Statement of Commissioner James H. Quello
June 18, 1992

In the Matter of: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

I generally support the entry of national broadcast networks into the field of cable television because of the vast changes that have occurred in the media marketplace. But I believe this significant change must be accompanied by appropriate safeguards. In the *Report and Order* that the Commission adopts today, I am concerned about the sufficiency of a purported safeguard that is being called "negative must carry." It at least has the virtue of being truth in advertising — negative must carry means "no must carry." But I doubt it will offer much protection.

I have a number of questions about this feature of the *Report and Order*, none of which have been answered to my satisfaction. For example, how much damage would a local station have to incur before we could act? How would we measure the anticompetitive effect of channel repositioning? How long would it take for the Commission to act on a complaint?

As these questions suggest, I have serious doubts that this so-called "negative" must carry could provide any relief if a network chose to abuse its position as a cable operator. Allowing a network to own a cable system gives the network the power to control the transmissions of its most direct competitors — other local broadcasters. Since each ratings point translates into about $100 million to a network during the course of a season, I am concerned that networks might be tempted to use this power.

As I said when we adopted the *Notice of Proposed Rulemaking* in this proceeding, "my guiding principle will be the probable effect of such action on the maintenance of free over-the-air television," and cautioned "my fellow Commissioners to ensure that any new rules are consistent with the Commission's other policies, particularly those adopted recently."

Unfortunately, the decision not to adopt real must carry safeguards cannot be reconciled with the majority's finsyn decision, which the Commission defended this week in a brief filed in the United States Court of Appeals for the Seventh Circuit. In that case, the Commission concluded that "a network would have an incentive and ability as a syndicator to favor its affiliates over the other local stations with whom they compete." The brief defended a number of burdensome and overlapping regulations to curb network power. It is no secret that in finsyn I disagreed with the majority position; I do not believe that networks have the power in national and international programming markets that the majority assumed. But as cable operators, networks would gain new power over their local competitors.

If I represented a network, I think I would run — not walk — to the Seventh Circuit and say, with today's decision to give networks control over competing local signals without must carry, the FCC has changed its mind about network power.

What makes this decision all the more puzzling is the fact that the networks did not oppose the adoption of real must carry. This would have been a good chance to adopt these rules to meet a real regulatory need.

Accordingly, I dissent to the decision on must carry and will issue a more comprehensive statement when the *Report and Order* is released.

Separate Statement of
Commissioner James H. Quello,
dissenting in part.

In the Matter of Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

I generally support the entry of national broadcast networks into the field of cable television because of the vast changes that have occurred in the media marketplace. But I believe this significant change must be accompanied by appropriate safeguards. As I noted when the Commission adopted the *Second Further Notice of Proposed Rulemaking* in this proceeding, "the question of cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper."[1] Accordingly, my guiding principle for evaluating possible changes in the network-cable rules is "the probable effect of such action on the maintenance of free over-the-air television."[2]

With this goal in mind, I have no quarrel with the decision to relax the network-cable cross-ownership restrictions. But I am concerned about the sufficiency of the purported safeguards to prevent possible anticompetitive abuses. In particular, I would have preferred to see the local cap set at a 25 percent audience reach, but will concur with the more liberal limit.

In the absence of more stringent structural regulations, however, it is vital that the Commission be certain that its behavioral safeguards will work. Unfortunately, this part of the *Report and Order* is the weakest — and is the portion with which I must dissent. Rather than adopt must carry requirements, as was proposed in the *Second Further Notice*, the Commission adopted a complaint procedure that in internal debates came to be known as "negative must carry." This policy choice at least has the virtue of being truth in advertising — negative must carry literally means "no must carry." But I doubt it will offer much protection.

Background: The Need For Must Carry

On numerous occasions I have advocated the need to impose must carry requirements on cable operators, who have the ability to control access by government-licensed television stations to a substantial portion of their audience. The need is even more compelling when networks are allowed to own cable systems, since this will give them control over the transmissions of their most direct competitors — other over-the-air broadcasters.

The Commission's half-hearted approach to must carry safeguards in this *Order* is explained by its conclusion that networks would lack a clear incentive to discriminate against other broadcasters. Indeed, the majority's minimalist approach to behavioral safeguards is based on the belief that "anticompetitive action by a network-cable entity against local broadcast television stations would undermine the value of the network's cable system." *Report and Order* at ¶ 23. But why would dropping an over-the-air channel damage a cable system that is likely to have no multichannel competitors? Does the majority really believe that subscribers will drop their cable hookups out of solidarity with the disfavored broadcasters, thus guaranteeing that they receive all signals off the air? Will people so readily give up their MTV and CNN? I doubt it.

