FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

OFFICE OF COMMISSIONER
JAMES H. QUELLO

May 6, 1988

TO WHOM IT MAY CONCERN

My granddaughter, Susan L. Quello, was selected by the TeleRep Company, a division of Cox Communications Co., for a special TV. sales training course in New York.

She graduated magna cum laude from the University of Detroit in communications. With her scholastic record and motivation, the university considered her a top draft choice for employment in the communications field. (She received six offers of employment.) She was a student intern at the National Association of Broadcasters in Washington last year. She was offered a fulltime NAB position upon graduation, but wisely elected for training and employment in the mainstream of the communications industry rather than in association employment.

Susan is of excellent character, doesn't smoke and has good temperate habits. I can recommend her without reservations for occupancy. She will be an attractive welcome neighbor.

Sincerely,

James H Quello

James H. Quello

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Collins on EEO. Congresswoman Cardiss Collins (D-Ill.) held press conference last Tuesday (March 24) to protest FCC's failure to enforce EEO regulations. Collins, author of legislation (H.R. 1090) that would strengthen FCC's enforcement authority, sent letter to FCC Chairman Mark Fowler and copy to incoming Chairman Dennis Patrick last week stating she is "deeply disturbed that minorities and women are grossly underemployed in the broadcasting industry." Citing recent study by FCC's EEO branch and cuts made by networks and stations, Collins asked FCC to provide her with list of radio and TV stations that did not meet FCC's EEO guidelines between 1984 and 1986; statement of action FCC is taking against stations that have failed to comply on regular basis; list of stations that have experienced decline in overall minority and female employment and decline in "top four" job categories, and comparative EEO hiring data for radio, TV and satellite networks. Collins was joined by Congressmen Charles Hayes (D-Ill.), Major Owens (D-N.Y.), Alfred Bustamante (D-Tex.) and Kweisi Mfume (D-Md.), and by Frank Maxwell, national president, American Federation of Television and Radio Artists (AFL-CIO); John Hall, AFTRA national executive secretary, and Jack Golodner, director of AFL-CIO Department for Professional Employes.

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Free for parties. Senator Claiborne Pell (D-R.I.), author of "Informed Electorate Act," bill that would require television broadcasters to provide free air time to political parties (BROADCASTING, March 2), has argued for bill at Senate hearing. Measure has been referred to Senate Commerce Committee, although Pell intends to offer bill in form of amendment to legislation under consideration by Senate Rules Committee. "My amendment would require licensed television stations to provide free air time for the presentation of views by candidates for the U.S. Senate and the House of Representatives," senator told Rules Committee. "It expressly provides that the time be used to promote rational discussion and debate of the issues in time blocks up to 15 minutes. Hopefully it could thus be an antidote to slick advertising and TV gimmickry which all too often result in negative and distorted campaigning, as we saw in the 1986 elections." Bill would force broadcasters to turn time over to political parties that would then dole out time to individual candidates. Rules Committee is looking at number of campaign finance reform bills and is expected to hold several days of hearings during which National Association of Broadcasters plans to voice its objections to Pell amendment. Committee is not expected to act until early summer.

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Poll closing. House Subcommittee on Elections passed legislation setting uniform poll closing time for presidential elections. Bill now goes to parent House Administration Committee where it is expected to pass without much opposition. House adopted identical measure in last Congress; it would close polls at 9 p.m. Eastern standard time in Eastern, central, mountain and Pacific time zones. (Alaska and Hawaii would be exempt from legislation.) Measure would extend daylight saving time for additional two weeks in Pacific time zone during presidential election, so that polls would close at 7 p.m. local time. Measure is designed to counter perceived effects of early television reports in East while polls are still open elsewhere.

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Certification checks. FCC said it is going to begin randomly checking financial qualifications of applicants for new broadcast facilities. It also said staff may single out applicants with large number of applications for questioning. In public notice, FCC said it had become "clear" that "a number" of broadcast applicants have been certifying their financial qualifications without any "basis or justification."

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Maunawili AM. FCC has granted application of Anita Levine for new AM station on 1460 khz in Maunawili, Hawaii. Levine is officer and director of Mount Wilson FM Broadcasters, licensee of KMGT(TV) Honolulu and KRTR-FM Kailua, both Hawaii. Since signal of AM would overlap signal of UHF TV station, one-to-market rule would generally prohibit grant. But FCC afforded relief under exception that rule provides for consideration of creation of radio-TV combinations involving UHF's.

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Hilo FM. In initial decision, FCC Administrative Law Judge Joseph Chachkin has granted application of Irving A. Uram for new FM in Hilo, Hawaii, denying competing applications of Southport Radio Inc. and Wailuku Radio Co. Uram prevailed on integration grounds. He is real-estate investor who has no other media interests.

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Reporting conditions. FCC has subjected KWIC-AM-FM Beaumont, Tex., to short-term renewals and equal employment opportunity reporting conditions. FCC said record didn't indicate "overt discrimination." But agency also alleged stations had made "few efforts" to insure that potential sources of black applicants were informed of job openings. National Black Media Coalition had petitioned to deny.

clean network feed only to households without broadcast or cable service," it said. "Second, an unscrambled feed could and likely would be viewed by HSD's within network broadcast station service areas. The damage that this would inflict on the work-affiliate delivery system, a sy whose efficiency we have long recogni would outweigh any benefits of such a scheme."

The extent of the "white areas"—unserved or underserved by network affiliates—was "not substantial" enough to warrant action, the report said. Such areas, it said, encompass fewer than a half million homes.

Furthermore, the report said, the networks believe that the construction of translators to extend service into white areas is a "viable" alternative to any kind of direct-to-home service. CBS, it said, "appears to have an overall, aggressive plan to implement new translator service on a nationwide basis."

The report also said that, even if it wanted to, the FCC probably couldn't order the networks to serve the home satellite market. The networks' arrangements with the copyright holders, it said, don't permit the networks to distribute programing directly to homes. More important, it said, "Section 705 of the Communications Act prohibits unauthorized reception of satellite network feeds and, in light of such statutory protection, we do not believe that we have the authority, even should we wish to do so, to order the networks not to scramble and to authorize HSD viewing of their feeds."

Nonetheless, the report said, CBS NBC should join ABC in at least consid serving dish owners in white areas by scra bling its feeds and authorizing reception only to those in white areas.

The report expressed concern about Satellite Broadcast Networks' new service, which involves putting the signals of three network affiliates on a satellite, scrambling them and selling them as a package to dish owners. So that it can offer its service under the compulsory license of the existing copyright law, SBN is defining its service as a kind of cable system in the sky.

The report said that it could find nothing in the "legislative history" of the copyright law "to suggest that Congress intended satellite distributors might themselves be defined as cable television systems under the compulsory licensing provisions of the law."

If the courts decide that SBN's service is not a violation of the law, it said, "it would be appropriate" for the FCC to scrutinize the service from a communications policy perspective. "The network-affiliate relationship plays an important role in supplying the public with television service. This system of distribution, which is based on program rights ownership and copyright protection, a system of exclusive broadcast outlets, and contractual relationships among the parties, is totally bypassed through the direct-to-home satellite distribution mechanism type proposed by SBN."

