Separate Statement
of
Chairman James H. Quello

Second Report and Order, In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.

This decision is a testament to a spirit of compromise in which reasonable people can disagree, or, perhaps more importantly, in which people can disagree reasonably.

The financial interest and syndication ("finsyn") rules have generated more controversy than any other single issue during my tenure at the Commission. It is no secret that the issue has divided this agency over the past three years. Indeed, the three Commissioners voting on this *Second Report and Order* approached the matter from sharply divergent perspectives.

Despite these differences, we were able to work together to reach a decision that, for the most part, is acceptable to all. Each office contributed creative ideas to the final outcome. And while it was not possible for every Commissioner to support fully every aspect of the *Second Report and Order*, we at least avoided the discord that cluttered previous proceedings. I believe the process by which we reached the decision represents the essence of reasoned decisionmaking.

I am writing separately to thank my colleagues for their good-natured cooperation in this proceeding, but also to underscore my own unease with certain aspects of the ruling. My reading of the record suggests that networks should be allowed actively to syndicate both off-network and first run programming. However, I was persuaded to accept continuing syndication limits on the understanding that they would expire at a specified time, and those seeking to reimpose such restrictions would face a heavy burden of proof.

Accordingly, I am voting in favor of the overall result, but with respect to the continuing restrictions on network involvement in the first run market and active syndication, I can only concur.

Just as the burden of proof will be on the proponents of rules when we conduct our final review following modification of the consent decrees, the Commission has an obligation to provide both logical and evidentiary support for those rules we retain today. But a searching review of the record really supports only two principal attributes of the syndication restrictions: their brevity and their presumptive expiration.

At the outset, I should emphasize that I fully support the public interest goals underlying the syndication rule. Specifically, I believe that the growth of independent stations has contributed significantly to the viewing options available free over-the-air to the American public.[1] But apart from rhetoric, I find nothing in the record to suggest that the finsyn rules have contributed significantly to the growth of independent stations.[2] Ironically, the strongest evidence before us shows overwhelmingly that UHF stations have been strengthened not because of the finsyn rules, but in spite of them — through the growth of the Fox Broadcasting Company.[3]

Since networks have not been active in syndication for more than two decades, the Commission should articulate exactly what the threat would be to allowing such entry now. The *Second Report and Order* assumes that networks could affect the supply of programs available to independent stations. Taking the anticompetitive motive for granted, this would be a serious concern only if networks syndicate a significant portion of the available programming, *and* they manage to predict which shows will be most popular, *and* they persuade other profit participants in the program to go along in an anticompetitive effort *and* they prevent other syndicators in the market from supplying attractive alternatives.[4] But this series of assumptions is implausible.

Networks currently are uninvolved in the syndication market, and, as the rules' proponents acknowledge, it would take years for them to develop a significant presence.[5] Even if they did so, it is doubtful that networks could control the market. As I noted in dissent to the *Reconsideration Order* in this docket, "the networks would have to produce hits in sufficient quantities to make inroads into a market that now

belongs exclusively to the studios and other syndicators. Since even the majority recognizes that 'it is virtually impossible to tell at the outset whether a proposed program will become a "hit,"' *Reconsideration Order* at ¶ 36, it is difficult to envision a strategy by which the networks could dominate the market." *Evaluation of the Syndication and Financial Interest Rules*, 7 FCC Rcd. 345, 396 (1991) (Commissioner Quello dissenting), *rev'd and remanded sub nom. Schurz Communications v. FCC*, 982 F.2d 1043 (7th Cir. 1992), *rehearing denied*, (February 16, 1993).

Even if the networks could gain the power to affect the syndication market, it is not at all certain that they would have the incentive to behave anticompetitively. For example, networks have no reason to warehouse popular programs in that syndication tends to improve the ratings of the continuing show. Examples of this phenomenon include *Cheers*, *Rosanne*, *Murphy Brown* and *Full House*.[6] To whatever extent bad motives could lead a network to overlook its own economic interests, other profit participants ensure that programs will be syndicated promptly and to the highest bidder.[7]

In the end, it is an abundance of caution — rather than record support — that gives the Commission a reason to retain syndication limits. Even commenters supporting the rule admitted that "there is no hard evidence concerning the precise extent to which ABC, CBS or NBC would harm independent stations by engaging in affiliate favoritism or warehousing practices or use their control over their O&Os to handicap the launch of independently produced first-run programs."[8]

Given such a sparse record, it might have benefitted the Commission's analysis to focus on what actually *is* happening in the syndication market, rather than to speculate on what the networks *might* do. Such an examination would have revealed that the syndication industry is concentrated and would benefit from additional competition.

In 1991-92, for example, the top ten syndication firms had 82.3 percent of the market. Six of the top ten firms were major studios with a 49.2 percent share. The top ten first run syndicators have an 85.3 percent market share. Kingworld and Paramount together control 40 percent of the syndication viewing audience. Add Buena Vista and Warner Brothers, and the total exceeds 50 percent. Six years ago, sixteen syndicators had shows in the top 20. But in 1992, only eight syndicators had first run product in the top twenty.[9]

Considering facts such as these, the Commission reasonably could have concluded that immediate network entry into syndication would increase both competition and diversity. Indeed, these facts made it very difficult for me to agree that it was reasonable to continue imposing syndication restrictions. After all, in 1991 the Commission found that it was safe to allow networks to actively syndicate in-house productions up to 40 percent of their prime time schedules. Nevertheless, the new syndication rules are more restrictive than the prior regulations, even though more direct competition to network prime time programming has emerged during the past two years. *See Second Report and Order* ¶¶ 43-51.

