

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

WXIA-TV

Complaint No. 91070126

**MEMORANDUM OPINION AND ORDER**

Adopted: January 22, 1992; Released: January 29, 1992

By the Commission: Commissioner Quello not participating.

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny Complainants' motion to disqualify Commissioner James H. Quello from participating in the above-captioned complaint proceeding.<sup>1</sup>

**II. BACKGROUND**

2. Complainants are nine political candidates who ran for office in the state of Georgia in 1986 or 1990.<sup>2</sup> Complainants have filed a formal complaint before the Commission alleging that the licensee of Station WXIA-TV violated the "lowest unit charge" requirement of Section 315(b) of the Communications Act of 1934, as amended, in the 1986 and 1990 Georgia election campaigns. In their complaint, they request that the Commission audit WXIA-TV's records for these years, revoke the license of WXIA-TV, assess forfeitures against WXIA-TV, and order WXIA-TV to refund overcharges to the candidates. The complaint is pending before the Commission.

3. On October 21, 1991, Complainants requested that Commissioner Quello voluntarily withdraw from participation in the complaint proceeding, or, alternatively, that the Commission disqualify him from participation. Complainants asserted that Commissioner Quello had made certain public remarks which indicate bias (or an appearance of bias) against their claim.<sup>3</sup> Specifically, Complainants argued that Commissioner Quello "has already made up his mind on the issues of liability and damages for violations of § 315(b) . . ."<sup>4</sup>

4. In response, Commissioner Quello requested the General Counsel's opinion as to whether he was required to recuse himself from the proceeding. The General Counsel issued a letter stating that, in his view, Commissioner Quello was not required to recuse himself because the Commissioner's remarks merely expressed his view that the Commission, not the courts, should adjudicate complaints alleging violation of the lowest unit charge requirement.<sup>5</sup> Commissioner Quello subsequently issued a separate opinion in which he declined voluntarily to recuse himself from the proceeding.<sup>6</sup> Complainants then renewed their request that Commissioner Quello be disqualified.

**III. DISCUSSION**

5. The test for disqualification of a Commissioner on the grounds of prejudice or appearance of prejudice in an adjudicatory proceeding 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, 590-591 (D.C. Cir. 1970) (*Cinderella*). Similarly, section 19.735-201a of the Commission's rules requires an employee, *inter alia*, to avoid any action which might result in or create the appearance of losing complete independence or impartiality. 47 C.F.R. § 19.735-201a. As discussed below, we conclude there is no basis for disqualification under the *Cinderella* test. Having made that determination, we also believe there is no violation of the Commission's rules.<sup>7</sup>

6. We believe that a disinterested observer could not conclude that Commissioner Quello has in any way adjudged the facts as well as the law of the pending complaints against WXIA-TV.<sup>8</sup> As a preliminary matter, we note that Commissioner Quello does not mention WXIA-TV or the specific complaints in any of the quoted remarks cited by Complainant. Further, it is apparent from both the speeches and the quotations in *Broadcasting* referred to by the Complainant that the import of Commissioner Quello's remarks was a concern that alleged violations of section 315(b) should be adjudicated by the FCC, not the courts. Read in context, a disinterested observer would thus readily conclude that the specific remarks to which complainants object relate only to the appropriate forum for resolution of the lawsuits pending in court, and not to the merits of particular complaints or the specific complaint against WXIA-TV.<sup>9</sup> Finally, we do not believe a disinterested observer would conclude that Commissioner Quello's statement that "[c]andidates have even challenged license renewals over allegations of lowest unit charge violations" would in any way suggest that he has adjudged the facts as well as the law regarding whether WXIA-TV has violated section 315(b).<sup>10</sup> We do not think a mere reference to non-renewal as a potential sanction is sufficient to cause a disinterested observer to tie Commissioner Quello's remarks to a particular case. Further, even assuming that this remark reflected a preconception as to whether, as a general legal matter, non-renewal is a proper remedy for section 315(b) violations, such a preconception as to the law would not require disqualification.<sup>11</sup>

7. Accordingly, IT IS ORDERED that Complainants' motion for disqualification of Commissioner James H. Quello from participating in this proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

## FOOTNOTES

<sup>1</sup> Before the Commission are Complainants' Demand for Voluntary Withdrawal or, in the Alternative, Motion to Recuse (Motion), received October 21, 1991, a Memorandum filed by Complainants in support thereof on the same day, and Complainants' Opposition to "Opinion of Commissioner James H. Quello" and Renewal of Complainants' Motion to Recuse (Renewal), dated November 26, 1991.

<sup>2</sup> The Complainants are the following candidates: Roy Barnes, Johnny Isakson, Lauren McDonald, Zell Miller, Andrew Young, Pierre Howard, Warren Evans, Tim Ryles, and Mack Mattingly.

<sup>3</sup> On October 2, 1991, Commissioner Quello spoke before the American Women in Radio and Television, Inc. and the Kentucky Broadcasters Association (October 2 speech). On October 11, 1991, Commissioner Quello spoke before the Minnesota Broadcasters Association (October 11 speech). *Broadcasting* magazine contained two articles in its October 7, 1991 issue, entitled "FCC Moves to Stem Lowest Unit Lawsuits" and "Quello Urges Leniency in Overcharge Cases," which included quotations from Commissioner Quello. Complainants rely on these two speeches and two articles as the basis for their disqualification request.

<sup>4</sup> Memorandum at 3.

<sup>5</sup> See Letter of November 7, 1991 from Robert L. Pettit, General Counsel to Commissioner James H. Quello.

<sup>6</sup> Opinion of Commissioner James H. Quello (Opinion), Public Notice No. 20642, released November 14, 1991. The General Counsel's letter is attached as an appendix to Commissioner Quello's Opinion.

<sup>7</sup> If a disinterested observer could not conclude that Commissioner Quello in some way had prejudged the case, then we also believe there would be no appearance of loss of impartiality under our rules. Further, contrary to Complainant's claims, our rules were not intended to impose a requirement of impartiality that is in any way more stringent than that imposed by the courts.

<sup>8</sup> As a point of clarification, we also note that a decision-maker's preconceptions as to the law, standing alone, do not invalidate agency action or require disqualification. See *FTC v. Cement Institute*, 333 U.S. 683, 702-03 (1948); *City of Charlottesville v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985). It is also noteworthy that even judges are free to decide cases involving policy questions on which they previously have expressed a view. See *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979); see also *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991); *In the Matter of a Petition for Investigation of Alleged Violations of the Commission's Rules*, 6 FCC Rcd 4762 (1991).

<sup>9</sup> See Memorandum at 2, quoting October 2 speech at 3, October 11 speech at 4; Memorandum at 2, quoting October 11 speech at 5-6; Memorandum at 3, quoting *Broadcasting* magazine, "FCC Moves to Stem Lowest Unit Lawsuits."

<sup>10</sup> See Memorandum at 6, quoting October 2 speech at 3, October 11 speech at 4.

<sup>11</sup> See cases cited in note 8, *supra*.