Dissenting Statement of Commissioner James H. Quello
In re Applications of Harriscope of Chicago, Inc., MM Docket No. 83-575

Today's decision represents the triumph of the administrative process over reality.

In denying renewal to Video 44, licensee of WSNS, the Commission decides to ignore six years of exceptional broadcast service to the citizens of Chicago and relies instead on a prediction, based on a limited STV-format experiment, of what the licensee's behavior might have been during this period. Even without actual experience as a comparative benchmark, it is difficult to lend much credence to the Commission's forecast, grounded as it is on a decade-old record covering the station's operation under a different format. This decision violates FDR's admonition that administrative agencies should seek to promote "substantial justice" over "technical legalism." Indeed, this is technical legalism run amok, and I therefore dissent.[1]

The Court of Appeals remanded this case to us because it concluded that the Commission's renewal expectancy analysis was insufficiently precise to monitor Video 44's performance. *Monroe Communications Corp. v. FCC*, 900 F.2d 351, 355-56 (D.C. Cir. 1990). But the Court was not without reservations about the relevant administrative practice. As Judge Silberman noted in his concurring opinion:

> It appears to me that virtually *all* the factors upon which the FCC relies in awarding or renewing broadcast licenses are in a sense fictitious; they are not really predictive of programming substance. Nor is it apparent to me that it is possible to articulate a public interest in any particular kind of programming (such as 'nonentertainment'). When I sit down on these cases, therefore, I feel somewhat like Alice in Wonderland. We have no alternative as a reviewing court, however, but to treat the FCC's elaboration of the public interest as if it made sense and therefore to insist on a consistent application of what we may really think are fanciful factors.

Id. at 359 (Silberman, J., concurring) (emphasis in original). Although I would not go as far as Judge Silberman in criticizing our processes, I half expect to see a Cheshire Cat lurking around the corridors when I am called upon to ignore a broadcaster's record to the extent done here.

It must be kept in mind that the ultimate purpose behind our analysis of a broadcaster's record for purposes of the renewal expectancy is to assess that licensee's probable future performance. *Id.* at 353, 355-56; *Central Florida*

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[1] I concurred in the Commission's decision following the remand of this case, reasoning that "[o]nce we focus on [the latter] period in the license term, as the Court says we must, it is hard to justify a renewal expectancy." *Video 44*, 5 FCC Rcd. 6383, 6386 (1990) (concurring statement). However, the issue of reviewing Video 44's post-term performance was not before the Court, and we did not consider it until this reconsideration proceeding.

Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983) ("*Central Florida II*"); *Central Florida Enterprises v. FCC*, 598 F.2d 37, 55 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979) ("*Central Florida I*"); *In re Simon Geller*, 90 F.C.C.2d 250 (1982), *rev'd on other grounds sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984). Indeed, the very point of the remand in this proceeding was that the Commission did not derive the most accurate prediction possible. Thus, the Court faulted the Commission for not focusing on "the station's most recent performance [which is] most probative" particularly where the licensee "has instituted a dramatic and permanent format change." *Monroe Communications Corp.*, 900 F.2d at 355.

Of course, the most ironic feature of today's decision is that to reach our best estimate of Video's likely future behavior, the Commission must disregard "the station's most recent performance" as well as "a dramatic and permanent format change." In short, the Commission has seen the future and has chosen to ignore it.

Absent from the Commission's decision is any meaningful recognition that on July 1, 1985, WSNS became the first and only all-Spanish broadcasting station serving the Chicago area. Within a very brief time, the station began providing exemplary service to the Hispanic community. As the City Council of Chicago expressed it in a resolution adopted on November 7, 1990, "[o]nly weeks after becoming Chicago's first full time [Spanish-language] TV station, Channel 44 surprised the city with its brilliant handling of the relief efforts on behalf of the victims of the earthquake that destroyed Mexico City in September 1985." The resolution also noted that "Channel 44 has been the main means of mass communication involved with and devoted to the nonpartisan civic and political education of Hispanics in the City of Chicago" and concluded that WSNS "has distinguished itself in the public service of the Hispanic community and of all citizens of the city as Chicago's only full time Spanish television station."[2]