ABC, CBS and Gannett, the owners of the stations that SBN is distributing to dish owners, have sued SBN, alleging violations of copyright law.

That some programers led by HBO may

move their feeds from C-band to Ku-band satellites does not mean the feeds will be unavailable to dish owners. Many of the new satellite receivers are capable of receiving either C-band or Ku-band signals, it said. "That's more, regardless of what satellite frequencies they are using, programers will have the same incentive to serve dish owners. "It seems unlikely that HBO's move to Ku band, or that of any programer, would cause it to cede a potentially lucrative market to others," it said. □

Simon introduces TV violence bill

Senator Paul Simon (D-Ill.) reintroduced a bill last week aimed at curbing violence on TV. The measure is virtually identical to one Simon introduced in the last Congress.

"The evidence is overwhelming: Violence on television has a harmful effect on viewers' attitudes and behavior, and especially on children," Simon said in a statement accompanying his bill. At the close of the 99th Congress, Simon's bill was adopted by a voice vote in the Senate but failed to move out of the House Judiciary Committee. The measure has been referred to the Senate's Antitrust Subcommittee, chaired by Howard Metzenbaum (D-Ohio), who is also a cosponsor.

Under the Simon bill, representatives of the three television networks, program producers, network affiliate organizations, and presidents of the National Cable Television Association, the Association of Independent Television Stations, the National Association of Broadcasters, and the Motion Picture Association of American, or their designees, would be exempt from antitrust laws so they could meet to draft and disseminate voluntary guidelines to suppress television violence. (The only change in the new version of the bill is that network affiliates were added to the group.) The antitrust exemption would expire after three years.

"Any suggested guidelines drawn by the industry could be voluntarily adopted by local broadcasters and other industry members," Simon said. Furthermore, he pointed out, the bill excludes boycotts from the exemption, "making it clear that we are not encouraging coercion." □

Family affair. One college student with an unusual vantage on telecommunications policy is Susan Quello, granddaughter of FCC Commissioner James H. Quello, who on assignment from the University of Detroit interviewed the commissioner and a number of his Washington colleagues. The resulting article, made available to BROADCASTING, quotes Quello voicing support for a bill introduced by Representatives Tom Tauke (R-Iowa) and Billy Tauzin (D-La.) that would eliminate comparative renewal. "Excellent legislation correcting a much abused process," says Quello. "Merits the support of all broadcasters and fair-minded legislators if, in return, demands on broadcasters as license trustees are reasonable."

Two generations of Quellos at INTV

Quello also endorses a bill introduced by Representative Al Swift (D-Wash.) to resurrect the FCC's antitrafficking rule, which required buyers to retain a station for three years before selling.

Moreover, he makes clear that he believes there are limits to what should be broadcast over the airwaves. "If obscenity on the air is proven, we should nail somebody with a license revocation proceeding or a $10,000 fine," Quello says. "I'm a strong journalistic First Amendment advocate, but our founding fathers didn't guarantee freedom of speech for this repulsive purpose. FCC action would have a much needed deterrent on smut on the air."

And he also offers a bit of TV criticism. Says Quello of ABC's mini-series, *Amerika:* "In a free society we allow all types of social expression or TV productions. Networks and reporters even have the right to be wrong as long as they are not deliberately malicious or obscene. On a scale of one to 10, I give *Amerika* a weak four as a socially significant TV production."

Belt-tightening at USIA and BIB

Authorization approved by House Foreign Affairs Committee puts 1988 budget below 1987 allocations

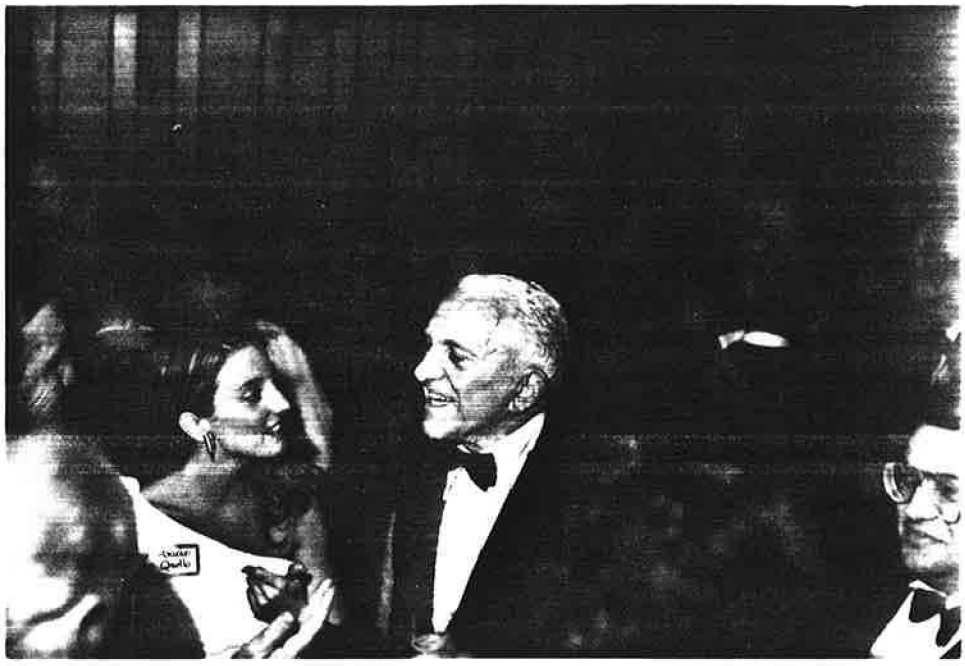
The House Foreign Affairs Committee last week initiated the U.S. Information Agency and the Board for International Broadcasting into the world of Gramm-Rudman-Hollings. It adopted an authorization measure that limits those agencies to spending levels at or below those of 1987. One consequence is that neither will be given new funds to continue modernizing its broadcasting facilities in the next fiscal year, even though that is a project Congress regularly endorses. And in what appears to be a demonstration of a lack of confidence in USIA director Charles Z. Wick, the committee earmarked some funds in the USIA authorization measure for specific purposes—the Voice of America and VOA Europe, among them—to prevent him from shifting those funds to other USIA accounts. The committee also denied USIA the additional funds requested for Worldnet, the international television network that is Wick's favorite project.

USIA is in the authorization measure for $820 million in 1988, and $919 million in 1989. The 1988 figure is $11 million more than Congress appropriated in unrestricted funds in the current year—but $6 million less if a supplemental appropriation bill approved last week by the House Appropriations Committee is included in the 1987 figure. "The total [for 1988] is a disaster," said one USIA official on surveying the Foreign Affairs Committee's handiwork. The BIB, which funds and oversees the operation of Radio Free Europe and Radio Liberty, is in the bill for $170,600,000 in 1988, about the level it would receive in 1987 if a $33-million supplemental measure, approved by the House Appropriations Committee, makes its way through Congress. The supplemental is needed to make up for a severe currency-exchange loss. Without it, BIB says, it would literally run out of money in July. The Foreign Affairs Committee approved a $219,424,000 authorization for BIB in 1989. "We'll have no operational problems in 1988 and 1987," said a BIB official.

