Remarks by Commissioner James H. Quello
Before the
American Women in Radio and Television, Inc.
and the Kentucky Broadcasters Assn.
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NEW TERM, NEW BALL GAME

Thank you; introductory remarks, etc.

In my early years in Washington, I said FCC stands for From Crisis to Crisis. It is truer today than ever. There has been a veritable explosion of contentious issues and mind-boggling technological developments in communications. I could list several dozen but just for openers consider: finsyn, telco, attic-to-basement broadcast improvement, DAB, HDTV, DBS, MFJ restrictions and political broadcasting rates.

Among the more timely issues this fall will be the clarification and codification of political broadcasting rules. You have expressed a special interest in this subject as many broadcasters are confronted with litigation and possibly fines.

With the recent announcement by some Democratic candidates, it looks like the 1992 presidential election will be hotly contested after all. So now is an opportune time to address our rules. This is one instance in which I would dispute James Reston's quip that "all politics are based on the indifference of the majority." In the case of FCC rules, none of the affected parties is indifferent. Far from it, since television, the most contentious regulated entity, is the life blood of the modern campaign. Political candidates want a clear statement of their access rights and of the meaning of "lowest unit charge." Broadcasters, too, want certainty about what is required of them under our rules.

These are reasonable requests, so last June 13, the Commission approved a Notice of Proposed Rulemaking designed to codify and clarify the Commission's political programming policies. This Notice proposes codifying the Commission's political programming policies with respect to "reasonable access" by federal candidates; equal opportunities and censorship of negative advertising; and lowest unit charge for political advertising. Our Notice recognizes that advertising sales practices have drastically changed over the years and that such changes affect how the political rules apply to broadcasters. This is one of the few instances in which changes in commercial practices literally change the meaning of the law -- as in the case of "lowest unit charge."

Such an effort to update and clarify our rules is long overdue. The Commission has not issued a comprehensive statement regarding our political broadcasting policies since the 1984 Political Broadcasting Primer. In the meantime, as broadcasters and their lawyers will tell you, we operate during the political season under something of an "oral tradition." With the rush of last minute advice regarding very specific situations, there is rarely time for any kind of written ruling. Most inquiries are by telephone with the Commission's Political Broadcasting Branch of the Mass Media Bureau.

This approach, while in some ways necessary because of the hectic pace of the political season, places enormous demands on the FCC staff and fails to create a clear set of rules for the broadcast community as a whole. So it is imperative that we codify our political broadcasting requirements, to the maximum extent possible. For situations that are very fact-specific--perhaps too specific to cover with a general rule -- we should issue an updated Primer to give the industry and candidates a written set of clear guidelines on how to comply with this complex law.

We are now in the process of sorting out the comments filed in the rulemaking proceeding. We expect to conclude the proceeding before the end of the year, in time for the 1992 political season.

The rulemaking also should help resolve some of the uncertainty caused last year by the political audit of broadcasting stations. A year ago last July, the Commission audited 30 radio and television stations in five major markets across the country. The stated purpose of the audit was to "assess the broadcast industry's compliance with the political programming law, particularly the obligation to charge candidates the 'lowest unit charge'" for political advertising.

The results of this audit were widely reported, but not so well understood. Although the audit found that candidates paid more for broadcast time than did commercial advertisers at 80 percent of the stations surveyed, it did not conclude that these stations were violating the law. It did find that the main reason for the difference was that candidates typically purchased the more expensive non-preemptible ads, while commercial advertisers rely on less expensive preemptible spots. It is important to note that the lowest unit charge requirement only requires stations to provide the most favorable rate in a given advertising category. It does not require broadcasters to sell non-preemptible time at preemptible prices. The matter of determining lowest unit rate is further complicated by special

off rate card negotiations brought on by the recent depressed advertising markets. Consequently, the audit report made clear that the Commission had not yet determined the extent to which--if at all -- the audited stations violated the law.

As I understand it, the Mass Media Bureau is in the process of making that final determination, and that the vast majority of stations will be found to have been in compliance. To whatever extent the Bureau finds what it believes are some violations, the stations will be given an opportunity to respond to specific allegations set out in Notices of Apparent Liability.

I believe broadcasters who earnestly tried to comply with the rules or inadvertently erred should not be subjected to harsh penalties.

This is how the process should work. Unfortunately, the audit report has become something of a political cause celebre--through over-interpretation by the press and by those seeking to use it for their own ends.

The FCC report had the unintended effect of creating a litigation boomlet among former candidates suing broadcast stations. As you may know, candidates in at least two states have filed contract claims against broadcast stations claiming violations of the lowest unit charge requirement. Additionally, in California, Governor Pete Wilson and Lt. Governor Leo McCarthy are suing 22 TV stations for what they believe are overcharges under the law. Litigation has been threatened in other states as well.

