

**Press Statement
of
Commissioner James H. Quello**

June 12, 1997

Re: Proposed Notice of Inquiry on Broadcast Advertisement of Distilled Spirits

I am issuing this press statement as a summary of a more detailed expression of my views on the FCC's lack of jurisdiction to inquire into the issue of advertising of distilled spirits on television. To cut through the demagoguery, rhetoric, and mischaracterization of my position, I want to reiterate that I think that this issue is an important societal concern requiring government action.

Hardly a family in this country has been untouched by the tragic consequences of abuse of alcohol. I believe not only that the government should respond but that the government already has responded. I want to report what has been lost in the press spin: the proper governmental agency is already investigating the matter. The Federal Trade Commission has two investigations in process.

Accordingly, I support the decision of Commissioner Chong to ask the Chairman to pull the proposed NOI on Broadcast Advertising of Distilled Spirits from consideration at the upcoming open agenda meeting. I cannot support the issuance of the draft NOI because I believe that the Federal Communications Commission lacks jurisdiction to consider the subject matter.

It is precisely because I want to see the issue of liquor ads on TV responsibly and effectively handled that I do not support engaging the FCC's investigative, rule making, or hearing processes in what I fear would ultimately be a futile, and possibly counterproductive, effort to devise an FCC mandated regulatory "solution." As I stated when this issue first arose: "In my view, the issue is not whether something must be done, but rather who can most capably do it."

This issue is undeniably important. What is equally clear to me is that this Federal Communications Commission is an unauthorized forum. We lack jurisdiction and no amount of hectoring from the Chairman's supposed "bully pulpit" can change that. I find it significant that key Congressional leaders agree with Commissioner Chong's and my decision on the jurisdictional boundaries between the FCC and the FTC. The good news for all of us concerned about the effect of advertising on underage drinking is that the matter is being handled competently by the FTC, an agency that has the requisite jurisdiction and expertise. The only down side is that the FCC will not get to claim credit for resolving the issue in the first instance. When balanced against an unauthorized and unwise foray into jurisdictional power grabbing, that is a result that I can support.

I believe that a significant measure of our duty as Commissioners to seek and serve the public interest in our decisions is to refrain from regulating wherever possible and certainly where we are not authorized to act. I look forward to the conclusion of the FTC's investigations and will be guided by their analysis and recommendations that will be transmitted to this commission pursuant to the long-standing interagency agreement.

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Commissioner James H. Quello**

June 12, 1997

Re: Proposed Notice of Inquiry on Broadcast Advertisement of Distilled Spirits

I cannot support the issuance of a Notice of Proposed Rule Making on Broadcast Advertisement of Distilled Spirits because I believe that the Federal Communications Commission lacks jurisdiction to consider the subject matter. I believe that a significant measure of our duty as Commissioners to seek and serve the public interest in our decisions is to refrain from regulating wherever possible and certainly where we are not authorized to act.

I am not an attorney so I do not intend for the following to be a treatise on the legal concept of "jurisdiction." Nevertheless, after twenty-three years of service on the Federal Communications Commission, including almost one year as Chairman, I have heard countless arguments on legal concepts and am required to make judgments based on them in fulfillment of my oath of office. Accordingly, I will offer my views as a Commissioner entrusted to vote on such matters.

It is precisely because I want to see the issue of liquor ads on TV responsibly and effectively handled that I do not support engaging the FCC's investigative, rule making, or hearing processes in what I fear would ultimately be a futile, and possibly counterproductive, effort to devise an FCC mandated regulatory "solution." As I stated when this issue first arose: "In my view, the issue is not whether something must be done, but rather who can most capably do it."

This issue is undeniably important. What is equally clear to me is that this Federal Communications Commission is an unauthorized forum. We lack jurisdiction and no amount of hectoring from the Chairman's supposed "bully pulpit" can change that. The good news is that the matter is being handled competently by the FTC, an agency that has the requisite jurisdiction and expertise. The only down side is that the FCC will not get to claim credit for resolving the issue. When balanced against an unauthorized and unwise foray into jurisdictional power grabbing, that is a result that I can support.