But the modernization programs of both agencies would be slowed, if not halted. The Foreign Affairs Committee, in a demonstration of the seriousness with which it approached its task of keeping within budget-mandated guidelines, would authorize no new funds for the project long heralded as essential to overhaul and replace obsolete equipment. BIB had hoped for $41 million to complete a $77-million program of refurbishing its transmitters and associated systems. The committee decided BIB would wait another year for the money. And the USIA would receive none of the $90 million the administration is seeking in 1988 as part of the VOA's $1.3-billion, multiyear modernization program; the committee approved $66 million for the project in 1989. But USIA has $142 million in unobligated modernization funds from prior years that it can spend. So the program need not be put on hold until 1989.

All told, $192,852,000 would be authorized for the Voice of America. And the bill has been written in a way to insure the funds are spent as the committee prefers. Even VOA/Europe, one of the smallest items in the bill at $3 million in 1988 and $3.1 million in 1989, would be protected. The committee has shown more regard for the service, aimed at Europe's post World War II generation, than Wick, who helped bring it into being two years ago but whose enthusiasm for the project has waned. Another service for which funds have been specified is Radio Broadcasting to Cuba (Radio Marti), $12,652,000 in 1988 and $13.2 million in 1989. The bulk of the protected VOA account comprises salaries and expenses—$177.2 million in 1988 and $184.3 million in 1989. The bill specifies that the funds appropriated shall not be available for any purpose other than the Voice of America.

Representative Dan Mica (D-Fla.), chairman of the International Operations Subcommittee, which marked up the bill on Tuesday before referring it to the full committee on Wednesday, did not try to restrain



Office of Commissioner James H. Quello

To: Betsy Date: May 6 1988

( ) Chairman	( ) Chief, Mass Media Bureau
( ) Commissioner	( ) Chief, Common Carrier Bureau
( ) General Counsel	( ) Chief, Field Operations Bureau
( ) Managing Director	( ) Chief, Private Radio Bureau
( ) Chief, Plans and Policy	( ) Chairman, Review Board
( ) Director, Congressional & Public Affairs	( ) Chief, Office of Science & Technology
( ) Chief, Administrative Law Judges	( ) _____
	( ) _____

office phone (202) 632-7557

Betsy dear - -

Jim rushing this to you for presentation at your Condo board meeting. She will write a follow up letter.

She should be an attractive, responsible, temporary occupant. Besides, the two of you will have a blast!

Thanks for everything but especially for your friendship.

Many kinds by love to you and the grandchildren - - Big Jim too.

Best, Jim

STATEMENT OF
COMMISSIONER JAMES H. QUELLO
BEFORE THE
SUBCOMMITTE ON TELECOMMUNICATIONS AND FINANCE

May 11, 1988

STATEMENT OF
COMMISSIONER JAMES H. QUELLO
SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE
MAY 11, 1988

I. Framing the Debate: Must Carry is Essential for the Public Interest

I applaud the efforts of the Subcommittee in reviewing the operational progress of the 1984 Cable Communications Policy Act. There have been profound changes in the communications marketplace. Since 1984, the fundamental relationship between broadcasting and cable has been drastically altered as a result of decisions by both the Commission and the courts. Full review is clearly warranted.

One issue transcends all others in importance in assuring the public's access to diverse information sources. That issue is must carry. The absence of must carry for local broadcast stations will have a profound -- indeed potentially catastrophic -- effect on the flow of information in our society. What is at stake is the survival of free over-the-air television. Without must carry, information about your local community will be reduced to the status of a commodity. Those fortunate enough to be able to afford cable's unregulated rates for basic service will have access to those signals that cable operators deem appropriate. Those unable to afford these prices will be forced to rely on off-air reception. However, the viability of local

over-the-air broadcasting will depend to some extent on the ability of a station to secure carriage on local cable systems. As cable penetration increases, lack of carriage will dramatically affect a station's ability to reach its local audience. Without access to a significant portion of its community, a station's revenue stream will decline. The result is diminished public service and significant adverse impact on those who do not subscribe to cable. Absent must carry, our population will be denied access to vital information about its local communities. Cable television -- now a monopoly bottleneck for video product -- will have the power to set the social and political agenda of this country without any government obligation to serve the public interest.

II. Review of 1984 Cable Act should include consideration of the lack of must carry protection.

Review of the 1984 Cable Communications Policy Act and the must carry debate are inextricably linked. The importance accorded must carry by the Congress can be found in the legislative history of the 1984 Cable Communications Policy Act. When enacting Section 624(f), which limits the authority of the FCC and local franchise authorities from adopting new content based regulations, the House Report stated expressly, "Regulations which relate to the content of cable service and which remain in effect include the FCC's must carry requirements

(47 C.F.R. § 76.51 et seq.)."[1]

Retaining the must carry rules in 1984 created a delicate balance between fostering the growth of cable and preserving the structure of local broadcasting. The Communications Committee Report stated:

> "At the same time, in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. House Rept. No. 98-934, 98th Cong."[2]

It seems clear that the existence of our former must carry rules was an important part of the balance struck by the Congress in enacting the 1984 Cable Communications Policy Act. I believe the competitive balance created by the Act provides an independent justification for the reinstitution of permanent must carry rules. Because the lack of carriage adversely affects the economic viability of local broadcast stations, the number of off-air signals available in a community may be reduced significantly in the near future. Under the Commission's own rules, however, the ability of a local community to regulate cable rates depends on the number of

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1/ House Rept. No. 98-934, 98th Cong., 1st Sess., p. 70 (Aug. 1, 1984).

2/ Id. at 22-23.

off-air signals available in the local community.[3] Thus, the potential consequences of no must carry raises vital questions regarding the status of effective competition between broadcasting and cable television.

The Cable Communications Act of 1984 was enacted with must carry in place and before cable started aggressively selling advertising in competition with the local stations. These are the same local stations whose programs cable takes free of charge and then charges cable subscribers monthly fees for basic service. Must carry was certainly a vital part of the legislative balance when the 1984 Cable Act was adopted. Elimination of must carry is a compelling reason why Congress should revisit cable legislation.

III. Decisions by the D.C. Circuit Court of Appeals Do Not Preclude Congressional Enactment of Must Carry Regulations.

The Commission has maintained must carry rules since the infancy of the cable television industry. The rules defined the relationship between cable and over-the-air broadcasting. Our

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3/ Under the Commission's rules implementing the 1984 Cable Act, local franchising authorities do not regulate the rates of basic cable service if there are at least three off-air broadcast signals covering a local cable community. The Commission has determined that the "three signal standard" is an adequate measure of effective competition in the cable industry. See Second Report and Order Implementing Cable Communications Act, MM Docket 84-1296, FCC 88-128 (released April 29, 1988).

rules promoted the statutory policy of localism by insuring that broadcast stations had access to the communities they were licensed to serve. I believe our must carry rules played a major role in the development of independent UHF television. Carriage on cable systems reduced the signal disadvantages of UHF television as compared with VHF signals. Cable carriage also guaranteed a receivable signal in mountainous regions and in thousands of small towns and rural areas where reception is often difficult. It is self evident that the rules served a substantial public and government interest.

