Summary Statement of

Commissioner James H. Quello

Federal Communications Commission

Before the

Subcommittee on Communications

Senate Committee on Commerce, Science and Transportation

July 17, 1987

Mr. Chairman, members of the Subcommittee, thank you for this opportunity to express my views on S.1277, known as the Broadcast Improvements Act of 1987. I welcome the chance to engage in a constructive discussion on issues which are very important to me -- reform of the comparative process, reinstituting the three-year holding rule and elimination of the sunset provision from our newly adopted must carry rules. I am especially pleased to share this panel with my friend and colleague, Chairman Dennis Patrick. While we may have honest differences of opinion, Chairman Patrick has an open mind and has been willing to engage in constructive discussion of the issues.

During my time as an FCC Commissioner, I have witnessed a productive evolution from overregulation to deregulation to unregulation to marketplace self regulation with occasional counterproductive lapses into unregulatory excess.

I was glad to participate in the timely deregulatory transition that eliminated tons of paperwork and corrected over-intrusive government regulation. I'm also gratified that I was around to register an occasional dissent when our actions struck me as counterproductive.

Some of the major issues where my viewpoints differ from the Commission majority may be relevant for discussion today. Subjects like repeal of the three-year anti-trafficking rule, sunsetting current FCC must carry rules, minority preferences, and de-emphasis of the localism and public trustee concepts. Sometimes the differences are merely a matter of degree.

Our occasional disagreements represent an honest difference in philosophical and regulatory approach. Conflicting viewpoints are a well established and useful fact of life in Commission processes. They represent an individual Commissioner's evaluation of a legal record and his personal perception of logic, reason and serving public interest.

At the outset, I believe the time has come to reaffirm the public interest standard for broadcasting. The legislation before you is a step in the right direction, striking a proper balance between public interest obligations and the need for broadcasters to compete in the marketplace.

Recently, there has been much discussion about the need for renewal reform and the "tradeoffs" necessary to obtain such relief. I do not view the issue in this light. Since enactment of the Communications Act of 1934, the Congress, the Commission, and the Courts have all recognized the need for a renewal policy that would be fair to worthy incumbent licensees. Underlying this policy is the laudable goal of promoting stability, certainty of investment, long-term program planning and avoiding restructuring of the industry on a case-by-case basis. Simply stated, creating a stable broadcast environment enhances service to the public.

The current comparative process detracts from these public interest objectives. The uncertainty and needless expense of the present regulatory requirements may serve to undercut service to the public by diverting scarce resources away from programming and public affairs. The two step renewal process envisioned by S.1277 will help reduce the burdens and uncertainties surrounding the present system.

I would note, however, that great care should be taken in crafting the requirements necessary to pass muster under the first step, particularly with respect to defining the term "meritorious" program service. To the extent the Senate feels the need to define meritorious in the legislation, then I believe it should track the programming obligations currently enforced by the Commission. Our current programming obligations

were the result of decades of experience enforcing various types of content regulation. I believe our existing program requirements strike a proper balance between fostering public trustee obligations and providing the necessary flexibility for broadcasters to effectively compete in an increasingly competitive marketplace.

The policies that underlie our renewal process apply equally to the transfer process. Again, the Commission should foster policies that promote stability and avoid wide restructuring of the industry. Most importantly, the Commission should seek to structure an economic environment that facilitates service to the public. This can be accomplished by reinstituting the Commission's three-year holding rule in combination with the two step renewal process.

The trend towards trafficking is beyond question. Data from several sources reveal a disturbing trend towards increased station flipping. For example, in 1983 only 5.1 percent of the television stations sold were held less than three years. By 1985, the percentage increased to 31.5 percent. In 1986, an astounding 52 percent of the television stations sold were held less than three years.

It is worth noting that, in 1962, the Commission enacted its anti-trafficking rules in response to what it believed to be a trend towards accelerated station trafficking. In 1961,

45 percent of the stations sold were held less than three years. In 1960, 53 percent of the stations sold were held less than three years. It appears we have come full circle on this issue.

