Remarks by FCC Commissioner James H. Quello
Before Texas Christian University's Dept. of Radio-TV-Film
and the Association of Broadcast Executives of Texas
Dallas, TX - November 14, 1991

Introductory acknowledgements, etc.

In a recent speech I mentioned that in charitable recognition of my seniority, most of the press has stopped using the lethal device of quoting me verbatim. However, in that regard, I'm afraid I was quoted exactly verbatim in various press reports about our FCC telco inquiry at the last FCC monthly meeting. The quote was verbatim, but incomplete -- several of the press reports accurately mentioned that I said "Phone companies entry into cable and programming would create the greatest monopoly known to man." I want to set the record straight and put affected industries somewhat more at ease by repeating my total phrase. I said "An argument can be made that depriving the phone companies with fiber optics from full participation in the cable communications world is preventing or delaying the introduction of advanced technology into American homes -- not only phone, TV and radio but also the great potential of two way communications, electronic press, computers, data processing and access, home-bank shopping and the other technological wonders coming onstream.

I continued "One entity providing all the vital communication services to the American home could be the ultimate in economy of scale and efficiency, but would also constitute the most powerful monopoly known to man." The key question in my mind is "Would telco entry into cable be a boon or deterrent to the all-important local free over-the-air universal services?" That total statement is more positive or at least more neutral in effect than just the negative inference of excerpting the "greatest monopoly known to man."

About two weeks ago, the FCC adopted a position (in Docket Number 87-266) that we hope and believe will encourage the establishment of a nationwide broadband network. In that important agenda item, we acted upon on October 24th, there were actually three separate, but related, documents.

First, we proposed that the telephone industry be free to construct a broadband network which can provide what has been termed "video dialtone." We asked for comments on proposals to change some of our rules to facilitate such a network. We attempted to establish a model whereby, in the words of the Further Notice of Proposed Rule Making, ". . . carriers will be able to respond to marketplace demand for video common carriage and advanced telecommunications services in the multimedia environment by providing both the underlying video dialtone-common carriage as well as their own competitive non-programming services. Among our goals is an increase in diversity and efficiency of information sources."

The FCC took another positive step along the path to increased video dialtone in the October 24th meeting by adopting a First Report and Order which made some critical interpretations of the Cable Act of 1984. First, the Commission concluded that the telephone/cable cross-ownership ban imposed by Section 613 does not apply to interexchange carriers. And, most important, we found that Section 621 of the Cable Act does not require either a local exchange carrier or its customers/programmer to obtain a municipal cable television franchise in order to offer video dialtone service. I predicted that those positive telco findings would not be greeted with universal enthusiasm by some business interests and that the courts would enter the debate at some point in the not-too-distant future. The opposition to this proposal reported by trade publications this week indicate that this very predictable prediction is coming true.

The Commission also issued a second Further Notice of Inquiry on October 24. That all-important inquiry seeks to encourage comment on whether the FCC's tentative conclusion, in an earlier notice, that local exchange carriers should be permitted to enter the cable television business is still valid. In other words, does the ability to provide video dialtone services generate enough incentive for the deployment of fiber to the home without the direct provision of programming by telephone companies? In that same notice, we asked about the desirability of joint ventures between phone companies and cable television companies. In the interest of full disclosure, you should know that I issued a statement aimed at clarifying my position on the Second Further Notice. I wanted to make it clear that I do not conclusively endorse some of the positions examined in the Notice at this time but that I am interested in reviewing the comments to see if there might be some variations or combinations that make sense. And, I recognize that, if exchange carriers are to become cable operators and this may be inevitably negotiable some time in the future, the Congress must change the Cable Act. I believe our recommendation to Congress based on a complete record could be an important, if not the decisive factor.

Incidentally, my response to the very first pre-hearing confirmation question asked by the Senate majority placed a high priority on implementing advanced multi-choice technology.

You may be interested in this perceptive first question and my reply. It was "What should be the Commission's priorities for the next 5 years?" My reply was "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 optics, DBS, DAB, HDTV, cellular and personal phone service. 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 determined 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 should continue to be the mainspring of American mass communications . . . . In their deliberations, Commissioners should apply the simple principle of the best service to the most people at the most reasonable, practical cost." Practical is the important active word. I believe it is time for the Commission to explore practical means for introducing advanced technology into American homes.

In adopting the comprehensive docket on the 24th, the Commission was sending a positive message that it favors accelerated deployment of advanced technology broadband facilities to homes and small businesses. We certainly don't know all of the answers as to how this should be done and who is going to pay for it. We expect that some expert technical and legal minds might have some ideas to share with us and we welcome their and your comments in this proceeding.

I also encourage phone companies to seek alliances and common ground among those who have serious concerns about their entry into the video business. I am particularly concerned that phone company entry not have a negative effect upon the viability of universal free over-the-air broadcasting services. I believe that broadcasting continues to provide a vital local service to the nation by making information, education and entertainment available, free of charge, to millions of Americans who have no other access to such video services. I do not want this nation to become one of video haves and have-nots because of circumstances of geography or economics. We have a long tradition in this country of virtually universal television service and I would like to see that continue.

I recognize that some phone companies have been actively talking with broadcasters, cable and others in an effort to reach some accommodation. I will continue to offer my services as honest broker where such services can be of value.

