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ABSTRACT

In commenting on the backlog of cable applications before the commission and other policy matters regarding cable television, Commissioner Wiley states that processing is being introduced to speed up the application process, and although the commission is developing procedures for dealing with whole classes of applications, some delay will always be part of the application process because of the time necessary for investigation of objections and because of the bureaucracy itself. Some cable franchise holders believe that regulations should be promulgated solely at the federal level, rather than some at the state and some at the local level, but he said for now, at least, this three-tiered procedure will continue. The Commissioner's other opinions are that rate regulation is unsuitable for the cable industry at this crucial stage of its development, that municipalities do not have the expertise to be and are in other ways improper cable franchisees, that cables should pay reasonable copyright premiums, and that these payments should be arranged by the parties involved rather than dictated by the government. (JK)

ADDRESS BY COMMISSIONER RICHARD E. WILEY
Federal Communications Commission
before the
California Community Television Association
Anaheim, California
November 17, 1972

It is both a privilege and pleasure for me to have an opportunity to address this Annual Meeting of the California CATV Association. Since this is only the third cable speech of my two year career at the Commission, I realize I am something of an unknown quantity to many of you. Accordingly, perhaps I can be excused if I begin -- somewhat immodestly -- by expanding on my own introduction.

It is true, as you heard, that I practiced law for a number of years in Chicago, that I also taught law school and was active in a variety of professional activities. All of this was naturally relevant and directly pertinent to my appointment in 1970 as General Counsel of the Federal Communications Commission. Completely irrelevant to that appointment, of course, was the fact that I was a Republican Precinct Captain at age 19, an Illinois Republican Committeeman and, in 1968, worked full-time in the Nixon-Agnew campaign.

Indeed, it was some 25 months ago, almost to the day, when I departed from the world of private enterprise and a conservative middlewestern ethic to go to Washington to head a General Counsel's office which has been admiringly described as a haven for the most liberal, the most activist and the most regulatory-minded lawyers in all of Washington. I suppose that the metamorphosis which was

expected of me is best illustrated by the somewhat theologically dated story of the good Jewish gentleman who resided in an all-Catholic neighborhood. Although good will generally abounded, the Jew had one habit which somewhat irritated his fellow residents: that of barbecuing chicken, with numerous spices and herbs which wafted through the neighborhood, every Friday evening. When all efforts by his Catholic neighbors to convince the Jew to barbecue on a non-tuna fish evening failed, it was decided that the only solution was to convert the Jew to Catholicism. Negotiations began, and lo and behold, the Jew finally agreed to convert. The next Sunday he was taken to Church and the good priest laid his hands on the Jew's head and recited: born a Jew, raised a Jew, now a Catholic. The parishoners beamed and peace and good will reigned in the neighborhood until the following Friday evening when, once again, the Jew-now-a-Catholic was in his front yard barbecuing chicken in the same old lusty manner. This time the neighborhood marched en masse to his home and just as they reached the property line, they saw the Jew put his hand out over the barbecue pit and recite: born a chicken, raised a chicken, now a fish.

Whether I will be a chicken or a fish when it comes to making difficult decisions affecting your industry in the years ahead naturally remains to be seen. In this connection, however, I think you fully realize that my job at the Commission is to serve the public interest -- and not necessarily the interest of the cable industry, the broadcast industry nor any other special group.

However, at least in my opinion, the public interest and industry's interest need not be -- and, in fact, should not be mutually exclusive. Let's take your case: I think the development of a strong, healthy and economically viable cable industry -- with all of the potential services and benefits which it portends for our citizens -- is very much in the public interest.

And, to be perfectly honest about it, you have been bottled up for a long time, far longer than the available technology would have dictated. Moreover, I know that even though our new rules are now in effect, many of you feel that the bureaucratic lid on your industry still remains due to the tremendous backlog at the Commission in processing certificates of compliance. On this score, I frankly have to evaluate your complaint as being entirely reasonable. Processing backlogs -- which are a fact of life at the FCC not only in the Cable Bureau but in a number of other areas as well (particularly newly emerging ones) -- are a negation of the public interest. When a businessman makes application with the government to bring a desired and valuable service to the public, it is unfair, anomalous and completely counter-productive to delay, frustrate and perhaps even deny that service solely due to an inability to administratively process the offering involved.

