Response to Pre-Hearing Questions from the Majority

by Commissioner James H. Quello

Confirmation Hearing, June 13, 1991, 9:00 AM

253 Russell Senate Office Building

General

Q-1. What should be the Commission's priorities for the next 5 years?

A-1. I believe the Commission's highest priority in the next five years will be the orderly, compatible implementation of the advanced technological services of telecomputing, fiber optic, DBS, DAB, HDTV, cellular and personal phone services. Advanced technology often outstrips society's ability to integrate it into our already complex, sometimes expensive communications systems. The rate and extent of technological development will be impacted by consumer acceptance and affordability, commercial practicalities, legislative and regulatory actions and by the service's beneficial contribution to total public interest.

I believe preservation and enhancement of the all-important free universal over-the-air broadcast service will continue to be the mainspring of American mass communications for at least the next five years. In their deliberations, commissioners should apply the simple principle of the best service to the most people at the most reasonable, practical cost.

Q-2. What Commission decisions over the past 5 years do you believe have the greatest impact, positive and negative on the communications industry?

A-2. **Greatest Positive Impact:** Practical management of AT&T divestiture; Initiation of Price caps for both AT&T and the BOCs; Reaffirmation of the public interest standard by this Commission; Implementation of the TCAF (Temporary Commission on Alternative Financing for Public Telecommunications) Committee recommendations for enhanced underwriting for public TV and radio; Development and management of advanced technology of DAB, DBS, HDTV, fiber optics and telecomputing; Deregulation of cable and broadcasting with substantial reduction in paperwork and reporting requirements; Initiation of the 4th network (Fox); Enforcement of obscenity-indecency laws; Court validation of FCC minority preference policy.

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I believe we have made notable progress in industry and government working together in a constructive spirit of mutual cooperation. In this spirit, we assure that Americans continue to be the best informed, most gainfully employed and best served people in the world.

Negative Impact: Excessive deregulation resulting in a merger mania of takeovers of broadcast properties; Faulty FCC rationale that resulted in court finding that FCC was not able to demonstrate a compelling government interest for must carry (Must carry was not found to be unconstitutional per se.); Three station effective competition rule exempting cable from local rate regulations; The recent FCC Financial Interest-Syndication (Finsyn) decision to which I dissented; RKO decision -- in my view a prime example of gross bureaucratic overkill resulting in an unprecedented loss of an estimated $1.2 billion in TV and radio properties.

Q-3. Some commenters believe that the FCC should be given the authority to auction the rights to use certain portions of the radiofrequency band. Do you believe that Congress should give the FCC this authority?

A-3. I think we should keep an open mind about the concept of spectrum auctions, but should move cautiously in this area. As currently proposed, spectrum auctions would be limited to services such as cellular telephone and personal communications services and specifically would not convey ownership rights to the spectrum. I think Congress and the Commission should exercise great care before adopting spectrum auctions or before extending the concept to mass media services. In the event that Congress is successful in reallocating spectrum from NTIA to the FCC, the Commission might be given temporary authority on a limited amount of spectrum (10 MHz) to conduct auction "experiments" to determine the positive and negative aspects of auctions. The results of such experiments should be reported to Congress and a complete examination of the auction concept can be made.

Q-4. The FCC has recently proposed to open up new channels of the radio spectrum for new technologies. How will the FCC handle complaints by current users of that spectrum that they cannot afford to move to a new frequency?

A-4. I believe this question refers to the initiative that Chairman Sikes announced regarding establishing a spectrum reserve. First let me state that this is in the early stages of study. This study does not necessarily mean that all licensees within certain bands (1800-2300 MHz bands) will have to move.

