August 2, 1985

Dissenting Statement of
FCC Commissioner James H. Quello

In re: Public Notice: "Commission will Not Appeal Quincy Cable TV v. FCC," released August 2, 1985.

I am writing to indicate my opposition to the Commission's decision not to pursue any appeal of Quincy Cable TV, Inc. v. FCC (Quincy), D.C. Cir. No. 83-1283 (July 19, 1985). While the cable industry's embrace of the First Amendment has found recent favor in the courts, this particular interpretation is both unnecessary and excessive, and it should not go unchallenged.

In the first place, the court has improperly gone out of its way to make broad constitutional pronouncements that are unnecessary to its basic determination that the Commission has not adequately demonstrated the need for its must-carry rules. In this regard, it is relevant that the Supreme Court recently relied upon the existence of the must-carry rules as evidence of federal preemption, and it failed to even hint at any constitutional infirmity. See Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694 (1984).

In the second place, the Quincy opinion improperly dismisses the importance of the current local regulatory environment in which cable companies generally enjoy exclusive franchises and thus operate as bottlenecks to viewer choice. Quincy, supra (slip op. at 31-32). Similarly, while the cable industry, and now the court, talk at length about A/B switches and their utility in receiving over-the-air services, such points blink the reality that these devices are quite unlikely to be installed or used.

I do not argue that the must-carry rules should not be revisited to address legitimate concerns raised by the court. I favor a Notice of Proposed Rulemaking to do just that. Even if the Commission should determine to abandon its must-carry rules, it would be far preferrable to do so in a rulemaking context with full opportunity for public comment on the wide-ranging effects that would flow from such a decision (e.g., the impact on local rate regulation of cable).

By its failure to appeal this decision, the Commission is abandoning rules that continue to have the sound purpose of assuring local diversity. By simply accepting the policy determinations inherent in this opinion, the Commission is abandoning its own congressional mandate to formulate communication policy in the public interest. I dissent.