Inside the FCC

James H. Quello

Commissioner, Federal Communications Commission, in a recent address before the Alaska Broadcasters Association.

Lone voice of dissent on 'must carry' relaxation, 'fast buck' broadcast entry

As you may have concluded from the uproar in Congress and the trade press, the most controversial broadcast issue for the year was and is "must-carry." I'd like to personally clarify my position, as I was the lone dissenter in the FCC's decision not to appeal the *Quincy* decision that found our must-carry rules unconstitutional.

I continue to believe that our must-carry rules were constitutional as written. The courts had 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 government 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.

First, I want to address the preposterous charges, made in the press and repeated occasionally within the halls of the commission, that there was a political "taint" to the must-carry proceedings.

The press quotes were from the very subjective self-serving opinions of expert attorneys well paid for representing cable clients who stated the FCC had permitted "political pressures to infest this vital process."

Congressional interest

I believe members of Congress have the right and even the obligation to express their views publicly on important rulemaking subjects affecting the public interest in vital communications. This right or obligation particularly applies to regulatory agencies that are considered arms of Congress

I submit that this unprecedented Congressional support for some kind of reasonable must-carry had to be generated by the belief that justice and reason must be made to prevail in the communications marketplace. It was the very first time that I can recall in my 12½ years on the commission that I saw a letter requesting commission action signed by every member, Republican and Democrat, of the House Communications Subcommittee. This Congressional outcry of itself is intrinsic evidence of the strong governmental interest in must-carry.

We even received very helpful and thought-provoking must-carry proposals from Senator John Danforth, the chairman of the powerful Senate Commerce Committee; NTIA director Al Sikes and House Communications Subcommittee chief counsel Tom Rogers.

The proposal the commission adopted seems to represent a sincere attempt to adopt a workable, reasonable, compromise position. The compromise was an improvement over the previous industry compromise in that it provided some special relief for public broadcasting.

It also took into consideration the plight of new UHF stations by eliminating the minimum viewership requirements for the first year. Consequently, I agreed with the result, under the premise that something is better than nothing.

I previously stated that I believe the commission's must-carry rules, struck down by the *Quincy* court, were defensible if the commission had the will to defend them. I dissented from the majority's decision to accept the *Quincy* ruling without appeal and protest. I agree with Congressman Al Swift, a knowledgeable Communications Committee leader, who charged the FCC took a dive on "must-carry."

The court practically invited an appeal, stating it would be willing to consider a recrafting of the rules. I continue to believe that comprehensive must-carry rules are necessary to protect our system of free over-the-air television broadcasting and 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, once installed, is a geographic bottleneck with little or no program accountability to any public or government authority, unlike broadcasting, which is required to maintain a programming/issues list as evidence of its obligation to serve the needs and interests of its local community.

A/B switch proposal

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 well 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.

Public broadcasting, although specially acknowledged in the commission's plan, is certainly losing much of the coverage one might expect for a service chartered by Congress, which continued its significant funding. 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 it 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.

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 *pay* service that serves less 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 both Congress and the FCC.

Ownership instability

I have also 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.

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, will inadvertently or vertently 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. In some cases like CBS, the huge debt incurred in fighting off takeovers or proxy fights results in the company serving debt rather than serving the public.

Unfortunately and perhaps, unintentionally, the FCC has contributed to this destabilizing takeover and merger mania during the past two years.

We first fostered a climate that made takeovers relatively easy. At one time, the FCC public interest approval required to take over 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 re-establish the three year 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 was 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."