Spectrum reserves can be developed by spectrum overlay technologies such as spread spectrum. Experiments are currently being conducted to determine if this technology can operate without causing interference to existing users. Additionally, spectrum can be used more efficiently in many services. The Commission will be voting at the June 13, 1991 meeting on an inquiry that proposes more efficient use of spectrum below 470 MHz. Industry migration to new technologies such as fiber may also free previously used spectrum. Finally, it may be necessary to reaccommodate licensees to other bands. The Commission has done this in the past. In the allocation of spectrum for the Direct Broadcast Satellite service the Commission allowed ample time for existing users of the 12 GHz band to migrate to other bands. The Commission discussed but did not impose compensation for the relocation. Multi-channel Multi-point Distribution Services (MMDS) can use ITFS channels and any use that results in change of technology can be paid for by the MMDS licensee. In the event the Commission does require the relocation of existing licensees to other bands, it could require that the new users of the band pay for relocation. Additionally, the Commission could allow sufficient time to assure the existing licensees' equipment has been amortized.

Mass Media

Q-5. The FCC recently issued a proposal to consider relaxing some of the cross-ownership and multiple ownership rules as they apply to radio.

Q-5a. Why is the FCC considering this proposal?

A-5a. Radio broadcast markets have changed considerably over the past decade. Currently, there are over 175 AM radio stations that have gone dark and this number is increasing, while only 17 FM are currently dark. The Commission is examining other issues that may help AM radio, such as the proceeding focusing on technical improvements to the AM band. Examining some of the Commission's ownership rules may result in actions that could provide economic relief for AM broadcasting.

Q-5b. Does the FCC know how many companies or individuals own 12 AM, 12 FM, or 12 television stations?

A-5b. It appears that only a very few owners have reached the limit. For example, CBS and Nationwide each owns 12 FM stations. Silver King Broadcasting and Trinity Broadcasting Network, Inc. each own 12 television stations.

Q-5c. It is my understanding that only a few companies are at the 12-12-12 limit. If that is the case, why is there any need to relax the rules?

A-5c. First, I am not sure we will be relaxing the rules. Broadcasters may be inclined to acquire stations in their own market allowing for economies of scale in the operation of the stations. This alone may provide incentives for licensees to acquire additional stations and we may see an increase in the number of licensees that will be at the 12-12 limit with respect to radio ownership. Nonetheless, as I mentioned in my separate statement issued with this Notice, I have to be convinced that the public interest will benefit from such rule changes. (See Separate Statement of Commissioner Quello, Notice of Proposed Rule Making on the Revision of Radio Rules and Policies.) It is not AM station viability alone that is at issue, other public interest factors also must be considered.

Q-5d. A number of parties, including the National Association of Black Owned Broadcasters, are concerned that lifting these restrictions will reduce the diversity of voices available in the marketplace. Are you concerned about broadcast diversity?

A-5d. Yes. On the FCC's recent Notice of Proposed Rule Making on revision of radio rules and policies, I raised this very issue in my separate statement. (Ibid.) As I mentioned in response to the previous question, I expect the Comments filed in response to this Notice to examine public interest issues, not just economic survivability. In my separate statement, I said "...the Commission must be careful not to place disproportionate emphases on competition at the expense of public interest, localism, diversity and minority ownership."

Q-5e. Have any minorities benefited from the policy that permits ownership of 14 stations, if two of those stations are controlled by minorities?

A-5e. Based on information supplied by the Mass Media Bureau, it appears that the policy has resulted in ownership opportunities for minorities as a result of transactions involving Trinity Broadcasting Network and Silver King Broadcasting.

Q-5f. The FCC's duopoly rules prohibit the ownership of two FM stations in the same market. Do the FCC's rules prohibit one station from purchasing "brokered" time on another station in the same market?

A-5f. The Commission's rules allow "brokering" arrangements. However, the FCC's rules are explicit about the licensee in a brokering arrangement maintaining control of and responsibility for his station. The issue of "brokering" is receiving increasing attention. Again, I have expressed concern about the

potentially detrimental effects of time brokering on stations within the "brokered" market. (Ibid.) The Commission must examine this issue to determine what is actually taking place under these "brokering" arrangements.

Q-6. Regarding the FCC's Order implementing the Children's Television Act of 1990: Could you explain to me what would constitute a program length commercial under the new rules?