Despite the important policy objectives of the rules, the U.S. Circuit Court of Appeals in Quincy Cable TV v. FCC,[4] held that the rules constituted an improper infringement on the first amendment rights of cable operators. The Court criticized the Commission for not producing evidence to support its theory that local broadcasting would be injured absent local carriage rules.[5] The court did not rule that the Commission's goal of promoting localism was not a substantial government interest. The Court 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

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4/ 768 F.2d 1434 (D.C. Cir. 1985).

5/ Id. at 1457.

> 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.[6]

Moreover, the Court did not hold that all forms of must carry rules were unconstitutional. In fact, the Court invited the Commission to attempt to re-craft its rule.[7] Despite my objection, the Commission did not appeal the case to the Supreme Court.

After much Congressional prodding and an historic industry agreement, the Commission crafted a new set of must carry rules.[8] The rules were not as broad as our original rules and did not require carriage of all local signals. The rules were to sunset in five years. However, the Commission substantially

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6/ Id. at 1459.

7/ The Court stated:

> We stress that we have not found it necessary to decide whether any version of the mandatory carriage would contravene the First Amendment . . . . Should the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is of course free to do so. We would consider the constitutionality of that effort at the appropriate time.

Id. at 1463.

8/ Carriage of Television Broadcast Signals, 1 FCC Rcd 864 (1986), recon. granted in part, 2 FCC Rcd 3593 (1987).

changed its justification. It no longer justified the rules on localism, but stated that the rules were necessary until cable subscribers learned how to use an A/B switch and install an outdoor antenna. Unfortunately, the regulations were struck down again by the U.S. Court of Appeals for the District of Columbia in Century Communications Corporation v. FCC.[9] This time the Court stated:

> [FCC's] arguments in this case leave us unconvinced that the new must carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech under the test set forth in United States v. O'Brien 391 U.S. 367 (1968).[10]

I believe a flawed or miscalculated rationale in the Commission's Order adopting the must carry compromise bears primary responsibility for the adverse court decision. The Commission never provided a sufficient justification to support the new compromise must carry rules. This is precisely why I issued separate statements when we adopted the new must carry rules.[11]

I believe we should have justified the rules on our established public interest and localism policies enunciated in

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9/ 835 F.2d (D.C. Cir. 1987), clarified 837 F.2d 517 (D.C. Cir. 1988).

10/ Id. at 293.

11/ A copy of my separate statements are attached hereto. See Appendix A.

Section 307(b) of the Communications Act. The Commission's emphasis on reeducating America about the need for new outdoor antennas and an A/B switch was an ideal, rather impractical solution that wasn't destined to carry the day in court. Our best trial lawyer argued the case but with a no win legal game plan adopted the Commission.

For some ideological reason difficult to fathom, the Commission majority obstinately and with considerable craftsmanship avoided or de-emphasized Section 307(b), localism, and the public trustee concept that broadcasters are licensed by the government to serve their community in the public interest, convenience and necessity. With this approach, overwhelming arguments demonstrating substantial, even critical, government interests were minimized or deleted from the FCC rationale.

Is there a substantial government interest in must carry? The record in the must carry proceeding contains a strong letter to the FCC signed by all 28 of the Congressmen, Republican and Democrat, on the Communications Subcommittee urging the FCC to craft must carry.[12] This unprecedented congressional interest represents the strongest type of government interest: Who represents government interest more than the duly elected

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12/ A copy of the letter is attached. See Appendix B.

representatives of the people? The letter constituted the first time in my 13-1/2 years experience at the FCC that I have seen a letter urging FCC action signed by every member of the Communications Subcommittee.

Also -- is there an independent substantial government interest in assuring public broadcasters access to the local community? Public broadcasting was formed by the government to provide a distinctive, separate service. It is funded by the federal and, in many cases, state governments. Yet, the National Association of Public Television Stations informs me that over 100 stations have been dropped by cable systems. In addition, over 100 public stations have had their channels repositioned and some have been forced to share channel space with another program service.[13] I will concede some extenuating circumstances for some cable systems, but overall the effect has been harmful. Public stations feel and are desperately threatened by no must carry. They should not have to depend upon plea bargaining or the generosity of a local cable company to reach the audience they are officially licensed by the government to serve. Substantial or predominant government interest? How can anyone say no!

13/ See Letter from David J. Brugger, President, National Association of Public Television Stations to the Honorable John D. Dingell, Chairman, Energy and Commerce Committee (March 29, 1988).

There are those who have argued that the Quincy and Century cases preclude the reestablishment of must carry rules. Specifically, some have alleged that these cases foreclose the use of localism as a substantial government interest that would justify some form of must carry protection.

A close reading of the cases, however, reveals that Congress is not foreclosed from using the public interest standard, expressed through our localism policies, as the basis for permanent must carry protection. Indeed, the Century court stated:

> We do not suggest that must carry rules are per se unconstitutional and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial government interests. But when trenching on First Amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures. [emphasis supplied][14]

It is obvious that both the Quincy and Century Courts were critical of the Commission's failure to establish a substantial government interest sufficient to justify must carry regulations against a First Amendment challenge. In the Quincy case the Court asked the Commission for evidence to support its policy concerns that localism would be harmed without must carry.[15]

14/ Century Federal Communications Corp. v. FCC, 835 F.2d at 304.

15/ It should be noted that the must carry portion of our original signal carriage requirements was not justified solely of the basis that the rules were necessary to ensure the

Unfortunately, the Commission in the subsequent proceeding decided to misconstrue evidence in the record that would have supported this rational and completely changed its justification for carriage rules to a weaker, less compelling rationale. Given this change in rationale, the Court's decision in Century was predictable.

The task confronting the Congress, therefore, is to provide either sound reasoning or empirical analysis that will support local carriage obligations in the face of a First Amendment challenge. Assertions that the courts have precluded us from acting are not substantiated by a careful reading of the court's decisions. They are counterproductive and merely demonstrate an over persistant reliance on an unregulated marketplace for solving complex communications problems.

15/ Continued
economic viability of local broadcasters. Instead, these rules were based primarily on the concern that cable subscribers would be denied access to local over the air signals, thereby undermining our table of allocations. First Report and Order CATV Rules, 38 F.C.C. 683, 705 (1965); Second Report and Order, 2 F.C.C.2d 725, 736 (1966). Unfortunately, the Court of Appeals in Quincy did not recognize this subtle, but important distinction. A review of the case reveals that the court linked must carry, which was based primarily on notions of access to local signals, to economic viability of broadcasting. See Quincy Cable TV Inc. v. FCC, 768 F.2d at 1455-1456. However, the economic viability arguments served as the primary justification for the non duplication portion of our original rules, not the rules requiring local signal carriage.

