address a few of these blunders in greater detail.

MUST-CARRY

In a speech I recently gave before the Alaska Broadcasters Association I described the issue of "must-carry" as the most controversial issue before the Commission this year. The must-carry issue created a bipartisan uproar in Congress. The foresight and solutions provided by Senator John Danforth, the Chairman of the powerful Senate Commerce Committee; by the proposal of Tom Rogers, House Communications Subcommittee Chief Counsel, as well as those made by NTIA Director Al Sikes --

all demonstrated the complexity of the issue and a call for a more reasoned approach in resolving the issue.

I was the lone dissenter in the Commission's decision not to appeal the Quincy decision that found our must-carry rules unconstitutional. As I have said before, I continue to believe that our must-carry rules were constitutional, as written. The courts have always sustained our rules in the past and I believe the Quincy court had a contrary view, perhaps, in part, because the Commission became negligent over the years in continuing to articulate the compelling governmental interest that still exists even in the 1980s. More importantly, I don't think we sufficiently emphasized the most compelling argument of government interest for the limited must-carry we proposed -- the substantial government interest enunciated in Section 307(b) of the Communications Act. That section has long been interpreted as mandating the maximization of local service. Furthermore, The Quincy court practically invited an appeal stating that it would be willing to consider a re-crafting of the rules. Perhaps Congressman Al Swift, a knowledgable House Communications Committee member, summed it up best when he charged the Commission took a dive on "must-carry."

I continue to believe that comprehensive must-carry rules are necessary to protect our system of free over-the-air television broadcasting. Furthermore, such rules are essential to the government's legitimate interest, pursuant to Sections 1 and 307(b) of the Communications Act, in fostering a system accountable for serving the public interest.

Cable, unlike broadcasting has little or no program accountability to any public or government authority. Cable operators are not required to maintain a programming/issues list as evidence of their obligation to serve the needs and interests of its local community. Unlike broadcasters, very few operators originate local news and public affairs programming.

I said it before and I'll say it again, I opposed the initial A/B switch proposal because I believed it generally overlooked the norms of human behavior and common sense. It was not credible that most cable subscribers would maintain antenna systems solely to receive the less popular television stations their cable systems choose not to carry. Also, unless antenna systems are maintained in good working condition, and not prohibited as many are by local regulation, the presence of an A/B is of no avail. I don't have much enthusiasm for the current A/B switch proposal but it may be worth trying. It has the potential of providing future empirical data on the marketplace feasibility of the A/B switch. I hope the A/B switch will provide the answer to the must-carry dilemma -- but in my opinion, it is a long shot. In the meantime, we have a reasonable must-carry proposal in place -- subject to reconsideration and possible further court appeal.

I regret that we have not adopted broader must-carry rules because the experimental course we have chosen is still inadequate to redress the critical marketplace imbalances fostered by the Quincy decision. Nevertheless, our action on August 7, 1986 provides a much needed transition study period

of partial must-carry with ample latitude for cable to exercise First Amendment judgments. I fervently hope that our system of free television broadcasting, which serves virtually all of the nation, is not seriously impaired by a misguided effort to preserve alleged First Amendment rights of a monopoly program distribution subscriber (pay) service that serves fewer than half of our citizens.

In my opinion, the overriding imperative is the substantial government interest in the continued ability of stations to have practical, workable, access to the public they are licensed to serve. It is vitally important, too, that these licensed broadcast entities continue to have the capability of providing a diversity of viewpoints in a free competitive marketplace as ordained by Congress and supported through the years by the courts, Congress and the FCC.

TRAFFICKING/TAKEOVERS

I believe the Commission has blundered unintentionally by repealing our anti-trafficking rules and establishing the "trustee" concept used in the transfer of licenses. I have expressed concern about the turmoil and disruption caused by the unprecedented number of station sales, takeovers and mergers the past two years. I don't believe the recent instability serves overall public interest. Remember, broadcasters are licensed to serve the public interest. When a broadcast property is challenged by a takeover or a license challenge, top management's first priority, and logically so, is to defend the company or the license.

Programming, including the most vital news and public affairs programming receive less commitment and time from key top management. All the resources of the licensee are concentrated on fighting or negotiating with the takeover challenger.

I believe broadcasting more than other industries requires stability and long-range planning capability to maximize service to the public. Unfortunately, the FCC has contributed to this destabilizing takeover and merger mania the past two years.

I'm afraid we blundered when we first fostered a climate that made takeovers relatively easy. At one time, the FCC public interest approval required to takeover a broadcast property was considered a formidable requirement. Now it was found to be not only possible but relatively easy.

The FCC actions fostering the easy sale, merger or takeover climate encompassed a variety of actions including the following: the new trustee concept to facilitate and expedite hostile takeovers, elimination of the three year holding rule; the simplification of financial qualification requirements by only requiring a simple personal certification, the extended 12-12-12 limit on station ownership, the new more liberal ownership attribution rules, and the easing of license renewal and license transfer requirements.

