

**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, DC**

**February 8, 1996**

Office of Commissioner  
James H. Quello

Center for the Study of Responsive Law  
Post Office Box 19367  
Washington, D.C. 20036

Dear Mr. Nader and Mr. Carbone:

I am writing in response to your request that I recuse myself from any FCC review of the proposed Disney-Capital Cities/ABC merger.

As an initial matter, you addressed your request for my recusal to Chairman Hundt. As you are no doubt now aware, however, a request for a Commissioner to recuse himself is to be decided in the first instance by the Commissioner involved. *Weiss v. Hunna*, 312 F.2d 711 (2d Cir.1963). I have considered your request, and believe it to be without merit.

The relevant standard in reviewing a request for recusal is whether "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C.Cir.1970). Furthermore, a court will set aside a Commission member's decision not to recuse himself only where he has "demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence." *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C.Cir.1980). *Cinderella* and subsequent decisions make clear that a number of conditions must be met to justify recusing a Commissioner. First, a party seeking recusal must point to a specific statement that clearly shows prejudgment of both the facts and the law of a given case. Second, the statement must be viewed in the context of the entire proceeding. Third, the statement must be analyzed from the perspective of a disinterested observer.

You base your recusal request on my press statement of August 2, 1995, claiming that this statement demonstrates that I have prejudged both the facts and the law. However, in your letter to Chairman Hundt, you misquoted my statement. Although

you claimed to cite me "in full," you omitted a highly relevant portion which undermines your position. And although you corrected the omission in a second letter, the omission nevertheless materially distorted my viewpoint.

I have attached a copy of my press statement in full. The final, indispensable sentence in this statement refers to the issues the FCC must resolve in approving the Disney-Capital Cities/ABC merger, and qualifies my preceding comments.

Contrary to your assertion, unsupported by any legal precedent, my statement does not indicate prejudgment of either the facts or the law. Throughout my statement, I referred to the key public interest and competition considerations that will guide the Commission's decision, as well as my own, on any waiver that Disney or Capital Cities/ABC may request. In conclusion, in the sentence you omitted from your recusal request, I noted:

There will be multiple ownership and cross-ownership issues to be resolved and the FCC will be required to make sensible decisions that best serve the overall public interest and a robust competitive marketplace.

As a matter of fact and law, this statement does not reflect a predisposition to approve the merger. Furthermore, I will approach any review of this merger as I approach all cases before the Commission: with an open mind and a willingness to look at the arguments presented in the record.

As you are probably aware, courts look unfavorably on such distortions. For example, in arguing a similar recusal request before the Court of Appeals for the D.C. Circuit, the petitioner's attorney quoted me as saying that I would have no objection to a waiver. Although the attorney only omitted only one word of my statement, "request," this omission was sufficient to distort its meaning. In fact, the statement at issue was that I would have no objection to a waiver request. The response of the court upon discovering the attorney's critical omission clearly conveyed its disapproval. *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 app. A (1995 ). For your reference, I have attached a copy of the court transcript.

For the foregoing reasons, I decline your request that I recuse myself from any review of the Disney-Capital Cities/ABC merger.

Sincerely,

  
James H. Quello  
Commissioner

**PRESS STATEMENT OF  
COMMISSIONER JAMES H. QUELLO**

**In Re: Disney - CapCities/ABC**

All I can say at this point is that two efficient, exceptionally well managed and public service oriented communications giants are joining forces with Disney acquiring ABC. As long as there is robust marketplace competition the public should be well served. Disney-ABC will have the finances, program resources and economies of scale to better serve the public. They will be well able to compete with other communications giants, such as Time Warner, Viacom-Paramount, GE-NBC, Seagram-MCA Universal, Gannett and Multimedia, TCI, and Fox with their programming interests, as well as a possible upcoming acquisition or merger involving CBS. In addition, large phone companies are acquiring or negotiating for substantial interests in programming ventures, including Nynex and Time Warner. Active competition among these vertically-integrated communications giants is the key to serving the public interest.

Disney-ABC will also be in a stronger position to compete internationally.