In contrast, the incentive for a network-owned cable system to manipulate the carriage and channel positioning of its broadcast competitors seems to be strong. The reason for this is obvious: broadcast networks are advertiser-supported media that compete directly against one another.[3] Small changes in the ratings translate into millions of dollars in revenue. During the course of a single season, each prime time ratings point equates to $100 million in advertising revenue.[4] Selective manipulation of carriage or positioning by network-owned cable systems in a sufficient number of markets could affect the attractiveness of competing network programming. To have this effect, it may not be necessary to go to the extreme of dropping a network affiliate although there is no reason why it could not do so.[5]

While the Commission has been content to study the issue of must carry rules from time to time, it has declined to act on the information submitted to it. Ironically, policymakers outside the Commission have understood much more clearly the implications of our years of study and indecision. Citing an FCC staff survey as well as "[c]omments filed at the FCC," the House Energy and Commerce Committee Report ("House Report") on H.R. 4850, the Cable Television Consumer Protection and

Competition Act of 1992, recited overwhelming evidence of the consequences of a lack of must carry protection.6

It is astonishing that the Commission would wait for others to draw the inescapable conclusions contained in the information so readily at hand. The most comprehensive analysis of this issue was undertaken by the Policy and Rules Division of the Mass Media Bureau in 1988. The resulting report disclosed that:

— Of the 4,303 cable systems that voluntarily disclosed data to the Commission, 869 systems admitted denying carriage to 704 television stations in 1,820 instances;

— 241 cable systems reported denying carriage to three or more local stations; 113 admitted denying carriage to four or more local stations;

— Cable systems dropped carriage of more than 100 local public stations;7

The Committee extrapolated from the staff findings and concluded that "in the year following the *Century* decision, there may have been as many as 3,640 instances of non-carriage."8 Thus, simply by examining information already compiled by the Commission, the Committee found "a grave threat to the allocation system favoring local service established by Congress and the FCC."9

Noncarriage decisions made by cable operators undermine the allotment system because stations that are dropped "effectively will cease to exist."10 The Committee found "concrete and demonstrable evidence of the harm suffered by local broadcasters when they are not carried by, or are repositioned on, their local cable systems."11 Such actions resulted in "forced reductions in local news, public affairs, and other public interest programs, the inability of new stations to obtain financing to commence operations, and bankruptcy for existing stations."12 When local stations are harmed in this way, it is not just a regulatory construction — the allotment system — that suffers. The ultimate losers are the American people, since "[l]ocal television stations . . . are both the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium."13

Our experience has been that these problems cannot be solved through half-measures, such as A/B switches. Four years after the Commission began mandatory public education for cable subscribers, less than 12 percent of subscribers were connected to an A/B switch and an outside antenna.14 This experience led the House Committee to conclude that A/B switches "are cumbersome, often ineffective, troublesome to install and operate, and are unacceptable to consumers."15

Where, as here, there is no effective alternative to cable carriage, the Commission should seek to minimize the incentive to drop signals or consider real safeguards. But as the Committee found, "the incentives for cable systems to drop, refuse to carry, and reposition may increase" as "competition for programming, viewers, and advertising dollars increases." House Report at 53. Ownership of cable systems by networks will only heighten this incentive, as I noted above.

Consequently, the Commission should have focused on meaningful must carry safeguards. The "negative must carry" option hardly qualifies as meaningful, as I will describe below. And the Commission cannot assert that it had no obligation to act because Congress is adopting comprehensive must carry protection as part of cable reregulation.16 First, the legislation has not yet become law. Indeed, the House had not yet voted when the Commission acted in this proceeding. Second, we do not yet know what provisions will be included when the bill emerges from conference, or if the President will sign the legislation. Third, we do not know how the very broad must carry rules will fare in court.17 And finally, if anyone at the Commission seriously was anticipating a congressional solution, there would have been no reason to adopt "negative" must carry.

So in the end, the Commission must live up to its independent responsibility to ensure that its policy choices serve the public interest and do not lead to unintended harms. In this proceeding, the Commission acknowledged the potential harm by adopting a watered-down safeguard, but neglected to fully analyze whether this approach would be effective. I dissent from this omission.