I believe the concerns that moved the Commission to act in 1962 apply equally today. Rapid station transfers, hostile takeovers and an environment favoring corporate raiders distort an otherwise functioning broadcast marketplace. Speculators and traffickers have little interest in programming and little incentive to serve their communities. Reestablishing the three-year rule will help re-emphasize the vital public interest standard in broadcasting.

In sum, a carefully crafted two step comparative process combined with the three-year rule will further strengthen the economic incentives for broadcasters to serve the public. Also, the current program/issue requirement serves as a major incentive to meet community needs without significantly impinging on a broadcaster's editorial discretion or First Amendment rights.

I recognize there are other important aspects of the bill now before you. For example, I fully support eliminating the sunset provision from our new must carry rules. My complete thoughts on this and other provisions of S.1277 are contained in my written statement.

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In recent years the Commission has taken significant steps to deregulate broadcasting. On balance, I believe the Commission's actions have benefitted the American people. We have created a more competitive broadcast environment and increased the number of viewing options available to the listening and viewing public.

During my time as an FCC Commissioner, I have witnessed a productive evolution from overregulation to deregulation to unregulation to marketplace self regulation with occasional counterproductive lapses into unregulatory excess. I was glad to participate in the timely deregulatory transition that eliminated tons of paperwork and corrected over-intrusive government regulation. I'm also gratified that I was around to register an occasional dissent when our actions struck me as counterproductive.

Some of the major issues where my viewpoints differ from the Commission majority may be relevant for discussion today. Subjects like repeal of the three year anti-trafficking rule, sunsetting current FCC must carry rules, minority preferences, and the de-emphasis on localism and public trustee concepts. Sometimes the differences are merely a matter of degree.

Our occasional disagreements represent an honest difference in philosophical and regulatory approach. Conflicting viewpoints are a well established and useful fact of life in Commission processes. They represent an individual Commissioner's evaluation of a legal record and his personal perception of logic, reason and serving public interest.

At the outset, I believe the time has come to reaffirm the public interest standard for broadcasting. Fundamentally, and by Congressional statute, broadcasters are granted a license from the government to operate broadcast facilities in the public interest. They are public trustees and have a fiduciary obligation to their communities of license. Broadcasting is a unique and distinct industry. We are not dealing with toasters, pork bellies, or any other commodity. I believe we all can agree that broadcasters must remain accountable to the public interest standard which is enforced by the Commission and the Congress.

In crafting communications policy, however, it is important to remember that broadcasting is, and will always remain, a business. The framers of the Communications Act created a unique system of broadcasting, encompassing both private sector efficiencies and public responsibilities. As your invitation stated, the key objective in crafting communications policy is to "create a proper balance between the public interest obligations of broadcasters and the broadcaster's interest to operate unfettered in the marketplace."

I believe the bill before you, as a general matter, is an appropriate step in attempting to strike this balance. The creation of a two step comparative renewal process is clearly a step in the right direction.

Before proceeding with the specifics of the bill, however, I believe it is important to establish some generalized conclusions at the outset. Current debate surrounding broadcast reform has been couched in terms of the industry "trading off" certain regulatory actions in order to obtain relief from the current comparative renewal process. While I believe it is important
to reaffirm the public interest standard, we should avoid pushing the pendulum back to the point where we merely repeat history.

The broadcast marketplace does not resemble that which existed even five years ago. Today, broadcasters face ever increasing competition from new, essentially unregulated, technologies such as cable, MDS, video cassette recorders and direct satellite delivery. In addition there is greater competition among broadcasters themselves for the local advertising dollar. Because broadcasters are no longer the only "mass media voice in town," the Commission and the Congress should seek to promote flexibility in regulating the medium. Such flexibility will enhance the broadcaster's ability to compete with other nonregulated media. Most importantly, we should seek to create an economic environment which fosters service to the public. This goal can be best achieved by adopting a two step renewal process combined with a three-year holding rule. Together these proposals will provide stability and investment certainty in the industry. It will help facilitate long range program planning. Moreover, the proposal will eliminate speculative trafficking which undercuts the broadcasters natural economic incentive to serve its community.

The bill before you accomplishes this goal to a large extent. Upon close examination however, I would respectfully make a few suggestions to incorporate into the legislative history.

