September 23, 1993

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

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

In my initial dissent to the Commission's finsyn decision I wrote, "If the Commission in 1991 set out to adopt finsyn rules for the first time, I find it inconceivable that anyone would consider doing so." *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3247 (Dissenting Statement of Commissioner Quello). I feel somewhat vindicated in this statement by the Commission's decision at today's meeting to reject finsyn-type restrictions on cable television operators.

This suggests to me that the types of restrictions the Commission adopted nearly a quarter century ago have no place in today's diverse and dynamic media marketplace. In this regard, I think today's decision to reaffirm the Commission's April 1 *Second Report and Order* is correct. Although I have some reservations about the continuing restrictions, I said at the time that the decision was "a testament to a spirit of compromise." I still believe this to be true.

In other words, I agree with almost all of today's decision. However, I found some of the arguments for reconsideration to be persuasive that, unfortunately, were not incorporated into this decision. It is in this very limited respect that I dissent.

Some petitioners suggested that the two-year sunset period was arbitrary in that it does not allow the Commission to adequately consider market conditions. I disagree with this argument to the extent some suggest that our procedure will cause premature repeal of the remaining rules. If, after the scheduled review, the Commission believes that some rules should be retained, it certainly may vote to do so.

On the other hand, if the world of mass media is transformed before the scheduled time for review, the Commission should be in a position to accelerate the process. Consider the real or potential changes that have occurred in the five short months since we adopted the *Second Report & Order*:

— A U.S. District Court in Virginia struck down as unconstitutional the cable-telco cross-ownership rule, clearing the way for Bell Atlantic (and possibly other telephone companies) to get involved in program production;

— News stories have persisted that Time-Warner and other major industry players are poised to launch a fifth broadcast network;

— Viacom and Paramount announced their intention to merge, a deal that has attracted additional interest in strategic alliances;

— Five TV station groups have combined forces to produce first run syndicated programming to provide themselves with an alternative to existing programming sources.

Given such significant developments, we may not even recognize the media landscape in a matter of months — not years.

A wise man once described as "regulation by robot" an administrative decision to decide a matter in advance and not to deviate from that time line, regardless of the facts. My question is this: What could be more robotic than to put off any further review for two years if the critical assumptions underlying the rules vanish long before the designated time?

I would have added a provision to expressly invite interested parties to seek expedited review of the remaining rules if warranted by further market changes. With such a procedure, the Commission would have been in a position to examine the facts to see if petitioners could make the case for earlier review. However, I could not persuade a majority to include such a provision.

Additionally, I would have further streamlined some of the reporting conditions imposed on the networks. Upon further reflection, I can think of no reason why the FCC should require the networks to dig through decades worth of old records to report on program interests acquired before 1970. I cannot imagine how this information will assist the Commission in its further review of the rules. This agency compiled an exhaustive record on the pre-1970 programming practices of the networks when it adopted the finsyn rules. That record will be more than sufficient when the time comes for further review. Similarly, I would dispense with reporting requirements on network in-house productions that are syndicated only in foreign markets. We should be more cautious about creating unnecessary administrative burdens — both inside and outside the Commission — if the information we seek is not relevant to our future proceedings.

I will provide a more detailed statement of my views when the text of the *Memorandum Opinion and Order* is released.

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This suggests to me that the types of rules the Commission adopted for the established networks nearly a quarter century ago have no place in today's diverse and dynamic media marketplace. In this regard, I think today's decision to reaffirm the Commission's April 1 *Second Report and Order* is correct. Although I have some reservations about the continuing restrictions, I said at the time that the decision was "a testament to a spirit of compromise." I still believe this to be true.

In other words, I agree with almost all of today's decision. However, I found some of the arguments for reconsideration to be persuasive that, unfortunately, were not incorporated into this decision. It is in this very limited respect that I dissent.

Some petitioners suggested that the two-year sunset period was arbitrary in that it does not allow the Commission to adequately consider market conditions. I disagree with this argument to the extent some suggest that our procedure will cause premature repeal of the remaining rules. If, after the scheduled review, the Commission believes that some rules should be retained, it certainly may vote to do so.

On the other hand, if the world of mass media is transformed before the scheduled time for review, the Commission should openly acknowledge that fact and stand ready to accelerate the process. Consider the real or potential changes that have occurred in the six short months since we adopted the *Second Report & Order*:

— A U.S. District Court in Virginia struck down as unconstitutional the cable-telco cross-ownership rule,1 clearing the way for Bell Atlantic (and potentially other telephone companies) to get involved in program production;

— News stories have persisted that Time-Warner and/or other major industry players are poised to launch a fifth broadcast network;

— Viacom and Paramount announced their intention to merge, a proposed deal that attracted a competing bid from the QVC home shopping cable network;

— Five TV station groups have combined forces to produce first run syndicated programming to provide themselves with an alternative to existing programming sources.