Constitutionality of Must Carry Rules

Opponents of must carry rules uncritically point to the D.C. Circuit decisions in *Quincy Cable TV, Inc. v. FCC* and *Century Communications Corp. v. FCC* as proof that must carry rules would be unconstitutional. Naturally, there was some internal debate about the implications of these decisions on any must carry rules that might have been adopted in this proceeding. The constitutional issue did not appear to be the deciding factor, however, since both *Quincy* and *Century Communications* are emphatically narrow holdings.

For example, the *Quincy* court repeatedly emphasized that it was not concluding that must carry rules are *per se* unconstitutional, and stated:

> 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.[18]

Similarly, the court in *Century Communications* noted that "[w]e do not suggest that must-carry rules are *per se* unconstitutional, and we certainly do not intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests."[19] In both cases, the court said that the Commission "failed to 'put itself in a position to know' whether the problem its regulations seek to solve 'is a real or fanciful threat.'"[20] The Court in *Century Communications* noted that the Commission was obligated "to adduce either empirical support *or at least sound reasoning* on behalf of its measures," and had failed to do so.[21] As explained below, these concerns would be unlikely to undermine proposed must carry rules in this proceeding.

Must carry opponents' reading of *Quincy* and *Century Communications* implies that almost no regulation relating to local programming on cable systems would survive First Amendment scrutiny. But this analysis overlooks subsequent cases that address this issue. For example, in *Chicago Cable Communications, Inc. v. Chicago Cable Commission*, the U.S. Court of Appeals for the Seventh Circuit upheld the constitutionality of local programming origination requirements.[22] In that case, the court found that "[e]ncouragement of 'localism' certainly qualifies as an important or substantial interest," and agreed with the franchising authority that programming requirements "serve the interest of preserving free, locally oriented television."[23]

With respect to the narrowness of the rules, the court pointed out that under *O'Brien*, the means employed "must be narrowly tailored but not necessarily the least restrictive alternative."[24] Thus, the court held that incidental restrictions on speech are permissible "[s]o long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation."[25] In short, courts have not hesitated to uphold analogous regulations in an appropriate case.

To understand the holdings in *Quincy* and *Century Communications*, it is necessary to review the context in which each of those decisions was reached. *Quincy* was decided in 1985, during what the court called a "wide-ranging deregulatory effort."[26] Several years earlier, the Commission had issued an *Economic Inquiry Report* that assessed the economic relationship between the cable and television industries. That *Report*, which the Commission said enabled it to speak "with a clarity[] which is uncommon in matters of public policy," led to various regulatory changes, including deletion of syndicated exclusivity and distant signal carriage rules. These measures were predicated on the Report's conclusions that "competition from cable television does not pose a significant threat to conventional television," that there would be a "fairly steady growth in the demand for advertising," and that "the ability of stations to maintain existing levels of service to their communities is likely to be unimpaired in the absence of . . . distant signal carriage rules."[27]

For the court in *Quincy*, the dissonance between the Commission's stated rationale for must carry and its other deregulatory initiatives was too great. In the two decades since the rules were adopted, the Commission had not attempted to gather evidence in their support, had reached contrary conclusions in a comprehensive economic report and had eliminated analogous rules. In that situation, the court properly concluded that the Commission did not demonstrate a substantial governmental interest, and quite possibly had repudiated the economic theory underlying the rules.28

Century Communications presents a less serious case, since it is doubtful that the Commission genuinely intended to demonstrate a substantial governmental interest. The court found that the Commission had failed to support its conclusion that interim must carry rules were necessary to enable consumers to become accustomed to A/B switches.29 Among other things, the court found no evidence to support the Commission's assumptions regarding consumer response to A/B switches, and, in fact, pointed to contrary evidence in the record.30 Since then, however, it has been demonstrated that very few cable subscribers have an outdoor antenna and an A/B switch.

