FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

August 24, 1987

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OFFICE OF COMMISSIONER
JAMES H. QUELLO

The Honorable Ernest F. Hollings
United States Senate
Subcommittee on Communications
SH-227
Washington, DC 20510

Dear Senator Hollings:

In response to your list of questions pertaining to S.1277, enclosed are my answers.

I hope this information states clearly my position on these issues.

Sincerely,

James H. Quello

Enclosure

S.1277 Hearing Questions and Answers

Commissioner James H. Quello

RENEWAL

Q1. Commissioner Quello, it has been suggested that in order to eliminate uncertainty as to how much local programming licensees are required to broadcast, we should establish percentages of programming in one or more categories. Do you agree with that proposal?

A1. I do not believe that percentage programming requirements serve the public interest. During the 1970s, the Commission adopted program percentage guidelines for processing and approving uncontested license renewals. See Amendments to Delegations of Authority, 43 FCC 2d 638 (1973); Amendments to Delegations of Authority, 59 FCC 2d 491 (1976). In 1981, we eliminated the percentage programming obligations for radio and in 1984 we eliminated the percentage programming requirements for television. See Report and Order in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984) recon. denied, 104 FCC 2d 358 (1986) remanded on other grounds sub nom., Action for Children's Television v. FCC, No. 86-1425 (D.C. Cir. June 26, 1987) ["Television Deregulation"]; Report and Order in BC Docket No. 79-219, 84 FCC 2d 968, 977 (1981), recon. denied, 87 FCC 2d 797 (1981), rev'd on other grounds sub nom., Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) ["Radio Deregulation"].

As the Commission has noted in these proceedings, our traditional policy objectives with respect to programming have never been fulfilled by presentation of mere quantities of specific programming. The Commission and the Courts have both recognized that quantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee's programming. Moreover, programming percentage requirements do not ensure that programming will be presented during times when there is a substantial audience. For example, a five minute informational program presented during prime time will reach more people than a half-hour program put on during fringe periods. A licensee should be given the flexibility to develop both the type of programming and the amount of programming that it believes will meet the needs of its community.

The record in both our Radio and Television Deregulation Orders demonstrated that licensees were performing at levels far above the minimum guidelines previously established. In addition, in 1977, we determined that specific program percentages were not appropriate for defining the term "meritorious" in the context of comparative renewal proceedings. See Report and Order in Docket No. 19154, 66 FCC 2d 419 (1977) aff'd sub nom., National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978). In sum, I see no compelling reason to return to this form of regulation.

Q2. Commissioner Quello, many opponents of this legislation oppose the requirement that TV stations demonstrate that they have provided meritorious programming directed towards children. Do you believe that TV programming directed towards children should be subject to different standards than programming directed towards adults?

A2. Since 1974, the Commission has focused its regulatory regime on needs of the child audience. See Children's Television Report, 50 FCC 2d 1 (1974). Our most recent statement was in 1984, in which the Commission held that "licensees are under a continuing duty to examine the program needs of the child part of the audience." Children's Television Programming and Advertising Practices, 96 FCC 2d 634 (1984) aff'd sub nom., Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985).

In addition to the obligation to meet the needs and interests of the child audience, licensees are under additional requirements regarding children's advertising. Specifically, licensees are under strict requirements to maintain adequate separations between program content and commercial messages. The rules currently require licensees to refrain from any host selling or interweaving commercial messages into program content. At one time, the Commission also had time limits on the amount of commercial messages that could appear during children's programming. This requirement was eliminated by the

Commission in 1984 as part of the Commission's Television Deregulation proceeding. Recently, the Court of Apeals remanded that part of our decision requesting further explanation. See Action for Children's Television v. FCC, No. 86-1425 (D.C. Cir. June 26, 1987). We are currently reviewing the Court's decision.

The proposed legislation in question employs the term "meritorious programming" in defining the children's program obligation. It is unclear, however, what the term "meritorious" means. As I have stated in my testimony before the Subcommittee, the term "meritorious" is extremely difficult to define. The word means different things to different people. I do not believe the term "meritorious" is either necessary or appropriate in defining a licensee's obligation towards its child audience. Our current programming obligations are sufficient to meet the needs of the child audience without unnecessarily infringing on the editorial discretion of broadcasters.

Whether TV programming directed towards children should be subject to different standards is a difficult question. I think it is important that we look at each specific regulation to see whether or not it in fact accomplishes its objective and meets the needs of the child audience. For example, I believe it is entirely appropriate for the Commission to channel programming,

which it finds to be indecent, to time periods where children are not present in the audience. See Public Notice, FCC 87-153, April 29, 1987. With respect to advertising, the Commission's current regulations prohibiting host-selling and interweaving of commercial messages also appear to be appropriate. As a general matter, I do believe that children constitute a special part of the licensee's audience and those needs should be met through programming.

TRAFFICKING

Q3. Many of the opponents of the anti-trafficking rule contend that the industry is in the midst of a transitional period due to changes in the industry and reinstatement of the rule at this stage would be premature. How would you respond to that argument?