Jurisdiction is a fundamental precept to regulatory action. Jurisdiction must be conferred by legislative enactment. It must not be "bootstrapped" from an overly expansive reading of general regulatory oversight authority. It is not the importance to society of a particular subject matter that, *ipso facto*, gives a particular agency jurisdiction to investigate. Accordingly, jurisdiction cannot be obtained by one of the regulators -- who should retain impartiality -- conducting a public relations campaign.

Jurisdiction over the subject matter at hand is the condition precedent to lawful action. A body acting in a regulatory capacity either has it or does not. Unlike judicial tribunals that are elucidating constitutional issues, regulatory bodies should tread very carefully when entering the arena of "penumbras and emanations." I am hesitant to infer jurisdiction from general pronouncements. I prefer to read the enabling statute and give the words their plain meaning. Put simply, jurisdiction is given in the statute or it is not. We either have it and can exercise it at our discretion or we do not and must not.

Regulatory bodies are the creation of the body politic. They are endowed with carefully circumscribed authority to perform certain roles that individuals in society deem more efficiently accomplished by their representative acting in their behalf rather than individually for themselves. Regulatory bodies are the result of statutory enactments. Agencies derive their very existence and their authority from the enabling statute. Before this or any other commission or agency may act, it must have authority to proceed. It is because I am convinced that this Federal Communications Commission does not have such fundamental authority to exercise power to investigate the advertising of distilled spirits on television that I have taken the extraordinary action of voting against inquiring into the issue and, furthermore, have taken the equally extraordinary step of issuing the instant Statement to put forth my reasons.

I am fully aware that the Federal Communications Commission has "[F]ull authority and power at any time to institute an inquiry, on its own motion, [**but only**] in any case and as to any matter or thing concerning which complaint **is authorized to be made**, to or before the Commission **by any provision of this Act . . .**"¹ As I have explained previously in a letter to Ranking Member John Dingell in response to his inquiry regarding the FCC's jurisdiction to inquire into the advertising of distilled spirits:

[T]he Commission does not possess sufficient express authority under its statutory mandate to pursue the complex facts or balance the competing interests necessary to resolve this issue. The First Amendment's protection of commercial speech and the specific provisions in the Communications Act proscribing censorship are well known. Crucially, the FCC has never before taken action concerning TV advertising without a specific mandate from Congress. In sum, absent a more specific mandate from Congress, this controversy appears to be outside the FCC's jurisdiction and expertise.²

In the absence of explicit statutory authority, agencies are not free to impose limits on advertising by cobbling together general assertions of "public interest" based on particular health effect characteristics of the product. A federal court recently held that government assertions as to the

¹ 47 U.S.C. 403, Communications Act of 1934, as amended, (emphasis added).

² Letter from J.H. Quello to Hon. J.D. Dingell (Jan. 31, 1997).

"unique" nature of a product and the alleged mandate to protect children do not confer statutory authority to regulate advertising where none exists.³ Similarly, the courts have limited this Commission's ability to unilaterally assert jurisdiction over programming matters in the absence of an express statutory grant.⁴ This restriction on the FCC's authority to interfere with programming content decisions applies both affirmatively and negatively; that is, we are limited in what we may approve and what we may preclude. In ruling on the 1992 Cable Act, the U.S. Supreme Court stated that,

The FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations. The Commission may not impose upon them its private notions of what the public ought to hear.

Over zealous exercise of expansive and ill-defined regulatory powers would quickly descend into the realm of the ludicrous. For example, the public has recently become concerned about the safety of air bags in the proximity of children. Well, automobiles are advertised on television, are they not? Are we, the Federal Communications Commission, to therefore, open an inquiry into the matter? Can we thereby distinguish between one or another automaker as to which entity falls within such asserted yet nebulous regulatory ambit?

I view this example as *de minimus* extrapolation of the arguments of those who urge jurisdiction upon us in the matter of the effect on children of the advertisement of distilled spirits on television. The jurisdictional nexus proffered by those who would have the Federal Communications Commission act on the issue of the permissibility of advertising of a legal product -- as are distilled spirits -- in the absence of an explicit legislative mandate is tenuous at best and trivializes the issue.

