Comments by FCC Commissioner James H. Quello
Before the Georgia Cable Television Association
Buford, Georgia, February 17, 1978

It is a pleasure for me to be here in Buford, Georgia for several reasons. First, I am several hundred miles away from the snow and traffic jams of Washington, and, secondly, I am most appreciative of the opportunity to address the members of the Georgia Cable Television Association. Third, it's also a welcome temporary reprieve from the legal deliberations, interpretations and complications of Washington bureaucracy. The FCC alone, at last count, had 342 attorneys--the legal complications are so pervasive that they lead to such chuckles as the new definition of "damn shame." (define)

I know you were promised Commissioner Margita White who is very well informed and attractive. You got me instead. It's like being promised sugar and spice and everything nice, and getting snakes and snails and puppy dog tails.

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It was just a few months ago that both Commissioner White and I participated on a panel at the Ninth Annual Western Cable TV Show and Convention in San Diego, California. Between us our assignment was to look at the past, present, and the future of cable TV. Of course, predicting the future accurately is an impossible task. I am reminded of one prominent prognosticator who concluded: "I've looked into the future--and it won't work."

Based on this astute observation I did not bring my crystal ball. Instead, I thought we might just potluck on cable matters as they stand today. And as an overall generalization I note that it has been said--obviously by someone with the Commission--that "today's cable industry is largely the result of regulatory policies that have developed over the years." Having in mind the every-changing complexities of our cable rules, I would paraphrase the observation to note that today's cable industry has resulted <u>in spite</u> of the regulatory policies that have developed over the years.

I thought I would give you my personal views as to the state of the cable industry today and to try to put a finger on the pulse of cable development through the regulatory process over the past couple of years. Frankly, I can utilize the words of a well-known commercial--"you've come a long way, baby." I am sure you will agree the Commission in the past couple of years particularly has undertaken numerous re-regulatory steps which have permitted cable to grow and function more efficiently. We have made more than 50 substantial changes to the 1972 cable rules, most of these seeking to permit the natural functioning of the communications marketplace where the

changes would not be unduly harmful to the existing industry structure. Many changes have aided the small businessman. Where unneeded regulatory burdens could be removed, they were.

One of the most significant steps the Commission took last summer to guide it in its deregulatory efforts and its continuing reassessment of its policies and rules was the initiation of the Cable Economic Inquiry. When we instituted the Inquiry, we stressed that the goal of our regulatory problem was still the maintenance of a system of over-the-air broadcast service, while at the same time fostering cable growth in order to provide diversity of programming and broadband communications services. I note that these goals are compatible if we keep in mind that the prime consideration has been the extent to which cables carrying TV broadcasts have had an adverse impact on television stations and their ability to serve the public. In short, the bottom line is localism and public service.

I think the Economic Inquiry is a positive step, since it shows that we are willing to develop economic data and the facts to guide us in our decision-making. During the past 12 years this controversy over the extent of cable's impact on broadcasting has often produced, as we have said, more "heat than light."

In this Inquiry we propose to examine the many facets of the claimed interdependence between cable and broadcasting, including cable demand and penetration, audience diversion, the audience-revenue relationship, and service to the public. I would emphasize, however, that the Cable Economic Inquiry is not being undertaken to reach any particular set of recommendations, such as to strengthen or delete signal carriage rules, but rather it is designed to generate the kind of economical data we need to draw knowledgeable conclusions.

As might be expected, there has been substantial criticism of our cable regulatory program. For example, the court in Home Box Office, after setting aside our pay cable rules, pointed out that: "Regulation perfectly reasonable and appropriate in the face of a given problem is highly capricious if the problem does not exist." The court noted that reasons such as "well, there must be some kind of economic impact" were not sufficient to justify regulation. The court told us that the agency must proceed cautiously and rely on factual evidence before interfering with the natural development of an industry. However, the point I want to make is that the Home Box Office decision cuts both ways--just as rules cannot be made without sufficient justification, neither can they be deleted without justification.

I think the Commission has made giant strides in trying to remove the onerous burden of regulation wherever possible. Since 1974, when we started our re-regulation program, which in reality is deregulation, the Commission has shown a remarkable willingness to delete rules that are no longer

useful. For example, one of the first rules to go was the leapfrogging rule, which required a cable operator to pull in only the nearest distant network and independent signals. Changes were made in the network nonduplication rules which exempted all systems with less than 1,000 subscribers. In 1975 we deleted our access channel and channel capacity requirements for cable systems with less than 3500 subscribers and relaxed substantially for those systems in excess of 3500. We also deleted most of our franchise standards, retaining only the fee limitations, since we felt that most franchise standards should be handled at the local level.

In the Definitions Proceeding, all cable systems with less than 500 subscribers were exempt from most of our rules. Just two weeks ago, on reconsideration, we decided to continue to use the community instead of headend definition for a cable system and refused to assert jurisdiction over MATV systems. On the more positive side for the cable industry, it was clear from the discussion at the Commission meeting that we will be looking shortly at the next step to see if our rules cannot be relaxed for systems up to 1,000 subscribers.