I have to admit I supported most of the measures, but I would like to reestablish the anti-trafficking and the financial- responsibility rules. I vigorously dissented to the trustee concept in hostile takeovers.

Other factors that caused the gold rush to stake a claim in broadcast properties were (1) the increased awareness two years ago that broadcast properties were great cash flow vehicles and relatively underpriced; and, (2) the incentives of an attractive depreciation allowance for new owners.

My general attitude questioning takeovers by professional financial raiders was initially expressed in my byline article in The Los Angeles Times (March 22, 1985). The key last two paragraphs read:

> "The financial community should realize that broadcast properties should not be considered just another takeover game. Potential buyers have to meet the requirements of not only the Securities and Exchange Commission and the Justice Department but also the FCC, which is required to make public interest finding before a transfer of control or ownership. The requirement for FCC approval is something that potential raiders should keep in mind. Our broadcasting system requires a degree of stability that is not enhanced by excessive financial manipulation and speculation."

I naturally don't oppose all mergers and sales. Many of the purchases and mergers between communications companies serve the public interest. My main concern is with professional raiders and financial opportunists with little or no broadcast or communications background or commitment. I was once quoted and I repeat "I don't think I was appointed by the President and ordained by Congress to accommodate a bunch of fast buck artists trading broadcast properties like commodities."

PUBLIC BROADCASTING

I would like to say a few words to the public broadcasters in the audience. The Commission's blunder in failing to challenge the Quincy decision is particularly important to you. Public broadcasting, in light of the court's decision, is certainly losing much of the coverage one might expect for a service chartered and significantly funded by Congress and for a service that is specially acknowledged in the Commission's allocation plan. The diversity of views contemplated by Congress and supported through the years by this Commission can only be diminished under our well-meaning plan which relegates to one video transmission pipeline a gatekeeping power over all video services that are licensed to serve the public interest in the area. While some may view elimination of must-carry requirements as a triumph of the marketplace. I view the Quincy decision as an unbalanced skewing of the marketplace to favor one participant over another. And, public broadcasting -- created specifically to stand outside of the marketplace and offer alternative educational and cultural television fare -- stands to lose carriage of many of its stations.

Regarding V for U swaps, the Commission has not ruled on this matter, and therefore, I am limited in what I can say. I previously have called the public broadcasting V for commercial U swap an intriguing idea whose time has not come.

When the idea of swaps first circulated at the Commission, I must admit I thought this might provide a greater degree of financial security for public broadcasters. I am also on record as saying that each situation is unique and would have to be judged on its individual merits. However, after careful review, I am inclined to believe that as a general policy, V for U swaps would not benefit either public or commercial broadcasting. On a large scale, it could result in an unauthorized re-allocation of national spectrum that would certainly involve Congressional action.

SPECTRUM ENCROACHMENT

I would like to take a few minutes and talk to you about another possible blunder that indirectly related to broadcasting -- the Commission action in the public safety/private land mobile radio area. As you may recall, the Commission reallocated Channel 16 from Ventura, California, to the Los Angeles County Sheriff's Department. The reason for the Commission's action was the "urgent" need of the Sheriff to provide appropriate communication technology for the Department's officers, and therefore meeting the public safety needs of the citizens of Los Angeles County. Channel 16 is only one example. Soon, the Commission will be deciding the UHF/Land Mobile Sharing item. In this proceeding the Commission will decide whether to reallocate UHF broadcast spectrum in major urban areas. The reallocated spectrum would be going to the Private Land Mobile Services.

Commissioner Patrick stated at the time the majority voted to allocate the 800-900 MHz spectrum, that Private land Mobile Services had demonstrated the strongest need for spectrum. I registered a minority dissent. In my opinion, the handwriting is on the wall in the UHF/Land Mobile Sharing proceeding.

The issue is much broader than just the encroachment on broadcast spectrum by those in the public safety and private land mobile services. As I stated in my dissenting statement on the allocation of the reserved spectrum, I am not against public safety services' needs being met. I am, however, against allocating spectrum without clearly knowing to what extent the spectrum already licensed is actually being used. Furthermore, in this day of spectrum shortages, the Commission should begin to differentiate between essential public safety services, e.g., police, fire, and ambulance, and nonessential services, e.g., road and sewage maintenance crews and municipal bus operations. The failure of cities to allocate the appropriate resources to provide for modern, spectrum efficient public safety/land mobile technology should not be borne by other services, such as broadcasting. We should also be more completely informed as to the scale of current usage of allocated land mobile spectrum. In most major markets many channels are still unused or underused.

Before I close, I must tell you that broadcasters and broadcast journalists also have made their share of blunders.

