SEPARATE STATEMENT
OF
COMMISSIONER JAMES B. QUELLO

Re: Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Systems (MM Docket No. 85-349)

The must-carry rules adopted by the Commission on August 7, 1986, are the very minimum that I can support. I continue to believe that only comprehensive must-carry rules can guarantee full protection to our system of over-the-air television broadcasting and the government's legitimate interest, pursuant to Sections 1 and 307(b) of the Communications Act, in fostering a system accountable to the public interest. Cable, once installed, is a geographic bottleneck[1] with, unlike broadcasting, little or no program accountability to any public or government authority. As I have stated on many occasions, the Commission should have appealed the *Quincy* decision.[2] The court of appeals, in my opinion, went far beyond the scope of review invested in the judiciary and, left unreviewed, created uncertainty and conflict both over the appropriate First Amendment standard to be applied to cable,[3] as well as the appropriate standard to be used when reviewing an agency's exercise of its policy-making function.[4]

Although still short of the mark, I voted to adopt the Commission's refashioned must-carry rule. It does seem to represent a sincere attempt to adopt a workable and reasonable compromise position. It provides carriage for the most popular stations as well as public broadcasting stations. And it takes into consideration the plight of newcomers. I still, however, find it necessary to issue this separate statement to express disagreement with some aspects of the *Report and Order* as well as to elaborate on a substantial government interest that is not relied upon in our *Order* but which, in my view, is the single most significant reason why the new rules are, and the old rules were, constitutionally sound. I would also like to take this opportunity to state that if the plan we have adopted is not implemented in all significant respects, for whatever reason, I will be left with little choice but to urge that we reinstate our former must-carry rule, or, at a minimum, adopt a must-carry rule, without a sunset date, as urged in the industry compromise.

The most obvious shortcoming of our *Order* is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities. In my view, both interests are substantial enough to justify a must-carry rule, without resort to any notion that broadcasters face economic ruin in the absence of a must-carry rule.

The Commission's *First Report and Order*, 38 F.C.C. 683 (1965) sought to protect all of the above interests. As we explained then:

> Persons unable to obtain CATV service, and those who cannot afford it or are unwilling to pay, are entirely dependent upon local or nearby stations for their television service.

The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Sections 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. *Id.* at 699.

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> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice. *Id.* at 705.

That these are substantial government interests seems intuitive. While not easily susceptible to empirical proof, they are the types of policy decisions that independent agencies were specifically created to consider. See note 2, supra. And the Supreme Court apparently agreed with our justification for a must-carry rule when, in *Capital Cities Cable, Inc. v Crisp*, 104 S. Ct. 2694, 2708 (1984), it noted that our "comprehensive regulations . . . to govern signal carriage . . . reflect an important and substantial federal interest."

The record before us again contains strong support for the notion that maintaining the integrity of our general spectrum allocation scheme and our longstanding statutory obligation to promote localism justify a must-carry rule.[5] That the Commission chose not to emphasize this substantial government interest justification is disheartening to say the least. I in no way mean to suggest that our principal rationale is not sufficient to support our rule. It should be more than adequate. On the other hand, we have consistently emphasized a licensee's local nonentertainment programming obligation in our radio and television deregulation orders. *Radio Deregulation*, 84 F.C.C.2d 968, 977 (1981); *TV Deregulation*, 98 F.C.C.2d 1076, 1091-92 (1984), reconsideration denied, F.C.C.2d (1986), appeal pending, *Action for Children's Television v FCC*, No. 86-1425 (D.C. Cir., filed July 23, 1986). This is an obligation which, in the past, we apparently regarded as arising from 307(b) of the Act. *Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 207, *cert denied*, 76 S. Ct. 650 (1956). And while the Commission may have subtly attempted to recast the obligation as solely within our discretion, the court of appeals went out of its way to note that the public interest standard imposes statutory nonentertainment programming obligations on licensees. *UCC v FCC*, 707 F.2d 1413, 1429, n. 46 (1983). Having made localism the cornerstone of our deregulatory policy, it simply makes no sense not to cite this as the most persuasive justification for adopting a must-carry rule. Our *Order* deserved much more than simply passing reference to this singularly most significant government interest.

