Adopted: February 22, 1989

Separate Statement of

Commissioner James H. Quello

Re: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industry

On balance, the benefits of reestablishing the right of broadcasters to contract for exclusivity protection persuades me to support the Memorandum Opinion and Order. While I continue to have reservations about certain aspects of the Commission's decision, they do not outweigh the positive benefits that emanate from reinstating the rule.

The most contentious issue on reconsideration is determining the effective date for our new regulatory regime. Parties seeking to extend the date of implementation argue that additional time is needed to develop and obtain the necessary switching equipment or acquire alternate programming. It is worth mentioning that parties to this proceeding have had ample time to prepare for implementation of our new rules. The text of the Commission's Report and Order was released in July 1988 and delayed implementation for a year until August 18, 1989. It must be remembered, however, that the Commission adopted its new rules on May 18, 1988. Accordingly, if the Commission were to retain its original effective date, the parties would have had fifteen months to prepare for the new regulatory regime. This time period is far more gracious than that afforded to broadcasters when the syndicated exclusivity rules were eliminated in 1982.

The Memorandum Opinion and Order correctly disposes of the arguments raised by those seeking to delay implementation of these rules. See Memorandum Opinion and Order at paras. 44-62. Indeed, I believe the evidence demonstrates convincingly that no further extension is required. The delay not only undermines the substantive public interest findings in this proceeding, but is also a recipe for further extensions. The record decision demonstrates that there presently exists commercially available technology that can be employed conveniently to accomplish the Commission's public interest objectives. Our assessment of existing equipment, costs and burdens placed on the cable industry and distant signal providers justifies moving forward according to our original schedule.

Delaying implementation while we wait for future development of the ultimate in electronic switching is counterproductive. In this regard, an extension provides a disincentive to the timely development of such technology. In any event, there is nothing in the record to demonstrate that decentralized time-programmable switching technology will fail to meet the industry's needs in complying with our decision. Obviously, the Commission can take into consideration technological inadequacies should problems arise. Moreover, the record demonstrates that cable operators will not be inundated with exclusivity requests from pre-existing contracts. In addition, some superstations are already acquiring exclusive program product, thereby making themselves "syndex proof."

I would have preferred to keep the original implementation date of August 18, 1989. At the very least, we should have honored the exclusivity for programming contracts entered into after the date of our Report and Order. In these cases, parties had legitimate expectations that they would be able to enforce syndex as of August 1989 and gain the benefit of their bargain. It is patently unfair not to honor these contracts.

While extending the effective date is basically unfair to those entering into programming contracts after our Report and Order, I am willing to support the decision with the extension. Perhaps the additional time will create a smooth transition to our new regulatory regime. Cable operators and distant signal providers will have had 18 months from the date we adopted the Report and Order to prepare for this new regulatory regime. More importantly, because we have retained our initial notification date of June 19, 1989, cable operators will have six months to assess their signal carriage burdens. We have given them more than enough time.

As I observed in my separate statement to the Report and Order in this proceeding, the Commission's treatment of pre-existing contracts, i.e., contracts executed prior to August 1988, is unfair and inconsistent with the underlying premise of the decision. Regardless of the intent of the parties, the Commission still requires these contracts to contain language stating, in effect, that the parties contemplated reimposition of our syndicated exclusivity rules. I doubt broadcasters and syndicators were blessed with the clairvoyance to place into their contracts, language that would not be required for several years. Moreover, as the Memorandum Opinion & Order states, most broadcasters have not been extended exclusivity protection for their pre-existing contracts. These facts support my initial thoughts in this proceeding, that broadcasters should be given exclusivity protection on all their existing contracts. Without such protection, our decision fails to rectify the current market imbalance between cable and broadcasting. I trust that as exclusivity is granted for prospective contracts the competitive environment will move towards equilibrium.

Of course, there never will be a true competitive balance between cable operators and free over-the-air broadcasting until broadcasters receive full "must carry" protection. While the ability to contract for syndicated exclusivity protection reduces the competitive disequilibrium somewhat, it is not a substitute for must carry protection. Indeed, the inability of broadcasters to obtain exclusivity protection for pre-existing contracts demonstrates that syndicated exclusivity, in and of itself, is not sufficient to restore the competitive balance in the video marketplace. In this regard, restoration of syndicated exclusivity is a necessary but not a sufficient action to meet our responsibility under Section 307(b) of the Act. The statute requires that free, local, over-the-air broadcasting be given a full opportunity to compete in order meet its public interest obligations. Memorandum Opinion and Order at para. 24. Must carry is essential to meet this responsibility. Syndicated exclusivity alone cannot accomplish this task.

In sum, my concerns with the decision are outweighed by the positive benefits that flow from reestablishing exclusivity protection. The Memorandum Opinion and Order reaffirms our legal authority and the factual predicate to reinstate these rules as a matter of sound communications policy. I wholeheartedly agree.