This example is not intended to make light of the seriousness of underage drinking. The tragic consequences of such illegal behavior are well known. I believe that the concerns expressed in the letters to this Commission asking that we pursue this matter are deeply-held, well-founded, and well-articulated. Unfortunately for those who would urge us to act precipitously and outside the scope of our authority, they are equally mis-directed.

This is not to say that those who are concerned about the subject of the effect of television advertising of distilled spirits on children are without remedy or recourse. Far from it. The FCC has an existing inter-agency agreement with the Federal Trade Commission under which our sister agency has the responsibility of investigating advertising practices and making recommendations to us for appropriate action within our jurisdiction, if warranted, upon

³ *Coyne Beahm, Inc. v. FDA*, 958 F.Supp. 1060, 1083-1086 (M.D.N.C. 1997).

⁴ *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

evaluation of their findings.⁵ The FTC is already conducting an inquiry comprising two investigations into the advertising of alcohol based products. It would be wasteful for this Commission to expend limited resources on duplicative efforts.

The Federal Communications Commission has a very full agenda. We have only just completed the initial steps in implementing the most sweeping overhaul of regulatory authority, embodied in the Telecommunications Reform Act of 1996, that I have encountered in my lifetime first as a broadcast executive and now as a Commissioner. We are not an agency in need of additional work or one looking for something to do to justify our existence.

Moreover, the issue is already being addressed in a forum of competent jurisdiction. I have no doubt that the FTC will resolve the matter consistent with the public interest. Nevertheless, if others perceive a gap in governmental responsiveness, Congress, as the duly elected representatives of the people, can exercise its legislative prerogative to inquire into the matter on its own as a prelude to legislation or to grant this or some other commission explicit jurisdiction to regulate on this subject. Until such time, I will continue to vigorously oppose efforts to engulf the Federal Communications Commission in a matter beyond its historical expertise and jurisdictional competence.

The authority of Congress to conduct wide ranging investigations into issues of national concern such as the health effects of the advertising of a particular product and to fashion an appropriate legislative response is plenary and beyond peradventure. By contrast, this Commission has long recognized that we lack expertise to adjudge the health effects of broadcast advertising. Over two decades ago we stated that:

If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health'".⁶

⁵ Copy of Inter-Agency Agreement between the FCC and FTC attached.

⁶ *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC.2d 1, 25 n.22 (1974), *aff'd*, *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977) (quoting *Banzhaf v. FCC*, 405 F.2d 1082, 1099) (1968), *cert. den.*, 396 U.S. 842 (1969).

I find it significant that many Congressional leaders agree with my interpretation of our jurisdictional boundaries. Moreover, the Committee Chairman cancelled the proposed hearings on liquor advertising when the major networks agreed that they would continue to abide by the voluntary ban and not carry such advertisements. In cancelling the proposed hearing, Senator Conrad Burns, the Chairman of our oversight subcommittee cautioned Chairman Hundt in the strongest possible terms against, "[Y]our repeated attempt to assert jurisdiction over the advertisement of various legal products" ⁷ Senator Burns concluded that, "[A]ny further investigation of this matter by the FCC would be inappropriate and would be a waste of the FCC's resources." Additionally, there is no doubt that Senator John Ashcroft, Chairman of the Senate Committee on Consumer Affairs, Foreign Commerce and Tourism, agrees that the FTC rather than the FCC has jurisdiction over liquor advertising. Senator Ashcroft concluded in a letter to the Chairman of the Federal Trade Commission, Robert Pitofsky, that, "[T]he FTC appropriately regulates the advertising of alcoholic beverages on television." ⁸ The Federal Communications Commission also responded to a detailed set of questions from John Dingell, the Ranking Member on the House Committee on Commerce, the clear import of which was to inform the FCC that we did not have jurisdiction to investigate the advertisement of a legal product. ⁹ Congressman Dingell noted that in creating the FCC:

Congress also carefully limited the Commission's authority. For example, Congress has never given the Commission the ability to censor specific programming or advertising; to prohibit or limit broadcasters' ability to air commercial advertising; or to prohibit or limit particular advertising of products or services legally sold in interstate commerce. It is unclear that Congress could give the Commission the ability to do any of these things in a manner consistent with the First Amendment. Even in those limited instances where the content of broadcast advertising, or the specific products or services that may be advertised, is regulated or prohibited -- including obscene or indecent advertising, prohibitions on gambling advertising and public broadcasting underwriting, and cigarette advertising -- it was Congress that required the Commission to act. *Id.*

I concur in the judgment of key Congressional leadership that the matter is being responsibly addressed in another government agency with clear jurisdiction and that the major networks are acting in a responsible manner in maintaining their voluntary commitments. I will not countenance intrusive regulatory micromanagement by this Commission masquerading in the form of government directed "voluntary" commitments.

