Dissenting Statement of
Commissioner James H. Quello.

In Re: Answer to Petition for Rehearing filed in *Schurz Communications, Inc. v. FCC*, No. 91-2350 (7th Cir.).

On January 12, 1993, the Court directed counsel for Schurz Communications, Inc., *et al.* to answer a *Petition for Rehearing* ("*Petition*") filed by the Coalition to Preserve the Financial Interest and Syndication Rule, *et al.* in *Schurz Communications, Inc. v. FCC*, No. 91-2350 (7th Cir.). I believe it is inappropriate for the Commission to respond to the January 12 *Order*, both under its express terms and under the Court's operating procedures. There should be at least some recognition of the fact that this is a party to which the Commission was not invited. I also oppose the Commission's participation because the *Petition for Rehearing* is wrong on the merits. Consequently, I dissent from the decision to direct the General Counsel to file a response.

The unambiguous terms of the January 12 *Order* should have been sufficient to alert the majority that no Commission response was necessary. The *Order* is directed to "Schurz Communications, Incorporated, et al." and it states that "[c]ounsel are requested to file an *answer* to said petition on or before 1/26/93." (emphasis added). This clearly is a request for briefs opposing the Petition, and not symbolic "me too" pleadings. The Court's operating rules support this reading of the *Order*. They specify that when an answer to a petition for rehearing is requested, "the clerk shall notify the prevailing Party that an answer shall be filed within 14 days. . . ." IOP 5(a). Under no stretch of the imagination could the Commission be considered the "prevailing party" in this case. And I cannot fathom how more verbiage from this agency will assist the Court in its deliberations.

Additionally, the assumptions underlying the Petition are plainly wrong. To begin with, it is based on a distorted reading of the December 7 Opinion. The Petition

misquotes the Court when it states that "the panel has decided that no regulation is 'preferable' to continued regulation." *Petition* at 6, misquoting Dec. 7 Opinion at 4. *See also id.* at 4. Petitioners ignore the five options outlined in the December 7 Opinion, ranging from vacating only the 1991 rules to vacating all rules. The Court avoided the most extreme alternatives, holding only that it was "preferable" to adopt essentially the remedy advocated by the Commission majority: allowing the 1991 rules to remain effective for a brief time to permit the FCC to conduct a remand proceeding. From an institutional perspective, it is a little rude for the majority now to complain after being given, for the most part, what it said it wanted.

On the merits, the Petitioners' (and the FCC majority's) assertion that the Court impermissibly substituted its judgment for that of the agency is similarly flawed. This view of the prevailing law leaves little room for judicial review. Indeed, it ignores that the Commission's wide latitude to make policy based upon predictive judgments implies a correlative duty to demonstrate that the policy actually produces the expected results. *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). It is "axiomatic" that "an agency's action will be set aside by a reviewing court whenever the agency fails to provide a reasoned basis for its decision." *Flagstaff Broadcasting Foundation v. FCC*, No. 91-2396, slip op. at 7 (D.C. Cir., Dec. 4, 1992) citing *Motor Vehicle Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). That the Commission's decision lacked a reasoned basis was more than amply exposed by the panel's November 5, 1992 Opinion.

Petitioners' argument also ignores history. The U.S. Court of Appeals for the D.C. Circuit was presented with a very similar case in *Home Box Office, Inc. v. FCC*, where it set aside the Commission's "pay cable" rules. 567 F.2d 9 (D.C. Cir.) *cert. denied*, 434 U.S. 829 (1977). In an interconnected series of rulemaking proceedings, the Commission had adopted rules restricting the types of feature films and sporting events that could be shown on premium cable channels and subscription broadcast

stations. The goal of the rules was to prevent "siphoning" of programming away from conventional television stations.

Like the finsyn rules, the pay cable regulations had as their goal "increas[ing] program diversity." *Id.* at 25. And, like the *Report and Order* at issue here, the Commission attempted to justify the pay cable rules with "conclusory phrases," such as claiming that the regulations would "enhance the integrity of broadcast signals." *Id.* at 28 (citation omitted). The Court found that the Commission's "generalities" crossed "the line from the tolerably terse to the intolerably mute." *Id.* Additionally, the Court found the rules to be unsupported by the record, *id.* at 37-40, illogical, *id.* at 40-42, and in conflict with other Commission policies. *Id.* at 28-32, 43.

In short, the comparison to the finsyn proceeding is complete. Yet there is one final, almost eerie, similarity. Because the pay cable orders under review "amend[ed] previous, more stringent . . . rules," *id.* at 17, various parties urged the Court not to eliminate the regulations but to confine its inquiry to "the rather limited question of the validity of the relaxation of prior Commission rules." *Id.* at 22 n.27. Nevertheless, the Court upheld subscription television rules but "vacate[d] the orders as arbitrary, capricious, and unauthorized by law in all other respects." *Id.* at 18.

Given this context, Petitioners' suggestion that "the panel could not properly bifurcate the Commission's order," Petition at 8, falls flat.[1] Not only does the Court have clear authority to uphold the Commission's deletion of the 1970 rules, such a

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[1]Petitioners' authority for this novel position is a 1985 Court of Appeals decision by (then) Judge Scalia on the subject of curtailment plans for a natural gas pipeline. *See North Carolina v. FERC*, 730 F.2d 790 (D.C. Cir. 1984). But in that case, the Court dealt with a series of compensation arrangements that the agency expressly stated were "not severable." *Id.* at 796 (quoting FERC order). Nothing in that (or any other) decision suggests that a reviewing court may not vacate part of an order while upholding other parts. Judge Scalia issued such an order one year later in *Illinois Commerce Commission v. Interstate Commerce Commission*, 776 F.2d 355 (D.C. Cir. 1985). There, in reviewing ICC rule amendments governing abandonment of railroad lines and permissible subsidies to avoid abandonment, the Court vacated "that portion of the regulation applicable to labor costs in subsidy determinations and [upheld] the portion applicable to labor costs in abandonment determinations." *Id.* at 360. *See also id.* at 360-61 ("We vacate and remand the regulation insofar as it governs subsidy calculations and uphold it insofar as applied to abandonment.").

ruling would be consistent with the Commission's intent. It is beyond dispute that the Commission has no interest in reviving the old regulations. For almost a decade the Commission has believed that the rules are obsolete.[2] I am the only member of the Commission that was present for the 1983 *Tentative Decision* to eliminate the rules. I dissented at the time, because I felt the networks wielded sufficient market power to justify Commission concern. But with the vast changes in the media environment that were so thoroughly documented by the current record, I concluded that my concerns were no longer valid.[3] Given my status as the last hold-out to support the 1970 finsyn rules, I can testify that it is long past time to eliminate them. In any event, any doubt about the Commission's intent can be resolved in the latest rulemaking proceeding, which already has commenced, without the need for rehearing by the Court.

For these reasons, I believe there is no basis for the Court to grant the *Petition for Rehearing*.

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[2]*See Tentative Decision and Request for Further Comments in Docket 82-345*, 94 F.C.C.2d 1019 (1983). Counting the extensive staff study of the rules published in 1980, the Commission's repudiation of the rules goes back even farther. FINAL REPORT OF THE NETWORK INQUIRY SPECIAL STAFF (1980).

[3]*See Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3216-19 (1990) (Dissenting Statement of Commissioner Quello).