

Remarks by
Commissioner James H. Quello
Before the
Colorado Broadcasters Association
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FCC ISSUES: 24 HOUR BAN ON INDECENCY; FOX - A POTENTIAL
4TH NETWORK; FINSYN, AND CABLE RE-REG

I am particularly pleased to be here with you in this rarefied atmosphere of Vail When you are from Washington, you are glad to be anywhere, particularly when you can go to a place that doesn't have more lawyers than waiters. Today I'm enjoying good company, fresh air and welcome relief from shoot-outs both in the halls of Congress and on the city streets.

I'm also delighted to be here for less facetious reasons. It is my very first official appearance in Vail before the Colorado Broadcasters Association. I feel at home with this broadcaster audience. I don't have to search for a mutuality of interest for my opening remarks. Broadcasting was my primary lifetime career and I have an inherent interest in its continuing vitality and growth. As a former president and eleven-year legislative chairman of the Michigan Association of Broadcasters,

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I can easily relate to your regular management problems as well as to your goals and priorities in program service, civic integration and government relations. Also broadcasting and broadcasting-related associations have been particularly kind to me the past two years with several prestigious "pre-posthumous" awards. You see I have a personal reason for that terminology.

This past April I reached another significant or unmentionable chronological milestone in my life! I scowled in a mirror and whispered "You old fossil -- you are over 75 years old and probably in the dawn of your senility but as long as you have 70% of your marbles (a good Washington norm), I'll let you hang in there." Actually, I feel too young to be that old! Someone recently asked me "What kind of a year did you have, Jim?" I said "Great! I was here when it started and I was still here when it ended." But there could be some advantage to age when going through the inquisitional kind of confirmation hearings they have on capitol hill these days -- with the involuntary celibacy of the golden years, I could say with conviction: "No, I'm not a womanizer -- at my age, I'm now a fantasizer."

I really don't worry about age because I am comforted by my delusions of adequacy. Also, I'm guided somewhat by the late Malcolm Forbes' saying "You are never too old until you admit it or are no longer around to deny it."

On another personal note, I've been lucky in getting 52 annual marriage license renewals without any petitions to deny. Mary claims she never considered divorce -- murder several times, but divorce never. Our longevity is a testimonial to the value of a woman's sense of humor. Besides, she was always willing to let me have her way. And when she wants my opinion, she gives it to me. Let the record show, I'm for marriage. If it weren't for marriage, many men might go through life thinking they had no faults at all. Also, I know the secret of a successful marriage, I'll share it with you men -- when you are wrong, admit it. When you are right, keep quiet!

On a more temperate note, I want to share with this audience my favorite classic quote on the positive aspect of aging. It is by that great German philosopher Goethe who said "It is only necessary to grow old to become more charitable and even indulgent. I see no fault committed by others that I have not committed myself." I try to keep that saying in mind before passing personal judgments on others.

Well, enough about "This is My Life" and personal judgments. The FCC this year faces critical public interest judgments on major issues affecting the future development of telecommunications in America. There are too many complex issues to include in any one speech so I have selected a few current, much publicized subjects for discussion.

Also at these conventions, I get the opportunity to informally exchange viewpoints on a number of other FCC issues.

The American viewing public today is enjoying the initial programs of an incipient 4th TV network thanks to an FCC decision last May. That decision approved a limited waiver of our financial interest and syndication rules for the Fox Broadcasting Company, allowing Fox to provide up to 18-1/2 hours per week of programming to its affiliates. The waiver is limited to a period of one year, or until we change our rules, whichever comes first. I believe the FCC decision represented an earnest statesmanlike compromise. It served the public interest by encouraging development of a competitive 4th national network that FCC studies the past 20 years have determined to be in the public interest. It strengthens 112 mostly under-privileged UHF stations that are part of the 129-station Fox network, in keeping with a long established FCC policy of encouraging UHF development. It provides for additional children's TV programming -- Fox proposed 5-1/2 hours of children's programming for fall 1990 as part of its 18-1/2 hours of total network programming. It also encourages competitive network coverage of national news events as live news events of national importance will not count against the 18-1/2 hour program limitation.

