Separate Statement of Commissioner James H. Quello, Concurring in Part and Dissenting in Part.

In re: Complaint of Lawton Chiles, Bob Martinez, and Bill Nelson Against Station WTVT(TV), Tampa, Florida.

The *Memorandum Opinion and Order* in this case upholds a discovery order resulting from a political broadcasting lowest unit charge complaint and, at the same time, limits the scope of discovery.

As the first occasion for the Commission to rule on a discovery order in a political broadcasting proceeding, this case has important policy ramifications. To a large extent, it will determine whether the Commission has created workable procedures or instead created an administrative morass that will ill-serve candidates, broadcasters and the FCC.

So long as the discovery procedures remain part of the complaint process, it is important to implement them in as rational a way as possible. Accordingly, I concur with the Commission's decision to narrow the scope of discovery. However, making an order as rational as possible under the circumstances is not the same thing as making it rational. I am concerned that the decision approved in this *Memorandum Opinion and Order* is procedurally deficient, that it overlooks key requirements for making a *prima facie* case and that it perpetuates a cumbersome and counterproductive process. With respect to these aspects of the decision, I dissent.

The Mass Media Bureau noted in its decision in this case that the complainants failed to support their allegations with affidavits and neglected to indicate what time period was included in the market data at the heart of the complaint. Rather than confront these deficiencies, the Bureau merely noted that "in the future, we would prefer that complaints be supported by declarations of the candidates in accordance with Section 1.16 of the Commission's rules." *In re Complaint of Lawton Chiles, Bob Martinez, and Bill Nelson Against Station WTVT(TV), Tampa, Florida*, 7 FCC Rcd. 6661, 6662 n.6 (Mass Media Bureau 1992). With respect to the factual showing, it "caution[ed] complainants in the future to provide the Commission with more precise information regarding the manner in which [market] data is utilized." *Id.* at 6662 n.8.

Although the procedural issue was not raised in the Application for Review, I had hoped that the Commission — in setting the standard for political broadcasting complaints — would seek to ensure that the watershed case would be free of obvious defects. We should be prepared to apply our procedural rules now, and not simply hope that complaints meet the Commission's standards at some point "in the future."

Far more troubling is the Commission's use of market data in this case. The complaint is based on Spot Quotations and Data, Inc. ("SQAD") analyses that list cost-per-point information each month in selected markets.[1] The Bureau found that complainants had established a *prima facie* case and ordered discovery because of SQAD data "demonstrating that the rates paid by candidates for use of WTVT's facilities . . . were higher than the *average rates charged by stations in the Tampa market.*" *Id.* at 6662 (emphasis added).

There are two significant problems with this finding: it ignores the influence of class of advertising time on lowest unit charge determinations and it focuses on average rates in a market rather than the rates of a specific station.[2]

Obviously, the only way to know whether a station is providing candidates the lowest unit charge is to examine the rates of that station, and not another. As the Chief of the Commission's Political Broadcasting Branch noted informally last February:

> The *prima facie* case has to be based upon the facts relevant to that particular station. And, what we're looking for is, is there a difference between the rates charged commercial advertisers versus the rates charged political candidates and that can only be determined on that particular station's universe.

Remarks of Milton O. Gross, FCC Brown Bag Lunch, February 25, 1992 (transcribed from audio tape).

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We get into very dangerous territory when we assume that a station may be violating Section 315(b) if its rates exceed the average rates in a community. The highest rated stations will always command higher rates; the lower rated stations will charge less. To base our evaluation on the average threatens to penalize the most popular stations and paradoxically insulate from review those with lower ratings.

The Commission attempts to address this issue by noting that the SQAD market averages (cost-per-point) were multiplied by "station-specific ratings information." *Memorandum Opinion and Order* at ¶ 9. That is, the WTVT ratings for a given daypart were multiplied by the average cost-per-point (based on SQAD) to obtain a benchmark rate for evaluating the complaint. While this approach acknowledges the conceptual problem the Commission faces, it unfortunately begs the question in answering it.

No matter how many times you multiply the SQAD data by other numbers, you still end up with an average market rate. It will always be an average, because the cost-per-point is calculated by aggregating rates from various stations in the market. The Commission's approach, without analysis or justification, assumes that all stations in a given market charge the same cost-per-point. But the fact is, the top stations in a market generally will charge rates that exceed the market average. Thus, even with the modified approach in the *Memorandum Opinion and Order*, the Commission's analysis is not a reliable indicator of Section 315(b) compliance in that it discriminates against higher rated stations.3

Even if the Commission's analysis was specifically directed toward the station under review and not a market average, its failure to account for different classes of time is astonishing.