Another aspect to the Commission's regulatory program is its refusal to enact rules where none are needed. An example of this was the Commission's recent decision not to enact rules restricting the transmission of radio programs by cable systems. The Commission found no facts indicating that cable systems discriminate against local signals in favor of distant ones. The Commission found that 27% of all systems carry no radio signals and that 51% carry all-band FM signals. Basically, the Commission found no evidence that local broadcasters were harmed by radio signal carriage by cable systems. Therefore, in this instance the Commission's policy of diversity was instrumental in its refusal to enact radio carriage rules.

As you well know, our rules on syndicated program exclusivity are among the most complex and confusing of our rules. Basically, these rules provide that a cable system in the first 50 major markets, upon receipt of notification, must cease carrying syndicated programming from a distant signal during a pre-clearance period of one year from the date that such programs are sold for the first time as syndicated programs in this country. This is called pre-sale protection. And, a cable system located in any major market, the top 100, may not carry a syndicated program to which a commercial television station, licensed to a designated community in the market, has exclusive broadcast exhibition rights. In the second 50 largest markets, there is no pre-sale protection and there are limits on the length of time during which stations are entitled to syndicated exclusivity protection. Additionally, protection is not required by systems serving fewer than 1,000 subscribers, and grandfathered signals are not subject to the exclusivity requirements.

The basis for the syndicated exclusivity rules in 1972 was the lack of copyright protection provided to copyright holders in relation to cable use of

their product. With the passage of the new copyright law in 1976, the question was rasied as to whether there is any need for these rules or, in fact, whether the Commission has jurisdiction to adopt rules designed for this purpose in the first place.

A Notice of Inquiry on the syndicated exclusivity rules was issued by the Commission on November 5, 1976. After a full examination of the information submitted in that docket, the Cable Bureau prepared a recommended Notice of Proposed Rulemaking accompanied by supporting economic studies prepared by the staff, recommending proposed deletion of the syndicated exclusivity rules, or substantial modification thereof. This item, as well as a companion item involving differing views from the Broadcast Bureau, was the subject of a Commission special meeting last Tuesday. Following some three hours of presentation by both Bureaus, the Commission instructed the respective staffs to prepare additional material for Commission consideration. My guesstimate is that preparation of the additional documents will require another three months or so, following which the Commission hopefully will be in a better position to determine whether to propose deletion of the syndicated exclusivity rules in their entirety, retention but substantial modification and clarification of syndicated exclusivity provisions, or to merely maintain the status quo for the time being. Basically, what we are proposing to do is to establish a documented, reasoned basis for whatever action we may take --and, believe me, this is no easy task.

Before leaving the subject of recent changes to our regulatory policy regarding cable, it may be worthwhile to let you know that the Congress has enacted the pole-attachment legislation. The only remaining action required to make it the first ever TV law is the President's signature. The Commission must have a regulatory program in effect six months after the President's signature, providing for the hearing of complaints and regulation of rates as needed.

The Bill has been strongly supported by your industry to protect it from potential monopoly abuses of the other utilities. The Bill will require the FCC to use a "zone of reasonableness" in reviewing rates. The floor for the rates will assure that the utility company recovers the costs associated with the attachment. The ceiling is the fully-allocated cost of the pole, apportioned to the cable company on the basis of the percentage of usable space occupied by the cable. The Bill provides that states may assert preemptive jurisdiction under certain conditions. The Bill also includes a provision expanding the scope of the Commission's forfeiture authority to include violators of cable rules as well as others.

On this point of forfeiture, I will dwell on this only to the extent of indicating my personal position in favor of forfeiture provisions for cable operators. I have heard the arguments on both sides as to the propriety of forfeiture provision at the present time, and I continue to believe that Commission authority to assess forfeitures will aid cable-industry quality and development. From the Commission's standpoint forfeiture authority is an enforcement tool for egregious situations, such as the cable system which refuses to comply with the carriage rules or to provide required non-duplication protection. Certainly the Commission needs some direct means of assuring that the very few "bad apple" operators comply with the rules, as do the great majority of the industry. You may be assured that we do not intend to use the forfeiture sanction willy-nilly or to harass.

I would like to spend a few moments looking at some matters yet to be decided. One sensitive area which is ripe for decision and involves first amendment protection of free speech is the cable access obscenity rules. This item had been scheduled for Commission meeting on February 14, but had to be postponed for a short time.

On June 2, 1976, the Commission adopted a clarification of its rule dealing with the cablecasting of obscene or indecent material on access channels. Generally, the clarification made it clear that a cable operator was required to prevent obscene or indecent material from being exhibited on public, educational or leased access channels. Sanctions would result based on a "reasonable man" test. More specifically, cable operators were required to take reasonable steps to insure that obscene or indecent programming was not cablecast. The clarification stated, for example, that while an operator was not required to pre-screen all material presented, he would be held accountable if he had notice that questionable material might be presented, and did not take appropriate steps (including pre-screening) to insure that proscribed programming was not cablecast.