Next May, Fox will be subject to whatever regulatory Finsyn regime that may be adopted. Currently Fox is only programming 9 hours per week. As of November 1989, ABC provided 83 hours of network programming, CBS 115.5 hours and NBC 100 hours. At this time it seems more appropriate to characterize Fox as a one fourth (1/4) network rather than the fourth network.

The FCC emphasized that its grant of a limited, temporary waiver of the financial interest-syndication restrictions and of the prime time access rules does not affect or does not foreshadow the outcome of the pending finsyn proceeding which will probably be decided in the late fall.

Financial interest-syndication, is a complex issue for the FCC to resolve because the negotiations between the networks and Hollywood studios have failed. I have facetiously stated it is now up to the FCC to craft a solution equally unfair to both sides. Some time ago, I characterized it as a battle of the wealthy vs. the very rich. Six years ago, Finsyn was the most intensely lobbied subject in all my FCC experience. Hollywood unleashed a parade of stars to lobby their cause -- Cosby, Alan Alda, Charles Heston, Jean Stapleton, Kirk Douglas, Norman Lear, etc. I opened my meetings with Bill Cosby and Alan Alda by thoughtfully presenting them with my personal autograph, etc.

Conditions have changed since 1983 and very dramatically from 1970 when the network antitrust consent decrees were first promulgated. Network dominance and audience have diminished. (Explain it is a matter of degree, etc.)

Cable and telco-cable proposals are contentious, complex issues with major ramifications for the TV consumer and for the future evolution of telecommunications in America. The cable-broadcast controversy is either further complicated or mitigated by media companies that have substantial ownership in both broadcasting and cable. The companies read like a media Who's Who: Cox Enterprises, Chronicle publishing, Heritage Media, King Broadcasting, Landmark Communications, Media General, Multimedia, Inc., Providence Journal Co., E. W. Scripps Co., Times Mirror Co., Viacom International and the Washington Post.

Cable legislation and regulation is further impacted by comprehensive Senate and House drafts of a cable re-regulation bill. Also, the FCC is addressing major cable issues with a report to Congress promised by July 30th.

The major ongoing FCC issues are (1) an omnibus cable inquiry, (2) reconsideration of effective competition standards, and (3) telco-cable entry recommendation to Congress.

The Commission adopted a comprehensive Notice of Inquiry last December 12th seeking comments on the contentious items of cable rates, exclusive franchising, ownership concentration and possible vertical and horizontal integration limitation. This will culminate with the Commission's Report to Congress July 30, 1990. I'm not at liberty to reveal our recommendations to Congress. In fact, they have not been approved yet by the full Commission.

Two other major cable issues were not included in the omnibus inquiry. The Commission's policy triggering cable rate regulation -- the effective competition standard -- was the subject of an FCC Notice of Proposed Rulemaking issued last January. The other issue, the all important, controversial NPRM recommending that Congress eliminate the existing telco-cable cross ownership restrictions, was issued in the spring of 1989. The comments from all parties have been received and are being carefully analyzed by the Mass Media staff. This is a pending rulemaking that could probably be completed later this fall depending upon current congressional action. I issued a statement shortly after the initial NPRM vote placing a heavy burden of proof on telephone companies. The principal thrust of my statement was that there are many complex problems to resolve and regulatory safeguards to enact before telephone companies should be authorized to provide full program services with their monopoly telephone lines.

I repeat what I first stated four years ago -- both the technological potential and problems are mind-boggling for telco entry into cable. Congress and the FCC must carefully analyze the problems and critical ramifications before any FCC recommendations or final congressional action.

Now, as I said before, the three cable television proceedings are quite contentious. The Commission has been flooded by many thousands of pages of comments and reply comments from all the interested parties. I think if you laid all the comments end to end they might stretch from Washington to Colorado . . . but they still wouldn't reach a conclusion. It's up to us at the FCC to try and make sense of it all.

In my opinion the crucial public interest issue is whether cable re-regulation or telco entry will be a threat or a boon to preserving free local television for all the public. The ultimate installation of fiber optics into the home that would enable nationwide telco entry into cable is probably 10 years or more away. Yet the recommendations of the Commission in late July 1990 and actions by Congress in late 1990, or more likely in 1991, will be most significant in setting the course for future telecommunications evolution in America.