During the past two years, the Commission repeatedly has shown its awareness of the importance of class of time in making lowest unit charge findings. In the 1990 political broadcasting audit, for example, the Mass Media Bureau found that "candidates paid more for broadcast time than commercial advertisers in virtually every daypart" at 80 percent of the stations surveyed. *Mass Media Bureau Report on Political Programming Audit*, Public Notice No. 4728 (September 7, 1990) at 3. The Report accounted for the difference by noting that "candidates purchased time at non-preemptible 'fixed' rates while commercial advertisers purchased time at 'preemptible' rates," *id.* at 5, and in the end, the Commission found that only seven percent of the stations surveyed had violated the lowest unit charge rule. *See, e.g., Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act*, 6 FCC Rcd. 7511, 7517 (1991) (Separate Statement of Commissioner James H. Quello, dissenting in part) ("*Declaratory Ruling*").

This understanding of the importance of class of time permeated the Commission's recent revision of the political broadcasting rules. In that proceeding, we expanded broadcasters' ability to create different classes of time for lowest unit charge purposes and to set different rates. *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 690-92 (1992). The Commission now inexplicably undermines this policy by subjecting to greater risk of liability those stations that create new classes of time.

As with the question of average rates, the *Memorandum Opinion and Order* responds to, but does not answer, this concern over class of time. It notes that "SQAD is a source of industry data on average rates [that] is currently the best source available for a candidate" and that "WTVT has not presented the Bureau with sufficient information regarding the manner, if any, in which SQAD data takes into account class of time." *Memorandum Opinion and Order* at n.13. It also points out that the Commission "specifically endorsed the use of such data on average rates in the *Declaratory Ruling*." *Id.* (quoting footnote 47, to the effect that "A *prima facie* case of a violation would otherwise be difficult, at best, to demonstrate . . . .").

Aside from the fact that the Commission by this action reverses the burden of proof on the lowest unit charge by class of time, it also omits the context in which the use of such data was "specifically endorsed." In footnote 47 to the *Declaratory Ruling* in which the Commission approved the use of average market data as part of a lowest unit charge complaint, we emphasized that:

> [A] complainant could make a *prima facie* case by using generally-available industry or statistical data on average rates to support its belief that the rate paid by a candidate was higher than the average rate charged *by the station for the same class of time*.

Declaratory Ruling, 6 FCC Rcd. at 7521 n.47 (emphasis added).

In establishing procedures for political broadcasting complaints, it was never contemplated that the average rates at issue would not be station-specific or ignore the class of time. But in the instant order the Commission commits both errors.

These unfortunate policy choices tend to reinforce my concern that the Commission has created unworkable procedures that will further confuse this difficult area of our rules. At the time the procedures were approved, I wondered whether the new procedures would allow candidates to make a *prima facie* case and obtain quick relief or lead to undue delay. I found it difficult to imagine that we could expect much speed from "a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings." *Declaratory Ruling*, 6 FCC at 7516-17 (Separate Statement of Commissioner James H. Quello, dissenting in part).

The complainants in this proceeding will be lucky if the discovery phase is completed by February 1993 — the one year anniversary of the complaint. Even under the narrower discovery order approved by the Commission, I understand that over 80,000 documents have been provided.[4] And we are only at the initial stage of the proceeding.

For the reasons stated above, I dissent, in part.

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[1] Cost per point is an estimate of the proportional price for delivering a percentage or rating point of national spot television audience for a designated population.

[2] SQAD reports are not — and were never intended to be — a specific measure of a station's rates. As SQAD noted in its 1990 reports:

> The SQAD report is composed of averages and is to be used as a yardstick and guide only, without representation or warranty that time buyers will be able to match the indicated costs and further that buying negotiations occur daily while the SQAD report is published monthly.

See Answer of WTVT, Inc., filed March 2, 1992 at 12. Evidently aware of this deficiency, complainants submitted additional data from *Spot Cost Outlook and Projections* ("SCOOP"), a product of *Media Market Guide*. However, in a declaration filed with the Commission, the publisher of SCOOP data noted:

> We publish data by market only and do not publish any data concerning rates on individual stations. . . . SCOOP is not intended to reflect actual costs in a market and any attempt to use SCOOP data to reflect actual costs in a market would be inaccurate. We have never authorized anyone to use SCOOP data to reflect actual advertising costs and would not do so.

See WTVT, Inc.'s Motion to Strike, filed March 17, 1992, Exhibit 1.

[3] This inequity is pronounced in this case, since WTVT was the highest rated station in the Tampa market for the period under review. *Answer of WTVT, Inc.*, filed March 2, 1992 at 13. Additionally, one of the network affiliates in the market has a weak signal, further exacerbating the disparities. *Id.* at 12.

[4] On December 15, 1992, complainants requested further discovery, including 27 interrogatories, the production of seven categories of documents and depositions of 38 persons. Complainants' Request for Further Discovery (filed December 15, 1992).