The American Civil Liberties Union appealed the Commission clarification, arguing that the rule constituted a prior restraint on protected speech. After analyzing this matter, the Commission asked the Court for a voluntary remand of the clarification, which was granted last August. Obviously, we will have to be most careful in our subsequent treatment of this matter.

Another upcoming matter of considerable importance is the cable system definition proceeding. At the time we acted to exempt cable systems with fewer than 500 subscribers from the majority of the cable rules, staff studies strongly suggested there are few distinctions between cable systems with 500 and those with 1000 subscribers. However, rather than adopt a 1000 subscriber small system exemption at that time, the Commission issued a Further Notice of Proposed Rulemaking to elicit public comment on staff studies.

The basic policy issue presented is whether to defer action on raising the small system exemption, as suggested by broadcast interests, until completion of the broad cable Economic Inquiry or to act now on the basis of the staff studies which show there would be little adverse impact on broadcasters from raising the exemption.

With respest to the matter of signal carriage, this subject will necessarily include our on-going Economic Inquiry as a prelude to the extent to which carriage restrictions may be further relaxed. The proposed five-year experimental period without any carriage restrictions worries me somewhat, particularly for small and medium-sized markets. I am most willing to look at relaxing the restrictions, but very carefully, with a thorough review of impact, if any, resulting from such relaxation.

I have not been particularly impressed by the sporadic attempts to raise translators as a real threat to cable television. I have read the many arguments set forth and I find many of them to be fallacious. I recognize that translators can be competitive to a cable operation in a given community, although limited in extent. I don't see translators threatening your capability for diversity and multiple channels. I do recognize that there can be instances of translator interference to cable headend reception. These situations should be brought to the attention of the Commission for individual resolution. In this connection, I believe that Notice of Translator Applications should be provided to local cable systems in order that they might comment with respect to channel interference potential. I do not agree, generally, with the claim that translators and cable should be regulated on a parity basis. There are substantial differences in the two services in motivation for initiating service, in number of channels carried, fees and profitability. I think our rules have taken into consideration the differences in characteristics.

Another area of cable television that has not received as much comment in the past is the potential for cable minority ownership. Opportunities exist, particularly in urban areas where many of the major markets have not been wired, in suburban markets only partially wired, and in rural areas which have probably

the greatest need for the kinds of services that can be provided through cable.

The greater involvement of minorities in cable participation and ownership raises new issues requiring serious consideration. For example, the Federal Government is currently funding numerous research and demonstration projects in the areas of health care, education and other local services to determine how cable and other telecommunications technology can improve the quality of life in both urban and rural areas. Are the results of these projects applicable to minorities? What are the effects of the interface between cable and newer technologies such as satellite, fiber optics, etc., for the delivery of educational, health and other social services to minority communities? What role should minorities play in the design and delivery to minority communities of electronic convenience services? What are the social and economic effects of absentee ownership in areas in which local minority ownership of cable systems cannot be achieved -- what happens when revenue derived from subscriptions to cable systems is taken out of minority communities each month?

Granted these are long range issues but of sufficient importance and impact that they should not be set aside or tabled purely for "future consideration." Hopefully, our Commission Office of Plans and Policy will at some point in time begin to examine issues such as these I have listed with respect to minority interests in cable television.

It is still too early to predict what new initiatives the Commission will take in the area of cable policy. With the addition of Chairman Ferris and Commissioner Brown, the Commission is still in the process of establishing a new philosophical identity. It may be that it is time for a period of reassessment before we move on to major new areas. The Cable Economic Inquiry would then have an opportunity to run its course and the data collected there may well suggest new directions for the Commission. However, I would suggest all of you continue to make your views known to the Commission so that they will be available in its deliberations in the future concerning the cable industry -- and I emphasize that "facts and figures" are much more persuasive than "impassioned arguments".

Remember all industries come to the FCC to present views favorable to their own private, economic interests -- true of cable, broadcasting, telephone, land mobile, movie producers, CB manufacturers, satellite companies, etc. That is only natural. Most successful industries these days are socially conscious -- they know their proposals must first serve overall public interest to best serve their own economic interests. It is difficult at times to determine just where the public interest really lies. As for cable and broadcasters, we are still hoping for peaceful co-existence. However, when the controversy gets too heated or the arguments too self-serving, I remind myself of the affluence of these two industries and mentally say "A Blessing on Both Your Houses."

Seriously, it is our job to apply an objective, overall public interest factor--that must be the dominating consideration in all Commission deliberations.

All I can promise you is to exercise my best good faith judgment on what proposals or options make the most sense legally, ethically and morally and vote accordingly. As much as the Courts will allow, I plan to continue an open-door, open-minded policy. I wish you continued success in the challenging, promising years ahead.