# Viewpoint

## Henry Geller

# Talk vs. Action at the FCC

SINCE 1981 WHEN MARK FOWLER became its chairman, the Federal Communications Commission (FCC) has been thought to be in the forefront of deregulation. Fowler said he wanted to go beyond mere negative burden lifting to bring a bold new principle to communications policy: broadcasting, he proclaimed, should receive the same First Amendment protection as the print media have always enjoyed. He therefore called on Congress to repeal the equal-time-for-political-candidates requirement, the so-called fairness doctrine, and the provision guaranteeing candidates for federal office reasonable access to airwave time. Not only would the FCC, under his stewardship, work for these statutory changes but also, he pledged, it would do all it could within its regulatory discretion to advance First Amendment values for broadcasting.

Whether the new chairman's crusade is a good one—and I agree with it in some respects, disagree in others—is a question for another day. My object here is to point up the surprising fact that it has had almost no discernible result thus far. Judged by the age-old precept of "watch what we do, not what we say," the new FCC is as devoted to business as usual on First Amendment matters as the most unregenerate of the old-time trucking regulators were in their field.

Christopher DeMuth, executive director of the Presidential Task Force on Regulatory Relief, wrote in these pages last year that, judging by the history of deregulation, "major administrative reform is a necessary prerequisite to statutory reform." Perhaps Chairman Fowler thinks DeMuth has it backwards. Perhaps he would argue that administrative action is counterproductive because it yields only partial relief while taking the steam out of the legislative effort to bring about needed full relief. But statutory reform is nowhere in sight. The Ninety-seventh Congress sloughed aside the commission's proposals to repeal equal time, fairness, and reasonable access, and doubtless the current Congress and the next will too. That is no surprise: Congress consists of incumbents, most of them future candidates, and candidates enjoy major privileges under the present rules. So, for the time being, there is no choice between administrative and statutory reform: it is the former or nothing. Let us look, then, at the new FCC's record on administrative reform.

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TAKE THE FAIRNESS DOCTRINE, which requires broadcasters to provide time for the discussion of important public issues and to make sure that the discussion fairly reflects conflicting views. This doctrine is set forth in the Communications Act (section 315a) and only Congress can repeal it. But the FCC can, if it wishes, implement it in a way that gives broadcasters more breathing room to air robust, wide-open debates. Under Chairman Fowler, the FCC's enforcement policies have been the same as they were under the previous commission chairman, Charles Ferris.

For one thing, there has been no move to address the personal attack doctrine. This is one of two commission rules promulgated in 1967 to implement the fairness doctrine. It requires broadcasters to notify persons or groups attacked during the discussion of a controversial issue of public importance and give them an opportunity to respond. But the rule is a crazy quilt of exceptions—exceptions for newscasts, for news interview shows, and for on-the-spot coverage of news. All these cases


*"Now, in compliance with FCC rules we present a rebuttal to our 'Save the Whales' editorial...."*

are handled through the broader fairness doctrine, which means that the broadcaster escapes the rigid notification procedure of the rule and instead is required merely to present the other side of the issue.

It all makes little sense. One of the FCC's sister agencies, the National Telecommunications and Information Administration (NTIA), petitioned the commissioners in 1978–79 to rescind the rule, and so allow the entire operation of the broadcaster to come under the general fairness doctrine.* The National Association of Broadcasters (NAB) filed a similar petition in 1980 (calling also for the rescission of the political editorializing rule). Under Chairman Ferris, the FCC ignored the petitions, which is understandable because Ferris approved of the fairness doctrine and all its works. But two years have passed since Fowler replaced Ferris. Why does the new FCC continue to ignore the petitions?

The political editorializing rule was also issued in 1967 to implement the fairness doctrine, and it too has illogical exceptions. If a broadcaster gives reasonably balanced coverage to, say, a referendum issue and then editorializes briefly in behalf of one side, it need do nothing; the general requirement of fairness has been met. But in the case of election contests, the matter is quite different. If the broadcaster airs a thirty-second editorial endorsing candidate A, it must notify all of A's rivals and give each of them thirty seconds to respond—whether or not its overall coverage of the election has been reasonably balanced. Quite naturally, this chills political editorializing. Unlike the *Washington Post*, Channel 9 is not likely to endorse a candidate, since that would mean giving reasonable time to all other contestants, even though it may have already covered their views again and again. To measure this chilling effect, the NAB surveyed 8,810 broadcast stations in October 1982. Of the nearly 3,800 that responded, 43 percent said the rule does inhibit them from editorializing.

