August 8, 1996

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

Re: Implementation of Section 302 of the Telecommunications Act; Open Video Systems, Third Report and Order and Second Order on Reconsideration, (CS Docket 96-46)

This Third Report and Order and Second Order on Reconsideration generally affirms the Commission's prior decision on the operation of open video systems (OVS), pursuant to the six-month deadline set by Congress in the Telecommunications Act of 1996 requiring the Commission to complete implementation of final rules.

When the Commission adopted OVS rules in June, I stated that it was necessary to be especially aware of the potential implications arising from the fact that this complicated proceeding, unlike many other pressing matters raised in the Telecommunications Act of 1996, was to be completed through reconsideration by August 1996. The Commission has been most careful to follow the express will of Congress and in doing so has established a framework for the development of OVS in the video marketplace. I remain concerned, however, that this accelerated timeframe for completing final rules may result in unintended consequences through exacerbated uncertainty and potential competitive imbalances as companies in the video marketplace work to follow those rules.

In terms of specific rules adopted in this proceeding, I continue to question the decision to expand the application of program access rules in the context of programming services, video program packagers, and OVS operators rather than to follow past precedent in applying these rules. In particular, I question the necessity of prohibiting the use of exclusive contracts between cable-affiliated programming services and cable-affiliated programming packagers on the OVS system. The Commission previously has distinguished between the legitimate and beneficial uses of exclusivity, especially in the context of developing technologies such as DBS, as compared to practices that restrict the availability of programming to subscribers.[1] The Commisison found regarding DBS that "...an outright ban on any MVPD exclusive contracts in areas unserved by cable, without any determination of the effect of such exclusivity on competition, defeats the very purpose of the 1992 Cable Act to foster competition from other non-cable technologies."[2]

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[1] See Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Program Distribution and Carriage, First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359 (1993); See also Memorandum Opinion and Order on Reconsideration in MM Docket No. 92-265, 10 FCC Rcd 3105 (1994).

[2] 10 FCC Rcd 3126 (1994).

Moreover, the Commission's original decision to implement Section 628 regarding program access, especially concerning exclusive contracts in areas served by cable, treated exclusive contracts between vertically integrated programming vendors and cable operators "in a somewhat less restrictive manner" by not applying a *per se* prohibition and finding that contracts of this type are not prohibited where the Commission determines that "such [a] contract is in the public interest."[3] In that context, the Commission also stated that "exclusivity under this provision is not prohibited" and that "the public interest in exclusivity in the sale of entertainment programming is widely recognized."[4]

The program access rules have been applied over time to preserve legitimate practices and to preclude practices that restrict the availability of programming to subscribers or favor a particular distribution technology to the exclusion of other competing distributors. As a result, I continue to believe that the Commission's application of program access rules in the context of OVS fails to find a similar level of balance, and I question how the original, specific competitive concerns that became the basis for program access rules are manifested in the context of this new service.

Meanwhile, we all continue to await the resolution of the pressing matter of treatment of cost allocation for OVS, which is being addressed in a separate rulemaking. Throughout the extensive and contentious history of the video dialtone proceedings, perhaps no other issue was as critically important, and yet as tentatively treated, as the issue of cost allocation. While the 1996 Act establishes a new framework for LEC entry into the video marketplace through the advent of open video systems, the same analytical questions regarding cost allocation have to be answered, because the potential competitive inequities surrounding the treatment of common costs for OVS and voice networks have not in any way been changed. It is my hope that the Commission's treatment of cost allocation issues in the future will address my concerns, especially that the cost allocation mechanism: (1) should be understood by all parties at the outset of OVS development, and (2) should account for the carrier's incentive in competing with incumbent cable operators to set a price for video service that is artificially low. Accordingly, we still must face the question of how we will identify and analyze costs underlying the lower rate that might otherwise go unseen or underestimated, as opposed to scrutinizing inflated cost estimates that might be used to justify a higher rate. I look forward to addressing the cost allocation matter in the near future.

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[3] 8 FCC Rcd 3383 (1993).

[4] 8 FCC Rcd 3384 (1993).