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March 17, 1994

Commissioner James H. Quello Addresses FCBA

Two new formal complaints filed against Howard Stern and Infinity Broadcasting could, if found actionable, result in serious enforcement action, according to Commissioner James H. Quello, speaking today before the Federal Communications Bar Association in Washington, DC.

Commenting on the new complaints, Quello stated "In each previous case in fining Infinity, the Commission has stated it would consider further actions should Infinity broadcast indecent material in the future. Each time there has been another repeated violation."

"How many 'next times' can the public and the Commission tolerate? Common sense alone would dictate that it is obvious the fines have not had a deterrent effect."

The senior commissioner then warned, "I do not know if the latest Stern complaints contain actionable material or not. I will, in the normal course, review their content and will at that time make a legal judgment. If that legal judgment finds that the material is in fact indecent, I will not shrink from a further judgment that forfeitures, however sizable, are not deterring illegal action. If the facts dictate that further conclusion, I will confront the issue of a possible FCC administrative hearing as a sad reality -- That sad reality will be one that Infinity, and not this Commission or this Commissioner has made necessary."

The latest complaints were filed March 4 and cover Stern broadcasts from November 17, 1993 to February 22, 1994, on station WWKD-FM, Buffalo, New York.

These complaints are in addition to previous complaints that the Commission unanimously found actionable in five previous decisions. They resulted in one warning and four separate notices of apparent liability. The four notices resulted in fines totalling \$1,678,250.00, all being appealed in court by Infinity.

In a strong statement dissenting to the transfer of station KRTH (FM), Los Angeles, to Infinity following the most recent fine, Quello wrote "I believe substantial and material questions of fact have been raised by the continued repeated egregious violations so as to question whether further grants of assignment or renewal applications to Infinity would serve the public interest."

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Quello concluded his statement with a general First Amendment declaration: "As a former newsman and broadcaster, I consider myself a strong advocate of First Amendment rights. I believe reporters and broadcasters have a right to be wrong; a right to even be insufferable smart asses; but not a right to violate established indecency and obscenity laws."

In other comments: Quello favored relaxation of multiple and cross-ownership rules in view of the increasing multi-channels and oncoming DBS, provided there is a market cap of 25% to prevent market domination by any single entity.

He said he tended to support all legitimate means that would provide additional income for universal free TV, the most influential and pervasive of all media, including secondary and ancillary flexible use of HDTV spectrum, as long as HDTV broadcasting remains the number one priority.

He asked that universal free broadcasting, the most essential of all services, be allotted the highest priority in all transmission systems, including in the advance planning of an electronic information superhighway.

The Commissioner also called for creating an environment that will allow cable industry reasonable growth and opportunity. He supported the recent further rate reductions, but stated that cable now must be able to adjust rates for inflation and to recover increased program costs, franchise fees and taxes. He added, "Most importantly, the Commission must promptly institute relief for small systems."

In opening his St. Patrick's Day remarks, Quello labeled FCBA lawyers "lucky legal leprechauns in a field of four leaf clovers filled with billable hours." He continued "the first leaf was the 1992 Cable Act otherwise known as the Lawyers Relief Act of 1992. The second leaf being spectrum auctions; the third leaf being PCS; and the fourth leaf of the clover being expanded interconnection. Because of the possibilities contained in this four leaf clover, partners are assured long term profits and your associates of full gainful employment."

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Remarks by Commissioner James H. Quello

Before the FCBA

Washington, DC - March 17, 1994

FCBA -- In a Field of Four Leaf Clovers

On this St. Patrick's Day, it is appropriate that I talk to the FCBA about pots of gold, blarney, four leaf clovers and other things Irish.

First, before I begin my regular speech I have something important to say Rumors of my early demise via retirement are grossly exaggerated. I plan to serve out my remaining 2 years and 3-1/2 months, God and my wife willing. I also have ambitions to be reappointed as the first active wheelchair Commissioner, now that I have actually witnessed wheelchair tennis -- I've seen good tennis players in wheelchairs enjoying vigorous 2 bounce tennis. Thus maintaining a semi-fit mind in a fit body. I am invigorated by the tumultuous issues we shall and must face in the next several years. While last year, all by itself, was a momentous year in terms of Commission actions, the next several years, I think, will be absolutely monumental. We have a new, relatively young FCC Chairman Reed Hundt -- (Of course, to me almost everybody is relatively young.) who has been a pleasure to work with thus far. With the prospect of more fresh energy on the 8th floor, I don't want to miss a minute of the historical challenges facing either our industries or our favorite federal agency. So don't "lame duck" me too soon.