There will be multiple ownership and cross-ownership issues to be resolved and the FCC will be required to make sensible decisions that best serve the overall public interest and a robust competitive marketplace.

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**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 93-1471 and 94-1039**

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**Metropolitan Council of NAACP Branches, et al.,  
Appellants**

**v.**

**Federal Communications Commission,  
Appellee,**

**Fox Television Stations Inc., et al.,  
Intervenors.**

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**On appeal from Orders of the  
Federal Communications Commission**

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**ORAL ARGUMENT OF DAVID HONIG, ESQ.  
ON BEHALF OF METROPOLITAN COUNCIL OF NAACP BRANCHES**

**November 4, 1994**

**MR. HONIG:** \* \* \* Here what we had was the unusual circumstance where two publications of great credibility have reported that Commissioner Quello, one naming him specifically, supported the waiver request, and --

**JUDGE RANDOLPH:** Now this was somebody else's statement of opinion that he supported the waiver request. As near as I could tell, there is no evidence in the record of any statement by Quello himself, is that correct?

MR. HONIG: Yes, there was one such statement in the March 29th issue of Broadcasting & Cable Magazine. Commissioner Quello is quoted on the record as saying that he "would have no objection" to the waiver.

JUDGE RANDOLPH: Do you have the exact quotation from Mr. Quello?

MR. HONIG: Only what Broadcasting & Cable --

JUDGE RANDOLPH: You quoted the words "would have no objection."

MR. HONIG: Right...

JUDGE RANDOLPH: Now, I can imagine a great many different circumstances under which that might fall, some of which would be all right and some of which would be awful, and most of which would be in between. Without some context, you don't have anything.

MR. HONIG: That's right. His explanation, though, was that he --

JUDGE RANDOLPH: That is not exactly what he said, though, is it, "I have no objection to the waiver"?

MR. HONIG: No, his --

JUDGE SENTELLE: No, he put the quotation marks before the words "to the waiver" just now and --

MR. HONIG: That's right, it was "we have no objection."

JUDGE RANDOLPH: What did he exactly say?

MR. HONIG: But he did explain in his statement what he meant.

JUDGE RANDOLPH: What did he exactly say? Do you have the full quotation or not, counsel?

MR. HONIG: No. All I have --

JUDGE RANDOLPH: You do not have the full quotation?



MR. HONIG: No, but I do have his explanation of what he meant. In his statement, in his separate statement, he said what he meant was "I do not object to the act of filing the request."

JUDGE RANDOLPH: So since you have nothing in the context of his statement, why should we not take him at his word?

MR. HONIG: Because his explanation is irrational. It would be as the chairman of a body. Of course, he cannot object to the ministerial act of filing.

JUDGE RANDOLPH: So we are supposed to take the highly unusual step of finding that a member of a body improperly failed to recuse himself based on a quotation and we don't know what the quotation is. Is that what you are asking us to do?

MR. HONIG: No, I cited the only quotation that was reported, and I don't know what the full statement he made to the publication was, because they didn't print it all.

JUDGE RANDOLPH: Exactly, we have no idea what the statement is, and yet we are supposed to hold he improperly didn't recuse.

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[LATER IN THE MR. HONIG'S ARGUMENT.]

JUDGE RANDOLPH: I hate to interrupt you, but I want to go back. I asked you what the exact quotation was that you were reading, and now I have found it. It is at page 499. My memory was that you misquoted Broadcasting & Cable Magazine. Take a look at 499. [Another appellant's] argument about literal truth really sort of applies to the argument you just made before us, doesn't it?

MR. HONIG: The quote was Quello said he "would have no objection to a waiver request."

JUDGE RANDOLPH: To a waiver request.

MR. HONIG: Right.

JUDGE RANDOLPH: That is not what you argued. You said he "would have no objection to a waiver."

MR. HONIG: Then I misspoke and I apologize, but I stand by the argument.

JUDGE SENTELLE: Had he been applying for an FCC license, he would thereby be denied it, right?

JUDGE RANDOLPH: Or at least have to have a hearing on your credibility.

MR. HONIG: If I misspoke, I apologize to the Court.

THE COURT: Thank you, counsel.

[MR. HONIG SITS DOWN.]