REMARKS BY

FCC COMMISSIONER JAMES H. QUELLO

BEFORE THE

WEST VIRGINIA BROADCASTERS ASSOCIATION ANNUAL FALL MEETING

THE GREENBRIER, WHITE SULPHUR SPRINGS

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I'm delighted to revisit my good broadcasting friends in West Virginia after eleven years to give you one Commissioner's version of recent FCC actions and to enjoy tennis at the famous Greenbrier. In Washington, it is generally understood that tennis is my last desperate clutch at youth -- also, it is well established that it is an invitation I can't resist.

First, I want to acknowledge that a highly respected West Virginian, Jim McKinney, played a major role in my appearance here. I wanted to come, but my travel budget was already overdrawn. Upon learning of my dilemma, Jim rushed to the rescue saying his Mass Media Bureau budget could accommodate one more trip. It is supposed to work the other way around, but Jim understood the problem and, as usual, he was there when I needed him. Way before this particular trip, Jim exemplified solid common sense and efficiency at the FCC. He is a credit to West Virginia, to the FCC and now to the White House. I'm proud to have had Jim as a longtime associate and friend.

More than incidentally, I'm very impressed with a state that boasts of the distinguished Senate Majority Leader, Robert Byrd, and an under-publicized potential future presidential candidate, Senator and former governor, Jay Rockefeller, whose wife Sharon is practically the patron saint of national public broadcasting. Also, Congressman Nick Rahall was a freshman Congressman when I spoke here last time. He has really "arrived" and now gives your state another powerful spokesman in the House.

So many things have happened since I last spoke here. There are so many things to talk about. Since my last appearance I have participated in a productive evolution from overregulation to deregulation to unregulation to marketplace self-regulation with occasional counterproductive lapses into unregulatory excess. I was glad to participate in the timely deregulatory transition that eliminated tons of paperwork and corrected over-intrusive government regulation. I'm also gratified that I was around to register an occasional dissent when our actions struck me as counterproductive.

Some of the major issues where my viewpoints differed from the Commission majority were repeal of the three-year anti-trafficking rule, sunsetting current FCC must-carry rules, minority ownership preferences, UHF-Land Mobile sharing, an AM Stereo standard, and de-emphasis of the localism and public trustee concepts. Sometimes the differences are merely a matter of degree.

Our occasional disagreements represent an honest difference in philosophical and regulatory approach. Conflicting viewpoints are a well established and useful fact of life in Commission processes. They represent a Commissioner's individual evaluation of a legal record and his personal perception of logic, reason and serving public interest.

At the outset, I believe it appropriate to reaffirm the general public interest standard for broadcasting. I also believe it not only appropriate, but long overdue, to grant broadcasters a statutory license renewal expectancy. The two step process proposed in Senate and House bills would help reduce the burdens and inequities of the present system. However, the bills in present form have the potential undesirable effect of increasing other regulatory burdens. With all the current turmoil (on the Fairness Doctrine, Must Carry and Three Year Anti-trafficking rule) there is little likelihood of any action on license renewal expectancy this year. However, it may be well so articulate logicsal arguments for future use and current reference. It is in this spirit that I offer these arguments.

If broadcasters have met their responsibilities, they should not have to suffer comparative challenges from opportunistic competitors offering unsupported promises in a paper presentation.

Past broadcasting performance and experience for an incumbent licensee should be the determining factor . . . . If not, all incumbent TV stations and especially multiple owners would be in jeopardy at any comparative hearing. The factors besides broadcast performance to be considered in comparing licensees to challengers would be diversity of ownership and integration of ownership and management. Anyone owning a station and especially group owners would be at unreasonable risk. The public benefits from experienced, capable owners and also from group owners. There is automatic efficiency of scale in group owners . . . they can exchange beneficial experiences, pay higher employee benefits, pool resources and afford major sports, news and entertainment programming free to TV viewers without the additional cost of cable, closed circuit TV or MDS service. If diversity were the determining criterion, any inexperienced applicant with no other license, could win over a veteran incumbent regardless of how well he has performed. An incumbent's past record of service must in all fairness prevail over paper promises of future service or diversity.

