July 16, 1992

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

In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266.

This is an historic item with great positive ramifications for future communications advancements. I support the general thrust of the Order, but I am guided by two vital objectives — (1) the preservation and expansion of universal free TV whether over-the-air or by wire, and (2) the initiation of a second transmission pipeline that is competitive with cable.

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My commitment to universal free TV started back in 1974, when I was first confirmed as a Commissioner. I promised Senator John Pastore, the Communications Subcommittee Chairman, that I would ensure that news, public affairs, political debate, major sporting events and entertainment would remain free to the American people. In my years on the Commission since then, I have endeavored to keep that promise.

Almost four years ago, I voted for a Further Notice of Inquiry and Notice of Proposed Rulemaking recommending that Congress eliminate the existing telco-cable ownership restrictions. Upon further reflection, however, I issued a statement modifying my support, and expressing concern over some of the implications of altering the cross-ownership rules. As I noted at the time:

> A key question is whether telco entry will be a threat or boon to preserving free universal TV service. In my opinion the crucial public interest issue is the preservation of free local television service to all the public. Only broadcasting, not cable or phone fiber, has a government licensed obligation to provide TV service to the public. Broadcasting is the principal source of local news and government affairs, of vital local services like traffic, road, weather, school closing reports and emergency bulletins. And only broadcasting has a program-issues public file requirement for license renewal and for public inspection.

Comments on Cable Telco by Commissioner James H. Quello at 2 (released January 12, 1989). Consequently, I "depart[ed] from the Commission's tentative decision to the extent that it [did] not adequately focus attention on the potential impact of telco entry on free over-the-air broadcasting." *Id.* In many respects, the same is true of today's decision. I also noted in 1989 that "I see little upside to replacing one unregulated monopoly (cable) with another larger monopoly. My initial thought is that telephone entry into cable should be limited to providing a competitive alternative, not merely replacing existing cable operations." *Id.* at 1.

I believe these same policy concerns are central to this video dial tone proceeding. It is vital that we keep in mind that the actions the Commission takes today will draw the blueprint for how video transmission will occur in the future. Will

the public demand or be able to afford some of the dazzling new services that video dial tone promises to provide? We simply do not know. But we do know that broadcasting, the most influential and pervasive of all media, is essential to the lives of millions of Americans and, for better or worse, has become a central part of our national fabric. It therefore is imperative that we do not inadvertently take actions that could undermine what we know to be in the public interest. The Commission should take care to avoid taking steps that could eventually lead to universal pay TV, as opposed to what is now government licensed TV available free to the American public. For purposes of the current item, we must ensure that broadcasters can obtain connections to the common carrier network on terms that continue to allow universal access by the public. We should consider special carriage treatment for communications entities like broadcasting that are mandated by the government to serve the "public interest, convenience and necessity."

Generally, I support the creation of video dial tone infrastructure as another means of providing multichannel video competition to existing providers, including broadcasting. In taking this step, I believe that the two-tiered regulatory structure should provide telephone companies with sufficient incentives to make the necessary investment in facilities. By allowing telcos to provide advanced gateway services, the Commission is giving the telephone companies wide latitude to structure advantageous business arrangements. This could include the provision of installation services, monitoring, billing and collection, joint marketing and the ability to finance programming, without ownership.

I cannot support, however, allowing telephone companies to make direct investments in programming. Such a change alters the telephone company's traditional common carrier role, and could create incentives for the telco to discriminate against information service providers in which it does not have an investment. Also, by permitting telephone companies to become involved in programming, the Commission may undermine the conclusion that telcos should not be considered cable operators subject to franchising requirements. I also believe phone companies should not be permitted to buy cable facilities in the telephone company service area and then provide video dial tone service over those facilities. This could lead to circumvention of the franchising provisions of the Cable Act — and also lead to a one-wire monopoly instead of a two-wire, competitive situation.

For these reasons, I agree with the essential thrust of this most significant item, but I also concur in part and dissent in part. Overall, Mr. Chairman, I must congratulate you on bringing this historic rulemaking before the Commission. I will issue a comprehensive statement when the text of the item is released.

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This is an historic item with great positive ramifications for future communications advancements. I support the general thrust of the *Second Report and Order*, because I believe that creation of a broadband video transmission infrastructure is both necessary and inevitable. But it is vital that the Commission carefully consider all of the ramifications of this decision.

In moving toward video dial tone, the Commission is now at a crossroad at which different transmission media and alternative regulatory regimes intersect. The path we take today will to a certain extent determine the informational and entertainment choices available to the American people in the years to come. Our course should be guided not only by what we can envision for the future, but also by a fundamental appreciation for our past.