I am impressed by this St. Patrick's day turnout. You see, when my great great grandfather, Michael O'Quell, was deported from southern Ireland for repeatedly eating meat on Friday (then a mortal sin in the Catholic Church), he was shipped off to Italy. Adherence to church rules were, and are, somewhat more relaxed in Italy. At that time, he was told that Italian citizenship would only be conferred upon applicants whose names ended in a vowel. Thus, the transformation of O'Quell to Quello. The new vowel transposition turned out to be most fortuitous for me. In 1974, when I was enduring the longest FCC confirmation inquisition in history, Chairman John Pastore finally noticed that my name ended in a vowel. He came to the aid of a countryman by stating "I have to admit I like the way he spells his name and answers the questions." The press stated that sentence spelled "confirmation," even though the hearings went on for two more days. So, Quello turned out to be the most useful name of choice -- you might say this Italian has a lot of the luck of the Irish with him. Incidentally, the foibles and tribulations of that record 8-day confirmation hearing will make a fascinating chapter in my book when I eventually leave the Commission.

I also have the good fortune to be married to a thoroughly Irish woman who is responsible for my maintaining a becoming sense of unimportance. We have been married for 56 years without her ever filing a petition to deny renewal. She admits she entertained murder and dismemberment several times, but never divorce, which is against her Irish Catholic teachings. She regularly threatens me with "one more crack like that and you will never make 57!" I even learned to smile when she repeats -- "Remember when God made man, She did it as a joke!" Nevertheless, I really believe in marriage. If it weren't for marriage many men would go through life thinking they had no faults at all. Besides, Mary has been very good at letting me have -- her way.

Now back to today's speech -- an appropriate theme song could well be the classic, "Happy Days are Here Again" for the Washington communications bar.

Some would label you lucky legal leprechauns on this St. Patrick's Day. After all, communications lawyers are in a field of four leaf clovers. One leaf being the 1992 Cable Act (otherwise known as the Lawyers' Relief Act of 1992) and all of our brilliant and simple implementing rules; a second leaf being spectrum auctions; the third leaf and, the fourth leaf of the clover being expanded interconnection. Because of the possibilities contained in this four leaf clover, partners are assured lush long term profits and your associates of full gainful employment. If only I continued my own education for 3 more years! I could have been a lawyer like all the bright people that tried to make me look good the past year -- Thank you FCC staff and thank you FCBA!

Personally, I want to specifically thank you for your assistance last year while I was serving as interim Chairman. I asked my Chief of Staff, Brian Fontes, to institute monthly meetings with the FCBA Executive Committee and other members to review a number of issues, such as licensing, resources and the like. The Commission did benefit from these meetings, and I hope you did as well. Thank you for your time, talent and ideas and for your strong support during my tenure as interim Chairman.

So yes, happy regulatory days are here assuring billable hours and financial compensation in perpetuity for communications attorneys.

If many of you experience a remarkable spurt in "billable hours," then it will be far more a result of the dynamism of telecommunications clients, the explosion of new communications services and the implementation of Congressional mandates, than the result of FCC overregulation.

There is no question that significant regulatory changes and new rules lie ahead to accommodate new developments. Lawyers, lobbyists and tactical combinations of both can salivate over the legal and adjudicatory possibilities of the following:

1. Participating in the detailed evolutionary development of the electronic and wireless superhighway of the future;
2. Implementation of telco entry into cable and vice versa;
3. Approval and waivers for megamergers and joint ventures to expedite advanced communications;
4. Implementation and enforcement of cable rate regulation, must carry, retransmission consent, program access and franchise requirements;
5. Conducting cable cost studies to determine rate adjustments for small systems;
6. Court appeals of Congressional cable legislation and FCC implementing regulations;
7. Competitive bidding for valuable, frantically sought, PCS and wireless mobile service licenses, approving standards and establishing technical rules for PCS and other new services;
8. Practical implementation of advanced technology including DAB, DBS, HDTV, spectrum compression, interactive video and data services;
9. Implementation of Congressional action revising the MFJ, with the FCC rather than the court as the ultimate overseer and regulator;
10. First Amendment challenges in broadcast and cable indecency and TV violence;
11. Field Operations Bureau and EEO enforcements and license renewal applications and challenges;
12. Possible relaxation of cross ownership and multiple ownership rules in view of increasing multi-channel communications and the advent of DBS;
13. Representing public utilities in their bid to compete in the telecommunications marketplace -- new client opportunities.

14. A combination of all of the above to avoid ending this promising list on number 13.

Ideally, the eventual cure for regulation will be a fully competitive marketplace, with no monopolies. Competition in all services, be it the local loop or cable or competitive fiber optics superhighways will eliminate the need for many government regulations and controls. With effective competition there should be little need for government regulation -- except for traffic highway patrols to monitor the communications superhighway. However, this will be a long term evolutionary process.

But before we spend too much time contemplating the future nirvana of total effective marketplace competition, let me give you some personal opinions on a few current FCC issues.

The Bell Atlantic-TCI Divorce: I was first notified at 11:00 PM at my home about the termination of the Bell Atlantic-TCI merger with John Malone blaming the FCC recent cable rollback and I issued this statement:

"The FCC is not the evil umpire -- the latest rate reductions were temperate -- we lowered the rates 7% for consumers and provided cable a reasonable rate of return for investment and expansion. Also, there are many cumbersome local franchise requirements for cable transactions beyond federal regulation.

I believe the cancellation more likely reflects astute John Malone's continued confidence in the strong economic viability of cable rather than in any regulatory overkill."

The breakup simply sent a signal that phone companies cannot be expected to pay exorbitant prices to acquire cable companies. Many phone companies are establishing their own fiber optic lines and will purchase their own programming or joint venture with existing cable companies.

However, in fairness, the FCC must now allow the cable industry to move forward in an environment that will allow it reasonable growth and profitability. Cable must be able to adjust rates for inflation and to recover increased program costs, franchise fees and taxes. We must fairly and promptly decide cost of service showings. We also need accurate cost data to determine the extent of rollbacks for low cost and small system operators. Perhaps, most importantly, we must promptly institute relief for small systems. We must remember that if cable is to be a competitive player in the future electronic superhighway, it must have investment capabilities from a profitable business.

There is much speculation today about the multiple and crossownership rules. It is time for Congress and the FCC to revisit these rules. I believe it is time to relax restrictions in view of increasing multi-channel competition and oncoming DBS. In order to avoid multiple ownership market domination, I believe some kind of total audience cap should be imposed. For starters we could consider a restrictive cap of 25% of the market reached or viewer audience to prevent market domination by any single company. The restrictions would eventually be eliminated when competitive superhighway multi-channels are in place.

There are so many more issues in this limited time that I'd like to discuss. For example, flexible use of broadcast spectrum. I have a tendency to support all legitimate means that would provide additional income for universal free TV, the most influential and essential of all media and the only media with a government public interest mandate. TV and radio are competing more and more in an increasingly multi-channel, multi-choice market with competitors supported by subscriber fees and pay per view in addition to advertising. This spring, with the advent of DBS, local broadcasters will face still another powerful competitor. However, the additional 6 MHz spectrum was specifically allocated to facilitate development of HDTV. Those advocating nonbroadcast uses of this broadcast spectrum could run into Ashbacker questions. Broadcasters must give HDTV the highest priority in utilizing the additional 6 MHz. In my opinion, any flexible use must be secondary or supplementary to the initial HDTV purpose. Broadcasters must make a convincing case to Congress for supplementary use. Before finalizing legislation, Congress could be well served by allowing the Commission to develop technical standards for advanced TV and reviewing all factors affecting digital service.

