Concurring Statement of
Commissioner James H. Quello

Re: Sanyo Manufacturing Corporation's Requested Waiver of Part 15 of the Commission's Rules.

The specific issue before the Commission on remand is to clarify the intent of its previous decision in this proceeding. While I was not part of the majority in the initial decision, it appears the Commission majority intended the decision to have broad applicability and not be limited to Sanyo. Association of Maximum Service Telecasters v. F.C.C., 791 F.2d 207, 209 (D.C. Cir. 1986). Therefore, I will concur with the decision herein to this very limited extent.

I remain convinced, however, that the Commission's interpretation of the statute is simply wrong. Section 303(s) states that the Commission shall:

> Have authority to require that apparatus **designed** to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission. . . .[emphasis supplied] Id.

The Commission has used this language to define a television broadcast receiver. 47 C.F.R. § 15.4(g) (1986). Consistent with the statute, the Commission has adopted rules requiring that television receivers be capable of receiving all channels allocated by the Commission to the television broadcast service. 47 C.F.R. § 15.65(a) (1986).

Unfortunately, the Commission continues to rewrite the statute without the benefit of the legislative process. Under the Commission's definition, the Act would apply only to devices that were **intended** to be television receivers. The Commission's desire to delete the word **designed** and replace it with the word **intend** finds no support in the plain meaning of the statute or the legislative history. See S. Rep. No. 1526, 87th Cong., 2d Sess. 2-3 (1962).

As a matter of policy, the Commission's interpretation of the statute makes little sense. The majority's position forces the Commission into a posture where it must determine the state of mind, i.e., "intent" of the manufacturer in order to determine the applicability of the Act. Such an approach requires a significant degree of administrative clairvoyance. For example, should the Commission place primary reliance on an inventor's specifications or the marketing department's sales literature? The decision provides little guidance on this point. The problems with determining a manufacturer's "intent" are obvious and could lead to wholesale circumvention of the statute.

Concern over the potential for circumvention of the statute is exacerbated given the recent demise of our must carry rules. The initial decision in this proceeding relied on the Commission's former must carry rules when addressing concerns over the ability to receive local broadcast signals. Limited Reception TV Receiver, FCC 84-261, 56 R.R.2d 681, 683 (1984). In fact, the Commission admitted that the spirit of the All Channel Receiver Act may be invoked where a cable system does not carry a UHF station that is otherwise receivable over-the-air. Id. Given the elimination of our must carry rules, see Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir. 1988), the Commission should carefully scrutinize the manufacture of television receivers that do not provide access to all local over-the-air television broadcast signals.

In its decision adopting the now defunct interim must carry rules, the Commission found that some cable systems had ceased to carry local broadcast stations. See Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd 864 at ¶ 131 (1986). The Commission's long term solution to this problem was to ensure that cable subscribers would have independent access to all local over-the-air television broadcast signals. To this end, the Commission promoted the use of an input selector device (A/B switch) which allows cable subscribers to maintain access to over-the-air television broadcast signals. Moreover, a consumer education program was implemented to advise consumers of the necessity to retain over-the-air reception capability.

It is difficult to imagine how the Commission can find that the public interest requires a regulatory scheme promoting access to all local over-the-air broadcast signals and at the same time allow the manufacture of television receivers capable of receiving only two channels. Such inconsistency appears to be rather arbitrary.

In summary, I am convinced that the decision conflicts with the express provisions of the All Channel Receiver Act. Given the absence of must carry rules, I am particularly concerned with the potential harm to the public that may result from the manufacture of limited channel receivers. To the extent the Commission's decision contemplates the approval of similar receivers in the future, the problem will surely increase. Because of the potential harm to the public and conflicting policies, the Commission should have solicited public comment before rushing to judgment in this matter. Therefore, I will concur on the narrow ground stated above.