With these themes in mind, my support for this item is tempered by two overriding objectives: (1) the preservation and expansion of universal free TV whether over-the-air or by wire, and (2) the initiation of a second transmission pipeline that is competitive with cable television. Given these two guideposts, I cannot support every aspect of the *Second Report and Order* or the *Recommendation to Congress*, so I dissent in part.

Adrift in the Brave New World

As the Commission dreams of a wide array of new video services, it is important also to contemplate the value of the ones we already have. Chairman Sikes described just one of the benefits of our free broadcasting system in a speech last year:

> Most TV stations program from three to five hours of local news, information, and other shows daily. I would guess that an average TV station spends several million dollars a year on local news alone. This programming is the linchpin of localism. It is the 'public interest' commitment.[1]

Similarly, the House Energy and Commerce Committee Report on H.R. 4850 concluded recently that "[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."[2]

Of course, it is unnecessary for me to cite official reports to prove the obvious. Free television is an essential part of our culture and is the origin of a wide range of shared experiences for American viewers. Most people watch network entertainment programs as part of their daily routine. Free access to important sports events, such as the World Series, the Super Bowl and the Olympics contributes significantly to national cohesiveness and the quality of life. Public television fills a crucial niche, providing programs that might not be given a chance in a pure market system. Again, Chairman Sikes hit the nail on the head when he said that "broadcasters remain television's lifeline."[3]

If the public interest means anything, it is that the availability of such service to viewers must be preserved. This belief has been the essential touchstone guiding my service at the FCC.

My commitment to universal free TV started back in 1974, when I was first confirmed as a Commissioner. I promised Senator John Pastore, the Communications Subcommittee Chairman, that I would ensure that news, public affairs, political debate, major sporting events and entertainment would remain free to the American people. In my years on the Commission since then, I have endeavored to keep that promise.

Almost four years ago, I voted for a *Further Notice of Inquiry and Notice of Proposed Rulemaking* recommending that Congress eliminate the existing telco-cable cross-ownership restrictions. Upon further reflection, however, I issued a statement modifying my support, and expressing concern over some of the implications of altering the cross-ownership rules. As I noted at the time:

> A key question is whether telco entry will be a threat or boon to preserving free universal TV service. In my opinion the crucial public interest issue is the preservation of free local television service to all the public. Only broadcasting, not cable or phone fiber, has

> a government licensed obligation to provide TV service to the public. Broadcasting is the principal source of local news and government affairs, of vital local services like traffic, road, weather, school closing reports and emergency bulletins. And only broadcasting has a program-issues public file requirement for license renewal and for public inspection.

Comments on Cable Telco by Commissioner James H. Quello at 2 (released January 12, 1989). Consequently, I "depart[ed] from the Commission's tentative decision to the extent that it [did] not adequately focus attention on the potential impact of telco entry on free over-the-air broadcasting." *Id.* In many respects, the same is true of today's decision.

What will be the continuing role for broadcasters in the brave new world of Video Dial Tone? The Commission's Office of Plans and Policy in 1988 warned that if broadcasters "see their business as emitting non-ionizing radiation from the tops of red and white towers, then they may be in trouble."[4] OPP suggested that broadcasters may find it in their interest to relinquish their FCC licenses and instead concentrate on "producing, selecting, and packaging television programming" to be delivered through a "universal broadband network."[5]

Of course, it will not happen immediately, but it is possible to imagine a time in the not-too-distant future in which "broadcasters" no longer operate their own over-the-air transmission facilities. If, or when, that time comes, will we have moved from being a nation with universally available free television to one with universal pay TV? And if so, where does this leave the average viewer?

The actions the Commission takes today will draw the blueprint for how video transmission will occur in the future. It therefore is imperative that we do not undermine what we know to be in the public interest. We must ensure that broadcasters can obtain connections to the common carrier network on terms that continue to allow universal access by the public. In this respect, I believe our statutory mandate would support special tariff treatment for communications entities, like broadcasters, that are licensed by the government to serve the "public interest, convenience and necessity."

I am profoundly disappointed that I could not persuade a majority of my fellow Commissioners to agree on this point. I had sought recognition in the text that special tariff rates for broadcasters (or others who provide free information services) would not necessarily violate Title II nondiscrimination requirements. I was not suggesting that the Commission *require* special tariffs; only that it acknowledge that the public interest inherent in a broadcast license could justify a lower rate category without being unreasonably discriminatory.

Only Commissioner Duggan shared my views in this matter. I applaud his strong commitment to universal television service, and especially to public television.

