Remarks by Commissioner James H. Quello
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POLITICAL BROADCASTING RULES AND RATES

Thank you, generous introductions, etc.

This is an exciting challenging time to be at the FCC. During the past few years, there has been a veritable explosion of technological developments and contentious issues in all fields of communications. It is apparent that the FCC has not been deregulated out of business. In fact, the communications marketplace is brimming with new controversial developments and regulations that require evaluation, interpretation, clarification -- providing, cynics say, seemingly infinite billable hours and engineering consultations. Some uncharitable souls even profess that law firms have incentives to generate crisis and regulatory contention. Surely such base motivation is far beneath the august legal profession -- one of the world's oldest if not the oldest, I am told.

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, retransmission consent-must carry and political broadcasting rates.

The most immediate crisis for broadcasters seems to be clarification and codification of the FCC political broadcasting rules. I was amazed when several Kentucky TV executives and AWRT officers last week in Louisville urged prompt Commission clarification stating it was currently more important to them than the controversial retransmission consent issue. All together broadcasters in at least eleven states have been confronted by demands for refunds and the prospect of extended litigation.

Responding to the urgency of the situation, the FCC this week placed on a short track a Public Notice stating our intention to issue a declaratory ruling with respect to exclusive authority of the FCC to determine whether broadcasters have violated the lowest unit charge requirement of Section 315(b). Parties were invited to comment on this issue within 10 days of issuance of the Notice. To expedite action, no provisions were made for reply comments. All parties are well informed on the subject as the proposed declaratory ruling is a timely addition to the

general Notice of Proposed Rule Making issued last June 13th designed to clarify and codify the overall Commission's political programming practices.

Some of the Commissioners, including me, suggested we broaden the Notice to invite comments on whether or not the FCC should assume total jurisdiction. Moreover, the prevailing sentiment at the Commission is that it would be advisable for the courts to stay any ongoing proceedings pending the outcome of the Commission proposal to determine jurisdiction. I am looking forward to reviewing the comments in this proceeding.

In the only federal court decision to rule on the question of exclusive jurisdiction, the United States District Court for the Northern District of Georgia dismissed complaints filed by eight political candidates who alleged that they had been overcharged for political advertising by broadcasters. The court found that the complaints presented a federal question and noted that "enforcement of the [Communications Act] and vindication of the public interest are vested in the Federal Communications Commission. Pointing to the "pervasive statutory and administrative scheme to enforce Section 315," the court cited cases in which the Commission has ordered rebates. Consequently, it dismissed the complaints and held that the Commission provides candidates an exclusive remedy for violations of Section 315(b) of the Communications Act.

I don't believe the FCC would be properly discharging its responsibility by relinquishing the enforcement of the lowest unit charge law to various state courts. You can't have 50 different state courts interpreting FCC rules. Congress established the FCC as the expert agency. It is up to us to effectuate the federal statutory policy that Congress intended. Interpretation of Section 315(b) is the FCC responsibility under the Communications Act. Political candidates need a clear statement of their access rights and an updated meaning of "lowest unit charge." Broadcasters need an updated certainty of what is required of them under our rules.

In addition to our position in the litigation, the Commission issued a general Notice of Proposed Rule Making last June 13th to clarify and codify the Commission's political programming policies. It proposes codifying the Commission's policies with respect to "reasonable access" by federal candidates, equal opportunities and sponsorship 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."

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 awritten 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 general 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 many candidates paid more for non-preemptible broadcast time than did commercial advertisers for preemptible time at the stations surveyed, it did not conclude that these stations were violating the law. It did find that a principal 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. The Commission will review each case before any fines are determined. Based on the preliminary information I have received, I understand that very few fines will be proposed.

Most broadcasters I have known through the years place the highest priority on regulatory diligence and civic service.

I believe broadcasters who earnestly tried to comply with the complex changing rules or honestly erred should not be subjected to harsh penalties, lengthy litigation, costly discovery processes, which totally preoccupies and disrupts broadcast operations and disserves the public. Unfortunately, the FCC 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 I noted earlier, 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.

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

The "State Broadcaster Associations" in their comments to the Commission succinctly stated

"However, the Associations would like the Commission to consider this overriding principle when it reassesses its political time rules and policies:

> Rules that are too complicated, either as written or as interpreted and administered, are less likely to efficiently serve their intended purposes.

Such rules tend to divert and exhaust, unnecessarily and counterproductively, the resources of the persons who are subject to the rules, the persons on whose behalf the rules were promulgated, and the agency charged with administering the rules. The class action litigation presently occurring in state courts well illustrates these points. The Commission's interpretation of the broadcaster's obligations has been a moving target of imprecision and inadequate notice over the years. As a result of this perpetual uncertainty, many stations, who have tried in good faith to stay on top of those Commission interpretations, have lately been thrown into a costly ring of litigation which threatens to swallow up the entire federal scheme of the political time rules. There is now the potential for endless fact-specific, sworn-testimony litigation over who said what to whom about the time buy alternatives available to advertisers and candidates. Whose interests are served by this? Such litigation leaves the Commission with two alternatives: clarifying and simplifying these rules once and for all, or risking the destruction of the entire scheme of political time regulations."

"This seemingly unrelenting trend toward complication and confusion is, as mentioned, counterproductive to the ends of the rules. Rules should be straightforward so that there is no systemic impediment to full understanding and compliance. That, in the Associations' view, is the problem with the current rules as interpreted and administered by the Commission, despite the best efforts of its staff to be helpful and responsive to the hundreds of inquiries each year."

Therefore, it is my strong view that we must clarify the rules and assume the necessary jurisdiction to enforce them. Some, who would attempt to politicize the issue, have suggested that the FCC is trying to deprive candidates of a legal remedy. What rubbish! Candidates have survived under this law for decades without needing an avalanche of litigation. And in the end, who is served by the rush to courts? To the extent licensees risk liability in an uncertain legal climate, they will cut back on

providing access to candidates -- and, frankly, I can't blame them. Neither the courts nor the Commission has ever fully defined what is meant by "reasonable" access for federal candidates and the law does not guarantee access by state and local candidates. Would it serve the public interest to create strong disincentives for broadcasters to accept political ads? I don't think so.

There is also a significant question whether the litigation helps candidates at all. Consider this: It is taking place years after the fact -- and, if truth be told, years after many failed campaigns. The only effective remedy -- and the one on which we have relied for years -- is to get a prompt administrative ruling from the Commission. Such rulings can be obtained during the campaign, when it can do some good, not years later when it serves mainly to line the pockets of assorted lawyers and consultants. I have heard that in some cases, the lawyers and consultants -- not the candidates -- have received more than 2/3 of the money received in settlements with broadcasters. I simply cannot believe Congress had this in mind when it adopted the lowest unit charge requirement.

In the meantime, broadcasters can minimize their troubles by providing fair and equal opportunities to all qualified candidates; charge the lowest unit charge or the charge for comparable use of the station.

We must also remember that stations should have broad discretion in how they present campaign programming. As matters stood before the recent KING decision (back-to-back speeches or interviews), 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 reported 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 in that case, applies only to the specific program proposal presented there. 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.

OPTIONAL ADDITION TO SPEECH IF TIME PERMITS:

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 fulfillment in the exciting great years ahead!

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