A3. As I stated in my testimony before the Subcommittee, there are numerous factors which lead to the rapid turnover in broadcasting in recent years. However, I do not believe that the rapid resale of broadcast facilities is a transitory phenomenon. Since 1983, there has been a steady increase in the number of stations sold that were held less than three years. Mass Media Bureau's analysis of television station sales reveals that in 1983, 5.1% of television stations sold were held less than three years. This number increased to 28.1% in 1984,

and 31.6% in 1985. In 1986, the amount of television stations sold that were held less than three years reached an astounding 52.1%. Data from Paul Kagan Associates corroborates this increase in short-term sales.

There is every reason to believe that short term station trading will continue. Station flipping has become a legitimate and, according to available data, increasingly popular investment strategy in the broadcast industry. The ability to sell off corporate assets is an integral part of the merger and acquisition process. In other words, broadcast stations must be sold in order to help finance large media mergers. In an otherwise healthy economy, rapid station trading will continue.

Assuming, arguendo, that the overall rate-of-station trading will level off, a more fundamental question must be addressed. Without the three-year rule, there is no assurance that future economic circumstances, or changes in our regulatory structure, will not converge to kindle the fires of acquisition and rapid station trading. Sound public policy dictates that the Commission adopt a transfer policy that promotes stability in long term planning in the industry. The peaks and valleys of the business cycle offer no such assurance. Therefore, I do not believe that reinstitution of the anti-trafficking rule would be premature at this time. When the Commission first adopted its anti-trafficking rules, 53% of the stations sold were held less than three years. Given the figures presented above,

it appears we have come full circle. The policy concerns that moved the Commission to act in 1962 apply with equal force today.

Q4. In view of the heavy debt that many station owners have incurred in order to acquire properties, if reinstatement of the trafficking rule depresses station prices, could the rule have an adverse impact on station operations?

A4. It is not entirely clear that reinstatement of the anti-trafficking rule will, in fact, depress the station prices. I am not aware of any hard econometric data that leads to the conclusion that station prices would be dramatically depressed with the reimposition of the three-year holding rule. Moreover, I do not believe the rule would have an adverse impact on the day-to-day operation of a station. Depressed station prices would come into play at the time the licensee attempts to sell the station. Reimposition of the three-year rule should have no effect on the day-to-day cash flow prospects of a broadcast facility.

Assuming, arguendo, that the three-year rule does depress station prices, there may be a potential for adverse impact in situations where there has been a heavy leveraged buyout. In these situations, the new owner may need to sell several broadcast facilities in order to meet financial commitments

of the takeover or merger. For transactions that have already taken place, one would assume that the spin-off transfers necessary to effectuate the merger have been already consummated. Obviously, if legislation were enacted, it would be applied prospectively. Mergers and acquisitions taking place during the transition period could be examined on the case-by-case basis to see whether or not a waiver of the three-year rule would be appropriate. The Commission has traditionally granted waivers of the three-year rule in cases involving economic hardship.

Q5. Commissioner Quello, in your testimony you indicated that it may be time for the Commission to reconsider its decision to eliminate the requirement that applicants submit evidence of their financial qualifications. Do you believe that this requirement should be reimposed on all applicants for authorization to operate broadcast stations?

A5. For the past five years, the Commission has required broadcasters to certify that they have the necessary financial qualifications to operate a broadcast station. Unfortunately, some applicants for broadcast construction permits certify that they have the requisite financial qualifications without any basis or justification. False certifications have created problems for the Commission by wasting resources and delaying service to the public. On March 19, 1987, the Commission

issued a Public Notice (FCC No. 87-97) informing all applicants that the Commission would randomly audit the financial qualifications of applicants for broadcast construction permits. This policy was adopted to deter applicants from misrepresenting their financial qualifications and abusing the Commission's process. If the audit detects that an applicant has falsely certified its financial abilities, it may be designated for a hearing on the issue of misrepresentation.

Ultimately, I believe the requirement may have to be reimposed on all applicants for construction permits. While the industry is generally in good health, the Commission should take steps to ensure that service to the public is provided on an expeditious basis. One means of accomplishing this task is to make sure that applicants have the financial backing to build a station before we grant a construction permit. Such a requirement will reduce the need for endless extensions of time to build the facilities. If our new audit procedures prove to be ineffective, I believe we should adopt a requirement that applicants submit evidence of their financial qualifications.

MINORITY AND FEMALE PREFERENCES

Q6. Mr. Quello, do you believe that the minority and female policies have succeeded in increasing the number of stations owned by minorities? Do you believe that the policies should be continued?

A6. Generally I believe that our minority and female ownership policies have contributed towards increasing the number of stations that are owned by minorities and women. Because the Commission currently has a pending Notice of Inquiry on this very issue, I do not believe it would be appropriate for me to give conclusory statements at this time. See In re Reexamination of Minority Ownership Policies, 1 FCC Rcd. 1315 (1986) as amended, 2 FCC Rcd 2377 (1987). I would also note that other factors such as broadcast experience, civic leadership, diversity, integration of ownership into management also serve as important factors in determining qualified broadcast ownership. However, I have gone on record stating that those seeking to eliminate our minority and female preference policies have a heavy burden to prove that the policies do not serve the public interest.

Exchange of broadcast stations (UHF/VHF swaps).

Section 501 of S.1277 would prohibit noncommercial VHF facilities from "swapping" channels with commercial UHF facilities. I wish to go on record stating that I agree with the proposed legislation. As a general matter, I do not believe it is in public television's best interests to allow noncommercial VHF stations to swap their facilities with commercial UHF stations. I therefore support the proposed legislation.