Again, the NAB and NTIA made submissions to the FCC in 1980 to remedy this situation by bringing all broadcast editorializing under one standard—fairness. And again there has been no action from the new FCC.

A third "fairness" problem concerns cable originations. In 1969 the commission adopted rules extending the fairness doctrine and its corollary rules to the programs that cable systems originate. An NTIA petition filed in 1980 asks the FCC to relieve cable operators of fairness obligations if their systems have "access channels"—channels on which individuals and groups have free access to talk and present program material. After all, the idea of the doctrine is to afford reasonable access to varying points of view, and that is precisely what a public access channel does. But, as of this writing, the commission has taken no action on this petition either.

THERE ARE ALSO EXAMPLES of inaction by the new FCC outside of the fairness area. One is the prime time access rule. Issued in 1970, this rule says that network affiliates in the fifty largest

*I should acknowledge that I was NTIA administrator at that time.

markets may not present network programs (including programs once shown on networks) during an hour and a half between 6 and 11 P.M. —which had the effect in practice of adding the 7:30–8 P.M. time slot to the non-network period. Children's shows, documentaries, and public affairs programs are excepted. Defining the boundaries of these exceptions raises troubling problems for the commission and the courts. Clearly, the rule represents precisely the kind of government tinkering with programming judgment that the new chairman abhors. Yet he has not moved to reconsider it. Conceivably he might say that because the rule has strong support among the most powerful broadcast stations in the largest markets, he cannot marshal enough votes to overturn it. The short answer is that he ought to try, if only to keep faith with his pledge. It is not a question of preserving consensus: Fowler was commendably willing to dissent from the majority on a proposal to increase competition in the common carrier area (cellular radio). Surely, the First Amendment area merits the same commitment.

Another example is comparative renewal. The 1934 Communications Act provides that when a broadcaster's license comes up for renewal a newcomer may file a competing application for the same license; and under established policy, the most important issue for the commission to consider in the event of a competing application is how the incumbent's record stacks up against the challenger's proposal. So the commission is forced to judge the overall quality of the incumbent's programming not only on its own terms but compared to a basically unknown quantity. In the light of Supreme Court warnings on the need for objectivity in sensitive First Amendment areas, the commission has a duty to try to furnish objective guidelines to both existing broadcast licensees and the public. But the commission has never done so. It has left the entire process vague, hoping that Congress will someday rescue it by eliminating the comparative aspect of the renewal process. The new FCC, like its predecessors, simply continues to drift on this important issue. In the meantime, comparative cases come up for decision, with no standards to guide the decision makers. The pattern that emerges is not heartening: a very small radio broadcaster from a town north of Boston loses its license, while a very large TV broadcaster, Cowles Broadcasting, wins renewal despite a serious blemish on its record.

SO FAR I HAVE BEEN TALKING about actions that the FCC has failed to take, all of which might be chalked up to simple slowness. But in January 1983, it did act on a petition for deregulation—again filed by me—and turned it down.

The story requires a bit of background. In 1971 Congress decided to vote itself a nice perk: advertising time at cheap prices. It included a provision in the Federal Election Reform Act of that year forcing broadcasters to sell time to candidates at the lowest unit rate they offered to any advertiser. Worried that broadcasters might refuse to sell candidates *any* time in order to avoid the discount, our ingenious representatives further decreed that the commission shall revoke the license of a station that willfully or repeatedly fails to give reasonable access to candidates for *federal* office. (People who run for governor and mayor were less well represented and got no such protection.)

In late 1979 the Carter-Mondale campaign committee tried to buy programming time on the three networks to kick off Carter's campaign for the 1980 election. All three refused, chiefly on the grounds that the time requested was too early for the coming campaign and would interfere unduly with their regularly scheduled programming. The FCC under its previous leadership ruled that the networks were acting unreasonably, and it prevailed before the Supreme Court: the statute is constitutional, the Court held, and broadcasters must provide reasonable access for federal candidates.