Fast forward to 1992. The Commission has reinstated syndex rules and that decision withstood First Amendment challenge. In June the Commission released a *Notice of Proposed Rulemaking* on the future of our television rules. The thrust of the *Notice* was to reduce regulatory burdens to help broadcasters "adapt to the multichannel video marketplace." The *Notice* found that that "[p]rofits of broadcast television stations . . . have declined steadily in recent years" and that outside the major markets, "losses apparently have become the norm."31 A principal catalyst for the Commission's inquiry was the Office of Plans and Policy Report, which found that many television stations, particularly in small markets, will find it hard to compete in a multichannel environment, and many will go dark.32

In short, the factual predicates of the 1979 *Economic Inquiry Report* and the 1985 *Quincy* decision are no longer relevant to the must carry debate. Given these changes, and assuming the Commission for the first time articulates a coherent regulatory rationale based on public interest principles, the courts would have little trouble upholding a must carry requirement in this proceeding.

As a necessary safeguard to prevent network-owned cable systems from discriminating against competing over-the-air broadcasters, must carry rules are narrowly tailored because they identify the problem to be corrected (the threat of anticompetitive conduct) and are designed precisely to address that abuse. The cases support this conclusion. In *Quincy*, for example, the court did not conclude that it necessarily would be overly broad to require a cable system to carry all local broadcast signals. In fact, the court noted that "it is for the Commission and not this court to ascertain which broadcasters or classes of broadcasters are sufficiently at risk to warrant protection" and "[i]t may well be that in some circumstances, requiring carriage of the 18th broadcast station is consistent with the objective of preserving free, community-oriented television."33 The problem in *Quincy* was that the Commission failed "to draw any lines at all" that would permit the court to assess the fit between regulatory means and ends. That is not the case in this proceeding.

In short, *Quincy* and *Century Communications* presented no obstacle to adopting must carry rules in this proceeding. But unfortunately it did not happen. If the majority had hoped to sidestep the constitutional issue by opting for negative must carry, it miscalculated. The issue will be presented in full force the first time the Commission "order[s] the cable operator to restore the carriage or channel position of the local station" under its chosen safeguard.34

So in the end, nothing was gained by thwarting true must carry protection. Was anything lost? Consider the majority's solution:

The Empty Promise of Negative Must Carry

The procedure outlined in the *Report and Order* pledges to "entertain complaints from local television stations alleging harm as a result of anticompetitive conduct by a network-owned cable system with respect to non-carriage or channel positioning." *Report and Order* at ¶ 23. The choice of words here — "entertain complaints" — is ironically appropriate, for the Commission truly has created a dog and pony show in the procedure. "Entertain" the complaints really is all the Commission can promise, since the requirements for bringing a successful carriage claim appear all but impossible to meet.

Network-owned cable operators initially must provide 30 days' notice to any local broadcaster that it plans to drop or reposition. The majority "expect[s] . . . the parties will utilize this 30-day period to reach a mutually agreeable resolution prior to the scheduled date for noncarriage or repositioning." *Id.* at ¶ 24. But this talk of reaching "mutually agreeable" solutions is nothing but a Washington euphemism that means "arranging a payoff," which, of course, is part of the problem. As the House Committee found, "refusal to carry, changing channel positions, *or demanding compensation for carriage* of local broadcast signals are all practices damaging to the public interest and to the policies and purposes of the Communications Act." House Report at 56 (emphasis added).

Those broadcasters unable to come up with sufficient funds to reach a "mutually agreeable resolution" may then seek special relief upon a showing that it "has suffered, or will suffer, competitive harm as a result of being dropped or repositioned. *Report and Order* at ¶ 25. But how is this to be proven?

The lack of seriousness with which the Commission evidently approached this safeguard is demonstrated by the elements of proof needed to bring a successful complaint. A *prima facie* case requires "factual evidence showing that the station *has lost* access to a significant part of its audience as a result of the cable operator's adverse action." *Id.* at ¶ 26 (emphasis added). So while the Commission promises prospective relief from anticompetitive conduct, the pleading requirements foreclose any such possibility.[35]

Additionally, the procedure requires the complainant to engage in mind reading, and to prove the evil intent of the cable operator. That is, the broadcaster must prove that the operator's decision to cease or modify carriage was motivated by competitive malice, and not by "legitimate efforts to serve the needs and interests of its subscribers." *Id.* Presumably, even if a broadcaster can find some way to demonstrate bad intent, the operator need only show that the replacement channel provides programming to subscribers that was unavailable on the dropped local signal.

