Concurring Statement of Commissioner James H. Quello.

In the Matter of: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

Generally, I am in favor of receiving comments on important matters affecting the broadcast and cable industries, so I can support issuing this Second Further Notice of Proposed Rulemaking. However, since this Notice comes so soon after the Commission received input in the Future of Television Inquiry, some have suggested that it represents at least a tentative conclusion to relax or repeal the network-cable cross-ownership rule. My vote should not be so interpreted. While I am willing to consider proposals to change the rule, my guiding principle will be the probable effect of such action on the maintenance of free over-the-air television.

To the extent some view this Notice as the preliminary announcement of an impending change in the rules, I would caution my fellow Commissioners to ensure that any new rules are consistent with the Commission's other policies, particularly those adopted recently. This concern also is most pressing when the Commission alters some of its rules as a result of changes in the video marketplace, but not others.

Such a lack of consistency was a major reason the Court of Appeals struck down "must-carry" rules in 1985. For example, the Court found the Commission's failure to question the assumptions underlying must-carry rules to be "in sharp contrast to [its] treatment of several other components of the regulatory framework." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1442 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). In particular, the Court noted that "the Commission eliminated the distant-signal-carriage and syndicated-exclusivity rules," both of which were premised on the same regulatory interest as must-carry — "protect[ing] broadcast television from competition from the expanding cable industry." *Id.* While marketplace changes and Commission actions over the past few years have enhanced the need to reimpose some type of must-carry rules,[1] the need for consistency in Commission policy remains constant.

For this reason, it is imperative that the Commission is mindful of its overall policies as it reviews the comments in this proceeding. For example, can the Commission reconcile a majority's recent conclusion that "the networks continue to benefit from historical structural advantages"[2] with the Notice's statement that "the near complete dominance of the three broadcast networks . . . has clearly diminished"? Notice at ¶ 8. Is it consistent for the Commission to retain significant financial interest and syndication restrictions while concluding in this Notice that marketplace changes "will force the networks either to reduce their costs . . . or develop supplementary revenue streams"? *Id.*

Similarly, can the Commission justify allowing greater vertical integration through network-cable combinations in light of its 1990 conclusions that "vertically integrated MSOs have the ability to limit competition to particular programming services" and that "most cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve"?[3] The Commission recently reaffirmed the principle that the main competition to cable television is a complement of over-the-air broadcasting signals. *Reeaxamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545 (1991). Is it consistent for the Commission to permit the primary competitors in local video distribution markets to merge?

Finally, it is significant that the policy purposes underlying the network-cable restrictions are closely related to those for the more general broadcast-cable cross-ownership ban. *See* Notice at ¶ 3. Of course, the broadcast-cable restrictions have not been targeted for retirement, obviously because these rules were codified in the Cable Act. *See* Notice at ¶ 3 & n.7. But to relax or repeal one of the rules while the other remains in place might create a serious imbalance in the Commission's policies.

I ask these questions not because I have firm opinions on the probable answers but because I believe the Commission must address these issues in addition to those raised in the Notice. I also believe that presumption favors the continuation of rules that were enacted to promote diversity in

local video markets. This is unlike the situation in the financial interest and syndication proceeding where I have said that changes in the media marketplace create a presumption in favor of repeal. That proceeding involved national and international markets for programming in which there are many alternative buyers. By sharp contrast, the question of cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper. The 1990 Cable Report found that local cable operators have the *ability* to engage in anticompetitive practices; the question now facing the Commission is whether allowing cross-ownership will create an added *incentive* for them to do so.

This brings us full-circle to the question of safeguards, which are discussed prominently in the Notice. Certain of the alternatives, such as limiting cross-ownership to large markets or imposing national subscriber limits, may not address the problem of local bottlenecks. Other options, such as must carry, recently have been criticized inside the Commission,[4] raising again the question of consistency.

I will review the comments filed in this proceeding carefully and will attempt to assess what effect any rule change will have on free over-the-air television. Ultimately, it is the Commission's responsibility in the public interest to answer that question, which this proceeding squarely presents.

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[1]As this Notice recognizes, the relative fortunes of the broadcasting and cable industries have shifted radically over the past few years. Not only have there been marketplace changes, but the Commission has reimposed certain regulations such as syndicated exclusivity rules. *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299 (1988), *aff'd United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). *See also Reeaxamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545, 4564-66 (1991) (issuing *Second Further Notice of Proposed Rulemaking* on whether to reimpose carriage requirements as part of effective competition standard).

[2]*Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3109 (1991), *modified*, ___ FCC Rcd. ___ (1991), *appeal pending* No. 91-2350 (7th Cir.).

[3]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 127 (1990). Indeed, with respect to the anticompetitive practices described in the Cable Report, the Commission found that "the record in this proceeding indicates that some [cable systems] have [engaged in such tactics]."

[4]*See Reeaxamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. at 4575-76 (Separate Statement of Chairman Alfred C. Sikes).