Cable, damned by customers, broadcasters, press and some government officials as the telecommunications monopoly "evil empire" is actually benefiting from a much needed infusion of glasnost and perestroika.

Problems still exist but have been somewhat mitigated by openness (glasnost) in dealing with must carry and channel repositioning and restructuring (perestroika) of rates and services. It also seems apparent that large dominant MSOs are ready to consider reasonable government limits on vertical and horizontal integration to avoid possible antitrust implications and charges of abuse of power.

The cable industry is facing up to the fact that a multi-channel sole-source provider of telecommunications services constitutes a monopoly that must face competition or regulation.

Many of cable's problems were self-inflicted by a few over-aggressive or greedy operators and are now in the process of being resolved by self correction or by legislation. Cable problems also were aggravated by inadvertent marketplace structural inequities generated by regulatory, judicial and legislative actions. For example, I believe the FCC contributed to the problems by miscalculation of the effects of our faulty definition of effective competition as three local TV stations and by our defective legal arguments on must carry.

It is also apparent that the 1984 Cable Act (that I strongly endorsed) is overdue for a legislative overhaul. It was enacted with must carry and channel positioning securely in place and before cable started to aggressively sell TV advertising in competition with local stations.

In my opinion, it was never envisioned by government officials that free over-the-air broadcasting would be placed in a position of subsidizing with all their own programming a monopoly cable transmission pipeline aggressively selling advertising against them. The local stations that include network affiliates and the most popular independent stations, provide the largest portion of cable's overall audience. In a sense, requiring cable to carry the largest, most popular local stations is merely serving a primary economic interest of the cable companies whose subscribers tune to local stations more than any of their cable-only services.

The Senate and House draft bills were conceived as a way of correcting undue escalation of rates to consumers and re-establishing equity in the broadcast marketplace. It is only an even money bet on whether or not a bill will be finalized this busy election year. Also the FCC cable report to Congress July 30th could affect the final legislation.

Another pending proceeding involves our inquiry into the rules governing the "effective competition" standard that triggers cable rate regulation. If, after reviewing the record, the Commission changes the effective competition standard, more cable systems would be subject to regulation. It would then be the challenging task of the FCC to provide a free enterprise rate guideline for local communities that would prevent undue escalation of rates, but still provide cable systems with reasonable incentives for growth, development and profit. It is highly unlikely that this free enterprise oriented FCC would impose unduly restrictive rates that would undermine the economic viability of a cable company or cause a lowering of the equity values. I read in Broadcasting magazine and in responsible financial publications that the threat of telephone entry into cable has depressed the value of cable stocks. The logic escapes me how the unlikely telephone entry into cable programming could depress cable stocks-at this time. First, legislation doesn't seem imminent to allow full phone entry into cable programming. Three powerful industries -- broadcasting, newspapers and cable vigorously oppose phone company entry into cable. If ever approved, it would take an estimated ten years to implement fiber optics into the home. If eventually the restrictions on telephone companies are completely lifted, I don't expect cable or broadcasting companies to hoist a financial white flag rather than battle the phone companies for business.

Cable and broadcasting would have a vast practical advantage in TV marketing know-how and in programming contracts and development. Then too, I believe broadcasting and cable will be able to not only survive, but to thrive, in a competitive environment.

I have stated on several occasions that I, personally, am a satisfied cable subscriber. My rates have increased, but I feel I'm getting full value. I must confess, however, that I have received dozens of intelligently written letters from outraged cable subscribers in one small suburban county of Michigan. The local paper had suggested they write to the Michigan FCC Commissioner. I then realized if I were a senator faced with similar complaint letters from 10 to 40 counties, I would certainly register concern and probably institute corrective action.

I like cable. I particularly like the additional service provided by CNN, TNT, ESPN, A and E and the Discovery channel. I once said I liked it -- I won't stay home without it. But I don't like it to the extent that I'll eventually have to pay cable to see regularly scheduled major sports or pay a premium for all major play offs such as the World Series or Superbowl.

I'm also concerned with the possible disenfranchisement of the poor and disadvantaged from TV service. I do believe that universal free TV service must be available to all Americans not only those with the ability or inclination to pay.