We are very concerned about this matter at the Commission, and we have been joined in this concern by the Office of Telecommunications Policy at the White House and Senator Pastore and others on Capitol

Hill. As a result, we are undertaking a variety of management improvement procedures -- including the greatly increased use of automated data processing -- which ultimately will contribute to an amelioration of the entire problem. The fact, however, will remain -- and it is a fact -- that we are a very small agency when compared with the dynamic and technologically advanced industries which we regulate. Accordingly, some backlogs -- unfortunate and unsatisfactory as the situation is -- may be always to a degree inevitable.

But let me be specific as to your area of interest. I would like to set forth for your benefit today, as I did three weeks ago for those who attended the Northeast Cable Expo in Hartford, Connecticut, the actual and most up-to-date facts concerning the processing of certificates of compliance for cable operations.

Perhaps I should begin by pointing out that backlogs come about not only because of work-load demands -- and with 1500 certificate applications now on file we certainly qualify in this area -- but also because of man-power shortages, administrative constraints and, perhaps most importantly, the requirements for legal fairness.

Let's look, initially, at the size of our Cable Bureau. Some of you have noted that the Bureau recently added ten new full-time attorneys. For your additional information, that brings their complement of legal professionals to a grand total of 28 -- with, as indicated, 10 of that number fresh out of law school and requiring, understandably, both intensive training and extensive supervision.

Moreover, many of these attorneys are engaged in hearings, Advisory Committee activities and a whole host of regular administrative duties -- fully removed from the responsibilities of processing certificates of compliance.

Then, consider the time constraints of our processing cycle: the first week to ten days of an application's life at the FCC is consumed in routing it to the Bureau, preparing a computer print-out, assigning appropriate file and code numbers and, in the true style of any bureaucracy, bringing it to the Commission's ever-popular fee cage. Thereafter, a built-in delay of 30 days, during which objections may be filed, prevents any immediate consideration of the pleading. If an objection to a grant of the application is filed, an additional 20-day period is set aside to await replies. Accordingly, as you can see, approximately two months may go by before an opposed application is even ripe for consideration.

Finally, remember this: each application, and indeed every objection (be it serious and meritorious or merely contentious and even frivolous), must be given appropriate consideration by the Commission due to the requirements of legal propriety and administrative due-process. And such consideration means time.

Now, what are the facts concerning our processing efforts to date? As you know, it was on February 3 of this year, the day following the adoption of the Cable Television Report and Order, that the Commission began to accept applications for certificates of compliance. However, the actual processing of these applications could not begin until the Commission ruled on myriad petitions for reconsideration which had been filed relative to the new cable rules. The Commission's Reconsideration Order -- disposing of a number of complex and difficult issues -- was not released until June 26. By this time, the backlog of certificate applications had grown to nearly 1,000.

Since June, we have received several hundred more applications bringing the grand total -- as indicated -- to almost 1500. Something less than one-half of that amount are uncontested and, accordingly, can be given expedited handling. Under delegated authority from the Commission, the staff to date has granted some 425 applications and they expect to dispose of another 300 applications -- mostly uncontested -- within the next several months.

From personal inquiry and observation, I can assure you that the staff is working night and day on the mountain of applications which confront them. However, I would be less than candid if I were to indicate to you that the pace of grants would accelerate in the

months ahead. Indeed, sad to say, the reverse in fact may be true because the contested applications that lie ahead necessarily will require more consideration -- which, as we have noted, inevitably means delay for your industry.

Understanding the rationale for delay does not, however, suggest that it should simply be accepted as unavoidable. In my opinion, the backlog problem must be accorded the highest priority among Commission matters. I personally am hopeful that a more systematized approach to breaking this log-jam can be devised. One suggestion which I have discussed with the staff -- and which I referred to in my Hartford speech -- relates to the development of "categories of objections"; the idea being that perhaps one case which disposes of a particular objection could serve as a pattern or precedent for other cases involving the same or a similar objection. I hasten to add, of course, that many oppositions may be premised on unique issues or individual circumstances, thereby preventing meaningful comparison or joint consideration with any other case. Nevertheless, I am convinced that responsive and responsible solutions can and must be found to eliminate, to the extent possible, the inequity of delay.