A-6. Under our rules regarding children's programming, the Commission defined a "program-length commercial" as a program associated with a product in which commercials for that product are aired. Although some parties to our recent rulemaking proceeding wanted to include within the definition programs in which the characters originated (within a specified time frame) as toys or games, we found that this created too much of a limit on children's programming. In short, we agreed with certain parties, such as Disney and the Children's Television Workshop, that limiting the introduction of program-related products would inhibit the dissemination of books, magazines, games and computer software that enhance the educational benefits of children's shows. Such a limit also would have restricted the development of new programs. Consequently, we fashioned our definition of program length commercials to prevent the intermixture of commercial content with related programming so as to create a workable and effective standard to protect children.

Q-7a. The HDTV Testing Committee is about to begin testing of several HDTV standards. There has recently been a delay in the testing as many of the proposals have switched to a digital system. Are you satisfied with the testing schedule?

A-7a. Yes, I am satisfied with the testing schedule. Certainly, I would have preferred that testing would have begun sooner. I believe that efforts to develop a digital terrestrial HDTV system will move the U.S. ahead of other nations in the development of HDTV. I hope that the research and development going into a digital terrestrial HDTV system will revitalize the U.S. electronics industry.

Q-7b. How far behind Japan and Europe is the U.S. with regard to HDTV?

A-7b. Japan is ahead of the United States in the development of satellite delivered HDTV; however, the U.S. has determined that HDTV will be delivered by terrestrial means. It's believed the U.S. is ahead of not only Japan, but also other nations in the development of terrestrial digital HDTV.

Q-8a. Under the Cable Act of 1984, the FCC can define effective competition; however, that only determines under what circumstances the local franchising authorities can regulate the basic tier of service. Neither the FCC nor the local franchising authorities can control what that basic tier contains, is that correct?

A-8a. The Cable Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals." The Court of Appeals has limited the Commission's authority to deviate from this statutory definition and has found that "[u]nder the Cable Act, cable operators generally have the freedom to structure their service tiers in whatever way they wish." ACLU v. FCC, 823 F.2d 1554, 1570 (D.C. Cir. 1987). Thus, to the extent more than one tier may include retransmission of local broadcast signals, a local authority may be empowered to regulate the rates of multiple tiers. But an operator has the discretion to group all local broadcast signals on the lowest tier -- or to exclude them entirely -- and to move all other signals to unregulated tiers.

Q-8b. Does the FCC have the authority to take steps to foster competition to the cable industry?

A-8b. The Commission may be able to foster competition with cable television by adopting a new must carry rule as part of the effective competition standard. In addition, the Commission has acted to encourage MMDS and other multi-channel technologies as potential competitors to cable. The Commission also has encouraged experimentation in providing video services by fiber optic delivery, but final resolution of the cable-telco issue is a matter for Congress to decide.

Q-9. The newspaper-broadcast cross-ownership rules prohibit the ownership of a newspaper and a broadcast station in the same market. If the owner of a daily newspaper were to acquire a broadcast station in the same market, the newspaper would first have to receive FCC approval of the acquisition. The FCC would only grant the application on the condition that the applicant divest its ownership of the newspaper within a reasonable period, is that correct?

If, on the other hand, the owner of a broadcast station were to acquire a newspaper, would the broadcast licensee have to seek the FCC's approval prior to the acquisition?

A-9. If a newspaper applied to acquire a broadcast station in the same market, the application would only be granted on the condition that the newspaper be divested within a reasonable period. See e.g., Metromedia Radio & Television, Inc., 102 FCC 2d 1334, 1353 (1985), aff'd Health & Medicine Policy Research

Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986). With respect to the acquisition of a newspaper by a broadcast station, the Commission has stated:

> "...if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by the time of its next renewal date, whichever is longer. If the newspaper is purchased less than a year from the expiration of the license, the renewal application may be filed, but it will be deferred pending sale of the station, if necessary, until the year has expired."
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> Second Report and Order in Docket 18110, 50 FCC 2d 1046, n. 25 (1975).