Title I. Renewal of Broadcast Licenses

A. Background

Before we revise our current rules, it is important to examine the historical and policy background of the comparative renewal process. While broadcasters have no vested rights to the spectrum, the Congress, the Commission, and the Courts have long recognized the need for a renewal process that favors worthy incumbents.

For example, the Court of Appeals, as early as 1939, expressed a sentiment favoring existing licensees. See e.g. Evangelical Lutheran Synod v. FCC, 105 F.2d 793, 795 (D.C. Cir. 1939). Similarly, the Commission in Hearst Radio, Inc. (WBAL), 15 FCC 1149, 1175 (1951), recognized that an incumbent's record of service created a greater likelihood that such performance would be continued in the subsequent license term. Furthermore, a challenger might not be able to render its promised service when confronted with the reality, and responsibilities, of being the actual licensee.

In 1952, Congress adopted an amendment striking language from Section 307(d), that required the Commission to evaluate renewal applicants under the same standards as new applicants. The House Report accompanying the 1952 legislation termed the approach formerly prescribed by the deleted language as "neither realistic nor [reflective of] the way in which the Commission has actually handled renewal cases." See House Rept. No. 1750,

82nd Cong. 2d Sess. (April 8, 1952). The Senate Report added that the Commission had the "right and duty" to consider the performance of a renewal applicant "against the broad standard of the public interest, convenience and necessity." See Senate Rept. No. 44, 82nd Cong. 2d Sess. (Jan. 25, 1951).

In 1969, the Commission, denied the renewal application of WHDH-TV and awarded the license to a competing applicant. See WHDH, Inc., 16 FCC 2d 1, 9 (1969), rehearing denied 17 FCC 2d 856 (1969) aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841, pet. denied, 463 F.2d 268 (D.C. Cir. 1971). The case sent shock waves through the industry. On appeal, the court expressed the view that the Commission ought to retain "the legitimate renewal expectancies implicit in the structure of the Act." "In the ordinary case," the Court noted, "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted, by a licensee without reasonable security." Id.

In 1970, the Commission attempted to reconcile the conflicting aspects of its regulatory scheme in comparative renewal cases, by adopting a Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970). The policy was similar to that envisioned by the current legislative proposal, establishing a two step renewal process. According to the policy statement, if a licensee's record of service to the public was substantial,

without serious deficiencies, the proceeding would terminate at that point and competing applicants would not be considered.

Unfortunately, the United States Court of Appeals for the District of Columbia Circuit in Citizens Communications Center v. FCC, struck down the Commission's 1970 Policy Statement. The court held that the bifurcated hearing procedure adopted by the Commission, contravened Section 309 of the Communications Act, as interpreted by the Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.s. 327 (1945), by depriving qualified challenging applications. The Court's holding was based primarily on the fact that the Commission had denied competing applicants a procedural right, namely, a full comparative hearing. However, the Court did not preclude the possibility that a finding on the renewal applicant's past record might prove to be determinative after an appropriate comparative evaluation and notwithstanding the other comparative criteria.

In the wake of Citizens, the Commission proceeded with efforts to provide quantitative standards for judging the performance of renewal applicants. By Notice of Inquiry, 27 FCC 2d /580 (1971), the Commission instituted a proceeding to explore whether, at least for some purposes, it should attempt to quantify the concept of substantial service. See also Further Notice of Inquiry, 31 FCC 2d 443 (1971); Second Further Notice of Inquiry, 43 FCC 2d 367 (1973); Third Further Notice of Inquiry, 43 FCC 2d 1043 (1973). The Commission issued its

Report and Order in 1977, and declined to adopt quantitative program standards for television broadcasters involved in comparative renewal proceedings. Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative hearing Process, 66 FCC 2d 419 (1977), affirmed sub nom. National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978).[1]

The most recent formulation of the Commission's renewal policy was expressed in Central Florida Enterprises v. FCC, 683 F.2d 503 (D C. Cir. 1982). In this seminal decision, the United States Circuit Court of Appeals for the District of Columbia affirmed the Commission's current approach stating:

> We believe that the formulation by the FCC in its latest decision, however, is a permissible way to incorporate some renewal expectancy while still undertaking the required comparative hearing. The new policy, as we understand it is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy weight. [emphasis added] Id.