Ignoring the significant public service obligations that apply to broadcasters alone, the majority declined to "require reduced access fees for certain programmers." *Second Report and Order* at ¶ 44. Such an approach "favors certain groups of speakers over others," according to the majority, and therefore is unreasonably discriminatory. *Id.* In other words, carriers are required *by law* to charge the same access rate (for like service) to HBO as to Channel 26, regardless of the different legal status and service requirements of the two entities. (The very next paragraph of the *Order* ironically proposes that "the video dialtone framework should seek to further the objective of regulatory flexibility." *Id.* at ¶ 45.) I am concerned that with this sort of tariff structure, the information that once was provided free to the public by broadcasters will be accessible only by subscription or on some type of pay-per-view basis.

I acknowledge that interconnection with a video dial tone system could not be free to customers in somewhat the same way that basic cable service is not free. But once the interconnection investment is made, what will it cost to obtain programming? The majority's one-price-fits-all approach suggests to me that programming, including formerly free local programming, will be subject to user fees. If information services that are now available over telephone lines provide a useful analogy, it is possible to envision being charged by the minute to watch local news.[6]

My concern is not relieved by assurances that access fees will be equal for all information

providers. This means only that they will be equally costly. And quite frankly, the majority's solemn commitment to equality of access would be more credible if the *Order* similarly barred discrimination at the enhanced gateway. Carriers will have wide latitude to "favor[] certain groups of speakers over others" through the provision (or denial) of enhanced services. While I recognize that common carrier services are subject to Title II requirements and enhanced services are not, the practical effect is to allow telcos effectively to subsidize their joint venturers.7

It is of course possible that broadcasters could benefit from telco-provided enhanced and non-common carrier services. But those services described in the *Order* — billing and collection, order processing, video customer premises equipment and inside wiring — are clearly more relevant for pay services than for the system of free broadcasting that we know today.

In approaching these policy issues, the following questions come to mind: In fifteen or twenty years, will it still be possible to flip on the TV after work and watch the news without paying a fee? Or will a person be able relax over a football game on the weekend without being a "subscriber"? Is the American public willing to give up such ready access to free television in exchange for a broadband delivery system that can duplicate some of the functions already available on a VCR?8

My position is that it is not an either/or question, and that the benefits of free commercial and public television are not incompatible with advanced technology. I had hoped that the text of the *Order* would seek some common ground, but instead it leans in the direction of a future in which all TV is pay TV. This tendency goes against everything I have stood for as a Commissioner, and I cannot join in it.

The Need For Facilities-Based Competition

The most persuasive reason to permit telephone companies greater latitude in providing video services is to provide competition to cable operators. The 1990 Cable Report found that "the multichannel video marketplace is not as fully competitive as it could be because of the absence of other distribution technologies to provide consumer choice."9 The Commission repeatedly has sought to stimulate multichannel competition with the understanding that it is difficult for regulators to duplicate the discipline of the market.

The *Second Report and Order* similarly seeks to foster "additional competition in the video and communications markets, so that free market forces, rather than governmental regulation, determine the success or failure of new services." *Id.* at ¶ [9]. For such competition to be effective, it must make available a separate multichannel network. As I noted in my 1989 statement on cable-telco cross ownership: "I see little upside to replacing one unregulated monopoly (cable) with another larger monopoly. My initial thought is that telephone entry into cable should be limited to providing a competitive alternative, not merely replacing existing cable operations." *Comments on Cable Telco by Commissioner James H. Quello* at 1.

The *Second Report and Order* similarly recognizes the need for facilities-based competition. It concludes, for example, that "a sweeping relaxation of our cross-ownership restrictions at this early stage in the development of an advanced infrastructure could undermine some or all of our public interest objectives." *Id.* at ¶ 28.

For this reason, I opposed early suggestions that telephone companies should be permitted to buy existing cable facilities and convert them to video dial tone systems. Such actions would thwart the very competition that we are trying to promote. Fortunately, we were able to agree that cable system buyouts would not serve the public interest.

Still, however, certain aspects of our final decision conflict with the goal of creating facilities-based competition. What is to be accomplished, for example, by recommending that Congress eliminate the statutory ban on cable-telco cross ownership? Aside from the fact that our advice may not be heeded, such a change would give telephone companies an incentive *not* to build new broadband facilities. Proposing a change in the rural cross-ownership exemption could have the same effect, unless we make it clear that telcos could only enter markets that do not have existing cable systems.

I realize that some now perceive the Commission's goal as the promotion of an advanced broadband video infrastructure, regardless of whether this results in alternative facilities. Whether we ultimately end up with

one, two or more wires to the home, in this view, is for the market to decide.

It is important to realize, however, that we do not operate in a pure free market system. Government intervention ultimately will have an effect on business decisions. For example, if cable operators perceive that they can avoid franchise obligations through the simple expedient of becoming "enhanced gateway service providers," we are not dealing with a market-based decision. The Commission must recognize and account for such incentives as it pursues the goal of facilities-based competition.