The remaining rules are predicated on the assumption that the syndication market — and particularly the first run market — are fragile flowers that would wilt at the first sign of network predation. But apart from the understandable lobbying posture of interested parties, there is little in the record to support this view. Perhaps a more balanced assessment can be gleaned from trade press reports, where one Warner Brothers syndication executive noted: "Prime time is the final frontier. . . . We own kids [programming] and we have pretty much taken over daytime with talk shows. We dominate late night, early fringe and prime access. Now we're looking at prime time."[10] I wonder whether such market participants need our protection.[11]

In addition, I question whether some of the restrictions we impose on network involvement in the first run market actually will promote diversity. For example, by allowing networks to invest in first run programming only when it is "solely produced," we eliminate the profit participants who represent the best check on affiliate favoritism. Additionally, by giving the networks the right to actively syndicate first run programs that are sold only in foreign markets, we encourage investment in shows the American public will never see. I am unsure how either provision serves our policy goals.

I would have preferred to eliminate the syndication ban for both off-network and first run programming, and, pending final expiration of the regulations, to rely on behavioral safeguards to prevent the possibility of warehousing or affiliate favoritism. But while I believe this would have been the most reasonable course of action, it is not the only reasonable policy choice.

As noted above, I can accept — albeit reluctantly — continuing syndication restrictions so long as it is understood that they will expire in a limited time. And while I am troubled by the idea of "taking back" the right to actively syndicate in-house productions, it is important to acknowledge that this right has not yet been exercised because of the network consent decrees. As we enter the final phase of the rules before they expire, I believe it is helpful to have simpler regulations that lack the "Rube Goldberg complexity" of the 1991 scheme. This I think we have achieved.

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[1]The expansion of independent television has created more local viewing choices, including more news and public affairs programming. This is the type of diversity that implicates the public interest, not — as some commenters suggest — the fact that off-network programs can be seen again and again on independent stations. *E.g.*, Independent Stations' Comments at 8. Indeed, trying to find an important public interest value in viewers' enhanced access to "reruns" contradicts the premise of our syndicated exclusivity rules. 47 CFR § 76.151 (1993).

[2]*See, e.g.*, INTV Comments at 12-18; Independent Stations' Comments at 7. *But see* CBS Reply at 18, quoting INTV Initial Comments filed in June 1990 ("an assertion that the rules caused the growth of independent television may be an exaggeration"). It is noteworthy that UHF station growth does not correlate with the finsyn rules — most of the expansion did not begin until 1979. Growth of UHF primarily was due to cable television, development of advertising markets and satellite delivery of syndicated programming. *See* CBS Reply at 18-19; ABC Reply at 18. *See also* NBC Comments at 16.

[3]Eighty-nine percent of Fox affiliates are UHF stations. FBC Affiliates Comments at 1. The emergence of Fox has strengthened the ability of UHF stations to compete and to produce news and other original programming. *Id.* at 6-9, 11. In the past 2 years, Fox has assisted 19 affiliates in creating local news services, and 17 more have requested assistance. Fox Comments at 7. Additionally, the growth of Fox has strengthened non-Fox independents by allowing more programming to be available to the other stations (including sports) and by freeing up local advertising markets. *Id.* at 7-8. *See Second Report and Order* ¶ 104.

[4]As one commenter put it, "[t]he effect on the competitive position of independent stations would be particularly severe if *each* of the networks controlled a substantial amount of syndicated programs, and *all* of the networks gave preferential treatment to their affiliates and their owned and operated stations." Independent Stations' Reply at 6-7 (emphasis in original).

[5]*See* Independent Stations' Reply at 8 ("no network owns a significant quantity of syndication rights today and that it would take the networks a few years to build a large inventory of off-network syndication rights if the syndication rule were repealed"). *See also* CBS Reply at 12 (Because of Fox and the growth of first run, there is a glut of programming in the syndication market. There will be 20 off-network half hours available for the 1994-95 season.).

[6]CBS Reply at 15.

[7]*See* Fox Reply at 4-5.

[8]Independent Stations' Comments at 11. *See also* Kingworld Comments at 4 (Diversity probably would not be harmed by network syndication of off-network shows. Networks might be more experimental in programming decisions if they could share in back-end rights.). The Independent Stations assert, however, that the Fox network, which has not been constrained by the rules, has favored its O&O stations in syndication practices. Independent Stations' Comments at 11-14. Those charges are without substance. *See* Fox Reply at 3-8.

[9]NBC Comments at 25; CBS Comments at 10.

[10]J. Mandese, *Power Surge*, ADVERTISING AGE, March 8, 1993 at S-1. Such comments are reminiscent of the remarks of Roger King, Chairman of King World, who reportedly said of his company, "[w]e ruled the 80s . . . and now we're locked in halfway through the '90s." Mahoney, *'This Company is Just Really Beginning,'* ELECTRONIC MEDIA, June 24, 1991 at 30.

[11] While some commenters point to the ownership by networks of major market stations as a reason for the rule, *e.g.*, Independent Stations' Comments at 9, this factor does not distinguish the networks from other major broadcast group owners, some of whom are active in first run syndication. CBS Reply at 17; Fox Reply at 13. Nor does the fact that networks have affiliate relationships operate as a drag on the first run market. It certainly has not hindered the launch of new first run prime time series, even when this has led to preemptions of network shows. *See, e.g.*, ABC Reply at 17; Fox Reply at 16.