

Remarks by FCC Commissioner James H. Quello

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The Regulatory, Legal and Political World of the FCC

I'm delighted to be here. When you are from Washington these days you are glad to be anywhere. I particularly appreciate that the Center for Telecommunications Management gave me the opportunity to enjoy the rarified atmosphere of Indian Wells, complete with tennis courts. As you may have heard, tennis is my last desperate clutch at youth. And I'm not above using psychological disdain tactics like saying "when I was only 75, I would have killed that shot!"

So I appreciate CTM's selection of an ideal site for an exchange of viewpoints. I noted with interest your stated philosophy

"To bring together industry decision makers with the academic community in a non-partisan forum for discussion and learning where each party can contribute to and benefit from the other's expertise CTM provides an objective platform where industry issues may be defined and expanded and where responses to industry challenges may be discussed."

My contribution will be in the non-technical area. I have been blessed by having a senior engineer advisor, a special technical oriented special assistant, and a legal assistant that I consider the most qualified on the Commission staff.

In the current issue of Broadcasting Magazine, Dane E. Ericksen, a distinguished engineer, suggested a statutory requirement that an engineer be one of five appointed commissioners. He was good enough to state

"A second reason why a statutory requirement for an engineer is needed can be seen by examining the backgrounds of the professional assistants to the current FCC commissioners. Although the Communications Act gives each FCC commissioner the right to appoint three professional assistants, one or more of whom could be engineers, only Commissioner Quello has seen fit to do so. But even if all of the commissioners had engineering assistants, a non-technical commissioner may never fully comprehend technical complexities and tradeoffs. Of course, a similar argument

might be made that an engineering commissioner might never fully comprehend the legal, economic and, yes, political complexities and tradeoffs of issues that come before the commission. It is for that reason that H.R. 3501 would require that only one commissioner be an engineer."

As a non-engineer, my contribution today will reflect my career background in broadcast and business management. I tried to bring some real world operational experience to the Commission. I have some practical understanding of TV, radio and cable programming services and economics. Also, I have learned to live with the regulatory and political issues, the tradeoffs and foibles.

For openers, I'll present some views of the government regulatory world. It is a world dominated by lawmakers and lawyers -- most of them bright, dedicated and possessing high priced capabilities upon leaving government. Three of these bright lawyers are now FCC commissioners and one has been designated chairman. Andrew Barrett, Sherrie Marshall and Ervin Duggan are the three relatively new commissioners and my good friend Al Sikes, former NTIA director, is the chairman. The two Democrats on the Commission are non-lawyers -- Ervin Duggan and myself. We have news and broadcast backgrounds. Commissioner Duggan is an excellent writer and accomplished public speaker.

As a light background, or for comic relief, I'll paraphrase some friendly advice I passed along to the new commissioners over a year ago. It is similar to what I remember receiving upon joining the commission. I'll also add a line or two of my own.

First, a bit of advice from my personal experience, add all "your oversight Senators and Congressmen" to the fourth commandment." You will find that it is a good idea to honor them.

I also remember someone advising me that you are now a confirmed bureaucrat, so don't worry about mistakes. Remember that when a bureaucrat makes a mistake and then persists in making it, it soon becomes policy.

Among the truisms someone was good enough to share with me, tongue in cheek, was "master the art of dynamic inaction." Use your old army training -- don't volunteer. If in an unguarded moment you do volunteer, make sure there are people more knowledgeable than you to handle the project (this should be no problem, the complete FCC staff qualifies for this type of assignment); perform your daily minutiae with effervescent sincerity. Also keep in mind that the longer you are here, the more you will appreciate the seniority system. And finally, remember that social regulation cannot repeal the laws of physics, but it may make you more popular.

Now back to the real regulatory world -- most of you probably expect me to provide a special insider's insight into the future policies and operations of the FCC. The best I can offer is an educated guess.

The future policy of the commission is principally influenced by Congress, the White House administration, legal and industry petitioners and initiatives from the commissioners and commission staff. My particular contribution is that I'm the only one with longtime institutional memory and recall -- a handy quality that is occasionally useful to the bright regulatory new blood we now have on board. As you know, we operated with only three commissioners for over a year. In fact, I had to personally get used to operating without my former awesome one vote veto power. Under conditions that existed before last year, if one commissioner chose not to attend a meeting, there was no legal quorum for official business! Incidentally, I remember Chairman Mark Fowler's classic remark over seven years ago when asked "What is the difference now that the commission has been reduced from 7 to 5 members?" His terse reply, "I have two fewer rears to kiss" -- he used the more explicit term, for rear, but I withheld it out of respect for this prestigious audience.

