

REMARKS BY FCC COMMISSIONER JAMES H. QUELLO

AT THE FCBA ANNUAL SEMINAR

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I'm delighted that the distinguished former FCC Chairman and currently the president of the prestigious Federal Communications Bar Association provided me this opportunity to enjoy tennis in this rarified Wintergreen atmosphere high in the Blue Ridge Mountains.

And I was perfectly willing, in exchange for this valuable privilege, to read a carefully prepared 35 minute treatise expounding the more complex engineering and legal aspects of solar atmospheric cadubiation.

But my omniscient legal advisor, David Donovan, interceded. He mentioned that complex technical and engineering developments would be old hat to this highly educated body of legal experts -- that they were already well acquainted with the relative interference consequences of solar radiation thrombating the cadubiators.

He said give them a current sizzler they can all identify with -- give them the latest developments in indecency and obscenity!

I confessed I no longer had a good memory for intriguing spicy stories -- and I even preferred playing R rated movies backwards, because at my age I like to see people get dressed and go home.

I trust Dave's judgment. He has proven worthy of trust. So he vetoed my two best blue stories. He even cleaned up my gag about "it is redundant to keep an airbag in a lawyer's car" by simply substituting "commissioner" for "lawyer" He assured me it would find much more acceptance with this audience.

So I'm going to take Dave's suggestion and talk principally about FCC actions to deter obscenity and indecency, the "sizzling" subject that is currently the now communications subject for talk shows and news headlines.

I'll stay with the subject even though I had many fascinating suggestions from different sources like:

The Fowler Legacy; the upcoming Dennis Patrick stewardship; Your 14th year on the FCC starts today April 25 (Remember, the old principle: "The older you get, the greater you were"?).

Another source, and I'll invoke my journalistic right not to reveal it suggested: Should you recommend Mark Fowler for a purple heart as well as for the distinguished service award (I recommended it at the NAB convention.) considering his wounds in battle with Congress and yes, even you, on "Must Carry," "UHF-land mobile sharing," reinstatement of the 3 year holding anti-trafficking rule, public trustee concept for broadcasters, minority ownership preferences, financial interest and syndication, and deregulation of call letters? Why don't you clarify your statement that you were with him 95% of the time in view of these rather major oppositions?

My general response to these questions:

1. Mark was a true believer, a tough advocate and fought a valiant battle. Sometimes I got the impression he had a "death wish" with Congress.

2. Six or seven major item disagreements out of several thousand major and minor items over six years is not bad. I was in basic agreement with his major deregulatory thrust. But I did remind him on two occasions that I did deregulation, but not anarchy. (He didn't take me to lunch that month.)

3. Overall his pluses far outweighed his negatives. There was a productive evolution from overregulation, to deregulation, to unregulation, to marketplace self regulation with an occasional, sometimes in my opinion, counterproductive lapse into unregulatory excess.

I'm glad I was around to participate in the long overdue deregulatory transition that eliminated tons of paperwork and over intrusive government regulation. And I'm glad I was also around to register a dissent when our actions struck me as counterproductive. So to departing Chairman Fowler, a respectful salute and I still recommend him for the DSA. It's OK with me if someone also adds a purple heart . . . however, I deserve one too. I took my share of shots in some of those exchanges.

I'm also taking some tough shots, as is the entire commission, on the number one communications topic of the week with a full load of journalistic adversarial sizzle -- indecency and obscenity.

It strikes me as paradoxical that so many writers and commentators critical of the FCC's comprehensive deregulation, lack of enforcement or the FCC unwillingness to enforce its regulatory mandate are the most vociferous in demanding full first amendment protection for purveyors of indecency and obscenity on the air.

It also strikes me as paradoxical that some organizations like the ACLU, so vociferous in demanding full civil rights for all kinds of criminals and questionable causes, are so aggressive in opposing full first amendment rights for broadcasters by advocating retention of the restrictive Section 315 and, also, the controversial fairness doctrine.

I want to emphasize at the outset, the FCC is not on a Salem moral witch hunt to exorcise evil disc jockeys or lewd students. We are simply enforcing an established law. We are not creating a new law. We are finding means of enforcing an established statute prohibiting the broadcast of indecent or obscene speech and material. Previous FCC decisions interpreted the Pacifica case so narrowly that they had the practical effect of obstructing or preventing the prosecution of patently indecent or obscene language on the air. We are re-interpreting the Commission's legal precedent in a broader more practical manner to enable us to act on egregious violations.

As a strong first amendment advocate, I am personally wary of government intrusion in programming. We are all well acquainted with Section 326 and the prohibition against any form of government censorship.

Then too, I normally should be the least likely of any of the current commissioners to lead a charge against obscenity. I served in the army for over five years. I served overseas for 33 consecutive months, finally as a combat infantry battalion commander in France and Germany. I assure you that I heard all variations of expletives in the heat of battle.