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 in addition to telco-cable: finsyn, attic-to-basement broadcast improvement, DAB, HDTV, DBS, retransmission consent-must carry and political broadcasting rates.

The most immediate crisis for broadcasters in many states seems to be clarification and codification of the FCC political broadcasting rules. I was amazed when several Kentucky TV executives and AWRT officers three weeks ago in Louisville and the Minnesota and Indiana Broadcasters Associations a week later urged prompt Commission clarification stating it was currently more important to them than the controversial retransmission consent issue. All together broadcasters in over a dozen states have been confronted by demands for refunds and the prospect of extended litigation. And the threatened litigation is spreading. The last figure I read was 250 broadcasters have been threatened with litigation in 12 states.

So the other principal thrust of my speech today will treat the immediate and urgent problem of political advertising rates. Responding to the urgency of the situation, the FCC three weeks ago 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 by October 21st. 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, believed we should 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 have already reviewed some of the comments, but I am looking forward to reviewing all the comments in this proceeding. I am placing the burden of proof where it properly belongs, on those who seek to deprive the Commission of the jurisdiction provided by Congress and the federal courts.

In the only federal court decision that is directly on point, 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.

For the reasons stated by the court as well as the previous regulatory history and precedent, 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.

I have heard some claim that the Commission lacks the necessary authority to enforce the lowest unit charge provision of Section 315(b) by ordering rebates. Frankly, I am puzzled by the argument. As a general matter, Section 303(r) of the Communications Act empowers the Commission to "prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of the Act." Additionally, with respect to political broadcasting, Section 315(d) provides that the FCC "shall prescribe appropriate rules and regulations to carry out the provisions of this section." Given the complex administrative framework Congress created for political broadcasting, the D.C. Circuit has ruled that the FCC has unusually broad authority to fashion remedies under Section 315(d). In Chisholm v. FCC, for example, the court noted that this was "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." Consistent with this clear line of authority, the U.S. District Court for the Northern District of Georgia recently held that "the ability to order refunds of overcharges is within the purview" of the Commission's enforcement authority under Section 315(b) of the Communications Act.

Not surprisingly, the Commission in the past has relied on this broad grant of authority to order rebates of overcharges in violation of Section 315(b). In both Southern Arkansas Radio Company and Atlin Communications, Inc. in 1990, the Mass Media Bureau ordered licensees to repay candidates for apparent overcharges. This is not something the Bureau can do on its own if the law is not clear. In fact, our rules require the Bureau to refer to the Commission any enforcement action "presenting novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines." [47 C.F.R. Section 0.283(c)(6)]. The reason the Bureau could order rebates is because there existed "outstanding precedents" affirming that authority. Indeed, following a series of similar rebate orders in the early 1980s, the Commission expressly affirmed the Bureau's ability to order refunds. In Alpha Broadcasting Corporation, 102 F.C.C.2d 18 (1984), the Commission upheld the Bureau's overcharge calculations and held that the licensee "must

rebate those overcharge figures which are specified [by the Bureau]."

Given this history, I am a little surprised that anyone would still have questions about the Commission's authority in this area. In fact, in our 1988 Public Notice on lowest unit charge obligations, the Commission even gave several examples in which candidates would be entitled to rebates. It would be strange indeed for anyone to suggest that the law provides candidates with a legal entitlement but that the Commission lacks any authority in the matter.

In addition to our anticipated declaratory ruling on jurisdiction, the Commission is currently considering proposals to clarify and codify the Commission's political programming policies. Our rulemaking proceeding 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 a written set of clear guidelines on how to comply with this complex law.

We are now in the process of studying the comments filed in the general rulemaking proceeding. We expect to conclude the entire proceeding before the end of the year, in time for the 1992 political season. The ruling on FCC assuming prompt

jurisdiction in response to the flood of threatened state litigation should be issued soon.

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. 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 is reviewing each case before any fines are announced. Based on the preliminary information I have received, I understand that several 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. As I mention, 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. It appears that that over-interpretation of the FCC's audit report was the catalyst for all of the litigation. To the extent we have contributed 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 FCC itself must assert its authority to order rebates and to impose fines for violations.

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."

Because of these concerns, I believe, it is absolutely essential that we 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 a large proportion 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. Also, the candidate would get more direct and prompt financial redress if the FCC determined liability and rebate without opening extended litigation and paying outside lawyers and consultants hefty contingency fees.

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. Station executives would do well to have written directives that emphasize enforcement of the lowest unit rate for all political candidates.

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.

Well, 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 must continue to do our best to assure fair treatment for all qualified significant candidates.

I have a lot more to say about many other contentious subjects at the FCC, in fact I have discreetly shortened some of my written text of my speech. You see, I don't want to risk any comparison with General Alexander Smythe of my adopted state of Virginia. General Smythe served in an early American Congress along with Henry Clay. The General had a decided tendency to speak at great length whenever the opportunity presented itself. Speaking in his usual extended fashion before the House, General Smythe turned to Clay and declared: "You, Sir, speak for the present generation; but I speak for posterity." Clay replied: "Yes and you seem resolved to speak until the arrival of your audience."

Overall, it is a challenging time to be at the FCC or with the telecommunication press reporting and analyzing FCC developments. 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 democracy'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 telecommunications industries, 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.

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