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[1] At approximately the same time, the United States Supreme Court in NCCB v. FCC, 436 U.S. 775 (1978), observed that the legitimate renewal expectancy afforded a licensee who has given, in the Court's words, "meritorious" service is consistent with the Communications Act. Id. at 805.

Pursuant to this approach, the Commission first examines a broadcaster's past record of performance. A renewal expectancy is granted to the incumbent depending on the Commission's review of the incumbent's program performance. If the Commission determines that the licensee's level of performance has been meritorious (i.e., above minimum), then the renewal expectancy is granted. The licensee is then evaluated against the new challenging applicant according to the structural factors found in the 1965 Comparative Policy Statement (e.g., diversity and integration of ownership into management). Alternatively, if the level of performance has been considered minimal, little or no weight will be given to the expectancy in the comparative analysis.

Recently, the Court of Appeals in Victor Broadcasting Inc. v. FCC, 722 F.2d 756 (D.C. Cir. 1983), affirmed the Commission's formulation of the new renewal policy adopted in Central Florida. Most importantly, however, the court reaffirmed the three part policy justification underlying the renewal expectancies. Those three justifications are: (1) "there is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance;" (2) the likelihood of renewal encourages licensees to make investments to ensure quality service which would not be made if their dedication to service is not "rewarded;" and (3) the comparing of challengers and incumbents on the same basis as new applicants are compared could lead to an undesirable wholesale restructuring of the broadcast industry. Id. at 762.

The current debate over renewal reform has been cast in terms of "giving" something to broadcasters in return for more regulation. As the above analysis demonstrates, there are sound public policy reasons for renewal reform. The most important of which is the need for stability and long range program planning. The problems with the current renewal process become particularly acute as broadcasting faces ever increasing competition from essentially unregulated communications services such as cable-TV, MDS and direct satellite television. If broadcasting is to compete effectively, we must look towards a more flexible and less burdensome regulatory regime. It is not a question of trading off regulatory burdens. The issue should be devising a comparative renewal process that promotes the public interest.

B. Revision of the Present System

While the present renewal system tries to incorporate these three policy considerations into the renewal process, the current comparative renewal process does not serve the public interest. Under the present regulatory regime, licensees that have served their communities still face the risk of protracted and expensive litigation.[2] Such a policy undermines stability

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[2] While data on this subject are far from complete, there is evidence demonstrating that inordinate expenditures are required to obtain renewal. See e.g., Wirth, Michael, Harry Bloch and Lawrence Thompson Television & Radio Station Expenditure Behavior under the Uncertainty of License Renewal, April 1982, included in Comments of the National Association of Broadcasters in MM Docket No. 83-670.

in broadcasting and forces broadcasters to incur needless expenses.

By proposing a two step renewal process, the legislation rectifies the problem associated with costs of protracted litigation. such a policy advances the objectives underlying the concept of a renewal expectancy. Care should be taken, however, in crafting the "meritorious" test for the first step in the process. It would be counterproductive to adopt a two step process if the first step is so uncertain or difficult as to conflict with the underlying policy objectives inherent in the renewal process. Accordingly, in crafting obligations for renewal, the Subcommittee should keep in mind the three policy objectives underlying the renewal process: (1) incumbent's proven past performance offers a better guarantee than a challenger's paper proposals; (2) renewal encourages licensees to make investments to ensure quality service; and, (3) avoiding wholesale restructuring of the industry through the renewal process.

The legislative proposal before the Subcommittee would require licensees to provide "meritorious" program service in order to pass muster under the first step. There are several important questions, however, that I would like to see addressed in the legislative history.

A fundamental concern is whether a licensee that does not pass muster under the first step can refile and participate as a new applicant in the second phase of the hearing? If not, then the standard established in the proposed statute becomes, in effect, a basic qualifying programming obligation and not merely a test for the privilege of avoiding a comparative hearing. A related question involves whether the standard established by the legislation applies to all applications for renewal, including uncontested renewals. The express language of the bill would appear to apply the new standard to all renewal applications both contested and uncontested.