It is true that once a chairman proposes an item or decides to act on a petition, he must generate the votes from a majority of his fellow commissioners to effect his proposal. Consequently, a chairman must hope for compatible commissioners and probably should have a voice in their selection. As you probably know, a commissioner's duties encompasses a broad range of governmental and legal responsibilities -- legislation (rule making), enforcement, judicial review and decisions and executive management.

I believe the Bush administration commission continued the Reagan marketplace deregulatory policy, but with a more moderate, less ideological approach. This commission has a markedly improved working relationship with Congress. Chairman Sikes inaugurated an era of regulatory glasnost and perestroika with Congress. We have the continuing challenge to expedite commission processes and effect more prompt action on applications and issuance of notices.

I have served under both Democratic and Republican controlled commissions. Only three of the five commissioners can come from the same party. I was relatively comfortable with the different social and legal approaches to regulation. Fortunately, commissioners don't decide complex policy issues by partisan Democratic or Republican votes. The issues are decided on the legal record and the individual commissioner's determination of logic, justice and serving public interest.

It is hard to believe that I'm in my 17th year as an FCC commissioner and will start my 18th year April 30th. I've seen a progressive evolution from overregulation to deregulation to unregulation, to marketplace self regulation with occasional counterproductive lapses into unregulatory excess. I'm glad I was around to contribute to the long overdue deregulatory transition that eliminated tons of paperwork and over-intrusive government regulations. I'm also glad I was around to register a dissent when our actions struck me as counterproductive. Several years ago the trade press quoted me correctly stating, "I do deregulation but not anarchy."

I disagreed with the majority of commissioners in the past on several major issues such as repeal of must carry, repeal of the three year holding (anti-trafficking) rule, disclaiming of the public trustee concept for broadcasters, attempted repeal of minority preference, repeal of UHF Impact Policy, the proposal to institute UHF-land mobile sharing without a demonstrated need for more land mobile spectrum, limited spectrum allotment for HDTV, broadcast spectrum auctions, the financial interest and syndication proposal, the most controversial major issue in my 17 years, and others. I have also expressed concern and shifted burden of proof to the phone companies, on the significant telco-cable issue.

Despite expressions of misgivings in some quarters worrying about marketplace competition replacing regulation, we still haven't deregulated either the FCC or the Federal Communications Bar Association lawyers out of business. Communications attorneys and engineers fully realize that the communications marketplace is brimming with present and future contentious billable hours on issues in the broadcasting, cable, telephone and satellite fields. Let me reel off a few of the more significant FCC issues of the past and present: pros and cons of the Fairness Doctrine; reinstating must carry; retransmission consent - S.12 legislation; repealing the compulsory licensing for cable; telephone price caps for BOCs; recommending lifting MFJ restrictions; overseeing the effect of the syndex reinstatement; broadcast cross-ownership waivers or rule changes; telco-cable cross-ownership; network-cable across-ownership; networks providing sales representation for their affiliates; the reinstating of the three year holding rule for broadcast properties; comparative renewal reform and license renewal expectancy; power increases and interference elimination for AM and FM radio; the proposed FM radio freeze; the problem of negotiated radio interference rights; broadcast time brokerage arrangements; enforcement of obscenity statutes and indecency rules; prohibiting UHF for VHF swaps; development of compatible terrestrial HDTV; DBS; MMDS; EEO regulation; implementing DAB radio; political broadcasting jurisdiction; spectrum auctions; spectrum and transfer fees; recurring possible ban on beer and wine and other advertising, etc. Each of these controversial

subjects could be the basis of a separate speech in itself. There is enough contentious litigation to go around for communications lawyers, engineers and the FCC to stay in business for years ahead.

For our discussion today I'd like to present my views on six current major controversial subjects -- political broadcasting jurisdiction and enforcement; telco entry into cable; network cable ownership; S.12 and retransmission consent and must carry; the growing public outcry against broadcast obscenity and indecency; financial interest and syndication -- the most controversial issue in my 17 years at the FCC. These issues entail interaction of legal, regulatory and political factors. (I will ad lib viewpoints at appropriate times throughout the conference.)

As I mentioned, all these issues will require some legal analysis and action -- It assures that current unemployment problems will minimally impact communications lawyers.

