

MEMORANDUM

TO: Chairman Mark S. Fowler
Commissioner Mimi Weyforth Dawson
Commissioner Dennis R. Patrick
Commissioner Patricia Diaz Dennis
James C. McKinney, Chief, Mass Media Bureau

FROM: Commissioner James H. Quello

SUBJECT: Recommendation for Crafting New Must-Carry Rules

DATE: July 21, 1986

When the Quincy court struck down the Commission's must-carry rules, it created a serious imbalance by leaving the cable industry with an inordinate amount of control over broadcasting services. On August 7th, 1985, I dissented from the Commission's decision not to pursue an appeal of Quincy. I continue to believe that our must-carry rules were constitutional, as written. The courts had sustained our rules in the past and I believe the Quincy court had a contrary view, perhaps, in part, because the Commission became over the years negligent in continuing to articulate the compelling governmental interest that still exists even in the 1980s.

While there are those who believe that no formulation of must-carry rules can pass muster with the courts, I am convinced that such rules can survive court review. As I pointed out last August, the Supreme Court in the Crisp case, unanimously and without so much as a hint of constitutional concern, noted that our "comprehensive regulations ... to govern signal carriage ... reflect an important and substantial federal interest." The lower court, in Quincy, promised that a mandatory carriage rule

"will be sustained if 'it furthers an important or substantial government interest * * * and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.'" Thus, it would seem that a demonstration of essentiality is the missing ingredient.

In allocating spectrum for broadcast services, the Commission is required to find such allocation in the public interest. In making those allocations, the Commission has never attempted to differentiate among them in terms of greater or lesser public interest being served by one full-service broadcast facility over another. The Commission has assigned television channels to each community based upon the needs of that community only after comprehensive painstaking Commission evaluation. This certainly furthers the important substantial government interest enunciated by the Court in Quincy and supported in principle by the Supreme Court in Crisp.

It is the nature of cable television service to bring in channels of information and entertainment otherwise unavailable. It has now become possible for cable to effectively lock out television signals which would, absent cable, be available. It is this role of gatekeeper that stands to frustrate the Commission's allocation scheme. The Commission has allocated and assigned television channels to a community so that they can serve that community. When a private entity inserts itself so as to effectively prevent that service--even a part of it--it

has impermissibly interfered with "an important or substantial governmental interest * * *."

The sophistry of the A/B switch argument is self-evident. It simply is not credible that most subscribers will choose to maintain an antenna system solely to receive local signals that the cable company has elected not to carry. The cable system will drop only those stations least favored by its subscribers lest it encourage off-air viewing. Viewers will then take the path of least resistance by watching local news on the stations selected by cable systems, not through their own preferences. Thus, although the Commission has determined that the public interest would be best served by assigning 7 local television stations to market X, the cable systems serving market X can overrule that determination and decide that only 4 of those stations will be viewed by its subscribers. Without must-carry the FCC public interest finding in allocating vital spectrum would be defaulted to a profit-oriented private industry requiring the public to pay for the service in heavily cabled areas. Preserving realistically a station's access to the audience it is licensed to serve justifies a must-carry rule, independently of whether the station would survive economically without a must-carry rule. And the proposed industry compromise is not much better than no must-carry; it would still allot cable operators disproportionate power and discretion on what programs are available to the subscribing public.

Everyone should be aware that FCC must-carry rules previously were found constitutional by the Eighth Circuit Court

of Appeals. In the Black Hills Video Corporation v. FCC, the court stated

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.

Retention of the well-established must-carry rule would obviate a controversial dispute over compulsory license. Congress in granting the lenient compulsory license for programming rights, assumed a definite nexus between must carry and the compulsory license. The initial decision repealing must carry has resulted in an unprecedented Congressional outcry for some kind of must carry to restore balance to the marketplace. The Congressional outcry in itself is testimony to the strong federal interest and public interest in must-carry.

Congress has strongly urged must carry for public broadcasting stations. Public broadcasting was inaugurated by Congress for the express purpose of providing a distinctive cultural and educational service to the public. Thus public broadcasting in itself represents an important decisive government interest that can be served only by full retention of the must-carry rules. The proposed industry compromise that didn't consider public broadcasting's unique claim to viewer access or, worse, repealing the rules, is directly contrary to Congressional and federal intent and will.