Assuming the Senate contemplates defining the term "meritorious" in the legislative history, as opposed to delegating that responsibility to the Commission, then the statute must define the term with precision. The Commission has examined the question of the level of satisfactory service for over a decade and has come up with numerous definitions. For example, we have employed terms such as superior, substantial and above "minimum." In addition, does the proposed statute envision defining meritorious service in qualitative or quantitative terms? As for a purely quantitative approach, the Commission examined this issue in 1978 and rejected the proposal. See National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978). Moreover, there are obvious problems with allowing a government agency to make decisions on elements such as quality, which are subjective in nature. This problem may be

exacerbated by the fact that the statute envisions examining a licensee's programming as a whole, which appears to include entertainment programming. Finally, the legislation expands a broadcaster's primary responsibilities from its local community of license to its "service area." Such a policy may ultimately detract from a licensee's obligation to serve its community of license, thereby undercutting the Congressional policy of promoting localism pursuant to Section 307(b) of the Act.

The definition of meritorious service is a critical element if the legislation is to promote stability in the industry and stimulate greater program service to the public. I believe a licensee that has fulfilled its public interest responsibilities and complied with our rules and policies should be renewed. The key issue, of course, is to determine what level of performance is consistent with the public interest mandate. I believe the programming obligations currently required by the Commission, define an appropriate measure of service to the public sufficient to warrant renewal. These obligations were the result of extensive economic analysis concerning the marketplace incentives for the provision of issue responsive programming. See Deregulation of Radio, 84 FCC 2d 968 (1981), aff'd sub nom., UCC V. FCC, 707 F.2d 1413 (D.C. Cir. 1983); Deregulation of Television, 98 FCC 2d 1076 (1984). In addition, broadcasters remain obligated to present children's programming. See Children's Television, 96 FCC 2d 634 (1984) aff'd sub nom., Action for Children's Television v. FCC, 756 F.2d 899 (1985).

These policies were derived after a careful balancing of public interest concerns, economic incentives for the provision of such programming and the First Amendment values involved. The programming obligations established by these rules represents a firm commitment on the part of broadcasters to serve their communities and children. It is an obligation that the Commission can and will enforce.[3]

As a practical matter, broadcasters under stable market conditions have strong economic incentives to serve their communities. For those broadcasters that plan to operate for an appreciable length of time, serving the community is essential for economic survival. Accordingly, I believe it is incumbent upon the Commission and the Congress to examine the broadcast marketplace and to adopt policies to ensure that the economic incentives to meet the public interest remain.[4] Rigid, inflexible programming obligations do not provide broadcasters

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[3] At this point in time, I do not see the need for a return to the random audit procedures for television contemplated by S.1277. Our current short form procedures rest on the presumption of service to the public. This presumption may be rebutted by petitions to deny or complaints alleging programming violations. See Deregulation of Commercial Television, 98 FCC 2d 1076, 1112 (1984). The complaint process has been recognized as a sufficient monitoring mechanism. See Action for Children's Television v. FCC, No. 86-1425, slip op. at 17-18 (D.C. Cir. June 26, 1987); Black Citizens for Fair Media v. FCC, 719 F.2d 407 (D.C. Cir (1983), cert. denied, (No. 83-1498, June 18, 1984). Reinstitution of long form audit procedures would appear to be unnecessary.

[4] In this regard, I fully support the limitations on financial settlements contained in the proposed legislation. Financial settlements in this context merely divert resources and do not necessarily improve service to the public.

with the requisite flexibility to serve their communities in a rapidly changing economic environment. Communications regulation should create a structure that will allow creativity in serving the public.

Viewed in this light, I would like to focus attention on Title II of S.1277 which seeks to reestablish the three-year rule. I believe reinstituting the anti-trafficking rules will restore the correct incentives for broadcasters to serve their communities. The policies that underlie our comparative renewal process apply equally to the three-year holding rule. Renewal reform will help promote stability and long-range planning in broadcasting. Reimposing the three-year rule will also promote stability and long-range program planning in the industry. As with renewal reform, the three-year rule will prevent possible adverse restructuring of the industry on a case-by-case basis. Therefore, the two policies are linked and should be included as one legislative package.