I must also make some remark about our heavy reliance on the A/B switch. When I dissented from the Commission's refusal to appeal the *Quincy* decision, I

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expressed considerable skepticism that the A/B switch could realistically be relied upon to maintain access to off the-air television in homes wired to a cable system. I re-emphasized that concern to my colleagues in July, pointing out that it was doubtful cable subscribers would maintain an antenna system solely to view the local stations a cable system chose not to carry. And commenters also voiced grave reservations about the utility of the A/B switch.[6] Nevertheless, I decided that a proposal requiring that the public be educated on the need for an A/B switch, coupled with a requirement that cable systems provide subscribers with an A/B switch, was worth trying. At a minimum, it has the potential of providing future empirical data on the marketplace feasibility of the switch. At the same time, it has been impossible not to take note of the criticism of our decision already reported by the press. While these views will not be considered by the Commission in issuing the *Order* it adopted on August 7, I want to forecast my intent to reconsider my vote should parties present persuasive arguments, on reconsideration, that the A/B switch, or something functionally equivalent, will not work. If an A/B switch will not work, then, until we can find an alternative means for ensuring the public's access to their local television stations, a permanent, comprehensive must-carry rule would be appropriate.

I want to make absolutely clear that I will use my best efforts to block any sunset of our must-carry rule should we have credible evidence that our program or assumptions underlying the program are in error. In addition, the comments we receive in response to the inquiries we will initiate concerning the compulsory license scheme, telco entry, and syndicated and network program exclusivity, will be highly relevant to my decision whether to permit sunset of our rules. In 1984, I dissented to the Commission's refusal to initiate an NOI to examine changes in the marketplace since elimination of the syndicated program exclusivity rule. I believed then, as I do now, that this Commission must consider the effect of its actions in conjunction with Congress and the Copyright Royalty Tribunal. Our's is a broad, not narrow, mandate to regulate broadcasting, and we cannot fulfill that responsibility in a vacuum. *In the Matter of Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts*, 56 RR 2d 625, 633 (1984).[7]

As a last issue of major significance, I express considerable regret that I could not convince the Commission to do more for public broadcasting. Public broadcasting, although specially acknowledged in the Commission's plan, is certainly losing much of the coverage one might expect for a service chartered by Congress which continues significant funding. The diversity of views contemplated by Congress and supported through the years by this Commission can only be diminished under this plan which relegates to one video transmission pipeline a gatekeeping power over all video services that are licensed to serve the public interest in the area. While some may view elimination of must-carry requirements as a triumph of the marketplace, I view it as an unbalanced skewing of the marketplace to favor one participant over another. And, public broadcasting -- created specifically to stand outside of the marketplace and offer alternative educational and cultural television fare -- stands to lose carriage of many of its stations.

In sum, I regret that we have not adopted broader must-carry rules; the experimental course we have chosen seems still inadequate to redress the critical marketplace imbalances fostered by the *Quincy* decision. Nevertheless, our action today provides a much needed transition study period of partial must-carry with ample latitude for cable to exercise First Amendment judgments. I fervently hope that our system of *free* television broadcasting, which serves virtually all of the nation, is not seriously impaired by a misguided effort to preserve alleged First Amendment rights of a monopoly program distribution *pay* service that serves less than half of our citizens.