⁷ Letter from Hon. Conrad Burns to Reed Hundt (April 14, 1997) (copy attached).

⁸ Letter from Hon. John Ashcroft to Mr. Robert Pitofsky (March 21, 1997) (copy attached).

⁹ Letter from Hon. John D. Dingell to Reed Hundt (January 2, 1997) (copy attached).

I am particularly suspect of regulations, characterized as "voluntary" or not, that could easily run afoul of the First Amendment. It seems to me that those who want us to "investigate" this issue are in actuality seeking mandatory content regulations. The Supreme Court of the United States recently held that liquor advertisements are "protected speech" within the contours of the First Amendment.¹⁰ In *44 Liquormart Inc. v. Rhode Island*, the Supreme Court unanimously affirmed the alcohol industry's commercial free speech rights in granting price advertising for alcohol products the same First Amendment protection given other legal products and services. On the other hand, the First Amendment does not convey unlimited rights to any speaker, commercial or otherwise.

I continue to hew to my judgment that, "The issues raised by hard liquor advertising constitute a very difficult legal and factual no-man's-land."¹¹ I am deeply concerned about striking a proper balance between free speech and the protection of our children, but I firmly believe that the Federal Communications Commission does not have the jurisdiction to strike that particular public interest balance. I am unaware of any legal authority for the FCC to undertake the exercise of rendering expert judgment or evaluating claims concerning the alleged harmfulness of liquor advertisements. The FCC has no established expertise in this area, and this is neither the time, nor the forum, nor the controversy for this Commission to try and learn about such matters, particularly given the other immense challenges confronting this agency.

I am all too aware of the high level of Commission resources that may be drawn into a debate over appropriate social policy with respect to "protecting" children. In view of the Commission's recent experience in this regard, I do not support committing any Commission resources to attempting to render expert judgments or evaluating claims concerning the harmfulness of liquor advertising or to even "merely gathering information" that would lead to the expectation that this Commission would do so.

The Court of Appeals for the District of Columbia recently warned this very Commission that, "[I]t goes without saying that the bald assertion of power by [an] agency cannot legitimize it."¹² The Court "categorically" rejected the suggestion that, "Unable to link its assertion of authority to any statutory provision, the [FCC's] position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area".¹³

¹⁰ *44 Liquormart Inc. v. Rhode Island*, 116 U.S. 1495 (1996).

¹¹ Press Statement of Commissioner James H. Quello (Nov. 18, 1996).

¹² *COMSAT Corp. v. FCC*, No. 96-1325 (May 30, 1997) citing with approval, *Railway Labor Executive Ass'n v. National Mediation Bd.*, 29 F.3d 655, 669 (D.C. Cir. 1994) (*en banc*).

¹³ *Id.* (quoting *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, *id.* at 670) (emphasis in original).

I intend to heed this clear and emphatic warning from our reviewing court. Our regulatory authority, indeed duty, to ground our decisions regarding broadcast licensees firmly in the public interest does not confer upon us the power to range afar and conduct "fishing expeditions" to gather information outside that narrow and explicit grant of power. This issue of the potential effect on consumption of alcohol by minors as a result of advertising on the broadcast medium is far too important to subject the parties to a duplicative and unproductive "dog and pony show" that is merely window dressing and distracts from the efforts of an on-going investigation being conducted by an authorized entity.

As part of the Chairman's public relations campaign to hype this issue he has asked rhetorically how those who oppose his power grabbing machinations would respond to those who have petitioned this Commission to address the issue of broadcast advertising of distilled spirits. My answer is plain and direct. I congratulate the President, Members of Congress, and concerned citizens for articulating the importance of the issue and direct their attention to the Federal Trade Commission for resolution of the on-going investigations. In that forum they will have ample opportunity to shape public policy in an authorized venue.

