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SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

CONCURRING-IN-PART AND DISSENTING-IN-PART

Re: Amendment of Part 76 of the Commission's Rules concerning Carriage of Television Broadcast Signals by Cable Television Systems.

My separate statement to the Report and Order stated that the must-carry rules adopted in this proceeding are the very minimum I can support. The petitions for reconsideration and responsive pleadings strengthen my belief that the only reasonable solution to the problems confronting the Commission is a permanent must-carry rule. Thus, while I support the must-carry rules adopted by the Commission in its Memorandum Opinion and Order, the legal justifications employed, as well as the sunset provision, constrain me from endorsing wholeheartedly the decision in its entirety.

At the outset, no evidence has been presented causing me to revise my previous observations regarding the geographic monopoly bottleneck of cable systems.[1] Once installed, cable becomes the gatekeeper for the distribution of video product into the home. Unlike broadcasting, cable has little or no programming accountability to any government authority. I still believe the Commission made a tragic mistake by not appealing the Quincy decision.[2] I also believe it was error to stay implementation of the must-carry rules while the reconsideration was pending.[3]

My overall views are set forth in my separate statement accompanying the Commission's Report and Order.[4] Because the rules -- in particular the input selector switch rules -- adopted on reconsideration are different from the rules adopted in August, I believe further explanation of my position is warranted.

I would have preferred the Commission to place greater emphasis on the statutory obligations imposed by Section 307(b) of the Act. Localism is one of the cornerstones of communication policy and should have served as the primary legal basis for the must-carry rules and consumer education requirements. It is obvious the Supreme Court recognizes localism as a substantial government interest,[5] a fact recognized by the Quincy court.[6] The point of departure in Quincy was that the Commission did not, at that time, demonstrate that our 307(b) policies would be at risk absent must-carry rules.[7]

The record in this proceeding demonstrates that must-carry obligations are necessary to maintain the integrity of our allocation scheme and to promote service to the local community.[8] Evidence to support this proposition is clear and convincing. Since the Quincy decision, more than 180 public television stations have been dropped from carriage.[9] The record also demonstrates that numerous commercial stations have been dropped, refused initial carriage or charged exorbitant fees to either secure carriage or maintain the same channel position on cable that they were assigned by the FCC.[10]

The damage to our local allocations scheme is exacerbated when we realize two facts. First, the cable industry has taken extraordinary steps to ensure cable systems do not drop signals or refuse carriage while this proceeding is pending.[11] Second, there are strong competitive incentives for local cable systems to drop or refuse carriage to broadcast stations. The cable industry is aggressively selling commercial time in local markets in competition with local broadcasters. Our decision last August expressly recognizes this fact.[12] I believe the evidence contained in the record reflects merely the tip of the iceberg with regard to the danger to our allocations scheme. Given the competitive incentives to drop local signals -- which the Report and Order expressly recognizes -- I believe we have moved far beyond the "more or less intuitive model" criticized by the Quincy court.

It is significant that both the Report and Order and the Memorandum Opinion and Order state expressly that the decision "contributes to 307(b)" objectives by fostering independent access to local off-the-air television.[13] If our policies result in the effective use of A/B (input selector) switch technology, then the decision comports with our 307(b) objectives. However, as I have stated on previous occasions, the efficacy of the A/B (input selector) switch option is doubtful. Furthermore, while I generally agreed with lessening the burden of a mandatory switch requirement, the optional approach adopted by the Commission makes the effectiveness of the A/B (input selector) switch even more questionable. In fact, it is difficult to distinguish the obligations imposed by the new input selector switch rules from the status quo. Subscribers have always had the option to purchase an A/B switch. The only real difference between this decision and the current state of affairs is the consumer education program. Whether the "new awareness" of the need for an A/B switch and outdoor antenna will achieve its intended purpose -- independent access of off-air signals -- remains questionable.

While I disagree with the majority's conclusions that tend to minimize the magnitude of the threat to our 307(b) policies, the decision today does not abandon this statutory obligation.

The decision, in my mind, does not serve as precedent for the proposition that the Commission is no longer concerned with the economic effects of the cable industry on local over-the-air television.[14] Indeed, the consumer education program and the interim rules are designed to facilitate access to local broadcast signals. Therefore, the decision in this docket is cast in the context of a perceived lack of harm to our 307(b) policies. The result may be far different if evidence becomes available that cable systems are in fact preventing access to over the air broadcasting.