As far as the most commonly over-used sexually oriented single word is concerned, I heard it, used it and done it. But there are places, occasions and times where it is improper and even disgusting.

In its action against Pacifica Foundation, Inc., licensee of KPFK-FM, Los Angeles, CA, the Commission responded to complaints of indecent broadcasts made during programs entitled 'IMRU' and "Shocktime U.S.A."

The Commission evaluated the legality of the two programs separately. The program "IMRU," which was a 10:00 p.m. broadcast, preceded by a warning as to content, contained excerpts from a play entitled "Jerker" that included explicit descriptions of sexual encounters. It determined that the material broadcast described sexual and excretory activities and organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. The Commission concluded that the broadcast constituted indecency, and that the evidence demonstrated that there was still a reasonable risk that children would be in the listening audience. Consequently, the FCC issued a warning in this case. Also, the Commission referred the IMRU broadcast to the U.S. Department of Justice for possible criminal prosecution for obscenity.

The complaint against the "Shocktime U.S.A." program involved the broadcast of certain expletives made by a participant on a live program. Because the remarks were not part of a planned script and were made during a live broadcast of the program, and because subsequent action to remedy the violation was taken immediately by expelling the member from the group and withdrawing the program from KPFK, the Commission determined that the "Shocktime U.S.A." broadcast did not involve actionable indecency.

The language in the program titled "Jerker" is too repulsive to be repeated here and far surpasses the seven dirty words used by George Carlin in the Pacifica case of 1978. For example, the language in "Jerker" goes way beyond the over-used vulgarism for an incestuous son. It is unbelievable that any responsible licensee would claim that such language is permissible under 18 U.S.C. Section 1464. However, a judgment from a local jury is required for a legal finding of obscenity unlike indecency where the FCC can take direct action. It is sometimes difficult to obtain a decision of obscenity because it must meet a three pronged test (Miller v. California, U.S. Supreme Court 1973).

Roughly the three prong test is:

1. Material as a whole must appeal to the prurient interest of the average person applying contemporary community standards.
2. Material depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law.

3. Material taken as a whole must lack serious literary, artistic, political or scientific value.

In general the material must contain some redeeming social value.

The federal indecency test as promulgated by FCC v. Pacifica Foundation, Supreme Court 1978 does not appear to require a jury verdict. It roughly requires:

1. Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for broadcasting, sexual or excretory activities or organs.

2. Broadcast at time of day when there is a reasonable risk that children may be in the audience.

The federal indecency statute reads: 18 U.S.C. Section 1464, "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than \$10,000 or imprisoned not more than two years or both." The FCC can impose civil fines or revocation of license for indecency on the air and the Justice Department can seek criminal prosecution.

I was quoted last month in several trade publications that "If proven guilty of indecency, we should nail somebody with a license revocation proceeding or a \$10,000 fine.

Our forefathers didn't guarantee freedom of speech for repulsive, obscene purposes. FCC action would have a much needed deterrent on smut on the air." The repulsive language in the "Jerker" program would be a prime example of what I had in mind in calling for corrective action. After the public notice is published in the federal register, the FCC should be able to effect direct sanctions under the updated indecency test. We are correcting a former overly-narrow interpretation of indecency. We also realize that any regulatory action taken by the FCC may be subject to a court appeal. However, our actions have been sustained by the courts in a great majority of cases.

I would like to touch upon an important part of this decision that somehow gets lost in the first amendment hyperbole. Our policies regarding indecent speech, as opposed to obscene material which may be banned altogether, are designed to reduce the risk that children will be exposed to such material. The imposition of reasonable time, place and manner restrictions are a judicially acceptable tool to accomplish this task. Time, place, and manner restrictions have been upheld in the context of adult movie theaters, school speeches, and even displays of printed material.

Broadcasting is different to the extent it is extremely difficult to separate the child audience from the adult audience. I think we all agree that the sensitivities of the child audience should not dictate the entire program fare

of broadcasting. Nevertheless, protecting children from indecent speech is an important, indeed a compelling, government interest.

In this regard, we have determined that presenting programming with indecent material after 10:00 p.m. does not guarantee a safe harbor for licensees. Audience data demonstrate that there are substantial number of children in the radio audience after 10:00 p.m. We recognize that alleged violations must be considered on an individual case-by-case basis considering factors of time and context.

The FCC action last week was in response to a growing public outcry for corrective action. The Mass media Bureau estimates that over 20,000 letters were received in 1986 complaining of obscenity or indecency on the air and the FCC was picketed for one month. This pattern of complaints has accelerated in 1987. The actions taken last week against indecency and repulsive language would be overwhelmingly approved in a nationwide public referendum. The FCC action strives to encourage constructive social values and maintain reasonable decency in the most accessible and pervasive of all media - TV and Radio.

The time is now _____ PM. So, if some one asks you how the speech went, you can always say he didn't say a helluva lot, but he did give us the right time.