I have said it before but it bears repeating, I thought the era of "big government" was over. Why then does the Chairman demagogue this issue by seeking duplicative government efforts, particularly in an unauthorized body? I will not be bullied into opening an FCC investigation on this subject -- an action which I firmly believe would violate administrative and Constitutional principles -- by the efforts of some to paint me as anti-child, or insulting to other officers of the government, or somehow a bad Catholic. *Ad hominem* attacks do not jurisdiction make.

Accordingly, I support the decision to pull the draft NOI on Broadcast Advertisement of Distilled Spirits from the agenda for the upcoming open meeting of the Federal Communications Commission. I eagerly await the results of the Federal Trade Commission investigations on this topic and will be guided by their expert analysis and recommendations.

LIAISON AGREEMENT

Between

FEDERAL COMMUNICATIONS COMMISSION

and the

FEDERAL TRADE COMMISSION

WHEREAS the Federal Communications Commission has been directed by Congress to regulate the broadcast media so as to assure that the public convenience, interest and necessity are being served; and

WHEREAS the Federal Trade Commission has been directed by Congress to prevent unfair trade practices and unfair or deceptive acts or practices in commerce; and

WHEREAS a significant amount of the Federal Trade Commission's efforts is directed to insuring that its responsibilities are met as to advertising on the broadcast media, and to the elimination of unlawful restraints within the meaning of Title 47, §313 of the United States Code; and

WHEREAS, with the exception of advertising for prescription drugs regulated by the Food and Drug Administration and of those exceptions spelled out in Section 5 (a) (6) of the Federal Trade Commission Act, the Federal Trade Commission has primary responsibility with respect to unfair or deceptive commercial advertising; and

WHEREAS the Federal Communications Commission, under the Communications Act of 1934, as amended, has the responsibility to determine that the overall operation of its broadcast licensees is consistent with the public interest, convenience, and necessity; and

WHEREAS further from time to time matters of particular interest to both agencies may require the exchanging of views between appropriate members of the staffs of both agencies:

THEREFORE, it is hereby agreed that:.

The F.T.C., pursuant to its legislative authority, will exercise primary jurisdiction over all matters regulating unfair or deceptive advertising in all media, including the broadcast media; and

The F.C.C., pursuant to its Congressional mandate, will continue to take into account pertinent considerations in this area in determining whether broadcast applications for license or renewal of license shall be granted or denied and in the discharge of other statutory responsibilities.

It is further agreed that:

In order to provide for more effective exchange of complete information so that both agencies will be utilized to the maximum effectiveness in the public interest, each agency will designate a liaison officer to serve as the primary source of contact. These liaison officers will be responsible for currently informing each other of proposed proceedings and of internal developments in areas of joint concern to the extent that such information is not privileged. Formal liaison meetings between appropriate senior officials of both agencies to exchange views on matters of common interest and responsibility shall be held from time to time as determined by such liaison officers to be necessary.

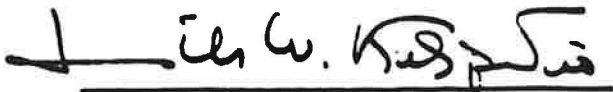
Designated Liaison Officers:

- a. Federal Trade Commission - The General Counsel of the Federal Trade Commission.
- b. Federal Communications Commission - The General Counsel of the Federal Communications Commission.

This agreement, when accepted by both parties, covers an indefinite period of time and may be modified by mutual consent of both parties or terminated by either party upon thirty (30) days' advance written notice.

APPROVED AND ACCEPTED FOR
THE FEDERAL TRADE COMMISSION

APPROVED AND ACCEPTED FOR THE
FEDERAL COMMUNICATIONS COMMISSION



Miles W. Kirkpatrick
Chairman
Federal Trade Commission

Date: April 25, 1972



Dean Burch
Chairman
Federal Communications Commission

Date: April 26, 1972

CONRAD BURNS
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DEPUTY WHIP

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(202) 224-2644

COMMITTEES:
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SPECIAL COMMITTEE ON AGING

April 14, 1997

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Chairman Hundt:

I write this letter to express my concern over recent FCC applications of the "public interest" provision in what, I believe, have been inappropriate contexts, and to inform the Commissioners that I am considering holding a hearing upon the scope of this provision before the Subcommittee on Communications.

