Adopted: 3/10/95

Concurring Statement of
Commissioner James H. Quello

WSEE-TV, Erie, PA, Notice of Apparent Liability
KTTU(TV), Tucson, AZ, Notice of Apparent Liability
Excess Commercials During Children's Programming

Like a broken record, I again must speak out against the imposition of short-term renewals against WSEE and KTTU for their apparent violation of the limitations on commercials in children's programming. However, unlike phonograph records, which have gone the way of the dinosaur, my position is based on a panoramic view of the future of telecommunications, and broadcasters' place in that future.

Preliminarily, I wish to emphasize that I do not think that the violations in these cases should be overlooked. Indeed, I feel that a forfeiture is clearly warranted in both cases. (Although I have made clear on many occasions that I am uncomfortable with large forfeitures, I will save this argument for another case.) I take very seriously the Commission's obligation to enforce the quantitative commercial limits explicitly set forth by Congress in the Children's Television Act, and believe that this Agency should aggressively enforce these limits.

However, the severe sanction of a short-term renewal should only be imposed in the most egregious cases involving second or third findings of liability for violations of the commercial limits. I am extremely concerned that the Commission in recent years has begun handing out short-term renewals like clowns handing out candy at the circus. My opposition to imposing short-term renewals in cases involving a first offense is based on four key concerns.

First, broadcasters must be in a position to compete in the increasingly competitive multichannel video world. If we continue to impose short-term renewals that place a cloud over the licensee and its ability to compete in an open marketplace (for example, in buying and selling stations, securing capital for upgrading their facilities to high definition television, etc.), we are tying the hands of broadcasters vis-a-vis their powerful multichannel cable, wireless cable, and DBS competitors.

Second, in a world of regulatory cracks, the specter of renewal challenges filed solely for the purpose of extracting some payment from a licensee looms large on the horizon. Short-term renewals only fuel the possibility that such baseless challenges will be filed. Even if a petition to deny or competing application is ultimately dismissed, the licensee has nonetheless been forced to expend significant sums of money to defend against a challenge which is without merit.

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Third, the imposition of a short-term renewal is particularly unpalatable in a narrowly-focused system of sanctions in which we all but ignore other factors that, while not directly relevant to the violation or time period at issue, nonetheless are of paramount importance to the public interest considerations that are the touchstone of the Commission's work. Such factors include, for example, how long the regulation at issue has been in place, the steps the licensee has taken to resolve the problem which resulted in the imposition of a forfeiture; the licensee's overall record of compliance with our rules; and the licensee's efforts to serve the community.

Fourth, I am at a loss to see how the Commission can impose a short-term renewal where the violation at issue was unintentional and inadvertent. The licensee made a mistake, not a deliberate misstep, and should suffer a reasoned consequence. The consequence should match the seriousness of the violation. While a forfeiture is a logical sanction for an inadvertent, first-time violation because the licensee submits a one-time payment for its mistake, a short-term renewal causes the licensee to unfairly pay for its error well into the future. This punitive, long-term sanction is imposed regardless of whether the licensee's operating record and service to the public are otherwise laudable.

The imposition of a short-term renewal is particularly egregious in the case of KTTU-TV. The NAL issued today is part of the very first group of cases involving NAL's for violations of the commercial limits, which became effective just over three years ago. The licensee, upon learning of the commercial overages at the station, took immediate and dramatic steps to correct the problem, including replacing the general manager of KTTU and establishing a detailed, multi-layer procedure for preventing future overages on the station.

Finally, and perhaps most ironic given the primary thrust of the Children's Television Act, KTTU has done an outstanding job of airing educational and informational children's television programming. During the period in which the overages occurred, KTTU was airing approximately five and a half hours of children's programming on weekdays and four hours on weekends (with the weekday hours decreasing to about two and a half hours in late September). Since that time, KTTU has added four half-hour educational and informational programs to its weekend children's lineup (including <u>Scramble</u> and <u>Pick Your Brain</u>, both quiz shows for children, <u>Scratch</u>, a magazine format program for children, and <u>Energy Express</u>, a physical fitness, health and sports program for children); a one-half hour program aired Monday through Friday (<u>Children's Room</u>, produced by the Christian Science Monitor in which books are read to children); and has plans for adding new and expanding existing educational and informational programming.

A great man once said "Let he who is without sin cast the first stone." This Agency, like the licensees it serves, is not without sin. I can only hope that, especially with respect to inadvertent violations of our rules that do not involve safety of life or property, we move toward a more fair-minded approach to enforcement that takes into account the marketplace, the licensee, and the circumstances.