As a former broadcaster, I feel I can exercise a few First Amendment rights of my own and comment on blunders in judgment made by broadcasters. Last year in a speech I made before the "Business of TV New Conference," I stated "I reluctantly have concluded that the adversary mentality of the press is reaching serious proportions and this may have serious adverse consequences for the press -- particularly the broadcast press." After CBS's inaccurate characterization of conspiracy by General Westmoreland in a one-sided Vietnam War documentary, their own in-house investigation revealed violations of guidelines and poor journalistic practice. ABC's faux pas, allowing a Soviet journalist 8 minutes of prime-time coverage to propagandize a strong refutation of a major address by the President of the United States is blurring the line between journalistic "scoops" and irresponsible decision making. It would require a full speech or book to cover many other journalistic gaffes.

Today, many of you have the opportunity to cover events in remote locations due to the wonders of satellite technology. After making the investment in your satellite vans, there may be more of an incentive to be first at the scene leaving little time for investigation. The reporting "live-at-the-scene" approach requires extraordinary broadcast journalism skills, a respect for the laws of the land, i.e., innocent until proven guilty, and a respect for human life and personal tragedy.

Remember that the greatest benefit most Americans derive from broadcasting is information. This potential for molding public opinion poses an enormous responsibility and challenge. It calls for more top management training and involvement in that most vitally important aspect of broadcast business -- news. Top management and news directors must emphasize truth and responsibility in news and public affairs reporting over the individual quest for ratings, money and power.

Before I close, I want to re-emphasize that all is not "blunder" at the FCC wonderland. Under Chairman Fowler's leadership, the Commission has removed many of the burdensome regulations and unnecessary paperwork imposed on broadcasters. He has worked hard to foster competition in the marketplace in hopes of providing more and better services to the American public. Some would argue that he's worked too hard in fostering the marketplace concept. Nonetheless, considering where you were several years ago in the regulatory maze of the Commission, you are much better off today. His many deregulatory accomplishments far outweigh his (or our) occasional "blunderland" foibles.

Finally, I know that the Commission's brief filed in the Steele case has raised a considerable controversy. The Steele case focused on the issue of awarding a license on the basis of female preference. On October 2, 1986, the House Telecommunication Subcommittee held a hearing that discussed the Commission's brief.

In case you were wondering, I want to state, for the record, that I remain, to the extent the law permits, as committed as ever to continuing the Commission's long-standing policy of encouraging and assisting minority and female entry into broadcasting. Over the years, the Commission has promoted this goal by holding minority ownership, financing, and advertising en banc hearings, by developing a minority distress sale policy, by granting tax certificates to those selling broadcast stations to minorities, and by awarding preferences to minorities and women in our lottery and comparative licensing proceedings.

We do not, however, always have the last word on our own policies. Courts do intervene causing us non-lawyers to be somewhat dependent on the legal advice given me by our agency's lawyers. We have asked the court to grant a remand in the Steele proceeding, and, if successful, I intend to study closely the record developed and then make a final decision on whether it appears to me that our preference scheme is constitutionally flawed. For the time being, however, attorneys at the agency have advised me that our minority and female comparative licensing preference scheme, based on recent Supreme Court case law, is constitutionally suspect. Based on that advice, I felt that I had no choice but to join my colleagues in directing our General Counsel to express our legal concerns to the court and request to have the Steele case remanded to us for further consideration. In my opinion, our court brief in Steele was primarily intended to make a strong case for the court to grant the request for remand.

I'm not a lawyer but I believe we have broad discretionary authority to regulate broadcasting in the public interest. I believe reasonable minority representation in broadcast ownership in America serves the public interest -- with or without a direct nexus to programming. If the courts disagree, I must critically examine all their reasoning and reserve final judgment. I really think minorities have arrived in America and I am pleased with the great progress the past 20 years -- they play a vital role in serving their country in the armed forces, elect important officials, receive widespread public acclaim and great wealth for their athletic and creative talents and also for their professional and executive attainments. They play an overall critical role in supporting American democracy. However, they still need added opportunities to own a chunk of the influential communications rock to become fully integrated into society.

Eventually I hope we can arrive at the millenium where all Americans have equal opportunity without special preferences. All of us today favoring minority preferences must face the reality that it is an inherently sensitive issue evoking strong pro and con expression. It tends to breed resentment from other Americans not benefitting from special treatment or not fully appreciating its social value.

However, in my opinion, we have not yet arrived at the millenium. We still have some "catch up" to do. There is still need for added minority incentives like tax certificates, preferences in lotteries and comparative hearings and also in economic aid to stimulate the desired diversity in ownership. As I said before, I simply believe reasonable increased minority representation in communications ownership serves the public interest. I remain committed to the Commission's longstanding goal of encouraging and assisting minority and female entry into broadcasting. I will carefully examine the court's opinion but I place the burden of proof on those that would challenge the constitutionality of our longstanding Commission policy of minority preferences.

So I remain in principle committed to minority and female entry into broadcast ownership and will do my best to keep the Commission on this worthy track. I wish you and all public-interest-conscious broadcasters continued growth and fulfillment in the challenging, exciting years ahead. Thank you.