FOOTNOTES
Commissioner Quello's Statement

[1] The Commission's *Order* emphasizes that cable is misperceived as a "gatekeeper" because the Commission's policies made it unnecessary for subscribers to maintain alternative means for receiving off-the-air broadcast signals. I disagree with this simplistic evaluation of cable's power. In my opinion, even assuming that the A/B switch is a workable device, cable's ability to pick and choose which off-the-air stations to offer subscribers carries with it the power to affect a station's viewership and revenues, if not survivability. This power cannot be reduced so easily to a single-minded notion of consumer misperception. [2] I fully agree with one of the observations of a well-known columnist:

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. . . In one of the least appealing judicial pronouncements since a federal judge destroyed the phone company, a three-judge panel of the U.S. Court of Appeals decided in July to strike down the so-called "must-carry" rules affecting cablecasters. The rules required cable systems to offer their subscribers all available TV stations in their service area.
This sometimes did lead to duplication of program choices (if, for instance, there were two ABC affiliates or two public TV stations on the same cable system), but it also helped keep the system and the service locally accountable.
The Cable Complications, The Washington Post, Sept. 4, 1985 (Tom Shales).

[3] Our *Order* discusses in detail the constitutional controversy surrounding cable operators' First Amendment rights. As the *Order* points out, the Supreme Court has not addressed the question of whether cable is entitled to First Amendment Protection akin to that enjoyed by newspapers. And in the courts of appeals there is a considerable diversity of viewpoints on this subject. I hope the day will soon be here when all participants in video communications will enjoy full First Amendment rights. That day, however, has not yet arrived. So long as cable voluntarily enters the video market and heavily uses off-the-air broadcast signals as part of its public offering, it thereby submits itself to a regulatory scheme established by Congress for broadcasting. In other words, I still believe that the only court to have addressed specifically the constitutionality of our must-carry rules (prior to *Quincy*) correctly concluded:

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.
Black Hills Video Corp. v FCC, 399 F.2d 65, 69 (8th Cir. 1968).

[4] The *Quincy* court, in faulting the Commission for having failed to develop an adequate factual basis to support its economic harm argument, imposed on this agency a standard of proof for rulemaking that was, in my opinion, far in excess of that normally applied when a court reviews an agency performing its functions as a legislator. It is well recognized that in rulemaking "the factual component of the policy decision is not easily assessed in terms of an empirically verifiable condition," but rather involves issues in which "'a month of experience will be worth a year of hearings.'" *Association of National Advertisers, Inc. v. FTC*, 627 F. 2d 1151, 1168 (1979) (quoting from *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc)). See also *FCC v. National Citizens Committee*, 436 U.S. 775, 813-14 (1978). Even if a stricter standard is to apply in cases where there are First Amendment implications requiring application of the *O'Brien* standard, the *Quincy* court appeared unwilling to give the Commission the benefit of any doubt. In another case, where the balancing of First Amendment rights were just as delicate and difficult as they were here, the Supreme court paid considerable attention to the agency's views:
The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.
CBS, Inc. v. DNC, 412 U.S. 94, 103 (1973). It seems to me that the court of appeals simply ignored the highest court's teachings. 106 S. Ct. 930, 931 (1986).

[5] See e.g, Comments of the *Association of Independent Television Stations, Inc.* ; *Television Operators Caucus, Inc.* ; *National Broadcasting Company* ; *and National Association of Broadcasters*. See also Reply Comments of *National Cable Television Association* which, in justifying the industry proposed compromise, stated that the compromise tries to ensure "that there will continue to be available to the public a reasonable quantum of free television service." Reply comments at p. 3. But most trenchant is the comment of the Honorable John C. Danforth, Chairman, Committee on Commerce, Science and Transportation, in his letter to Chairman Mark S. Fowler on July 22, 1986, at page 4:
If the Commission acquiesces to circumstances that bestow gatekeeper status upon cable systems, this will conflict with three longstanding, substantial government interests -- the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

[6] See e.g., Comments of the *National Association of Broadcasters*, June 1986; Letter to Commissioner James H. Quello from Preston Padden, June 19, 1986.

[7] I disagree with the *Quincy* court's apparent conclusion that there is no connection between the compulsory license scheme and the Commission's must-carry rules. *Quincy*, 768 F.2d at 1454, n. 42. See also, Comments of the *National Telecommunications and Information Administration* at p. 18, n. 30; Comments of *Association of Independent Television Stations, Inc.*