I believe there is an undeniable government interest in making certain that television stations licensed by the government to serve the public interest continue to have access to the public they are licensed and required to serve. I believe the obligation to serve the local community is mandated by the Communications Act and by the Commission's allocation of channels to local communities across this nation. I don't believe any monopoly or semi-monopoly transmission pipeline should be able to prevent or obstruct the licensed station's local service to the public.

The failure to demonstrate a substantial governmental interest was due to a flawed FCC rationale that didn't develop the many practical government interest arguments. Also, a legally well-qualified court with authority to overrule the FCC, suffered from lack of practical knowledge or experience in the real TV and cable commercial marketplace. In my opinion, the

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15/ Continued

The incorrect focus of the Quincy Court's analysis is further evidenced by its reliance on the Commission's Economic Inquiry Report, 71 F.C.C.2d 632 (1979). In that report, the Commission found that cable did not pose an economic threat to broadcasting. However, the report was concerned primarily with the competitive ramifications of the Commission's distant signal carriage rules. The Report did not address the fundamental question of access to local signals as compelled by Section 307(b) of the Act.

Therefore, the Court's admonishment that the Commission failed to question its "speculative premises" is misplaced. The Quincy Court's analysis would be correct had the Commission

court decision perpetrated a gross marketplace inequity on broadcasters providing a free service to the pubic.

I believe the drastically changed circumstances of no must carry require that Congress, in all fairness, reconsider and revisit the Cable Communications Act to restore balance to the marketplace. Congress should do this not to please broadcasters, but to serve the public with assured free TV and to correct a gross miscalculation caused by FCC ideological avoidance of Section 307(b), the public trustee concept and localism -- the principal factors necessary to developing

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15/ Continued
justified its local signal carriage obligations solely on competitive grounds. However, the Commission's rules were premised on fundamental Section 307(b) principles, that cable subscribers should have access to local over-the-air broadcast signals.

The importance of the argument is that justifying must carry rules on the basis of localism-access-public interest does not require a showing of "harmful" economic impact to broadcasters in order to substantiate the important government interest involved. The Commission compounded the Court's error by failing to appeal the case to the Supreme Court. Because the Commission changed its rationale in adopting its new must carry rules, the Century Court never addressed this issue.

substantial government interest. In this regard, it should be noted that the Supreme Court has not had the opportunity to review our must carry rules. Given recent statements, however, there is every reason to believe the Court would uphold carriage obligations based on localism.16 Moreover, there is also the question of whether the D.C. Circuit Court of Appeals used

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16/ In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Supreme Court upheld the Commission's jurisdiction over cable stating:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. [emphasis supplied]

Id. at 177. See also, Capital Cities Cable Inc. v. Crisp, 467 U.S. 691, 714 (1984); FCC v. Midwest Video Corp., 440 U.S. 689, 706 n.16 (1979); United States v. Midwest Video Corporation, 406 U.S. 649, 669-670 (1972). As these cases demonstrate, the Supreme Court appears to view the traditional Section 307(b) justifications for signal carriage obligations in a favorable light. While the Court has not squarely addressed the question of whether localism, would constitute a substantial government interest in the context of must carry, these cases suggest that the Supreme Court would consider it far more favorably than the D.C. Circuit.

Of course, Congress is obviously free to craft must carry rules that are designed to support some other articulated government interest. For example, legislation that would link must carry obligations with the compulsory copyright. See H.R. 4293, 100 Cong., 2d Sess. (1988). I support this proposal and believe it would pass constitutional muster.

correct First Amendment analysis.17

Finally, the Courts give greater deference to Congressional statements and factual findings, as compared to administrative agencies, when reviewing policy justifications in the context of a constitutional challenge. In short, the Courts would give great weight to Congressional findings that could correct the Commission's approach in the must carry orders.18 Therefore, Congress is not foreclosed from crafting local carriage obligations that will withstand judicial review.

The Courts' decisions eliminating must carry are potentially disastrous for free television service to the public and for local broadcast service in the public interest. The potential

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17/ There is a legitimate question whether the Court of Appeals in both Quincy and Century applied the correct First Amendment test. In this regard, the Court appears to have misapplied the O'Brien standard when reviewing the must carry rules. The court's application of the O'Brien standard is far more strict than the Supreme Court cases employing the same standard of First Amendment review. See e.g., City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); United States v. Albertini, 105 S.Ct. 2897 (1985); Clark v. Community for Creative Non Violence, 468 U.S. 288 (1984). While the Solicitor General does not believe this issue merits review by the Supreme court, I continue to believe that Congressional action is justified. At the very least, the above analysis demonstrates that Congress is not constitutionally precluded from adopting must carry legislation based on a localism, public interest rationale.

18/ Great weight is accorded to decisions of Congress even though legislation implicates constitutional rights. See Columbia Broadcasting System Inc. v. FCC, 412 U.S. 94, 102 (1973); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980).

harm could usurp the FCC's orderly channel allocation to provide community service and lower the quality of service to the public

IV. Lack of Must Carry Creates a Clear And Present Danger to Free, Local Over-the-Air Television Service.

A. Local Independent Broadcasting is at Risk.

There should be little doubt that the continued viability of independent stations that provide local news and public affairs different from network affiliates constitute a substantial government interest. Again, isn't there an inherent, not only substantial but also essential, government interest in all stations being able to serve the audience they were licensed to serve by the government? It is beyond question that increasing the number of diverse, local broadcasts is consistent, indeed compelled, by the Communications Act. Twenty-three independent stations are now in Chapter 11. The trend is growing. Is it caused by no must carry? No, not completely and in some cases not at all. But the mere threat of no must carry is a contributing cause. Banks are reluctant to lend money to stations with no assurance of carriage.[19] Will the independent stations' viability be threatened by no must carry or even by the power of a cable

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19/ For example, WCVX-TV, Martha's Vineyard, MA, was unable to secure carriage to a substantial portion of its viewing area. Ultimately its largest creditor took over the station. The single largest factor forcing the bank to foreclose was the station's inability to access the vast majority of cable subscribers. See Free Television Under Siege: INTV, May 1988 at 11.

company to inflict no must carry at any time? The answer has to be a resounding yes. To any practical businessman, or to any fair-minded body, no must carry or the threat of it can only aggravate an already economically pressed local independent service.

There is an increasingly strong incentive for cable to drop local broadcast signals. Cable operators are now aggressively competing with broadcasters for the advertising dollars that support free programming available to the public on TV stations. Carriage is no longer an issue of having sufficient channel capacity. The incentive not to carry local stations is purely economic; it is the ability to deny carriage to local stations and preclude access to their local audience in order to obtain a competitive advantage. According to authoritative sources, cable advertising revenues in 1987 were over a billion dollars -- and cable advertising is a relatively new phenomenon with great future growth. One study projects cable advertising revenue growth at a compound annual rate of 18.5%.[20] Specifically, the competition for local advertising dollars is growing and will become more intense in the future. National spot sales on cable television have increased from 3 million in 1983 to 12.5 million in 1988.[21] Cable has increased its local

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20/ Varonis, Suhler & Associates, 5th Annual: Communications Industry Report (1987) at 23.