Let me begin by stating that I believe that the FCC's charge to protect the public's interest is one of its most -- if not *the* most -- important duties. Having said that, however, I am compelled to caution the Commissioners that, taking action in the name of protecting the public interest carries profound consequences and should be done so sparingly; it should never be done so in contravention of Congressional mandate.

With that in mind, I encourage you to reevaluate your stated position concerning the FCC approval of the transfer of radio ownership licenses under the Telecommunications Act of 1996 (the Act). Because the radio ownership provisions of the Act and their legislative history make it very clear that Congress specifically rejected imposition of a public interest test with respect to transfer of ownership determinations, imposition of such a requirement, in my view, is in direct violation of the Act. I strongly encourage you to reevaluate your position on this issue.

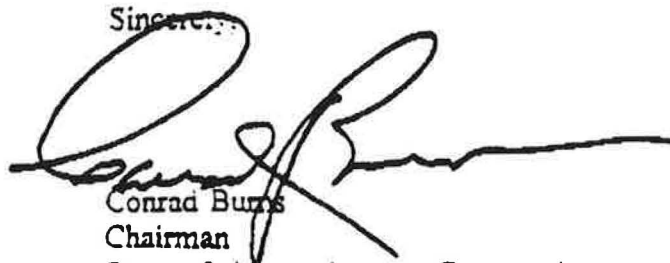
Furthermore, your repeated attempt to assert FCC jurisdiction over the advertisement of various legal products continues to be of great concern to me. According to the Liaison Agreement Between the Federal Communications Commission and the Federal Trade Commission (a copy of which is attached hereto for your reference), jurisdiction over such broadcast issues clearly lies with the Federal Trade Commission. Notwithstanding that agreement, as I'm sure you've already heard, last week, I met with executives from the four major broadcast networks, and each assured me that their network would not break the voluntary policy against airing liquor advertisements. Because I believe that the broadcast issues raised by this controversy have been resolved for the most part, I have canceled any hearings scheduled on this matter before my subcommittee. In view of that, and in light of

the FTC's clear jurisdiction over this issue. I believe that any further investigation of this matter by the FCC would be inappropriate and would be a waste of the FCC's resources.

These are but a few examples of where, in my view, some Commissioners have inappropriately extended their "public interest" mandate to the detriment of the public. I encourage these Commissioners to reevaluate their position on this matter.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Conrad Burns", written over the word "Chairman".

Conrad Burns
Chairman

Senate Subcommittee on Communications

United States Senate

WASHINGTON, DC 20510-2504

March 21, 1997

Mr. Robert Pitofsky
Chairman
Federal Trade Commission
Pennsylvania Ave. at Sixth St. NW
Washington, DC 20580

Dear Mr. Pitofsky:

Thank you for coming in to discuss the Federal Trade Commission and the issues facing it this year. As the new chairman of the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, I need not only to hear your views, but also to be able to draw upon your expertise to understand better the laws under which the FTC operates.

I was pleased to learn that the FTC is actively enforcing the law in the area of alcohol advertising pursuant to Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive advertising. While alcohol advertising constitutes commercial speech with some constitutional protection, practices that target alcohol advertising to minors are clearly not protected by the First Amendment. I support you in diligently enforcing the law in this respect.

As I told you during our meeting, I am concerned that the Distilled Spirits Council of the United States (DISCUS) has lifted its self-imposed ban on advertising on television. Many fear that advertising distilled spirits on television may lead to increased alcohol consumption among minors. Incidences of drunk driving fatalities and alcohol poisoning involving underage drinkers have scarred our nation. We as a society should work to ensure that such tragedies do not occur by preventing alcohol consumption by those below the legal drinking age.

DISCUS has drawn up guidelines for the spirits industry to follow regarding responsible placement of advertisements, including one stating that: "Distilled spirits advertising and marketing should not be placed in any communication intended to appeal primarily to individuals below the legal purchase age." I urge you to hold the distilled spirits industry to this standard, and I ask you to keep me apprised of the Commission's involvement in this area.