To the extent the Memorandum Opinion and Order can be construed as promoting 307(b) solely by maximizing "consumer choice," then I must disagree. First, absent an effective A/B switching arrangement, the cable consumer does not have the choice of tuning in a local signal where the cable system has decided to delete the station. The channel simply will not be made available. Second, dropping signals may lead to existing stations going dark or, if payment is required for carriage, drain funds from program acquisition and production. Moreover, uncertainty over carriage hinders the financing of new stations in the market. Together, these factors serve to limit "consumer choices" not only for cable subscribers but also for nonsubscribers.

While the ability to choose local broadcast programming is an important component of Section 307(b), the Commission's statutory requirements go beyond merely providing cable subscribers with the freedom to choose.[15] Because broadcasters are obligated by statute to serve their local communities, it is incumbent upon the Commission to ensure those signals are, in fact, accessible.[16] Thus, if the means selected by the Commission to ensure independent off-air access proves ultimately to be ineffective, then the Commission has an obligation to revisit the issue.

Finally, I must take exception to the statement that protecting broadcasting per se in furtherance of 307(b) would have the effect of limiting choices. This is simply not true. Such a possibility exists only where the channel capacity of cable systems are so limited as to force a choice between local signals and cable programming. While this may be the case with older small-capacity cable systems, those systems being constructed today are not presented with this dilemma.[17] In fact, there is excess capacity on many of these new cable systems. Problems presented by lack of channel capacity will diminish greatly in the future. As a result, the Commission can further its 307(b) policies without diminishing overall service to the public.[18]

I strongly disagree with the Commission's decision to sunset the must-carry rules. Sunsetting the rules without the benefit of experience with our interim rules and education program is -- to put it kindly -- premature. Our decision is particularly

inappropriate in light of the optional switch rules adopted on reconsideration. While burdensome, the required A/B (input selector) switch rule adopted last August at least ensured that the switches would be placed in the home. The optional switch rule offers no such assurance. Our new policy seems to argue for a more cautious approach regarding elimination of signal carriage rules.

I fully recognize the importance of balancing First Amendment rights of cable operators with the necessity of protecting our broadcast allocations scheme. When it reviewed our former must-carry rules, the Quincy court seized upon both the A/B switch, as a less restrictive alternative to signal carriage obligations, and our failure to determine whether the switch would in fact work.[19] Evidence contained in the record demonstrates that while the technology may be sufficient, switches may not be utilized. Therefore, the A/B switch may not, as a practical matter, be a viable alternative. Under the Quincy Court's own analysis, signal carriage rules appear to be the most narrowly tailored means of ensuring access to local broadcast signals. Accordingly, I believe a must-carry rule would pass muster under the O'Brien standard as articulated by the Quincy Court even absent a sunset provision.

I regret that we have not adopted broader and permanent must-carry rules. Nevertheless, I believe the rules adopted today establish a minimum base line for protecting the Commission's localism concerns.[20] The consumer education program and the interim rules are sufficiently tailored to meet the Quincy court's requirements. While the principal rationale established by the majority is sufficient to support the interim rules, I believe that the need to promote localism -- a goal which my colleagues state is facilitated by the decision -- should have been the focal point of our analysis.

I look forward to our oversight of the consumer education program as well as receiving data on the efficacy of the A/B (input selector) switch. I have no doubt that, during the next five years, my colleagues and the Court will come to see the wisdom of a permanent signal carriage rule.

FOOTNOTES

[1] Congress recognized the ability of cable to behave as a bottleneck when adopting the Cable Communications Policy Act. While discussing the constitutionality of the Act's access provisions, the House Report said:

> If these [cross ownership rules] are permissible, then surely a less restrictive regulation that does not absolutely ban speech through the cable medium, but requires only some limited sharing of bottleneck facilities on a content neutral basis, is also valid. (emphasis supplied)

H.R. Rep. No. 98-934, 98th Congress., 2nd Session, August 1, 1984 at 33. Moreover, the courts have found that cable may be considered a natural monopoly, thereby allowing a city to "offer a de facto exclusive franchise in order to create competition for its cable television market. See e.g., Central Telecommunications Inc. v. TCI, 610 F.Supp. 891 (D.C. Mo. 1985), aff'd 800 F.2d 711 (8th Cir. 1986), cert. denied ___ U.S. ___ (1987)

[2] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc., 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502).

[3] See Order, FCC 86-575 (released December 24, 1986).

[4] Report and Order in MM Docket No. 85-349, 1 FCC Rcd. 864, 912 (1986) (Quello, concurring).