After this decision was handed down in 1981, I petitioned the FCC to implement the provision, in accord with its new philosophy, on an overall rather than case-by-case basis. That is, the commission should revoke or deny renewal of a broadcaster's license only where the station has shown a pattern over time of willful or repeated failure to afford reasonable access. Whatever the network's response to this or that particular request, the critical issue would be whether reasonable access was afforded during the course of the campaign. With this approach, the commission could avoid being pushed into deep—and perhaps partisan—intrusions into broadcast editorial judgments. In *Carter-Mondale,* the FCC's vote was four Democrats to

three Republicans, a split that Justice Stevens noted with concern in dissenting from the decision in which the Supreme Court upheld the FCC (by six-to-three). And of course, in light of the very substantial amount of time that the networks gave and sold to presidential candidates during the 1980 campaign year, they would have escaped the charge of willful or repeated failure had they been judged on their overall performance.

It is true that the networks themselves would prefer case-by-case rulings. As observers have pointed out, the networks would rather surrender a hundred editorial decisions than run the slightest risk of losing a license: their business fears take precedence over First Amendment concerns. But it is possible to give the networks a security blanket. If they believe for some reason that they must continue to ask a government agency whether they have exercised reasonable editorial judgment in these sensitive political areas, the commission could let them petition for a declaratory ruling (the disgruntled candidate, however, should not be permitted to seek such a ruling). The networks' attitudes, however, clearly should not dictate FCC policy. Other broadcasters may want to avoid the quagmire of the case-by-case approach, and they are entitled to a commission policy that offers breathing space for editorial decisions.

On January 27, 1983, however, the commission rejected my petition, stating that the case-by-case procedure is consistent with the statute, its legislative history, and the majority opinion in *Carter-Mondale*. The statute, you will recall, banned willful or repeated failure to afford access. But the commission has said it will continue to act on "individual complaints, even where a licensee's action may not be willful" or "repeated" (in *Carter-Mondale* the denial was the first of the campaign). Such a procedure is needed, said the commission, "to protect both the candidate and the people to whom each candidate needs to communicate." Chairman Fowler has said that the reasonable access provision is an unwarranted intrusion on the broadcaster's editorial province. But now he too has joined in the commission's call for rulings on *every* candidate request, whether or not the broadcaster's denial of access was willful or repeated—surely the most intrusive procedure possible.

Another initiative from the new chairman —this one in the field of children's TV programming—presents different problems and may indeed be interpreted by some as striking a blow for broadcaster freedom. Again a bit of background is needed. In 1975, the FCC under Chairman Richard Wiley adopted a policy statement affirming that, as public trustees, television stations have the responsibility to present reasonable amounts of informational or educational children's programming. This policy was upheld by the courts. By and large, the commission's method of promoting children's TV programming has been the "lifted eyebrow" approach. But now Chairman Fowler says he will abandon this practice, asserting that it is inconsistent with the First Amendment and that commercial broadcasters have no obligation to present such programming. Is this, then, a case of genuine deregulation?

Not at all. As it happens, I disagree with the chairman's goal here; I find the children's television requirement perfectly sound. More to the point, Fowler's statement was reckless and ineffective, even on his own terms. The 1975 pronouncement represents official FCC policy, unless and until it is set aside by Congress, the courts, or the commission itself. It is therefore impossible to imagine what useful purpose is served by Fowler's declaration. What if some broadcaster took him seriously and failed to meet its obligation under the 1975 policy statement? What would the agency or the reviewing court then do in the face of a petition to deny or a comparative challenge at renewal time? In the absence of the reality, the rhetoric endangers those Fowler would like to help.

IN HIS 1980 DEBATE with Jimmy Carter, Ronald Reagan ended with a pithy question: "Are you better off or worse off than you were four years ago?" I would paraphrase that question here: "Is the First Amendment better off or worse off than it was two years ago?" I cannot think of any real improvement that the new FCC has made. Not only has performance fallen far short of promise, but time may well be running out. Fowler is going into his third year as chairman and chairmen generally serve about two-and-a-half years. If his sincerity is to be matched by equal effectiveness, it is time—even long past time—for him to deliver on the promise. ■