Mr. Robert Pitofsky

Page 2

March 21, 1997

Finally, I believe that we are in agreement that the FTC appropriately regulates the advertising of alcoholic beverages on television. The Federal Trade Commission Act makes clear that the FTC is responsible for enforcing the prohibition on unfair or deceptive advertising.

I look forward to working with you during the 105th Congress. Should you need to discuss matters affecting the FTC in the future, please feel free to come again.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Ashcroft", written in a cursive style.

John Ashcroft

JDA/acb

THOMAS J. BLLEY, JR., VIRGINIA, CHAIRMAN

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U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

January 2, 1997

JAMES E. DERDEMAN, CHIEF OF STAFF

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

The Members of this Committee have been closely observing the developing controversy surrounding beverage alcohol advertising. Like you, we believe the beverage alcohol industry, like any other industry, has the duty to encourage its customers to use its products responsibly.

We view with great seriousness the role of the Congress in this controversy. As we consider the issues surrounding broadcast advertising for beverage alcohol, I want to understand more fully your views and those of each of your fellow Commissioners about your agency's ability, competence, and jurisdiction to address those issues.

As you know, Congress established the Federal Communications Commission over sixty years ago. The Commission was created pursuant to Congress' responsibility under the Commerce Clause of the Constitution to foster the orderly development of our nation's telecommunications services, including broadcast radio and television. The Commission was given the authority to license radio and television stations, and only limited, and clearly articulated, authority over the matters that are broadcast.

Congress also carefully limited the Commission's authority. For example, Congress has never given the Commission the ability to censor specific programming or advertising; to prohibit or limit broadcasters' ability to air commercial advertising; or to prohibit or limit particular advertising of products or services legally sold in interstate commerce. It is unclear that Congress could give the Commission the ability to do any of those things in a manner consistent with the First Amendment. Even in the limited instances where the content of broadcast advertising, or the specific products or services that may be advertised, is regulated or prohibited -- including

obscene or indecent advertising, prohibitions on gambling advertising and public broadcasting underwriting, and cigarette advertising -- it was Congress that required the Commission to act.

Congress expressly created the Commission to be its expert agency on telecommunications issues. It is far less evident that Congress expected or empowered the Commission to become the expert agency on the effects of advertised products on segments of society, to be the evaluator of claims of the harmfulness of lawfully sold products, or to ban or limit advertising of those products. If the Commission took on that role, I am concerned that it could achieve little else that Congress expects of it within its existing mandate. This is particularly troublesome because Congress plainly gave one of your sister agencies, the Federal Trade Commission, explicit authority to address these matters.

As a result, I find curious your public assertions that the Commission can regulate broadcast advertising of beverage alcohol. These views are especially noteworthy since they are not held universally by your fellow Commissioners.

To better understand the many points of view at the Commission on this issue, through this letter I am requesting you, and each of your fellow Commissioners, to provide your views on the Commission's ability to regulate advertising, including alcoholic beverage advertising. Please include in your responses answers to the following questions:

- Where in the Communications Act has the Commission been given the ability to censor specific programming or advertising?
- Where in the Communications Act has the Commission been given the ability to prohibit or limit broadcasters' ability to air commercial advertising?
- Is it possible, consistent with the First Amendment and the Communications Act, for the Commission to censor specific programming or advertising, or to prohibit or limit broadcasters' ability to air commercial advertising?
- Can the Commission censor or regulate specific programming or advertising before it actually airs? When?
- From where does the Commission derive any specific authority to regulate or prohibit particular kinds of advertising?
- Does the Communications Act give the Commission the ability to regulate or prohibit advertising in any area other than specific areas where Congress specifically gave the Commission that authority?

- What legal authority does the Commission have to assert that it can render expert judgments on the effects of advertised products on segments of society, to be the evaluator of claims of the harmfulness of lawfully sold products, or to ban or limit advertising of those products?
- What specific resources would the Commission call upon to reach its judgments on the effects of advertised products on segments of society, to be the evaluator of claims of the harmfulness of lawfully sold products, or to ban or limit advertising of those products?
- Do you believe it is appropriate, consistent with the First Amendment, for the Commission or any Commissioner to suggest, intimate, or threaten that a broadcast license may be denied, conditioned, limited, or not renewed on the basis of the content of otherwise lawful advertising aired or to be aired by a licensee or applicant?