Common Carrier

Q-10. The FCC is currently considering several proceedings that could significantly alter the regulation of the long distance telephone industry, such as the "dominance" proceeding, the "equal, per unit of traffic" waiver, the court remand of the Tariff 12 proceeding, and others. Some parties have raised concerns about the effect that these proposals could have on long distance rates in rural areas. What are your views as to the competitiveness of the long distance market? Do you believe that there is sufficient competition in the market to justify deregulating AT&T? Do you believe that any of these proposals could have a harmful effect on rural telephone rates?

A-10. I believe it's clear that some parts of the long distance market are fiercely competitive and the Commission is engaged in trying to identify those markets. We are not proposing to deregulate AT&T in even the competitive submarkets but we would like to remove the Commission from the competitive process to the extent feasible. By permitting AT&T greater flexibility in these hotly contested markets, it seems to me, we will be helping to forestall any incentives to deaverage rates because AT&T is often the only carrier serving some of the rural areas. The more profitable markets, not surprisingly, are the most contested.

Q-11. The cellular telephone industry has been growing quickly. Yet some analysts believe that there is insufficient competition in this market. Do you believe that the cellular telephone industry is currently competitive? What actions, if any, do you believe that the FCC or Congress should take to make the industry more competitive?

A-11. The explosive growth of the cellular industry has been responding to so much pent up demand that the providers haven't felt much need to compete on pricing. I believe that is about to change and that there will be more price competition in the near future even without further regulatory or legislative action. The Commission is actively exploring various personal communication (PCS) proposals with a view toward authorizing new services which will compete with cellular. The Commission has authorized approximately 60 PCS experiments.

Q-12. The FCC recently adopted a proposal to allow competing providers of local access services to interconnect with the local telephone companies' facilities. Some are concerned that this proposal could lead to greater competition for local services, which could result in more confusion and higher prices for residential customers. On the other hand, others believe that greater competition for local services is essential to technological progress. Do you believe that the FCC or Congress should promote competition for local telephone services?

A-12. I believe that competition for many local services can be beneficial provided that the Commission takes certain steps to ensure that the competition is fair. For example, local exchange carriers were required to price some of their services to subsidize other services. These subsidies must be identified and, if they are to be retained, should receive a contribution from all competitors. This will not be an easy task but it must be done if we are to continue to encourage competition with local exchange carriers. There may be separations implications and we, in cooperation with the states, will need to deal with those as well. I do not believe that local competition will be harmful to residential customers if we are careful in the manner in which it is introduced. On the contrary, competition should produce benefits for residential subscribers.

Q-13. Although the FCC has worked hard to issue hundreds of cellular licenses over the past few years, a significant number of such licenses have not yet been issued. What action, if any, do you believe the FCC should take to hasten its resolution of these other cellular licenses?

A-13. It's my understanding that about ninety percent of the cellular licenses have been granted. The remaining applications have some legal questions which must be resolved before they can be granted and the Common Carrier Bureau is working to resolve those in the near future. I'm told that the Commission will have the bulk of unresolved cases before us this summer. While I understand the desire to move expeditiously, we are required to decide these remaining cases according to the law which sometimes is time consuming.

Q-14. The FCC has continued to allow several of AT&T's Tariff 12 options to take effect despite a court decision that called into question the legality of these tariff offerings. Are you comfortable with the FCC's decisions to continue to allow these tariffs to take effect even though the FCC has not resolved the legal questions underlying these tariffs?

A-14. The court remanded a limited number of Tariff 12 options to the Commission for further proceedings. The court was concerned that the Commission had not adequately justified the acceptance of those options on the record. Last February, we issued a notice asking for comments to supplement the record and the staff is now reviewing those comments. We continue to examine all Tariff 12 offerings under the procedures established in our rules. Simply precluding all Tariff 12 offerings from taking effect, it seems to me, would cause unnecessary disruption of the market and deprive customers of an opportunity to negotiate for better rates and services.

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