

**Dissenting Statement
of
Commissioner James H. Quello**

**In Re: Amendment of Part 76 of the Commission's Rules
Concerning Carriage of Television Broadcast Signals by Cable
Television Systems, MM Docket No. 85-349;**

**In Re: Amendment of Part 15 of the Commission's Rules
Concerning Input Selector Switches Used in Conjunction with
Cable Television Service, GEN Docket No. 87-107;**

**In Re: Amendment of Section 76.62(c) of the Commission's Rules,
RM-6152**

As a result of the Court's decision in Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987) clarified 837 F.2d 517 (D.C. Cir. 1988), the Commission is required to eliminate its must carry rules. However, I disagree with the majority's decision to retain the input selector rules and with the language of the rule that will allow cable operators to "cherry pick" local signals.

I find it ironic that the only part of our must carry rules to survive is the input selector switch provision. In this regard, I would remind the Commission that the must carry rules, input selector switch requirements and consumer education program were part of an overall package. We stated:

If any of these articulated elements were to be deleted, the remaining portions of the program might not be sufficient to achieve our objectives.

Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864, 886 (1986) Admittedly, the court stated that the input selector rules were not inextricably linked to the now moribund must carry rules. Century Communications Corp. v. FCC, 837 F.2d at 517. Nevertheless, the decision did not compel retention of the input selector rules. On the contrary, whether the Commission should implement its existing input selector and consumer education rules is a policy decision which the Commission should address.

Viewed from this perspective, I do not see any value in lifting the stay and imposing the input selector switch rules at this time. As I have noted previously, the A/B input selector switch is simply not effective in accessing local broadcast signals. Memorandum Opinion and Order in MM Docket No. 85-349, 2 FCC Rcd 3593, 3626 (1987) (Quello, concurring-in-part and dissenting-in-part). Indeed, the most interesting aspect of this proceeding is that both the broadcast and cable industries recognize the practical and technical problems associated with the A/B switch. See e.g., Joint Petition for Reconsideration by

571

National Cable Television Association, Community Antenna Television Association and National Association of Broadcasters in MM Docket No. 85-349, December 17, 1986. Apart from the interference problems associated with improper installation, an A/B switch is only effective if it is connected to an antenna. Unfortunately, the record in this proceeding demonstrates convincingly that most American households no longer have off-air reception capability. Zoning restrictions, terrain problems, man made construction and the systematic dismantling of outdoor antennae significantly reduce the efficacy of the A/B switch as an alternative to mandatory signal carriage rules. Moreover, the problem is exacerbated by the Commission's decision to make the A/B switch requirements optional.

I am faced with the decision of implementing a rule that most industry observers believe is not an adequate substitute for carriage requirements and will not provide an adequate means for the American people to access local broadcast signals. Granted the new rules may apprise some cable subscribers of the need to retain off-air capability. However, such knowledge is simply inadequate to solve the problem. Given the Commission's recent data reporting that over 700 television stations have been denied carriage since 1985, I cannot in good conscience support a rule that will not effectively address this problem. See Mass Media Bureau Staff Report: Cable System Broadcast Signal Carriage Survey, (September 1, 1988). In this regard, I see no need to burden the cable industry with rules that won't produce the desired effect.

Implementing these rules gives the appearance that the Commission has found a narrowly tailored, content neutral means of ensuring that viewers will have access to free, local over-the-air broadcast television. It most certainly has not. If the adoption of a new set of must carry rules becomes a possibility, I would ask the Congress or a reviewing court to closely examine the evidence in this record concerning the efficacy of the A/B input selector switch. The technology is a poor alternative to a carefully crafted set of carriage requirements.

Independent of my objection to imposing an ineffective A/B switch rule, I also object to the language of the rule itself. Specifically, the rule has revised our "manner of carriage" provisions. See 47 C.F.R. Sec. 76.62. This new provision requires that broadcast programs be carried in full. In other words, once a cable system has decided to carry a broadcast station it need not carry the broadcast signal in its entirety. Instead, it can "cherry pick" or select specific programming from a menu of local signals. The only requirement is that each specific program be carried in full. In theory, a cable operator could establish a channel that is a composite of all or several local stations in the market.

There is little or no disincentive to engage in "cherry picking" local signals. Of course, for each program selected the cable operator would be required to pay the appropriate compulsory copyright fee as if it had carried the local station's entire signal. However, fees for the carriage of local signals are fairly insignificant. The only concern to the cable operator is that it must carry the program - including adjacent advertising - in its entirety or risk losing the benefit of the compulsory license. See 17 U.S.C. Sec. 111(c)(3).

Admittedly, this is precisely the regulatory treatment that existed for non-must carry signals under the old must carry regime. Nevertheless, because the absence of must carry can have a devastating effect on the local broadcast market, I believe the Commission should adopt a requirement that cable operators choosing to carry local stations must carry the entire signal as opposed to carrying the station on a program-by-program basis. Absent such a requirement cable operators will be able to create a composite local channel, selecting only the best programming from each local station.

Requiring cable operators to carry the entire signal of local broadcast stations does not conflict with the Quincy and Century decisions. Quincy Cable TV Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert denied sub nom; National Association of Broadcasters v. Quincy Cable TV Inc., 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987). These decisions prevent the Commission from compelling the carriage of local signals. However, they do not preclude the Commission from adopting "manner of carriage" requirements for broadcast signals that are voluntarily carried by cable operators. Cable systems would have the editorial discretion to select whatever local signal they wish to carry. From a constitutional standpoint, there is little difference between a manner of carriage rule that requires programming to be carried in full and one that requires the signal to be carried in full.

In sum, I would not lift the stay preventing the implementation of the A/B input selector switch rules. Instead, the Commission should continue to examine the problems associated with the lack of must carry in its pending Notice of Inquiry in MM Docket No. 88-138, 3 FCC Rcd 2698 (May 10, 1988). In addition, the Commission should continue to monitor the marketplace and record incidents of stations being denied carriage, channel repositioning and payment for carriage. Second, cable operators carrying local broadcast stations should carry the entire signal and not be able to "cherry pick" specific local programs. Accordingly, I dissent to the majority's decision.