21/ Channels, May 1988 at 74 citing data from Paul Kagan Associates, Inc.

spot from 47 million in 1983 to 338.5 million in 1988, an increase of over 720 percent.[22] The growth in local advertising revenues prompted at least one cable executive to exclaim:

> But the big story in the last year is that we are breaking through to the major local advertisers. We're starting to get our message across to the ad agencies handling these accounts. We're going after the serious bucks."[23]

The Commission simply failed to adequately assess the competitive impact of competition for local advertising dollars at the time it issued its most recent must carry orders. Knowledge about an A/B switch would never repair the damage caused by no must carry. Indeed, cable has only begun to "scratch the surface" of this revenue stream. As systems mature and penetration levels off, systems will turn increasingly to advertising for revenues. The incentive to deny carriage to local stations is a logical, rational and, without must carry, a legal business strategy.

The potential scenario for a no must carry communications market is nothing but disastrous for a free local broadcast service and eventually for continued free local news, major sports events and fine quality programs. Let's consider this very possible operating scenario for an aggressive, but very legitimate, cable operator. This scenario would be completely

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22/ Id.

23/ Channels, May 1988 at 72, quoting, Ron Fischmann, Vice President, Cable Advertising Bureau.

legal under the court's inequitable marketplace decision on "no must carry."

Take any large or medium size television market. Given current penetration rates, assume it is 50% penetrated by cable. First, the cable operator could originate, not merely retransmit, local news and public affairs. This could be accomplished without any public interest requirements -- without any FCC accountability or limitations. Because the cable transmission pipeline into the home does not require broadcast spectrum, traditional public interest responsibilities found in broadcasting may not be legally imposed.

With its own local CNN type news and some public affairs service in place, the cable system would be in a better position to attract local advertising, while at the same time having the legal power to drop most of the competing local TV signals. Cable operators would only be restrained by their own calculation on how many to drop and how much advertising profit they could accumulate without causing a public outcry or a Congressional uproar.[24]

24/ This scenario is not fictional. WLIG, Channel 55 Riverhead, New York, is the only commercial television station licensed to serve Long Island. The cable system serving a major portion of WLIG's audience refuses to carry the station. The cable system has begun a 24 hour a day local news service and is aggressively selling local advertising spots. See: Letter Marvin R. Chauvin, Vice President & General Manager, WLIG, April

Cable would have the power to drop local independents and replace them with distant signals thereby providing subscribers with their favorite "broadcast" or pay shows. Perhaps as an act of statesmanship or charity, they would continue to carry some of the struggling, least competitive local independents. Cable also would have the legal right to drop local network affiliates and import networks from other cities.25 This could be promoted as broadening the service. The result? The most productive and profitable semi-monopoly imaginable! You would have a cable audience monopoly in 50% the television market. With most of the local stations locked out and with cable ostensibly providing its own comprehensive local news, advertisers would be forced to spend a major portion of their advertising and marketing budgets on cable. Without cable, the advertiser would be locked out of 50% of the most attractive portion of the market -- those able to afford cable which consists of the wealthier audience with upward mobility and more spendable income.

24/ Continued
7, 1988. In addition, it is alleged that WCVX-TV, Marthas Vinegard, MA, was denied carriage on a cable system in part because the system had developed its own local news show and viewed WCVX as a competitor for local advertising. See Free Television Under Siege: INTV, May 1988 at 11.

25/ There has been at least one situation where a local network affiliate has been repositioned off a cable system's basic tier, while the system has imported a distant affiliate. The local affiliate failed to assert network non-duplication protection for fear that it would be dropped entirely.

With huge advertising revenues cable could well afford the reasonable current copyright fees for importing distant signals. Cable would thus be in the enviable position of having the best of all worlds -- fees from subscribers, dramatically increased revenues from advertisers, no public interest obligation or government accountability. It all spells huge profits with unregulated monopoly power!

Then, too, cable with its lock on the higher income TV audience and with the power to charge for both cable service and advertising, could easily outbid broadcasters for major sports events and the most attractive entertainment programs. In addition, vertical integration in the cable industry has been increasing, with large multiple system operators owning significant portions of the programming services they distribute. Like any monopolist with concentration of control, cable can practically dictate the price to be paid.[26]

Installation of an A/B switch might allow over-the-air signals into the television household. However, with cable systems providing local cable news and the availability of 36 to 104 channels, the incentive to install an A/B switch and pay over one hundred dollars for a new antenna would be negligible.

26/ See "Is Cable Cornering the Market," New York Times, April 17, 1988 p. 1F.

In many areas of the country, both urban and rural, off-air reception is difficult if not impossible. Many local zoning ordinances do not allow outdoor antennas. An A/B switch is useless in these areas. Both the NAB and NCTA questioned the efficacy of the A/B switch in our must carry proceeding. In an ideal world everyone would have a convenient workable A/B switch. In a practical world, why bother?

With no access to the cable half of the market, local stations, specifically licensed by the government to serve the community, will suffer decreased audiences and greatly reduced revenues. The inevitable result? Many local stations will not have the economic viability to continue comprehensive or quality local service. Without must carry local program choices will diminish, diversity of broadcast ownership will be threatened and in some cases disappear. The real losers are people who cannot afford cable's deregulated rates and homes that do not have access to cable. Citizens relying exclusively on off-air service will be devastated. The FCC's longtime, assiduous allocation of broadcast spectrum to serve the public interest would be disrupted or nullified. This is speculation at this point, but without must carry or upwardly revised copyright fees for all programs, cable has not only the legal right, but also the power to make it happen.

Cable's ability to flex its muscle in the market place is already being exercised. Despite recent warnings by leaders of the cable industry to tread lightly on the must carry issue, the behavior of numerous cable operators demonstrates their power to control the destiny of local broadcasters. The record before the Commission in its must carry proceeding demonstrated that cable won't hesitate to drop local broadcast signals.[27] Cable systems have demonstrated their capacity to reposition broadcast stations to less desirable channel positions in order to enhance the viewing of cable programming or distant broadcast signals. Even where carriage or channel position are provided, cable operators often attempt to extract large sums of money. For example, a CBS affiliate, WKBT La Cross, Wisconsin was almost moved from channel 3 to channel 26 on the Eau Claire, Wisconsin cable system. The system offered to keep WKBT on channel 3 in exchange for $25,000 per-year cash. WTGS in Savannah, GA, has entered into an agreement which requires it to pay $24,000 in cash and $10,000 in advertising per-year in order to obtain carriage. WAYK, Orlando-Melbourne is being charged $35,000 for access to its home town of Melbourne. At one point, it was

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27/ The inability to secure carriage apparently continues today. For example, WPGX-TV, Panama City, FL; WVFT-TV, Roanoke/Lynchburg; WTTV, Bloomington, IN; WPMT-York, PA; WAWA, Rome, GA; WAYK-TV, Orlando, FL; WFMP, Lawrence, MA; WLIG-TV, Riverhead, NY; WHCT, Hartford, CT and many others continue to have problems being carried on various cable systems in their areas.

offered carriage in Orlando for $1 million per-year. A recent statement filed by the Association of Independent Television Stations documents over 40 cases of cable operators dropping, repositioning or demanding payment from local television stations.28 I have received letters from various broadcasters further documenting these abuses.