In the even more brief time between the Commission vote in this proceeding and the release of this text, Bell Atlantic and TCI, the nation's largest cable television operator, announced their intention to merge. If it is consummated, this transaction would be the largest merger in U.S. history — twice the size of the Time-Warner merger — and it would combine telecommunications, cable and programming businesses on a scale unimaginable when the Commission began reconsidering finsyn.

Given such significant developments, we may not even recognize the media landscape in a matter of months — not years. Obviously, this would have profound implications for the continuing validity of any finsyn rules.

In its bid to merge with Paramount, Viacom has been joined by both NYNEX and Blockbuster Video. This possible combination would create a single entity that is involved in motion picture production and distribution, cable channel networking, cable system ownership, television programming, publishing, broadcasting, telecommunications, video rentals, and interactive

multimedia products. With regard to broadcasting alone, the merged company would own 12 television stations, would produce over 30 hours of new television programming weekly and would control what Viacom describes as "an enormous syndication library."

The proposed merger of Bell Atlantic and TCI dwarfs the prospective Viacom-Paramount deal. It could fundamentally alter the communications landscape and no doubt will trigger other similar alliances. *See, e.g.*, Foisie, *Handicapping Telco-Cable Partnerships*, BROADCASTING & CABLE, October 11, 1993 at 37.

In short, we are entering an era in which programming and other software producers are combining with firms engaged in various forms of distribution. The only entities excluded from this trend are the companies that have been most responsible for providing free over-the-air broadcasting to the American public — the established television networks. This makes less sense with each passing day.

Even if the Commission were to limit its review to changes in the broadcast sector, it appears that competition is developing even more rapidly than anticipated. Press accounts strongly suggest that major studios are racing to create a fifth network. *See, e.g.*, Flint, *Warner Unveils a Fifth Network*, BROADCASTING & CABLE, August 30, 1993 at 6; Tyrer, *Warner TV Plan Pivots on Stations*, ELECTRONIC MEDIA, August 30, 1993 at 1; Flint, *Who Will Be the First With a Fifth Network?*, BROADCASTING & CABLE, October 18, 1993 at 18. If this develops, the additional competition would further reduce any remaining rationale to constrain the established networks.

Moreover, independent stations would need less protection because most would likely qualify for affiliation with the new network. *E.g., Suppliers See Market Shifts*, BROADCASTING & CABLE, August 30, 1993 at 14. As the head of Warner Brothers Television said in a recent interview:

> We are very excited about the fifth network. We are program suppliers, and that's what my operation is about. We are the number one supplier at three of the four networks right now. Hopefully, we'll be the number one supplier at four out of the five. . . . What's been happening right now is the lining up of the various station groups. And I don't think it will fragment it any more because all the stations will be doing is unifying station groups that are already out there.[2]

For independent stations that do not affiliate with new networks, protectionist policies will be less necessary as station groups join to produce first run programming. *See* Benson, *Stations Buck System*, DAILY VARIETY, September 1, 1993 at 1 ("In an unprecedented effort to break the grip of the major studios and networks over production and distribution, five TV station groups are teaming to produce their own fare . . . .").

Of course, the Commission cannot make policy based on prospective press reports, and none of these arrangements may come to pass. Then again, they may all bear fruit. The point is, even a casual observer of the media landscape must be aware that we are in a time of great change.

A wise man once described as "regulation by robot" an administrative decision to decide a matter in advance and not to deviate from that time line, regardless of the facts. My question is this: What could be more robotic than to put off any further review for two years if the critical assumptions underlying the rules vanish long before the designated time?

I would have added a provision to expressly invite interested parties to seek expedited review of the remaining rules if warranted by further market changes. With such a procedure, the Commission would have been in a position to examine the facts to see if petitioners could make the case for earlier review. However, I could not persuade a majority to include such a provision.

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Similarly, I would dispense with reporting requirements on network in-house productions that are syndicated only in foreign markets. We should be more cautious about creating unnecessary administrative burdens — both inside and outside the Commission — if the information we seek is not relevant to our future proceedings.

In the larger scheme of things, my concerns about this decision are relatively minor. Taken as a whole, it represents substantial deregulation, and promises to complete the process within a reasonably foreseeable time. Better a bit late than never.

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[1] *The Chesapeake and Potomac Telephone Company of Virginia v. United States*, Civil No. 92-1751-A (E.D. VA August 24, 1993).

[2] *Warner TV's Leslie Moonves and Television in the Fast Lane*, BROADCASTING & CABLE, October 11, 1993 at 19, 24.