REMARKS BY FCC COMMISSIONER JAMES H. QUELLO

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I am delighted that Communications Daily, a daily must-reading at the FCC, invited me to present my layman FCC viewpoints to this prestigious Congressional and legal telecommunications forum.

Actually, my delight with the invitation was somewhat tempered by my anxiety about appearing before this impressive audience of legal experts. The government regulatory world is dominated by lawmakers and lawyers -- most of them bright, dedicated, and possessing high priced abilities upon leaving government . . . which is the best lead-in I can think of for this story . . . which illustrates a point. "A high priced lawyer, a low priced lawyer and Santa Claus were walking down the street and came upon a $100.00 bill. Which of the three characters got the $100.00? The high priced lawyer because the other two are mythological characters!"

I would like to share with you my views on several topics confronting the broadcast industry today. Of course the current controversy surrounding the Fairness Doctrine is of particular significance to both the Commission and Congress. In addition, there is a continuing need for reform in the comparative renewal process. These issues raise fundamental questions concerning the obligation of broadcasters to act as public trustees. Viewed in this light, we must also re-examine the effect that repeal of the 3 year trafficking rule, permitting hostile takeovers and the existing financial certification process has on a licensee's ability to meet its responsibilities under the Communications Act. I will discuss each of these issues in turn.

As most of you know, my regulatory philosophy reflects a more journalistic than legalistic approach. Thus, I have naturally been a longtime advocate for the repeal of Section 315 and the Fairness Doctrine. I have long believed the Fairness Doctrine is statutory and therefore, a Congressional prerogative. However, I also believe the Doctrine has a chilling effect on addressing controversial issues of public importance. In fact, I experienced numerous chilling effects during my broadcast career.

Recently, the U.S. Appeals Court for the District of Columbia in the TRAC teletext case stated the Fairness Doctrine is not incorporated in the Communications Act but is only FCC policy which the FCC can eliminate. Telecommunications Research and Action Center v. FCC, No. 85-1160, slip op. (D.C. Cir. Sept. 19, 1986), pet. for rehearing en banc denied, (Dec. 16, 1986). In a different but somewhat related Fairness Doctrine case, the court sent the Meredith case back to the FCC for reconsideration 3-0 with scalding comments, "We are aware of no precedent that permits a federal agency to ignore a Constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." Meredith Corp. v. FCC, No. 85-1723, slip op. at 21 (D.c. Cir. January 16, 1987). So there we are. The FCC has issued a public notice requesting comments by February 25th because of the general importance of the issues. It is unlikely Congress will revise or repeal the statute. So now it is a major ongoing controversy involving the courts, FCC and Congress. Ultimately, the courts will have to resolve the Constitutional issues.

With regard to comparative renewals, I recommend that broadcasters give highest priority to re-affirming their public interest responsibilities in exchange for a more assured license renewal expectancy for meritorious or substantial service.

License challenges at renewal time, it seems to me, are far more costly than any public benefit they allegedly produce. Our comparative criteria, as they have developed over the years, have become largely irrelevant to the process of selecting the licensee best qualified to serve the public interest. Under the Ashbacker doctrine, the Commission is obligated to consider challenging applications at renewal time. We do that in the context of a Byzantine system of often-meaningless comparisons which require highly-subjective judgments by the Commission. There is no evidence of which I am aware indicating that the public has ever been served by Ashbacker in the renewal context. It is far from clear why a broadcast licensee who is otherwise qualified to have his licensee renewed should be required to defend himself in an often-costly and time consuming comparative hearing. While the license challenge is purported to act as a spur to better performance by incumbents, it is more likely encouraging frivolous self-serving petitions and risk-averse journalistic behavior instead. While the case law produced supports the Ashbacker doctrine, it is not a holy writ. It seems a propitious time to challenge it or to recommend corrective legislation in the context of comparative broadcast renewals. I applaud the efforts of Congressman Swift, a staunch public interest disciple, to rectify this problem by amending the Act.

Controversy surrounding the Fairness doctrine and comparative renewals gives rise to fundamental questions regarding a broadcaster's public interest responsibilities. By re-affirming a public trustee type obligation for broadcasters, the Commission will be enunciating a responsibility intended by Congress and accepted by most licensees.