Quite often, just the threat of litigation is enough to get a broadcast station to raise the white flag. One lawyer, who represents a large number of candidates, was recently quoted as saying that 10 TV stations already have paid about $600,000 in settlements! With the amount of money at stake, you can bet there will be more lawsuits -- or at the very least the threat of them. Candidates have even challenged license renewals over allegations of lowest unit charge violations.

These developments prompted Jeff Baumann, Executive Vice-President and General Counsel of the NAB, to state that "this whole rash of frivolous lawsuits reinforces the need for the FCC to take decisive action to gain control before the situation is totally out of hand." I couldn't agree more. The only thing on which the opposing sides can seem to agree is that the FCC's audit report was the catalyst for all of the litigation. To the extent we have added to the confusion it is incumbent upon the Commission to help clear things up.

Last summer, we took a step in the right direction by filing a brief in the Alabama case claiming that the FCC has the exclusive jurisdiction to decide whether the Communications Act has been violated. One federal court has held that such matters, including assessment of damages, are within the FCC's sole jurisdiction. I strongly agree with this position. Congress established the FCC as the expert agency responsible for overseeing this complex area. Not only that, if the lowest unit rate provision is to have any coherent meaning at all, it cannot be subject to differing interpretations in the courts of 50 states.

One possible step we could take would be to issue a declaratory ruling on the issue of jurisdiction. The Commission could issue such a ruling either on its own or at the request of an affected party. This might save us the trouble of having to re-explain the Commission's position in each court as litigation arises. Also, if the ruling were appealed -- as I expect it would be -- the review would probably take place in the D.C. Circuit, the court most familiar with our rules.

Hopefully, by clarifying our rules, the Commission can help make it less necessary in the future for parties to resort to litigation.

Moving away from the contentious topic of lawyers and litigation, there is one area in which the Commission has taken what I think is a positive step toward improving broadcast campaign coverage. At our August 1 meeting, we adopted a declaratory ruling that clears the way for news formats involving back to back speeches and interviews with major party presidential candidates. This ruling was necessary because the "equal opportunities" provision of the Communications Act sometimes acts as a limit on the amount of time stations devote to campaign coverage. Our recent ruling treats these special news formats as essentially the same as candidate debates, which stations may sponsor freely. We hope this will encourage more in-depth coverage of campaigns, and will emphasize serious discussion of issues as opposed to 30-second "sound bites."

This declaratory ruling resulted from a request filed by KING-TV in Seattle asking that the Commission approve innovative formats for presenting political programming during the presidential campaign. KING wanted to run a series in which the major party candidates would give back to back 30-minute speeches (one show at the start of the campaign, and one at the end), and the candidates would give back to back 45-minute interviews (to be aired once or twice during the campaign). The programs would be made available to other TV stations and cable systems.

The Commission initially denied the request on technical legal grounds but the Court of Appeals remanded the decision. The main issue, according to the court, is whether the proposed programs are based on the licensee's good faith news judgment. Having been shown the light by the Court, I am happy to say that we voted unanimously to reverse our earlier ruling. As a result, stations will have a little more discretion in packaging political/public affairs programming.

Lord knows that stations should have broad discretion in how they present campaign programming. As matters stood before the KING decision, a debate was the main type of specialized campaign programming that a station could sponsor on its own. Valuable as they are, debates are not the only legitimate way of getting candidates' views to the voters. The sometimes low viewership for debates suggests that audiences can tire of the format where there are few alternatives. In fact, there may be a lesson in the Reagan-Mondale debate in which the last half hour was interrupted by a technical failure. It was said at the time that Reagan won the first 30 minutes, Mondale the second 30 minutes and the American public the final 30 minutes.

This is not intended to denigrate the value of political debates as a means of informing the public. Far from it. It's just that there can be too much of a good thing. I am glad the Commission has taken an initial step toward opening up some alternatives.

I should point out that the KING request, as well as our order, applies only to the specific program proposal presented in that case. However, stations should be able to apply the principles of that decision to other innovative programming and to state and local political races, as well. Those seeking to do so should make sure that they apply the principles of our declaratory ruling: the presentations must be based on the licensee's bona fide news judgment and the programs must be structured to provide fair and equal opportunities for all qualified candidates to present their messages. Also, it wouldn't hurt for those proposing to use novel formats to obtain some advance guidance from our Mass Media Bureau. Our hope is that this will lead to more and better campaign coverage.

Now, it may be too much to expect for television to accurately reflect how politics really works. After all, as Art Buchwald once asked, "Have you ever seen a politician talking to a rich person on TV?" But I suppose we have to accept the fact that there will always be some perception-gap between television and reality. Still, we at the Commission will continue to do our best to assure fair treatment for all qualified significant candidates.

Before closing, I would like to present some bottom-line viewpoints on several other contentious issues.

Retransmission consent: There is a justifiable need for some kind of retransmission consent, some payment for program property, but it may be difficult to administer particularly in many areas where cable is bringing TV to an unserved or underserved area -- that's the area where the compulsory license originated and was justified. This requires Congressional action -- I support the thrust of S.12 but with practical guidelines. The main problem could be administering complex regulations for the rural or small markets where cable provides the primary TV service. Legislation or regulation could make special provisions for areas where cable is the primary provider of basic TV services. Retransmission consent is a hotly contested issue in both the Senate and House.