An example of such a solution was the Commission's action this week involving cable service to Rockford, Illinois. The application of CATV of Rockford had been opposed on various grounds including

the fact that its application, granted by the municipality in 1966, was not in strict conformity with our 1972 FCC rules.

The Commission previously had attempted to deal with such a situation by announcing that we would grant certificates where such pre-1972 franchises were in "substantial compliance" with our new rules. While we believed that compliance with our Federal standards would prove to be best for cable's proper development in this country, we also recognized that it would be unfair to expect those who granted CATV franchises over the past few years to have been clairvoyant as to what our FCC rules -- whenever they might be adopted -- would provide.

In the Rockford case, we announced that, since franchises granted prior to the adoption of our rules must be in compliance with them by March 31, 1977, the term "substantial compliance" would be given a very liberal construction. Thus, if, for example, the franchise period or fee, the number of access channels or the construction timetable did not precisely accord with our own guidelines, we would -- except in an extreme case -- wait until 1977 to require strict compliance.

I am told that perhaps as many as 200 certificate applications might be subject to FCC approval due to this single action. This one instance of identifying an objection category and developing a method of dealing with it represents, in my opinion, precisely the kind of administrative response needed to reduce our mounting application backlog -- and, in public interest, to get cable moving in this country.

In the brief moments remaining to me this morning, I would like to touch on several subjects of importance to your industry. Let me take the most troublesome -- from your standpoint -- first. I mentioned that a number of Cable Bureau attorneys are engaged in the work of various Advisory Committees -- including one relative to Federal, State and Local jurisdictional authority. I am aware that many of you believe that a "three-tiered Chinese puzzle of regulatory policy" (as one critic has termed it) will be disastrous to cable's orderly development -- and that there should be federal pre-emption for almost everything save franchise selection (on the theory, I suppose, that bad as the FCC may be, there is only one of us with which to deal).

Nevertheless, at least for the present, the Commission has chosen another path -- a path which, as you know, involves a sharing of the regulatory burden and responsibility with state and local government. While such a course may have been unavoidable in light of constraints on the allocation of budget and manpower at the federal level, and while my own basic philosophy would certainly not reject out of hand a plan based on the concept of "creative federalism", I will have to acknowledge that only time will tell whether the system will work to the benefit or detriment of your industry. In the meantime, however, very troublesome issues exist which require prompt and definitive resolution. In this connection, I am convinced that the formation

of a special Advisory Committee, designed to provide the Commission with broad expertise and advice concerning the manifold problems of regulatory authority, was an imperative step.

While near-total federal pre-emption may not be in the cards, at least for the immediate future, there are several areas of possible state and local regulatory action, however, in which I might share some of the concern which has been expressed by segments of the cable industry.

First of all, let me -- to coin a phrase -- "make one thing perfectly clear": I think rate regulation for the cable industry, particularly at this juncture of its development, would be nothing short of catastrophic. With the tremendous financial investments, and indeed the tremendous financial risks, which must of necessity be assumed in the maturation of this industry, I am personally convinced that cable cannot properly develop if subjected at the outset to the strictures of such regulation. For, realistically, the growth of any new industry in this country depends both on business initiative and strong financial support. And, in my opinion, that support will not be forthcoming if future profits are pre-determined and unduly limited.

This same abiding faith in our free enterprise system also causes me to look with considerable skepticism on the effort of a few municipalities to take an active ownership interest in cable systems.

While I seriously question that municipal ownership will spread very widely (to date it has been tried in only about a dozen communities), I would like to briefly express my reasons for opposing the concept.

To begin with, it strikes me as something less than salutary to permit a municipality to determine who will be the appropriate cable franchisee, and under what conditions, when the city itself is a competing or sole applicant. Furthermore, I don't think it is irrelevant -- in terms of insuring cable's proper and orderly evolution -- to speculate concerning the level of service to cable subscribers which a municipal owner might provide. At a time when many a city government is experiencing grievous, albeit perhaps understandable, troubles in controlling its traffic, keeping open its schools and picking up its garbage, I wonder what expertise it might apply to the operation of a cable system. Moreover, it seems clear to me that cable is not a municipal "necessity" in the same sense as public utilities like water, gas and electricity. Finally, and most fundamentally, I have serious reservations about the wisdom of government ownership of a communications outlet. I would suggest that the free flow of information and ideas in a democracy like ours would not be advanced by placing cable's voice under government dictation and control.