Finally, even if the obstacles to a successful complaint were not so formidable, time works against the broadcaster. It naturally will require some time to assemble the proof that our procedure requires — that the broadcaster has lost a significant part of its audience, and the operator must be given sufficient time to respond as a matter of due process. After the pleading cycle runs its course, the Commission must consider the issue, reach a decision and give the operator sufficient time to comply with whatever order we issue. Thus, even if every stage of the process is handled expeditiously — something for which the Commission is not well known — the damage will have already been done.

In the end, the only relief guaranteed by negative must carry will be to law firms looking for ways to spend their clients' money. It certainly will be no help to broadcasters.

The Problem of Consistency

As noted above, the court previously invalidated must carry rules in large part because the Commission's commitment to the rules was "in sharp contrast to [its] treatment of several other components of the regulatory framework." *Quincy Cable TV, Inc.*, 768 F.2d at 1442. With the decision in this proceeding to forego adopting true must carry protection, one may well wonder if the Commission has a coherent position on the existence of network market power.

In the financial interest and syndication proceeding, a majority of the Commission retained significant restrictions on the ability of networks to enter programming markets and adopted a complex web of new regulations designed to limit perceived network power.[36] Here, however, the Commission appears to be relatively unconcerned with network market power, opting only for the transparently ineffective negative must carry alternative.

So, what is the FCC's position on network market power? I am not suggesting that the networks are run by bad people who are intent on crushing their competitors. At the risk of mixing truisms, I believe simply that power abhors a vacuum. And where networks can combine the ability to control the signals of their over-the-air competitors with the natural incentive to win in the marketplace, the power is likely to be used. Where millions of dollars and executive careers are on the line, the temptation may well become too great not to use it.

Oddly, however, the Commission focused its regulatory authority on the issue of network power in finsyn and not in this proceeding. As I noted earlier in this proceeding:

> This is unlike the situation in the financial interest and syndication proceeding where . . . changes in the media marketplace create a presumption in favor of repeal. That proceeding involved national and international markets for programming in which there are many alternative buyers.

> By sharp contrast, the question of [network-cable] cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper. The 1990 Cable Report found that local cable operators have the *ability* to engage in anticompetitive practices; the question now facing the Commission is whether allowing cross-ownership will create an added *incentive* for them to do so.[37]

From my perspective, the Commission expressed its concern over possible network market power in the wrong proceeding. But from any perspective, the Commission must be able to explain its decision to restrain network power in the first case and not in the second.

As in *Quincy*, the courts may be less willing to listen to the Commission's explanations where there is no coherent regulatory philosophy supporting the policy choices. As the D.C. Circuit noted in another case, "an agency's entitlement to deference depends upon the quality of its determinations. Factors to be considered include 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'"[38]

Until the Commission can figure out whether it is concerned about network power, or not — and can provide a cogent explanation of why it is concerned in one case but not another — there is no reason for reviewing courts to defer to our judgments on this issue.

Conclusion

I hope that my concern over must carry rules is moot, and that the cable bill and its comprehensive must carry package will become law. But as of the date of our vote in this proceeding, and even as the final text is going to press, we do not yet know the outcome.

To the extent the Commission sought to address the must carry issue, I would have preferred that it do so directly by making the best case possible in support of the rules. The case is there to be made. But the Commission instead opted to water down the rules in an apparent effort to conform to the limited showings we have made in the past. Accordingly, I dissent from that aspect of the decision.

---

[1] *Second Further Notice of Proposed Rulemaking,* 7 FCC Rcd. 586, 594 (1991) (Concurring Statement of James H. Quello).

[2] *Id.*

[3] The Commission should be alert to the fact that MSOs have exercised their market power when threatened with direct competition between cable networks. For example, CNBC was forced to change its format so as not to compete with CNN in order to obtain carriage commitments. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd. 4962, 5028 (1990). In the case of broadcast networks, such direct competition is a fact of life.

[4] *In the Matter of Evaluation of the Syndication and Financial Interest Rules,* 6 FCC Rcd. 3094, 3233 (1991) (Dissenting Statement of Commissioner Quello), citing Comments of CBS, Inc., June 14, 1990 (Appendix A, Affidavit of Jeffrey F. Sagansky). In this respect, networks as cable operators would have an incentive to discriminate that is far more powerful than any facing existing MSOs. Any given cable network garners only a small fraction of the overall audience; it has dozens of competitors, no one of which is likely to have a substantial effect on its success or failure. But broadcast networks have only two or three readily identifiable competitors for their core audience. If a competing over-the-air network can be hobbled, the benefit to the other broadcast networks is likely to be significant.