The problem of reasonable rates and marketplace equity is on the way to being resolved through well considered proposals and cable's new found reasonable compromise positions on carriage and channel positioning.

Cable and broadcasting have presented the American public with the most comprehensive and best telecommunications service in the world. I don't think public interest is served by making them any less than they are. Congress in its wisdom is taking progressive steps to preserve their service by assuring an equitable broadcasting marketplace that best serves all American consumers.

In my opinion the crucial public interest issue is whether cable re-regulation or telco entry will be a threat or a boon to preserving free local television service for all the public. The recommendations of the Commission on July 30, 1990 and actions by Congress in late 1990, or more likely in 1991, will be most significant in setting the course for future telecommunications evolution in America.

A week ago Thursday, the FCC adopted a report concluding that the statutory prohibition of broadcast indecency on a 24-hour-a-day basis is enforceable by the Commission. This action responds to a remand of the record by the U.S. Court of Appeals for the District of Columbia Circuit in a case in which this prohibition has been challenged. The FCC in fact was implementing the will of Congress as directed in the Commission's 1989 appropriations authority.

Congress' primary purpose when mandating the 24-hour prohibition in 1988 was to protect children from exposure to indecent material. The Commission promulgated regulations implementing the statutory requirement but, when challenged, the U.S. Court of Appeals for the D.C. Circuit stayed their implementation pending judicial review.

In the report adopted a week ago, the FCC concluded that the prohibition of indecent broadcasts comports with the First Amendment as analyzed using the Supreme Court's "compelling interest/narrowly tailored" test. This report will be conveyed to the U.S. Court of Appeals for the D.C. Circuit, which is expected to schedule further proceedings in the case at issue, Action for Children's Television v. FCC, D.C. Cir. No. 88-1916.

The report focuses on whether the prohibition, under applicable constitutional standards, is a sufficiently narrow

means of preventing access to indecent broadcasts by children. Based upon data collected in the Commission's proceeding, the Commission found that children are in the broadcast audience for both radio and television at all times of day and night, and that alternatives such as time channeling and technological restrictions are insufficient to protect them from exposure to harmful indecent programming.

The FCC also concluded that: (1) "children" are appropriately defined as minors 17 and under; (2) the Commission's definition of indecency has been upheld by the courts and will not be changed; and (3) adults have alternative sources of indecent materials. For purposes of broadcasting, the Commission has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

To ensure consistency with constitutional requirements as expressed by the Supreme Court in its recent decision in Sable Communications of California, Inc. v. FCC, the Commission described a modified enforcement policy. Stations will be permitted to demonstrate that children in fact are not present in the broadcast audience for the market at the time the programming at issue was aired.

FCC and Congressional action to curb broadcast indecency was in response to a growing public outcry for corrective action. We have received thousands of complaints. The FCC and congressional actions strive to encourage constructive social values and protect children from indecent material on the most accessible and pervasive of all media -- TV and radio.

I concurred in the item because I believe protecting children is an important aspect of the public interest and because Congress has clearly stated that a 24 hour ban is needed to serve that interest.

In my concurring statement I emphasized this report should not be taken as an attack on the broadcast industry in general. The vast majority of broadcasters are very responsible. In those few instances when a licensee goes too far, I have always been in favor of enforcing the law.

However, I think the FCC should recognize and support broadcasters' efforts at self regulation. Last month the NAB issued an excellent Statement of Principles for broadcasting. Such efforts could be even more effective if the industry receives an antitrust exemption for such a broadcasting code, and I support legislative measures, like Senator Simon's bill, to enact one.

I just don't want the Commission to lose sight of the responsible efforts being made by a great majority of broadcasters.

There are many other major issues before the FCC -- further license renewal and challenge reforms, AM radio improvement, obscenity/indecency enforcement, spectrum allocations, along with the regular complaints, applications and enforcement actions. It's a fascinating daily agenda -- Busy enough so that I don't have time to gracefully grow old. In fact, I've been celebrating my 69th birthday for 7 years!

So, I'll pause on that happy note and add a final closing thought. I've said it before and I think it is worth repeating -- at my age, an active tennis playing senior citizen, all I want is what all of you want -- a decent effective government in a strong progressive America.