Without question, the issues of rate regulation and municipal ownership of cable are important, not only from the standpoint of basic regulatory philosophy but also with regard to the

long-range course of cable's development in this country. However, I would like to turn now to an area in which you have an immediate problem and concern. Under Section 76.601 of our Cable Rules, all systems must comply with certain performance test standards by the end of this year. The NCTA, as you know, has filed a petition requesting that the deadline for meeting the initial performance test standards be extended to the end of next year. Because the Commission is still awaiting comments on the NCTA proposal, it would be premature for me to make any definitive comment on its merits. Nevertheless, I must confess that I presently can see no reason why such a request should not be given positive consideration. As I understand the problem, it is unrealistic to expect compliance by the end of this year in light of the unavailability of trained engineers and sophisticated equipment necessary to undertake such testing, to say nothing of the immediate financial onus on small cable systems which would be involved. Unquestionably, compliance with our technical rules is a necessary requirement. However, if this requirement places an undue burden on the industry, with no corresponding public benefit -- and on this point not all of the evidence is in -- I am at least inclined to look favorably on an extension of time.

If I have struck a few responsive chords today, if we have found some areas of mutual agreement, so well and good. However, before closing today, I do want to touch on a final issue -- one on which some of you and I perhaps will disagree. That issue is copyright.

I have tried to express to you today my fundamental belief in the basic economic system of this country. And that belief is perhaps implicit in many of the regulatory judgments which I have made during my time at the Commission. And so it is, I think, in this area. Frankly, ladies and gentlemen -- as I said in Hartford -- there is no such thing in this country as a truly free ride. One works for what he earns; one pays for what he receives. Simplistic as those statements may be when applied to the complexities of cable copyright payments, I think that the application is nevertheless valid.

In my personal opinion, your industry will not attain the growth and maturity which its technological promise suggests until it is clearly established that cable will be a paying customer for the services it employs. Aside from the morality of the situation -- and I candidly make that moral judgment -- there are those who will be your competitors and your suppliers who -- rightly or wrongly -- will find ways to retard your progress and to forestall your natural development until and unless they receive reasonable consideration from you in return for the use of their property.

I am not unaware of your legal victories -- and, in turn, you are not unaware of the vagaries of our judicial system and at least the possibility of future and perhaps contrary judgments in higher courts. But my comments today are not directed to debating the ultimate legal verdict -- which patently is a number of years away --

nor even the obvious benefit of the current situation to an industry struggling for economic viability. Instead, what I am suggesting is that -- from a completely pragmatic standpoint -- reasonable copyright payment may be in your own best interest, especially when viewed in terms of the long run growth of the cable industry. For without such compensation, I reiterate my prediction that your expansion will be continually stymied and frustrated along the way.

In this connection, I want to make it clear that I have reached no judgment on the appropriate terms or amount of such payment. Certainly, both must be reasonable in light of cable's realistic ability to pay. Indeed, to expect too much of a newborn industry would not only be counter-productive in terms of the public interest but also self-defeating for those whose property rights may be involved.

But whatever the ultimate copyright package might include, my personal philosophy is that an accord between the private parties involved would produce a far more acceptable plan than having the government dictate and impose it from above. I commend the route of negotiation, compromise and private settlement to you in preference to regulatory or legislative fiat.

I realize that these final remarks may have removed me from both the categories of an unknown quantity and a "friend", all in one fell swoop. However, I assure you that I make them as one who believes

that the citizens of this country will be greatly benefitted by the potential communication services which a vigorous and healthy cable industry may bring.

What image the name "Commissioner Wiley" will conjure up in your minds hereafter reminds me -- in closing -- of the recent event which occurred in a classroom of a prestigeous Western University. It seems that the professor had decided to utilize a word association experiment with his students -- he would mention a name and the students would orally respond with the first thoughts that came into their heads. The professor began with the name "Viet Nam." And like the good collegians they were, the students responded in unison: "Get out." Next the professor called out: "Dr. Spock." And, to a man, the students hollored back: "Right on." Finally, the professor ventured the name: "Indianapolis 500." To which the students collectively replied: "They're innocent!"

I don't know whether, in your minds, we at the Commission are -- at this point -- innocent or guilty. But, at least for me, the trial has begun. I have put in my opening testimony and I await your cross-examination and your ultimate verdict.

Thank you.