It is no answer to suggest that a single wire to the home is sufficiently competitive to the extent it is regulated as a common carrier. Leaving to one side the question of whether telephone companies that also compete as enhanced gateway providers may have an incentive to restrict competition, we simply cannot afford to give one entity that much control over the information that flows to the home.

Courts have affirmed a common carrier's ability to refuse service to certain information providers if the telco determines that such carriage would harm its corporate reputation.[10] In *Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co.*, for example, the U.S. Court of Appeals for the Ninth Circuit held that "Mountain Bell may exercise some business judgment about what messages, even lawful ones, it will carry" despite common carrier obligations requiring it to offer service to "all persons without discrimination."[11]

The Commission's Office of Plans and Policy has questioned the ability of carriers to exert this level of editorial control, noting that "[t]he criteria used by carriers in determining which audiotex services are 'objectionable' can be very subjective."[12] Indeed, news reports suggest that carriers may be tempted to avoid serving politically-oriented interactive information services.[13] One large owner of newspapers and broadcast stations reported that in a standard contract for audiotex service, the telephone company reserved the right "to withdraw any information without notice or liability." This provision was dropped, but only after the broadcaster agreed to limit the service to "only news, weather and sports information without user interaction."

As noted above, the stakes are too high to rely on a single wire to the home, and we must avoid policies that encourage that result. Moreover, where facilities based competition is lacking, the temptation to engage in anticompetitive conduct is greater. For the same reason, I oppose allowing telephone companies to make direct investments in programming. Such a change alters the telephone company's traditional common carrier role, and could create incentives for the telco to discriminate against information service providers in which it does not have an investment. Also, by permitting telephone companies to become involved in programming, the Commission may undermine the conclusion that telcos should not be considered cable operators subject to franchising requirements.

Conclusion

As I noted at the outset, I fully support the creation of a broadband video infrastructure as a means of providing competition and to bring a range of new services to the public. But my support is tempered by my concern for preserving public access to free television services and ensuring that information providers have alternative means of reaching viewers. Consequently, I concur in part and dissent in part to the Commission's decision.

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[1]Remarks of Chairman Alfred C. Sikes before the International Radio and Television Society, September 19, 1991, at 6.

[2]H. REP. 102-628, 102nd Cong., 2d Sess. (June 29, 1992) at 50. Polls indicate that television is the primary source of news for 81 percent of the public. The Roper Organization, AMERICA'S WATCHING 11-12 (1991).

[3]Remarks of Chairman Alfred C. Sikes before the International Radio and Television Society, September 19, 1991, at 7.

[4]R. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change* (OPP Working Paper No. 24, November 1988) ("*Through the Looking Glass*") at 84.

[5]*Id.* at 84, 87.

[6]The Commission expressly compares envisioned video dial tone services with "Prodigy and Compuserve services which offer a range of information to consumers." *Second Report and Order* at 4 n.5. *See also id.* n.23 ("Video gateways would . . . be analogous to and could perform many of the same functions as the existing non-video gateways offered for non-video information services."). Access to such on-line services typically is based on a per-minute charge that varies widely. Similarly, access to various 900-type information services by telephone can cost 50 cents to several dollars per call.

[7]The majority assumes that alternative gateway providers will act as a check on possible telephone company abuses. But no other entity will have the entrenched infrastructure and personnel readily available to do so as effectively as the telephone companies.

[8]The *Second Report and Order* suggests that "a local telephone company and other customers of the common carrier platform could offer video processing functions and capabilities that would allow a subscriber to store selected video programs or replay portions of a program, or to create tailored menus, searches, and navigational aids." *Id.* at ¶ 12. I am not suggesting that video dial tone, as envisioned in this item, is limited only to the same functions as a VCR. But the capabilities are largely unknown, as is the potential market.

[9]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5002-03 (1990). *See also id.* at 5005, 5007.

[10]*Carlin Communication, Inc. v. Southern Bell Telephone & Telegraph Co.*, 802 F.2d 1352, 1361 (11th Cir. 1986) ("a private business is free to choose the content of messages with which its name and reputation will be associated").

[11]827 F.2d 1291, 1293-94 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 1586 (1988).

[12]*Through the Looking Glass* at 65. OPP noted that Michigan Bell has refused to provide billing services for customers whose messages are "inflammatory" and "likely to offend" various groups, or that would otherwise "have a detrimental effect on Michigan Bell's image or reputation." *Id.* at 65-66. Given the breadth of this exclusion from service, OPP wondered whether the carrier "could refuse to bill for a 976 audiotex consumer hotline that consistently complained about the telephone company's rates and service". *Id.* at 66.

[13]*See* COMMUNICATIONS DAILY, July 8, 1992 at 4.