We would appreciate a response from you and each individual Commissioner no later than January 31, 1997.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Dingell", written over the word "Sincerely,".

JOHN D. DINGELL
RANKING MEMBER

cc: Commissioner James H. Quello
Commissioner Rachelle Chong
Commissioner Susan Ness

June 12, 1997

**Press Statement of FCC Commissioner Rachelle Chong
on Broadcast Advertisement of Distilled Spirits Draft Notice of Inquiry**

Today, I asked the FCC's Chairman to remove a draft Notice of Inquiry regarding broadcast advertisement of distilled spirits from the Federal Communication Commission's June 19 agenda meeting. While I share concern about the serious societal problems of underage drinking, drunk driving and alcoholism, these problems should be addressed *directly*, by stronger enforcement of laws restricting the sale of alcohol to minors, by improving drivers' education, and by programs that assist recovering alcoholics. They should not be addressed *indirectly*, by an FCC attempting to reduce perceived demand by a blanket ban on the advertising of lawful products under the guise of public interest considerations relating to broadcasters.

To the extent that the Chairman's concern is liquor advertising that tempts minors to purchase alcohol, the expertise to examine the effects of liquor advertising on underage persons clearly resides at the Federal Trade Commission (FTC), whose job it is to investigate false, deceptive and misleading advertising or advertising aimed at illegal audiences. In fact, the FTC has taken up the issue and has two ongoing investigations on alcohol advertising already. I am confident that our sister agency will take action if necessary to protect the public interest.

I agree with the statement of Senator Conrad Burns in his April 14, 1997 letter to Chairman Hundt, that "any further investigation of this matter by the FCC would be inappropriate and would be a waste of the FCC's resources." Moreover, all the major networks on behalf of their owned and operated stations and many major broadcasting groups have already voluntarily pledged to decline hard liquor advertising on their stations. As a fiscally responsible Commissioner, I believe the FCC ought to be focusing on the unfinished tasks that remain before it in implementing the Telecommunications Act of 1996.

To the extent that the Chairman's concerns is the mere presence of truthful liquor advertising on television directed at adults, I oppose any FCC inquiry into such constitutionally-protected commercial speech. I strongly disagree with those who suggest that the FCC must open this inquiry as a step toward ensuring that broadcasters serve the public interest. The FCC's general mandate to ensure that spectrum is used to serve the public interest is not a plenary authorization to conduct broad-ranging inquiries ultimately aimed at dictating program content. Nor should our processes be used in a biased manner to pursue only one sector of the industry -- distilled spirits -- while allowing the beer and wine industry to continue to place advertisements on TV, as the draft NOI proposes.

I continue to emphasize the important First Amendment considerations raised in this debate. This is not unplowed ground. In the past, individuals have asked the FCC to take regulatory action on broadcast advertisements of products ranging from snowmobiles to hand guns and air bags. The courts have offered direction on what the FCC may and may not do, absent Congressional direction. The Supreme Court has recognized that truthful liquor advertising is entitled to First Amendment protection. While concerned parties can argue that alcohol advertising presents a health hazard sufficient to justify a restriction on this commercial speech, the courts look to whether Congress has reached that conclusion and directed the FCC to ban a particular type of advertisement. In the case of distilled spirits, Congress has not made such a judgment. Thus, I do not believe the FCC should be stepping into areas well beyond our expertise without express statutory direction.

In light of all of the above, I believe that the issue of advertising practices by the hard liquor industry would be best left in the hands of our sister agency, the FTC, to address these issues in its ongoing proceedings. If further action is warranted, Congress is in the best position to decide what government action may be appropriate.

Meanwhile, I join in the call for all broadcasters and advertisers to be responsible and responsive to the concerns about alcohol advertising. We do not want to encourage underage drinking or drunk driving, and any voluntary actions they can take should be undertaken as good corporate citizens. Such voluntary actions could include airing the ads during hours when children are not likely to be watching, screening the advertisements for appropriateness, or voluntarily developing and airing counter advertisements to educate the public about the hazards of drinking irresponsibly.

-FCC-