I believe the abuses occurring today are just the "tip of the iceberg". These activities come at a time when the cable industry is just beginning to recognize the importance of local advertising. In addition, the leaders of the industry have been statesmen in attempting to keep the industry from abusing it's new found power. Experience tells me that the natural competitive incentives will not be restrained forever. As soon as the political spotlight shifts from the cable industry, its unbridled power will be brought to bear.

Under existing conditions, cable dominance is likely in due time. It will lead to a bonanza for lawyers filing restraint of trade and antitrust suits. From a policy perspective, we should not wait until local broadcasters are filing for bankruptcy before taking action. If free over-the-air broadcast television

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28/ See Free Television Under Siege, INTV May 1988.

is to remain viable, then Congress must act to restore must carry as soon as possible.

B. **Non-Commercial Public Television is in Jeopardy.**

As previously stated, there is a substantial government interest in ensuring the survival of our public television system. Over the years, the federal government has spent hundreds of millions of dollars establishing a television system that is insulated from private competitive pressures. The most significant problem confronting public television today is adequate funding. As the former Chairman of the Temporary Commission on Alternative Financing for Public Telecommunications, I can attest to the difficulties public stations have in securing non-government funds. The dropping of a public television station by a cable system can have enormous impact on a station's revenues. Mr. David Brugger, President of the National Association of Public Television Stations explained in a recent letter.

> Every drop by a cable system of a public television station is harmful to the public television station. To illustrate this point we have enclosed a sample of letters from cable subscribers to operators complaining about cable drops or to public stations discontinuing financial support because they no longer receive the station. This mail shows Americans angered by their inability to view the very public television that their tax dollars help to pay for. It also shows public stations losing desperately-needed public contributions.[29]

29/ See, note 13, supra.

Given current uncertainties surrounding the levels of government funding for public broadcasting, declines in revenues from being dropped by cable operators can be devastating. Moreover, some advertiser supported cable networks compete with public television for programming. Increased cable revenues combined with decreases in funding place public television in a form of double jeopardy. Congress should reassert the substantial government interest that underlies public broadcasting and reinstate must carry protections for these stations.

IV. No Must Carry Effectively Circumvents Political Broadcasting Regulations

The Communications Act and Commission precedent have established a comprehensive system of political broadcast regulations. The equal opportunities rules embodied in section 315 of the Act, reasonable access provisions for federal candidates found in section 312(a)(7), and personal attack and political editorial rules all play a significant role in the electoral process. Indeed, Congressional efforts to reinstate the fairness doctrine demonstrate its continued desire to retain a regulatory structure that governs the political and social debate of this nation. While the Commission's decision to eliminate the fairness doctrine has provoked considerable - often heated - debate, there is one aspect of the discussion that is often overlooked.

Regardless of the regulatory strictures placed on local broadcasters, cable operators can effectively circumvent the process by simply not carrying the broadcast station. The potential danger in this scenario is not limited to the fairness doctrine, but also implicates the political equal opportunities responsibilities under section 315 of the Communications Act.

Candidates that have been able to obtain access to local broadcast stations may be unable to reach a significant portion of the community because of lack of carriage. Without some form of local signal carriage obligation, cable operators become the sole gatekeeper of political discussion in the community.

There is certainly an incentive for cable operators to attempt to increase their power relative to political broadcasting. Cable operators are just beginning to realize the significance of revenues from political advertising.[30] There is every reason to believe cable will make significant inroads into the political advertising market in the very near future.

Cable's monopoly transmission position in the community raises some troubling policy concerns absent must carry. First, in most communities candidates have the option of using several

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30/ "Hitting Political Paydirt," Cable Television Business, May 1, 1988 at 107.

separately owned television stations. With cable, however, a candidate has no choice, as there is generally only one cable operator per community. The problem is exacerbated to some extent because the guaranteed reasonable access provisions of section 312(A)(7) of the Communications Act do not apply to cable.[31] Candidates do have a right to secure access on public, educational or government access channels. However, these cable channels do not necessarily carry popular programming, thereby reducing the audience reach of the political message. Moreover, because cable operators are prohibited from exercising editorial control over the access channels, political messages on these channels do not constitute a "use" of the cable system, thereby avoiding obligations under section 315 of the Act.[32]

A second problem concerns the scope of section 315 as applied to cable. The equal opportunities provisions and the lowest unit rate requirements apply only to "origination

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31/ The Federal Election Campaign Act of 1971 originally applied the reasonable access provisions of 312(a)(7) to cable systems. See Use of Broadcast and Cablecast Facilities by Candidates for Public Office. 34 F.C.C.2d 510 at n.2 (1972). The provision was repealed, however, by the 1974 Amendments to the Act. See Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263 (1974).

32/ See Albert J. Zawicki, 60 R.R.2d 1657 (1986). (Equal opportunities of Section 315 apply only to channels under exclusive control of cable operator.)

cablecasting."[33] In other words, only programming originating on a cable television system over one or more channels and subject to the exclusive control of the cable operator will trigger section 315 responsibilities. The definition excludes the retransmission of local television signals because the editorial judgment rests with the broadcaster. Because the broadcaster is subject to the political broadcasting rules, it was believed that there was no need to hold the cable operator accountable.

The policy works well as long as cable operators are required to fully carry local stations. Because cable operators were prohibited from altering or deleting any portion of the programs, all local signals were carried in full. Without must carry it appears that cable operators can selectively carry portions of local broadcast signals.[34] Therefore, under this scenario a cable operator can, either intentionally or unintentionally, delete programming that was intended by the

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33/ Section 315(f) of the Communications Act makes the equal opportunities doctrine applicable to CATV. However, the scope of the requirements have only been applied to origination cablecasting. 47 C.F.R. § 76.205.

34/ A selective carriage strategy has already been employed by several cable operators. For example a local cable operator threatened to drop KOKH's (Oklahoma City) coverage of the "Goodwill Games" if the station did not cooperate in promoting the cable system. A cable operator blacked out station KSAS's broadcast of a local college basketball game because it was also carried on the USA cable network. Local cable operators attempted to drop the WTZA's (Kingston, NY) local news. WNDS, Derry, New Hampshire has had its prime-time lineup deleted and replaced with the Yankee Cable network by a local cable operators. See Free Television Under Siege: INTV, May 1988.

local broadcaster to be responsive to its obligations under section 315 of the Act.[35]

I do not believe the issue should be resolved by expanding the scope of our political broadcasting rules and the fairness doctrine as applied to cable. On the contrary, given recent court decisions holding that content based regulations on cable are subject to a higher level of constitutional scrutiny as compared to broadcasting, then relying on the cable political rules is a legally risky proposition.[36]

35/ The only impediment to engaging in a system of selective carriage is the potential loss of a system's compulsory copyright. The 1976 Copyright Act states that a cable operator may be liable under the Act if the content of any program including commercial advertising or station announcements are willfully altered or deleted. 17 U.S.C. § 111(c)(3). While the provision proscribes manipulation of program content and adjacent advertising, it does not prevent the complete deletion of a program with its advertising. Moreover, it appears the prohibition against manipulation of program content and adjacent advertising applies only to signals that trigger liability under the compulsory copyright, i.e. distant signals. If, local signals are exempt from these restrictions, then a cable operator can selectively edit programming or advertising without risking its status under compulsory license.