Since 1985, WSNS has aired prime time programs, public service announcements, and daily news directed toward educating the Hispanic community. It also has produced original weekly programs designed to inform the Hispanic community on issues such as education and school reform, immigration and naturalization, the 1990 Census, political coverage and voter registration, health issues and other matters of local concern. Between 18 and 20 percent of the station's airtime has been devoted to non-entertainment programming, including both general and specialized news and public affairs series.[3] Ninety-two percent of Hispanic

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[2]The Commission implies that Video 44 opportunistically switched to a Spanish language format because it faced the prospect of nonrenewal. *Memorandum Opinion and Order* ¶ 15. It does not attempt to explain, however, why the licensee would do so knowing that the Commission does not normally consider post-term behavior, nor does it account for the level of excellence attained on WSNS. It is undoubtedly no coincidence that every other STV operator in the United States also abandoned that format.

[3]*See Brief for Latino Committee on the Media as Amicus Curiae in Support of Video 44's Petition for Reconsideration* at 3-8.

households in Chicago tune into WSNS in a typical week, and the average Hispanic adult tunes into the station thirty hours per week.[4]

The outpouring of support from the community for renewal of Video 44 is even more impressive. *See United Broadcasting Company*, 100 F.C.C.2d 1574, 1581 (1985) (testimony of community witnesses shows station's responsiveness to community needs). The Coalition in Defense of Access to Channel 44 (a Chicago area organization comprised of 112 organizations or businesses and 31 individuals), the Telemundo Group, the Chicago Educational Television Association, the Latino Committee on the Media, the Governor and General Assembly of Illinois, the City of Chicago, the Archbishop of Chicago, Bishop Placido Rodriguez and the Consul General of Mexico in the City of Chicago have filed petitions supporting renewal of Video 44. In addition, petitions with more that 57,000 individual signatures have been submitted to the Commission.[5]

It should be obvious to the Commission that public preferences such as these have some bearing on the public interest. Yet if there is any doubt about how this input relates to the renewal expectancy, the Court in *Central Florida II* stressed that our guiding principle in awarding such expectancies must be "the interests of the listening public" and not "the factors themselves" in the Commission analysis "nor some other secondary and artificial construct." 683 F.2d at 510.

Contrary to the Court's directive, the Commission in this proceeding expressly ignores the public's expression of its interest in order to serve an artificial construct. To consider such evidence, according to the majority, "is inconsistent with well established Commission policy." *Memorandum Opinion and Order* ¶ 16. This recitation of policy is technically correct, and generally it is sound policy. As the majority points out, "for the renewal expectancy to function as an incentive, the licensee must comply with the applicable standards during the time period under review." *Id.* at ¶ 17 The Commission has noted previously, "if we *routinely* allowed evidence of 'upgrading' to save broadcast licenses that would otherwise not be renewed, we would expect to find potential competitors for the frequency hesitant to file a competing application."[6]

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[4] *Id.* at 7.

[5] *See generally Memorandum Opinion and Order* at n.9. A number of other organizations and individuals also submitted petitions.

[6] *Alabama Educational Television Commission*, 50 F.C.C.2d 461, 476 (1975) (emphasis added). In response to this argument, the majority cites a lengthy quotation from the *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970). *See Memorandum Opinion & Order* ¶ 16. In vacating that *Policy Statement*, however, the Court of Appeals stressed that the Statement is "null and void and may not be used by the Commission for any purpose." *Citizens Communication Center v. FCC*, 463 F.2d 822, 823 (D.C. Cir. 1972). The majority then quotes an earlier Court of Appeals decision in the same proceeding, to the effect that "incumbent licensees should be judged *primarily* on their records of past performance." *Citizen's Communication Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971) (emphasis added). I do not disagree, but in the limited circumstances presented here, I would also judge the incumbent by its more recent experience. Ironically, the *Citizens Communication Center* cases struck down an earlier version of the Commission's renewal expectancy