Title II. Broadcast Ownership Stability

My views on reestablishing the Commission's anti-trafficking rules are well known. I fully support reinstituting the three-year holding rule for broadcast licensees. Eliminating speculative trafficking in broadcasting would help reestablish the public interest standard by recreating the economic incentives for broadcasters to serve their communities.

I have previously submitted two lengthy statements to the House Subcommittee on Telecommunications supporting reestablishment of the three-year rule.

Without question there has been unprecedented churn in broadcasting in recent years. For example, data provided by Paul Kagan Associates, Inc. show that in 1986, 160 television stations were sold. Twenty three percent of those stations were held two years or less.

Transfers in radio have been similarly brisk. Data compiled by Com Capital Group of New York demonstrate that approximately 1600 radio stations were sold in 1985 and 1986. Other data, based on a more limited sample of radio sales, provided by Com Capital Group, suggest that approximately 29 percent of the radio stations that were resold for a "significant" capital gain in 1985 and 1986, had been owned for less than three years.

Data compiled by the Mass Media Bureau, also demonstrate an unequivocal trend towards increased station trafficking. The most telling evidence is Mass Media Bureau's analysis of statistics from the 1987 Edition of the Television Factbook. In 1983, only 5.1 percent of the television stations sold were held less than three years. The number of television stations sold that were held less than three years increased to 28.4 percent of station sales in 1984 and 31.6 percent in 1985. According to

the latest available data, an astounding 52 percent of the television stations sold in 1986 were owned less than three years.

It is important to remember that the Commission, in 1962, first adopted the three-year rule in response to what it believed to be a trend toward accelerated station trading. At that time, 1961, 45 percent of all station transfers involved stations that were held less than 3 years. In 1960, 53 percent of the stations traded were held less than 3 years. With 52 percent of all stations traded being held less than 3 years in 1986, it appears we have come full circle.

I believe concerns that prompted Commission action in 1962 are equally applicable to today's marketplace. There is every reason to believe the trend will continue. For example, it has been estimated that 1987 will rank as the third biggest year for station sales, a volume of approximately 4 billion dollars. See Television/Radio Age, June 22, 1987, p. 46. Furthermore, the above data demonstrate that trading in stations has become a widely accepted business strategy.

I believe that continued trafficking in broadcast properties is inconsistent with the public interest.[5] Those opposing the

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[5] A more detailed explanation of my conclusions appears in my prior testimony of May 28, 1987.

three-year rule generally argue that speculators in broadcast properties have an economic incentive to operate the stations efficiently and in the public interest. As I have stated previously, rapid speculative turnovers in broadcasting provide economic disincentives to serve the public interest. Servicing heavy debt burdens and short-run financial objectives impede the provision of issue responsive programming. Moreover, testimony provided by David Shutz of Com Capital Group before the House Subcommittee on Telecommunications and Finance states that it takes approximately 18 to 24 months for the effects of expense slashing and personnel cutbacks -- which increase cash flow, hence profitability, in the short term -- to produce tangible declines in audience. As a result, the speculator is able to artificially inflate the price of a station -- price being a multiple of the station's cash flow -- and sell it before any adverse effects surface.

Supporters of current policies argue that there is no demonstrable harm to station trafficking. It should be noted, however, that the Commission's analysis of marketplace performance was conducted at a time when short-term station trading was not a commonplace event in broadcasting. At that time broadcasters had only one investment option, to serve the community on a long-term basis. As noted in my prior statements, licensees now have an equally profitable business strategy -- "station selling." Because we are ultimately concerned with the public interest, the burden of proving that

there is no harm in the current marketplace environment should be placed on those promoting these policies.

A second issue that has surfaced is whether the Commission will be able to monitor speculative trafficking absent a three-year rule. Obviously, the Commission has the obligation to approve all transfers under Section 310(d) of the Act. However, the language of the Report and Order eliminating the three-year rule leaves little room for review of speculative trafficking under existing precedent. See Report and Order in BC docket No. 81-897, 52 RR 2d 1081, 1088 (1982). Without a reasoned statement that the Commission has decided to change its policy, there is no current legal theory to evaluate speculators, save for a finding of misrepresentation or possibly an abuse of process. In any event, the Commission would have to announce that it was changing its policy, either by rule making or in the context of a specific case, in order to prevent speculative transfers.

