

DISSENTING OPINION OF
COMMISSIONER JAMES H. QUELLO

In re: EIA petition for waiver of CB receiver chassis radiation requirement and EIA petition for expedited action on application for CB equipment authorization.

In granting this waiver, the majority has contributed additional uncertainty about its ability to deal with important matters with a reasonable degree of finality. The Commission first affirmed its new radiation standard last July 1/ and then reaffirmed it in October 2/. Now, less than a month since reaffirming the standard, the majority has apparently, and suddenly, changed its mind.

I believe it's important to point out that today's action was taken without benefit of any new information germane to the issue of the radiation standard. There was nothing presented to support the waiver that had not been considered in the first and second instances. Therefore, the Commission - unhappily, not for the first time - found itself sidestepping a rule upon which the ink was not yet dry.

It's clear that by its action today, the Commission has broken faith with those manufacturers who made the necessary effort to comply with our standard. I would like to quote from a letter to each Commissioner from Carl Korn, President Dynascan Corporation (Cobra Communications) in which he pointed out that "there were some indications that a few of the companies who did submit radios (for equipment authorization), did so with the full knowledge that their radios did not meet the five microvolt standard and with the hope that the FCC would relieve this requirement up to the 50 microvolt level. Since that was their business risk to take, it would be unfair to those companies who did meet the requirements to suffer because of the increased cost to manufacture five microvolt units, while those who did not meet the requirements are temporarily relieved of that responsibility."

Insofar as there were those who chose not to comply with the Commission's rules in the hope of gaining some business advantage, the majority has rewarded such defiance. It is not simply that certain manufacturers have successfully defied the Commission. In doing so, they have assured themselves the opportunity to compete in the marketplace against manufacturers who have complied at considerable cost.

1/ Docket No. 20746, First Report and Order, adopted 7-27-76, released 8-4-76; 41 FR 32590

2/ Docket No. 20746, Memorandum Opinion and Order, adopted 10-18-76, released 10-28-76; 41 FR 47442

The majority rationale for granting the waiver ^{3/} should properly be confined to rulemaking. Waiver should be granted only in exceptional circumstances not of general application. Obviously, the arguments advanced by the majority were considered in their proper place and rejected. Now, under a procedure which can only be described as "reconsideration once removed", the majority has undercut its earlier decisions and undermined public confidence in its even-handedness.

I'm concerned that the public will view our action today as vacillation. Certainly, the Commission has a right and a duty to change its mind when that change is dictated by new facts and new circumstances. Neither new facts nor new circumstances were presented here. The majority has changed Commission policy in response to a waiver request which, in reality, was a petition for reconsideration of our earlier reconsideration. That is clearly unsound procedure and bereft of any substantive foundation.

Therefore, I dissent.

3/ Majority opinion, paras. 13 & 14