Some uncharitable souls even profess that law firms have incentives to promote regulation, generate crisis and regulatory contention. Surely such base motivation is far beneath such an august profession -- one of the world's oldest or close to being the world's oldest, I am told. I was recently mailed a copy of part of a will that demonstrates the continuing problem of unfavorable private, if not public, perception of the legal profession. Even I had to smile when I read this to the New York Communications Bar Association and I quote, and brace yourselves:

"No attorney or firm or group of attorneys, nor any bank shall for any reason whatsoever receive any money, property or valuables from my estate as I have already, while living, involuntarily contributed far more than my share to the benefit of this crooked bunch of miserable bastards who prey upon the misfortunes of others."

This outlandish quote containing some bare element of truth should take care of the usual deprecating lawyers stories for the day. Oh yes, I was once considering working in a laugh line like "Air bags are redundant in a lawyer's car." However, my loyal legal assistant suggested I could refine and immensely popularize the statement with a simple one word substitution -- commissioner for lawyer. Good suggestion, also with some bare element of truth.

The legal and regulatory power of the FCC has been overestimated, underestimated, challenged, debated and damned. The distinguished columnist and scholar, William F. Buckley, Jr., interviewing a former FCC Chairman some time ago said, "I think it fair to say that the FCC chairman and his distinguished colleagues wield greater economic power than all the courts put

together." That is undoubtedly overstating FCC power -- although the impact and ramifications of some of our decisions are agonizing and rather awesome. The function and jurisdiction of the FCC as an independent regulatory agency has been defined by the Communications Act of 1934 and guided by the Constitution. The FCC was established by the Congress as an expert agency to implement the Act. We remain subject to oversight by the Congress.

The Senate and the House in the exercise of oversight authority make certain that regulatory agencies maintain a becoming humility. The numerous inquiries from oversight and other committees are a regulatory fact of life. The questioning is intense and detailed. Commissioners are constantly reminded they are an "arm of Congress," the duly elected representatives of the people. In fact, I wouldn't be surprised if someday a question would be included in a hearing -- "Is there anything known only to you and not this committee that could possibly be used to embarrass, discredit, or impeach you. Please state and remember you are under oath."

One of my favorite quotes is from my longtime friend, Chairman John Dingell of the House Committee on Energy and Commerce, who gave me fair advance warning years ago when I first sought an FCC appointment. When I was first nominated, he said "What do you want the damn job for? You will be beaten up by Congress and overruled in the courts." He didn't even mention abuse by the press. We do get beaten up from time to time, but a great majority of our decisions are sustained in court. At last count, we had 282 government attorneys at the FCC -- bright, dedicated and well able to compete with their much higher paid counterparts from the private sector.

As I mentioned, some of the decisions are awesome. Arguments pro and con are very persuasive. You listen, reach, deliberate, soul-search and agonize. You consult your staff assistants. Sometimes you even wish you could flip a coin. The first and foremost consideration is which action best serves overall public interest. In this case, what is the public interest? Where do reason and justice predominate? What arguments are the most persuasive? Which viewpoint or action scores the most points legally, ethically and morally?

Finally, it's "H" hour and "D" day -- the Commission votes. Promptly after the Commission votes on a significant controversial issue, four things invariably happen. First, the losing parties immediately charge the Commission with not serving the public interest. (You haven't served their private economic interests or adopted their business proposals, hence you are not serving the public interest in their view.) Your motives, qualifications and integrity are impugned. Sometimes your jurisdiction is challenged.

Second, the losing parties generate as much public opposition as possible. They damn you in Congress, in the press and among friends and organizations sympathetic to their case or viewpoints. (Frequently the objective is to cause public criticism, a tough oversight hearing, or a legislative reversal.)

Third, the losing parties who invariably consider their arguments as not having been fully appreciated or fairly judged, petition us to reconsider our ill-considered action.

Fourth, the FCC decision is appealed in court -- the third and fourth are perfectly legal and ethical recourse. I would like to be spared the machinations and rhetoric of the first two even though they keep the legal meters running.

In discharging its regulatory responsibilities, the FCC should keep in touch with the moods and will of the people and of their elected representatives in Congress. I once told an exceptionally bright and technically correct legal assistant that working directly for a non-lawyer commissioner will be a broadening experience in practical regulation. I smiled,

"You will see how we apply social and political solutions to highly technical legal problems." Most FCC decisions are strictly legal matters, but the most significant ones require consideration of all policy perspectives with an emphasis on the policies expressed by Congress.

In closing, I want to state that my approach to communications issues is more journalistic than legalistic so I find great solace and guidance in a quote expressing President Franklin Roosevelt's view of the role which administrative agencies should play in government. That great president said,

"A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

This is sage advice from a great historic American. I intend to apply that principle of substantial justice as we confront the contentious exciting communications developments of the 90s.

Overall, it is a challenging time to be at the FCC. 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 this 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.

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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