As noted in my previous testimony, I don't oppose all mergers and sales. Some of the acquisitions and mergers between communications companies serve the public interest. My main concern is with professional raiders and speculators with little or no broadcast or communications background or public interest commitment. I have been quoted and remain convinced that "I don't think I was appointed by the President and confirmed by

Congress to accommodate a bunch of fast buck artists trading broadcast properties like commodities."

While elimination of the three-year rule was not the sole cause of the merger mania that has gripped the industry, reinstatement of the three-year rule will help prevent speculative station trafficking. As a result of the rule, business entities seeking to acquire control of broadcasting facilities will do so with the knowledge that they must hold the license for at least three years. Because of this possibility, those seeking short-term quick profits from the resale of broadcast facilities will be deterred. With a three-year rule, broadcasters will be able to devote more resources to programming and meeting the needs of their communities instead of concentrating on fighting takeovers and heavy debt burdens.

C. Summary

An appropriate regulatory focus would be to develop a system ensuring that broadcast licensees will fulfill their responsibilities as public trustees. I believe that the adoption of the two step renewal process would remedy unnecessary costs associated with the current comparative process. However, in order to ensure that economic incentives to serve the public remain, I would reinstitute the three-year holding rule to prevent "fast-buck speculators" from distorting

the otherwise functioning economic incentives in the broadcast industry. Together, these revisions strike an appropriate balance between the public interest and economic freedom.

Apart from the issues of comparative renewal and station trafficking, there are other aspects of the bill that warrant discussion. As a general matter, I can support many of these provisions.

TITLE III. MANDATORY CARRIAGE OF BROADCAST SIGNALS

I fully support Title III of the bill which would remove the sunset provision contained in the Commission's must carry rule. As you know, I was against sunsetting the rules before the Commission had an opportunity to determine the effects of its decision. See Report and Order in MM Docket No. 85-349, 1 FCC Rcd. 864, 912 (Quello, concurring).

The Commission's decision to sunset was based on a belief that merely educating the American public about the need for an antenna and an A/B switch was sufficient to meet its responsibilities under Section 307(b) of the Act. I do not find this line of reasoning persuasive. The mere existence of an A/B switch does not address the question of whether the switch is an effective competitive alternative to cable television. The efficacy of the A/B switch alternative should be a crucial

aspect of our public interest analysis. Such an examination would appear to be required by our duty to allocate television stations to each community under Section 307(b) of the Act.

Cable television competes directly with local broadcasting. For example, a report released recently by a New York advertising agency concludes that cable may be a better medium for advertisers than broadcasting. See, e.g., Communications Daily, July 10, 1987, pp. 1, 3. As a result, there is a clear incentive to drop local television signals or threaten to drop stations in an attempt to extract compensation for carriage. Evidence of stations being dropped is not hard to find. The record before the Commission contained numerous examples of independent commercial stations being dropped by cable operators in the absence of a must-carry rule. Moreover, apart from commercial competition, noncommercial stations appear to be at risk. Recent data provided by the National Association of Public Television Stations estimate that between 168 and 184 public stations have been deleted from various cable systems.

Competition between cable television and local television broadcasting for local advertising dollars is increasing and will increase in the future, providing further incentive to drop local signals. Sound policymaking dictates that the Commission should examine the impact of its new must-carry rules before eliminating them. In other contexts, the Commission has expressed concern over the need for a level playing field.

In this case, we should make sure the field is level before taking ourselves out of the game.

Therefore, I fully support this provision of S.1277. I would add, however, that the legislative history of this provision should make reference to Section 307(b) of the Communications Act. Localism is an appropriate legal justification for signal carriage obligations and has been recognized by the Courts. See e.g. Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694, 2708 (1984). Unfortunately, the Commission chose to de-emphasize this important policy objective when adopting the new must carry rules. Congress should include this important statutory obligation in the legislative history when enacting this part of S.1277.