In proposing the retransmission consent provisions of S.12, Senator Daniel Inouye, Chairman of the Communications Subcommittee, said:

> "The retransmission consent provisions of S.12 are straightforward. They simply provide that when a local station forgoes the option for must-carry protection, it may utilize its retransmission rights to negotiate with the local cable system over the terms and conditions of its carriage on the system. In other words, broadcasters will have the option of being treated like any other cable programmer. Cable operators negotiate with cable programming services for the right to carry those program services. Gone are the days when broadcasters received their revenues from advertisers and cable received its revenues solely from subscribers. Today, cable competes with broadcasters for local and national advertising."

Congressman Jack Fields in supporting the Eckart-Fields Bill (H.R. 3380) in the House said:

> "Retransmission consent-Must carry is essential if we are going to protect the future of free over-the-air television and the local service, news and information it provides. Things have changed since the early years of cable when broadcasters were forced to give their programs for free. Today, cable not only controls access to the majority of the households in the nation, but it also competes with broadcasters for programming, audiences, and advertisers."

Telephone "dial tone" authorization: I agree with the enhanced use of the video dial tone to install and operate a data, voice and limited video network without the necessity of requiring phone companies to obtain local permission or a local franchise. I also agree at this time that phone companies should act as common carriers and not be allowed to provide or produce TV programming. Phone involvement in programming is vigorously opposed by cable, newspapers and broadcasting which provide vital, widely accepted, separate local services. To me the key question is will telco entry into programming be a boon or deterrent to the all important universal free over-the-air TV service for all Americans.

Must Carry: I believe proposing 6 local TV channels as effective competition to cable that a cable system isn't required to carry can't possibly constitute effective competition. I believe requiring must carry must be an integral condition of our effective competition proposal. Must carry could not be required if retransmission consent is enacted -- It would have to be an "either/or" condition and I believe the proposed legislation includes that condition.

Must carry is an open issue so I'm considering the various comments. My longstanding position is that the public must be assured access to the stations licensed to serve its community. It is generally known that cable once installed no longer requires TV antennas for reception. In many cases, TV antennas are disconnected. I have stated for the record that I don't believe any transmission pipeline monopoly should have the power to prevent a TV station licensed to serve an area from serving that area on the TV channel assigned by the government.

DAB is the most revolutionary and promising improvement for radio in modern times -- particularly for the troubled AM service. FCC must encourage full speed ahead and explore every technical possibility to develop a terrestrial in-band or a hybrid satellite-local service system. DAB practical tests are scheduled for the NAB convention next spring. To its credit, the NAB is in the forefront of developing this exciting new technology.

Also, digital compression of audio transmission promises to multiply the channels available for radio programming of the future. This represents both a future challenge and a multi-channel opportunity for radio operators. It also presents a potential problem of diluting an already over saturated radio marketplace. As I have previously stated, I believe those who have pioneered or who have a large longtime investment in developing communications in America deserve a priority consideration in instituting advanced technologies affecting their business.

Excessive sex and violence on TV: I have expressed my concerns on panels and speeches that TV is playing a significant role in de-sensitizing society to violence, rape, murder and sexual promiscuity. In my recent speech before the FCBA (Federal Communications Bar Association), I couldn't resist expressing my caustic comment "Instead of prime time TV serving the public interest," we too often have "slime time TV serving the pubic interest." As you know, the FCC has a Congressionally mandated rule against obscene or indecent programming. It is generally known that I strongly support its enforcement within the bounds of the First Amendment. I have urged frustrated concerned citizen groups to register their objections directly with TV or radio stations, cable systems, and most importantly, with advertisers. Frequently, citizen groups get positive results without Congressional or FCC intervention. When these citizen groups represent the views of a broad cross-section of the American public who are fed up with what they see on TV, their producers, advertisers, broadcast and cable executives would do well to listen. This is nothing more than the public marketplace at work.

Overall, it is a challenging time to be at the FCC. The FCC has offered me the most exciting and gratifying period of my career. This is a period of revolutionary growth, contentious developments and technological advancements in all fields of communications -- and the best is still to come! The FCC's challenge will be the orderly practical implementation of advanced technology services of telecomputers, fiber optics, DBS, DAB and HDTV. We must deal, too, with the implications of increasing communications globalization.

The most important challenge facing the Commission in the coming decade is to take care that our policies do not erode one of our nation's most valuable institutions: universal free over-the-air television available to all the public. Congress seems dedicated to this all-encompassing principle that best serves public interest and so should all of us.

In summary, the broadcast industry, the communications bar and government must work together to implement advanced technology and to maintain and increase our communications leadership so that Americans remain the best informed, most gainfully employed and best served people in the world.

Best wishes to all of you for personal and professional fulfillment in the exciting great years ahead!

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