June 7, 1996

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

Re: Implementation of Section 302 of the Telecommunications Act; Open Video Systems (CS Docket 96-46)

This Second Report and Order implements several provisions of the Telecommunications Act of 1996 regarding open video systems (OVS), which created new sections 651 through 653 of the Communications Act of 1934. In keeping with the 1996 Act, this decision adopts a streamlined regulatory framework that: (1) exempts open video systems from certain requirements of Title VI and establishes that Title II common carrier requirements will not apply; (2) allows an OVS operator to offer its own programming while affording independent programmers the ability to reach subscribers directly; and (3) ensures access to the open video system by independent video programming providers on terms, including rates, that are just and reasonable. In doing so, this action is intended to bring new competition to the video programming distribution market.

936

As an initial observation, I believe that it is 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, must be completed through reconsideration by August 1996. While we have been most careful to follow the express will of Congress in providing opportunity for OVS entry into the video marketplace, I am concerned this compressed timeframe could lead to the adoption of rules that would yield unintended consequences, especially in the form of exacerbated uncertainty that could constrain investment in OVS. Should this occur, the result would be unfortunate twice over: first, because it could hamper the development of OVS as a potential competitor in the video marketplace, and second, because it could lead to unreasonable disparities in investment in other competitors in the video marketplace.

My greatest concern regarding this decision involves the treatment of cost allocation matters. In this decision, the Commission provides that OVS operators may file updated cost allocation manuals (CAMs) prior to initiation of service, subject to the resolution of general cost allocation issues in a separate Part 64 proceeding. This raises particular concern on my part due to the indication that this Commission may still fail to realize the significance of cost allocation in the process of authorizing LEC-owned multichannel voice and video systems. 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 vagaries and potential competitive inequities surrounding the treatment of common costs for OVS and voice

networks have not in any way been changed. Accordingly, it is my hope that the Commission's treatment of cost allocation issues in the future will reflect greater attention to these concerns.

Given that the technologies LECs may choose to employ for purposes of developing open video systems remain for the most part undetermined, the types of costs and the manner in which they will be treated likewise remain uncertain. Furthermore, I am concerned that the Commission may be no better prepared today to confront cost and pricing issues presented by a situation where the carrier has an incentive in competing with incumbent cable operators to set a price for video service that is artificially low, rather than the practices associated with artificially high rates as we have been accustomed to addressing. 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. Based on these lingering questions, I am uncomfortable accepting that the cost allocation questions are likely to be resolved with greater ease in the context of OVS than we experienced in the video dialtone process. I would have preferred to provide a better opportunity for the Commission to evaluate cost allocation matters by requiring OVS operators to file amended cost allocation manuals at a much earlier time, and in any event prior to the system's construction when operators will begin to incur costs.

I am also concerned by 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] Accordingly, the program access rules have been applied to preclude practices that restrict the availability of programming to subscribers or favor a particular distribution technology to the exclusion of other competing distributors. With respect to their application in the context of cable-affiliated programming services and cable-affiliated programming packagers on the OVS system, I suggest that such exclusive contracts could be a means of establishing stronger and distinct platforms, one of the keys to potential viability for an open video system. In any event, I question how the original competitive concerns -- regarding vertically integrated programming vendors and cable operators with significant horizontal market power in the video marketplace -- that became the basis for program access rules are manifested in the context of a new service, especially one operated by local exchange carriers.

Despite these concerns, I support the Commission's decision because I believe that the

---

[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).

overall package of implementing rules for OVS operators may lead to the advent of another competing service in the video marketplace. In the final analysis, perhaps the compressed timeframe in which this proceeding must be concluded eventually will become a benefit to the extent that interested parties may be able to readdress quickly these issues I am raising as well as other issues to which the Commission may need to devote further thought.