Finally, I must say something about the electronic superhighway. I congratulate President Clinton and Vice-President Gore for their interest in telecommunications issues and their recognition of the role telecommunications will, and I might add does, play in all aspects of American life, from schools to hospitals to homes. The FCC, working with Congress, will continue to play an instrumental role, along with industry, in formulating the telecommunication infrastructure essential to developing the superhighway. This will necessitate reviewing existing barriers, creating regulatory incentives, implementing legislation and proposing rules that assure all telecommunications providers, including broadcasters, have a role in the evolutionary development of the superhighway. The availability of universal free broadcasting, the most influential and essential media to all the public, must be a primary consideration. Free universal broadcasting is the most valuable asset this democracy possesses and must be allotted highest priority in any future communications transmission highway.

And now for the subject I'm not supposed to talk about even though everyone else does -- Infinity Broadcasting and Howard Stern.

I am informed there were new complaints against Howard Stern filed since my dissent to the transfer of KRTH(FM) was released on February 1, 1994.

At that time I wrote:

"The pattern of egregious repeated violations of FCC indecency rules is so flagrantly aggravated by six new complaints against Infinity and Howard Stern that I am impelled to dissent to being a party to any action that would result in approving additional stations for Infinity. This is such a serious nationwide matter that I believe final disposition of the Infinity case should involve a thorough review by a full Commission. Once the issues raised in the Act III court case have been fully addressed, the full Commission should reconsider Infinity's repeated flaunting of the FCC indecency rules which could bear on the fitness of the licensee. It is apparent that previous FCC fines have not had a deterrent effect. Additional fines could merely be written off as a cost of doing business. In fact, no fines have been paid. Infinity is actively opposing the FCC fines exercising its legal rights. Approving transfer of additional stations to Infinity at this time might be misinterpreted as the FCC endorsing Infinity and Howard Stern actions.

The FCC has broad discretion in determining and implementing the public interest. I believe it is antithetical to the public interest to authorize additional stations for probable dissemination of gross indecency and possibly obscene broadcasts by Stern. It is unlikely and counter-intuitive to believe decent responsible people would find it in the public interest to support additional outlets for licensees propagating lewdness, incest, deviant behavior and demeaning women, blacks and gays. Certainly, First Amendment rights were not conferred by our Founding Fathers for repulsive indecent or possibly obscene purposes. It must surely be embarrassing for First Amendment absolutists to defend language quoted in my dissent, broadcast at times children and young people are in the audience.

In this case, substantial justice should ultimately prevail over any technical legalism that First Amendment purists may utilize. Substantial justice requires the FCC to serve overall public interest. Today there is an overwhelming public outcry against excessive, explicit, deviant sex and glamorized violence and brutality on the air. It requires responsible action by the FCC and by public service minded broadcasters.

I believe substantial and material questions of fact have been raised by the continued repeated egregious violations so as to question whether further grants of assignment or renewal applications to Infinity would serve the public interest, convenience and necessity.

The recent Act III decision confirmed that there is a compelling government interest in protecting children from indecency and in no way invalidated the FCC's indecency enforcement from 6 AM to 8 PM."

In its public release of February 1st, the Commission stated "This action is without prejudice to any actions this Commission may deem appropriate should Infinity broadcast indecent material in the future."

Today there is considerable public support for "three strikes and you're out" (lifetime penalty) for unlawful conduct. In each previous case in fining Infinity, the Commission has stated that it would consider further actions should Infinity broadcast indecent material in the future. Each time there has been yet another violation.

How many "next times" can the Commission tolerate? At some point, common sense alone would dictate that it is obvious the fines have not had a deterrent effect.

I do not know if the latest Stern complaints contain actionable material or not. I will, in the normal course, review their content and will at that time make a legal judgment. And if that legal judgment is that the material is in fact indecent, I will not shrink from a further judgment that forfeitures, however sizable, are not deterring illegal action. If the facts dictate that further conclusion, I will confront the issue of a possible administrative hearing as a sad reality -- but one that Infinity, and not this Commission or this Commissioner, has made necessary.

As a former newsman and broadcaster I consider myself a strong advocate of First Amendment rights. I believe reporters and broadcasters have a right to be wrong; a right to be insufferable smart asses; but not a right to violate established indecency and obscenity laws.

"And that's the way it is" -- at least with me.

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