[5] The cable operator could drop network signals selectively, such as deleting a given program or a particular evening's schedule; it could exile the competing networks to channel Siberia; or it could constantly shift channel positions, such as during "sweeps" periods.

[6] H. REP. 102-628, 102nd Cong. 2d Sess. (June 25, 1992).

[7] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report,* September 1, 1988. Moreover, from 1990-91, at least seven additional public stations (serving more than 263,179 subscribers) were dropped. *See* Comments of America's Public Television Stations in Effective Competition Proceeding, February 14, 1991 at 10 n.21.

[8] House Report at 52. The Committee noted that its calculation "is likely to understate the full extent of the carriage problem" since only about half of the cable systems surveyed responded to the

Commission. *Id.* at 52 n.52. The staff report also showed that 974 responding cable systems had repositioned channels of local TV stations a total of 3,000 times.

[9] *Id.*

[10] H.R. REP. NO. 101-682, 101st Cong., 2d Sess. at 58. *See also* House Report at 54 ("All evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over-the-air."). These legislative findings are consistent with Chairman Sikes testimony that stations deleted from a local cable system "would probably fail." Testimony of Alfred C. Sikes before the Senate Committee on Commerce, Science and Transportation, June 20, 1991 at 46-47.

[11] House Report at 51.

[12] *Id.* at 51-52.

[13] *Id.* at 50.

[14] Fratrik, A-B Switch Availability and Use, Sept. 23, 1991, attached to Comments of the National Association of Broadcasters in MM Docket No. 90-4, Sept. 25, 1991. Of those households with A/B switches, only half of those surveyed could recall ever using the device. *Id.*

[15] House Report at 54.

[16] Both the Senate bill, S. 12, and the recently-passed House version, H.R. 4850 contain full must carry requirements for cable systems.

[17] As I have noted on numerous occasions, and reiterate here, I believe an adequately supported must carry rule will survive judicial scrutiny. But with the track record of these rules in court, it seems that a more narrowly tailored approach — as was proposed in this proceeding — would be easier to sustain.

[18] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1459 (D.C. Cir. 1985), *cert. denied sub nom.* National Ass'n. of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986). *See also id.* at 1463 ("We stress that we have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

[19] *Century Communications Corp.* v. FCC, 835 F.2d 292, 304 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 468 U.S. 1032 (1988).

[20] *Id.* at 304-05, quoting *Quincy Cable TV*, 768 F.2d at 1457-59 (citation omitted).

[21] *Id.* at 304 (emphasis added).

[22] 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990).

[23] *Id.* at 1549, citing *Quincy Cable*, 768 F.2d at 1454.

[24] *Id.* at 1550.

[25] *Id.*, quoting United States v. Albertini, 472 U.S. 675 (1985).

[26] 768 F.2d at 1442.

[27] *Id.* at 1442-43.

[28] *Id.* at 1457.

[29] 835 F.2d at 304 ("Our decision today is a narrow one. We hold simply that, in the absence of record support to support its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored. . . .").

[30] *Id.* at 302-03.

[31] *Review of the Commission's Regulations Governing Television Broadcasting*, FCC 92-209 (released June 12, 1992) ("In 1989, at least 25 percent of stations in the top ten markets experienced losses; aggregate losses occurred in most markets below the top 100; and at least 50 percent of independents in all market classes below the top ten experienced losses.").

[32] Office of Plans and Policies Working Paper #26, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996, 3999 (1991); *Review of the Policy Implications of the Changing Video Marketplace*, 6 FCC Rcd. 4961 (1991).

[33] *Quincy Cable TV*, 768 F.2d at 1461, 1462.

[34] Report and Order at ¶ 27.

[35] The fact that the Commission will not seriously consider prospective requests for relief is reinforced by the additional factors set out in the *Report and Order* — almost all of which are expressed

in the past tense (*e.g.*, Commission will consider whether cable operator "received a substantial number of subscriber complaints."). *See* ¶ 27.

[36] *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094 (1991), *modified*, 7 FCC Rcd. 345 (1991), *appeal pending* No. 91-2350 (7th Cir.).

[37] *Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. at 594 (Concurring Statement of James H. Quello).

[38] Hernstadt v. FCC, 677 F.2d 893, 906 (D.C. Cir. 1982), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (interim citations omitted).