As it exists now, any citizen with a grudge can wreak revenge on a station through the comparative renewal process. The process is easy to initiate for any challenger with political or social philosophies different from the station, whether reasonable or unreasonable. By simply filling out an FCC Form 301, an easy procedure, any challenger has the potential of initiating an intrusive and expensive hearing process. This has lead to numerous abuses in the past.

As I mentioned, the comparative process itself is grossly unjust because it compares paper promises to actual performance. The incumbent is forced to defend a record shaped by meeting the daily problems of personnel management, production, engineering, marketplace competition and the stress and unpredictability of day-to-day operations. The challenger has no like problems or proven record for comparison. He has the luxury of designing a model application aimed primarily for meeting legal criteria or impressing a judge without regard to the real world of actual station operations in that particular market. The public doesn't benefit from this kind of ordeal. It has too great a potential for abuse and some cases seemed to result in extortionate consultation fees.

The mere threat of a license challenge can divert top management's prime attention from program service to defense against litigation. No matter how unworthy the challenge, the licensee immediately faces months of prolonged, expensive litigation through reconsideration and appeals. The threat itself has a chilling effect on the independence and integrity of a station's operations including its news and public affairs.

Uncertainty and instability do not provide a positive environment for investment, long range planning and program service. The two step renewal process proposed in the Senate Bill, if presented without all the new regulatory requirements, would eliminate the comparative renewal process and would better serve both the public and broadcasters interests.

Elimination should not hinge on concessions from the broadcast industry. If the process is unfair and disserves the public, it should be eliminated without additional conditions. The current FCC quarterly program/issues requirement serves as an important and substantial regulatory requirement for license renewal. So the Senate and House Bills are interestings proposals, but a long way from being presented or adopted in acceptable form.

Before I close, I must comment on our latest newsworthy decision on the Fairness Doctrine. And, also, briefly discuss our controversial decision enforcing a policy prohibiting broadcast indecency. Our strong First Amendment pronouncements towards eliminating the Fairness Doctrine and guaranteeing full First Amendment rights for broadcasters, might seem contradictory to our action against indecency. I don't think so.

In a previous speech regarding indecency, I emphasized that the FCC was not on a moral witch hunt. We were simply enforcing an established law -- a policy prohibiting the broadcast of indecent speech and a statute prohibiting obscene speech and material.

I even mentioned that normally I should be the least likely 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 did it. But there are places, occasions and times where it is improper and even disgusting. I even confessed that at my age I preferred playing R rated movies backwards because I now like to see people get dressed and go home.

The FCC meant well. We don't think our forefathers guaranteed freedom of speech for repulsive, obscene purposes. Our FCC action tried to encourage constructive social values and maintain reasonable decency in TV and radio, the most accessible and pervasive of all media for children. For me, enforcement presents a real First Amendment dilemma -- I'll just do my best on a case-by-case basis.

As you know, the most controversial current communications subject is the recent FCC action finding the Fairness Doctrine unconstitutional. The FCC decision is being appealed in court and being condemned by some key members of Congress.

It was a tough decision for us and personally for me. I regret offending Congressional leaders in the House and Senate whom I have respected for years. I don't support or recommend "end runs around the will of Congress." It was a matter of principle to me. I realized it was politically hazardous.

Since my initial confirmation in 1974, I have gone on record and appeared before Congressional committees supporting broadcast journalists in their quest for full First Amendment rights like their counterparts in print. But my personal judgment in this area was always tempered by the belief that the Fairness Doctrine was statutory. Recent decisions by the U.S. Court of Appeals for the District of Columbia, however, state the doctrine is not statutory.