[5] The Supreme Court has stated:

> There can be little doubt that the comprehensive regulations developed over the past twenty years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest. In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers. See e.g., Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d, at 744-746. To accomplish this regulatory goal, the Commission has deemed it necessary to assert exclusive jurisdiction over signal carriage by cable systems.

Capital Cities Cable Inc. v. Crisp, 104 S.Ct. 2694, 2708 (1984). See also National Association of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

6 Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1454 n. 43.

7 Writing for the court Judge J. Skelly Wright stated:

> We reiterate that this case has not required us to decide whether, as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest. We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. Should the Commission move beyond its "more or less intuitive model," as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment. As long as it continues to rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done. (emphasis supplied)

Id. at 1459.

8 See Comments of the Association of Independent Television Stations Inc.; Television Operators Caucus, Inc.; National Association of Broadcasters; and Letter from Senator John C. Danforth, Chairman, Committee on Commerce, Science and Transportation to Honorable Mark Fowler, dated July 22, 1986, at 4.

8 See Opposition of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service to Petitions for Reconsideration at 11 n. 12, citing letter of the National Association of Public Television Stations, Peter M. Fannon, President, January 30, 1987.

10 See Consolidated Opposition of the National Association of Broadcasters to Petitions for Reconsideration Appendix B; Comments Association of Independent Television Stations Inc.

11 See Comments of the Independent Television Association of Independent Television Stations, Inc. at 6, citing Address of Edward Allen, Chairman, National Cable Television Association, to the Washington Metropolitan Cable Club, September 18, 1985.

12 Report and Order in MM Docket No. 85-349, 1 FCC Rcd. 2314, 2331 (1986).

13 Memorandum Opinion and Order at para. 49.

14 The unbalanced market relationship between cable and broadcasting was a factor in the Commission's decision to propose new syndicated exclusivity rules. Notice of Inquiry in General Docket No. 87-24, FCC 87-65, ___ FCC Rcd. ___ (released April 23, 1987). We observed there that "repeal of the syndicated exclusivity rules may have unduly shifted the competitive balance in cable's favor and against other programming outlets." Id. at para. 7. Concerns over the market place imbalance between cable and broadcasting were also expressed in our recent decision to examine the compulsory copyright license. Notice of Inquiry in General Docket No. 87-25, FCC 87-66, ___ FCC Rcd. ___ (released April 23, 1987). The Commission's concerns with the economic relationships between the two media and its desire to provide a "level playing field" in those proceedings are applicable to the instant docket. In terms of priority, the issue of signal carriage has greater economic significance to local broadcasting than either syndicated exclusivity or the compulsory license.

15 While the majority choose not to emphasize this point, the Commission's decision in Television Deregulation creates an obligation to provide issue responsive programming to its community of license. Report and Order in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984) recon. denied 104 FCC 2d 357 appeal pending sub nom. Action for Children's Television v. FCC No. 86-1425 (D.C. Cir., filed July 23, 1986). This obligation stems not only from interpretation of the public interest standard, See Office of Communications United Church of Christ v. FCC, 707 F.2d 1413, 1429 n. 46 (1983) but also from Section 307(b) of the Act. Pinellas Broadcasting Company v. FCC, 230 F.2d 204, 207 cert. denied 76 S.Ct. 650 (1956).

16 It would appear our current regulations requiring a licensee to place a city grade signal over its community of license become somewhat superfluous if a significant percentage of the population subscribes to cable and is unable to receive the licensee's signal. See Section 47 C.F.R. Section 73.685(a).

17 Approximately 88 percent of existing cable systems have channel capacity greater than 20 channels. Fifty-nine percent of existing cable systems have between 30-50 channels. Thirteen percent have a channel capacity above 54 channels Television and Cable Fact Book: Cable and Services Volume, No. 54 (1986 Ed.) at A-45.

18 I believe that program choices from nonbroadcast sources, e.g., cable satellite or nonlocal broadcast stations, should not be considered as enhancing our localism objectives. Section 307(b) is applicable only to radio and television broadcasting and does not necessarily apply to these alternate video sources. See National Association of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) (distinguishing DBS service from local broadcasting). Furthermore, I doubt the Commission would want to subject satellite programming to the regulatory regime envisioned by Section 307(b).

19 Concerning the Commission's assumptions of the efficacy of the A/B switch the Quincy Court stated:

> In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device that would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the vitality of local broadcasting.

Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1457.

20 Id. at 1461.