The most fundamental principle underlying our entire broadcast system is the Commission's obligation to regulate broadcasting consistent with the public interest, convenience and necessity. Coincident with the Commission's duty, is the broadcaster's responsibility to act as a public trustee. As the Court of Appeals stated recently, "The clear intent of the Act was that the award of a broadcasting license should be a public trust." Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1427 (D.C. Cir. 1983). This basic obligation, found in Section 309 of the Communications Act, is as important today as it was when the Communications Act was drafted in 1934.

While some may argue that growth in media outlets and technological expansion call for elimination of the public interest standard, I believe retaining a practical unobtrusive public interest standard is essential during this period of rapid technological change. As a regulatory goal, the public interest standard provides an anchor, ensuring the interests of all Americans are considered when creating telecommunications policy.

The Commission's most difficult task is to define what it means by the public interest. The Communications Act purposely allowed the FCC broad discretion and flexibility to accommodate change. I can't define it but I know it when I see it. Walter Lippman once said that "The public interest is what people would do if they thought clearly, decided rationally and acted disinterestedly." Having described at the outset an objective which few are wise enough to attain, we can discard the assumption that any one (or any group) has a lock on the truth. As a general matter, however, I believe the Commission's fundamental public interest responsibility is to facilitate the development of a broadcast system that serves as a vehicle for the expression of viewpoints in our local communities so that informed public opinion -- necessary in a functioning democracy -- will be possible. Moreover, unlike other methods of distributing information -- such as satellites -- broadcasting is, and must remain, locally oriented. I would add, however, that service to the local community coincides with the broadcaster's economic interest. It makes good business sense for a broadcaster to serve its local community.

Retaining the public interest standard does not mean the heavy hand of government must regulate all aspects of broadcasting. Where marketplace incentives are consistent with the objectives of the Communications Act, the Commission should refrain from regulating. Government intervention is appropriate where market incentives run counter to the fundamental goals established in the Communications Act.

In recent years, the Commission under the leadership of Mark Fowler has deregulated many of the rules governing broadcasting. He has done more than any other Chairman to get government off industry's back. I would nominate him for broadcasting's deregulatory "Hall of Fame" for eliminating tons of unnecessary paperwork and reducing oppressive regulation. You see, I have come to praise Caesar not bury him. For example, we have eliminated the unnecessarily burdensome ascertainment rules and programming log requirements. Eliminating the programming guidelines provided broadcasters with greater freedom in selecting programming to meet their community's needs. In addition, the Commission has saved broadcasters tremendous amounts of time and money by adopting postcard renewal procedures. The Commission has also made significant revisions to its ownership rules by eliminating the regional concentration rule, adopting the 12-12-12 rule, and by revising our attribution of ownership rules. All of these changes I believe to be consistent with the Commission's public interest responsibilities.

However, this is not to say the Chairman or the Commission have been correct with all aspects of deregulation. 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 erred when 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 is 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. Also, I vigorously dissented to the trustee concept in hostile takeovers.

Other factors that caused the gold rush of entrepreneurs to stake a claim in broadcast properties were (1) the increased awareness two years ago that broadcast properties were great cash flow vehicles and then 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."

The most troubling aspect of the elimination of the trafficking rule is the lack of accurate data surrounding the impact of this policy on broadcasting. The Mass Media Bureau prepared data last July demonstrating that 25% of stations now being traded were owned less than three years. The data, however, suffer from several flaws including not considering new stations licensed after 1982. Indeed, the number of long and short form transfers approved by the FCC skyrocketed in fiscal 1986 to 2,457 for radio and 767 for television. I recognize these figures may not necessarily reflect an increase in trafficking but they do reflect an unprecedented churn in sale and transfer of broadcast properties. By reinstituting our trafficking rules and revising our hostile takeover policies, broadcasters would be able to devote more resources to meeting the needs of their community instead of concentrating on fighting takeovers or on financing a heavy debt burden.

In conclusion, I believe the public interest standard and a practical public trustee model should remain as an important part of our regulatory framework. The public trustee model is not inconsistent with deregulation. However, it does require close examination of each issue to ensure the Commission remains faithful to the Congressionally mandated public interest standard.