The Court of Appeals in the landmark decision, Meredith Corporation v. FCC, 809 F.2d 863, 874 (D.C. Cir.) held:

> Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. U.S. Const. art. VI, cl. 3. To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath, but, in any event, the Commission must discharge its constitutional obligations by explicitly considering Meredith's claim that its enforcement of the fairness doctrine against it deprives it of its constitutional rights. The Commission's failure to do so seems to us the very paradigm of arbitrary and capricious administrative action.

Because the Fairness doctrine raises such an important issue, we have proceeded cautiously. In 1985, we concluded perhaps the most extensive study ever conducted on the subject. See 1985 Fairness Doctrine Report, 102 FCC 2d 143 (1985) appeal pending sub. nom., Radio and Television News Directors Association v. FCC, No. 85-1691 (D.C. Cir. Jan. 16, 1987).

In the case now before us, the Commission took the unique step of soliciting comment on the constitutionality of our enforcement of the Fairness Doctrine. After much deliberation,

the Commission has concluded that the Fairness Doctrine "contravenes" the First Amendment and thereby disserves the public interest. Our decision supported my 12 year advocacy of full constitutional rights of freedom of speech and press for broadcast journalists.

Broadcast journalists from around the country have cause to celebrate and support their new-found freedom. Concomitant with this freedom is increased responsibility. I would remind all licensees that our obligations to serve the public interests through the quarterly program/issues requirement remain. Furthermore, licensees remain obligated to provide children's programming and to refrain from activities such as news distortion and presenting false and deceptive programming. For me, these local service obligations which still allow broadcasters full editorial discretion in programming, constitute the cornerstone of the public interest standard. This decision has not removed this bedrock public trustee obligation.

I believe there is a need to diffuse the political controversy surrounding the Fairness Doctrine. It is a journalistic and First Amendment issue, not a political issue.

Also, there are many worthy people, both Democrats and Republicans, of sincere intent supporting the FCC action.

Senators Packwood and Proxmire, former Senator Howard Baker and former House Communications Subcommittee Chairman Lionel Van Deerlin are honorable, wise Congressional or former Congressional leaders supporting full First Amendment freedoms for broadcasters.

In his regular San Diego news column, former Democratic Subcommittee Chairman Van Deerlin wrote,

> "...Things will have reached a strange pass if freedom on their air is to be opposed by Democrats and defended by Republicans.
>
> In the end, however, those First Amendment rights were not written for the benefit of reporters and anchor men or station owners and publishers. They were intended to guarantee us Americans free, unfettered access to sources of information from which we may divine truth."

I believe TV and radio newsmen and executives are every bit as responsible and qualified to exercise First Amendment rights as their print brethren.

Practically every leading newspaper in America has supported elimination of the Fairness Doctrine and advocated full First Amendment rights for broadcasters with editorials. The newspapers include: The Washington Post, The Washington Times, The New York Times, The Los Angeles Times, USA Today, The Wall St. Journal, The Chicago Tribune, The Detroit News and Detroit Free Press. There are many others from coast to coast. Also, nearly all communications trade magazines have editorialized favoring full First Amendment rights for broadcasters and the elimination of the Fairness Doctrine.

The ultimate decision will probably rest with the courts (the FCC Meredith decision is now being appealed in the second circuit court in New York), the Congress and perhaps, with the will and actions of the newsmen and members of the Radio-TV News Directors Association, the principal proponents for full First Amendment rights.

An experienced lobbyist told me, "If the news directors and broadcasters really want it bad enough, they never had a better chance to revisit and sell Congress. But the *Packwood theory will probably prevail (*"Broadcasters can't lobby themselves out of a paper bag").

My prediction: Senator Packwood is probably right again. Unless the Supreme Court ultimately decides the issue, broadcaster apathy (I mean broadcasters throughout the nation, not the NAB) and Congressional indignation will result in legislation codifying the Fairness Doctrine as statutory. Believe me, this FCC will enforce any such statute.

In my opinion, broadcasters can live easily and blandly with a Fairness Doctrine. Just avoid controversial editorializing. However, it just doesn't belong in a country dedicated to freedom of speech and freedom of the press.

End of message. Thank you.