TITLE IV. DIVERSIFICATION IN OWNERSHIP OF BROADCAST STATIONS

A. Minority Ownership

This provision of the bill codifies the Commission's existing policies regarding comparative preferences, distress sales and tax certificates. The Commission currently has before it a Notice of Inquiry examining these policies. See Reexamination of Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies, 52 Fed. Reg. 596 (Jan. 7, 1987). In this proceeding, the Commission is examining whether

there is a nexus between minority ownership and minority programming.

I have stated on numerous occasions that these minority ownership policies have served the public interest. In my mind those seeking to eliminate these policies bear a heavy burden to demonstrate that these procedures are inconsistent with the public interest.

I understand the desire to incorporate our minority ownership policies into the statute. However, codification may, in some instances, hinder the Commission's ability to modify its policies that will help minorities. For example, the Commission also has an outstanding Notice of Inquiry that seeks comment on a modification of the distress sale policy that would benefit minority owners. See Notice of Inquiry in MM Docket No. 85-299, FCC 85-543, 50 Fed. Reg. 42047 (October 17, 1985), (released Oct. 8, 1985). The Notice proposes to allow distress sale licensees to sell to minority controlled entities after the licensee has been designated for a hearing, for 50% of the fair market value. This modification would be precluded by the language of the proposed statute which appears to only allow distress sales prior to designation. Accordingly, the ability to remain flexible is a factor that the Senate should consider in deliberating this bill.

B. Multiple Ownership of Broadcast Stations

The bill appears to "freeze" the Commission's multiple ownership rules as they exist today. Of course, diversity of ownership is one of the cornerstones of communications policy,. It is a policy I have always supported and will continue to do so. The need for diverse, antagonistic ownership of broadcast stations is especially important in local markets.

I am not persuaded, however, that we need to "freeze" our multiple ownership rules at their current levels. The broadcast market has undergone tremendous change in recent years. New competitors such as cable television, VCRs, and satellite-direct services are competing with traditional over-the-air television. I expect the economic environment will continue to undergo significant changes in the near future.

The Commission should retain the flexibility to adapt its multiple ownership rules to changing economic circumstances. For example, one of the primary reasons for increasing the national multiple ownership limits was to facilitate the possibility of developing new networking possibilities. We are just beginning to see the first attempts at creating a new broadcast programming service today. I believe the Commission -- with its expertise in this area -- may be in a better position to react quickly to marketplace changes.

Provided there is oversight from Congress, crafting ownership rules should remain as a delegated function.

TITLE V. EXCHANGE OF BROADCAST STATIONS

Section 501 of the proposed legislation concerns the ability of a noncommercial UHF station to swap its facilities with a commercial UHF facility. Current Commission practice allows intra-band exchanges. For example a noncommercial UHF can swap its facilities with a commercial UHF station. The proposed statute would eliminate only interband swapping between UHF and VHF facilities.

At one time it was believed that noncommercial broadcasters would benefit from such interband exchanges. There are mixed views among the public television community regarding such interband swaps. To the extent there is little interest in interband swapping, then codifying this provision would not cause undue concern among noncommercial television broadcasters. Alternatively, because there is little demand for these changes, it may not be necessary to codify a proscription against such UHF/VHF exchanges. It is possible, of course, that there may be isolated and unique circumstances which might justify permitting a UHF/VHF swap.

CONCLUSION

In sum, the Senate should adopt the two-step renewal process envisioned by S.1277. However, in crafting the renewal obligations, I believe the legislation should track the obligations currently imposed by the Commission's rules regarding issue responsive and children's programming. There is no need to impose more burdensome program requirements. Adopting more stringent rules would simply cancel out any benefits derived from the two-step renewal process. The current issue-responsive programming requirement serves as a major incentive to meet community needs without significantly impinging on a broadcaster's editorial discretion or First Amendment rights.

In return, the Senate should adopt Title II of the bill that reestablishes the three-year rule. Re-imposing the three-year rule will provide the necessary economic incentives for broadcasters to serve their communities and will, in itself, re-emphasize the public interest obligations of broadcasters. By reinstituting our trafficking rules and revising our hostile takeover policies, broadcasters will be able to devote more resources to programming and meeting the needs of their communities instead of fighting takeovers or financing heavy debt burdens.