I agree with this reasoning in the routine case. But the matter before us is far from routine. Certainly the Commission has the ability to consider post-term behavior of the licensee in circumstances were it is clear that such review is in the public interest and where it would not otherwise undermine our licensing policies. The Court of Appeals has noted that "[t]he Commission should have the discretion to experiment and even to take calculated risks on renewals where licensee confesses the error of its ways." *Office of Communication of the United Church of Christ*, 359 F.2d 994, 1008 n. 28 (D.C. Cir. 1966). Similarly, the Commission has acknowledged that "[e]vidence of improved performance may in some circumstances be advanced by a renewal applicant as evidence of his willingness to correct deficient license term performance." *Alabama Educational Television Commission*, 50 F.C.C.2d at 476.[7]

The majority's aversion to such an exercise of Commission discretion is puzzling given its flexibility toward other aspects of the comparative hearing process. For example, the Commission initially adopted a very liberal third-party settlement policy, which permitted strangers to a Commission proceeding to obtain a license by settling with (*i.e.*, paying off) those who had filed applications pursuant to our rules. *Rebecca Radio of Marco*, 4 FCC Rcd. 830 (1989). I dissented from that decision, arguing that it undermined our licensing procedures and amounted to a *de facto* auction of broadcast frequencies. Eventually, the Commission agreed. *Rebecca Radio of Marco (Memorandum Opinion and Order)*, 5 FCC Rcd. 937 (1990). Yet in a subsequent case, the Commission found that, in certain limited circumstances, third party settlements could be allowed without thwarting our licensing scheme. *See James U. Steele*, 5 FCC Rcd. 4121 (1990). The reasoning in *Steele* still is more permissive toward third party settlements than I can accept, but I agreed with the ultimate conclusion that in the limited circumstances of that case, allowing such a settlement would not undermine our comparative licensing process. *Id.* at 4122 (concurring statement of Commissioner James H. Quello).

Given this broader context, I think the Commission should consider being somewhat more flexible in its analysis of the renewal expectancy. Video 44's most recent experience and the overwhelming public response makes clear that the post-term performance is more predictive of how WSNS will operate if the license is renewed. The majority does not dispute this point. It simply concludes that if the Commission allows evidence of Video 44's post-term performance, "the congressionally-mandated comparative renewal process . . . would be rendered meaningless." *Memorandum Opinion and Order* at ¶ 17. I simply cannot agree.

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because it would deny broadcast franchises to "new interest groups and hitherto silent minorities." *Id.* at 1213 n.36. Today's decision has precisely the effect feared by the Court.

[7]The majority suggests that this dictum from *Alabama Educational Television Commission* is limited to the noncomparative renewal context. Yet there is no indication in that case that the Commission imposed the same limits on its reasoning. Indeed, that decision reaffirmed the general "no upgrade" policy because of its ramifications for "potential competitors." 50 F.C.C.2d at 476. Consequently, I believe that the Commission may consider post-term performance in an appropriate case whether or not renewal is comparative. *See generally National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1212 (D.C. Cir. 1984) (FCC has a responsibility to "reexamine its initial decision when the verdict which the future returns on the agency's predictions substantially undermines the basis of the initial decision.").

Where a licensee has adopted a totally different format after experimenting with what eventually was classified as a nonbroadcast service; where all licensees ultimately abandoned the nonbroadcast service in question; where the licensee has since had an exemplary record and has substantially furthered the goal of programming diversity;[8] and where the Commission's renewal expectancy "prediction" is based on decade-old evidence, I do not think we do violence to the comparative hearing process by taking a peek at the licensee's post-term record. In other words, if this ain't a purple cow, no such animal exists.

Of course, this analysis does not completely resolve the proceeding before us. Even if granted a renewal expectancy, Video 44 would have to go through a renewal hearing. But unlike the majority, I would give the licensee its day in court.

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[8] *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).