36/ Recent court decisions have held that because cable is not limited by spectrum scarcity, the principles established in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), may not necessarily withstand judicial review when applied to cable. See FCC v. League of Women Voters of California, 468 U.S. 364 (1984); Century Communications Corp. v. FCC 835 F.2d at 294.

The best way to insure that the political broadcasting rules remain effective is to reinstate the must carry rules. Because the rules are content neutral, they have a good chance of being upheld by the courts, provided the Congress articulates a substantial government interest for the rules. Moreover, the signal carriage obligations would yield benefits beyond the narrow issue of political broadcasting. The rules would help correct a gross inequity in the market place.

V. Congressional Reimposition of Must Carry is Essential to Restoring the Competitive Balance in the Marketplace and Ensure the Public Maintains Access to Free-Over-The-Air Television.

I respectfully suggest that the most practical course of action at this time is for the Congress to hold comprehensive hearings on must carry and perhaps on compulsory license. Congress can hear all sides, both pro and con, on the cable/broadcast issue. Congress will be able to develop a convincing record for the court. Because the court has traditionally displayed more deference for a congressional record than a regulatory agency record, the rules would stand an excellent chance of surviving judicial review.

As for me, I would testify that there is more than a substantial public and government interest in assuring that all people, not only the higher income personages, can continue to see major sports events, movies, and syndicated features on free over-the-air television as intended by Congress.

During my confirmation hearings in March 1974, Subcommittee Chairman Senator John Pastore insisted that I pledge to him that the world series, the super bowl, major sports, news and major entertainment programs would continue to be available on TV free to all the American public. Now more than ever it is time to reemphasize the honoring of that pledge.

My longtime association with Senators and Congressmen has led me to believe -- that the public interest and government interest are inextricably intertwined. Also, I believe the duly elected representatives of the people are the logical and by far the most authoritative source to define substantial government interest.

A quote from one of our greatest presidents seems apt for the cable-broadcasting issue. I'm not a lawyer so my approach to communications problems is more journalistic than legalistic. Bottom line: Unlike the Courts, with their legal technicalities, I try to determine issues on the basis of practical reason and justice. So I find great solace and guidance in a quote expressing President Franklin Roosevelt's view of the role that administrative agencies should play in government. The president said

> A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism.

All of us applaud the goal of substantial justice. Congress with its varied constituencies, different philosophies and countrywide representation seems to be in the best position to implement substantial justice and define substantial government interest. I urge you to reinstate must carry obligations.

APPENDIX A

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

June 26, 1986

Honorable Mark S. Fowler
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D. C. 20554

Dear Mr. Chairman:

We are pleased that the Commission has decided to take final action on the adoption of a must-carry rule by August 7, 1986. In our view, a properly crafted must-carry rule is in the public interest and should be promulgated by the Commission as soon as possible. Of course, in light of the U.S. Court of Appeals decision in Quincy, we would expect the Commission to design a rule which is sensitive to the Court's concerns in balancing the competing interests at stake.

We believe that the joint recommendation of the broadcast and cable industries represents a constructive starting point for fashioning a new rule. Any such rule should recognize the special role of public broadcasting as an alternative source of television programming. To further the public interest in diversity, any rule should also provide for the needs of new entrants into the broadcast marketplace in having an opportunity to compete.

Requiring the use of an "A-B switch" in lieu of a must-carry rule, which the Commission is reported to be considering, offers no assurance that the public will have meaningful access to broadcast programming.

The Commission's must-carry proceeding has been underway since November 14, 1985. The reply comment period closed on April 25 and the issues have been fully aired. In order to eliminate the confusion and uncertainty surrounding the manner in which programming aired by broadcast stations will be available to the nation's millions of cable subscribers, the Commission must act quickly. Thus, we believe it is imperative that the FCC take final action on the must-carry issue by August 7, 1986 and we fully expect the Commission to act no later than this date.

With best wishes.

Sincerely,

JOHN D. DINGELL
Chairman
Committee on Energy
and Commerce

JAMES T. BROYHILL
Ranking Minority Member
Committee on Energy
and Commerce

TIMOTHY E. WIRTH
Chairman
Subcommittee on
Telecommunications, Consumer
Protection and Finance

MATTHEW J. RINALDO
Ranking Minority Member
Subcommittee on
Telecommunications, Consumer
Protection and Finance

AL SWIFT, M.C.

THOMAS A. LUKEN, M.C.

DENNIS E. ECKART, M.C.

JIM SLATTERY, M.C.

RICHARD C. SHELBY, M.C.

W.J. "BILLY" TAUZIN, M.C.

JOHN BRYANT, M.C.

RALPH M. HALL, M.C.

cc: All Commissioners

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.

9 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.

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.

Honorable Mark S. Fowler
June 26, 1986

RON WYDEN, M.C.

CARLOS J. MOORHEAD, M.C.

FRED J. ECKERT, M.C.

DAN SCHAEFER, M.C.

MICKEY LELAND, M.C.

MICHAEL G. OXLEY, M.C.

JACK FIELDS, M.C.

EDWARD J. MARKEY, M.C.

THOMAS J. BLILEY, M.C.

HENRY A. WAXMAN, M.C.

THOMAS J. TAUKE, M.C.

DAN COATS, M.C.

PHILIP R. SHARP, M.C.

CARDISS COLLINS, M.C.

WAYNE DOWDY, M.C.

BOB WHITTAKER, M.C.

cc: All Commissioners

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.
>
> * * * *
>
> 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

xpressed considerable skepticism that the A/B switch ould 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:

* * * *

. . . 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.*

Letter to Chairman Markey and Commissioner Quello's Statement for the Cable Hearing Record were sent to the following:

All Subcommittee Members

Thomas Cohen

Ralph Everett

Toni Cook

Scott Johnson

Barbara Crapa

Larry Irving

Sharon Rockefeller

Jerry Feniger

Joel Chaseman

Wally Jorgenson

Tack Nail

Debbie Mesce

Jack Carmody

Karole White

Bernie Koteen

Al Sikes

Dick Quello

Daren Benzi

Robert Kastenmeier

Eddie Fritts

Jim May

Jeff Baumann

Preston Padden

Jim Hedlund

Mary Jo Manning

Dave Brugger

Dick Wiley

Bruce Christensen

Jim Lynagh

Steve Herson

Doug Halonen

Sol Paul

Carl Lee

Jim Evans

Gina Keeney

John Graykowski

Susie Quello

Hamilton Fish, Jr.