Adopted 5/18/88

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries.

In 1980, I registered a vigorous dissent to elimination of the syndicated exclusivity rules. At that time, I believed that elimination of these rules would result in a gross disparity in the marketplace to the detriment of local broadcasting. Given the recent demise our must carry rules, the need for syndicated exclusivity becomes all the more important.

As a strong supporter of syndicated exclusivity protection, I find myself in the uncomfortable position disagreeing with the procedures established to reinstate these rights. Accordingly, I feel compelled to register a concurrence on this issue.

My concern revolves primarily on the application of our new rules to existing programming contracts. When the syndicated exclusivity rules were eliminated in 1980, the Commission allowed the importation of duplicative distant signals notwithstanding the broadcaster's contractual rights to exclusivity in the marketplace. The Commission's decision, however, departs from this procedure and does not restore syndicated exclusivity to all existing contracts. Rather, the Commission establishes various mechanisms to determine whether existing contracts have syndicated exclusivity protection.

In order for the Commission to determine whether a broadcaster has exclusivity protection, the licensee must demonstrate that its contract contains specific provisions stating in effect that the parties contemplated a reinstatement of the syndicated exclusivity rules. I doubt that such precise language appears in a significant majority of existing contracts. Obviously, there are numerous ways parties could draft language evidencing an intent to afford a licensee syndicated exclusivity protection. I simply do not see the need to require existing contracts to contain specific language stating that the parties contemplated reimposition of rules. Rather, if there is language referencing syndicated exclusivity, then it should be sufficient for the Commission to grant exclusivity protection. Giving legal effect only to specific language created by the Commission years after the contracts were drafted is unduly restrictive. Moreover, this approach substitutes the Commission's judgment for that of the parties as to how to draft syndicated exclusivity contracts. More importantly, requiring such language is antithetical to the central premise of our decision that the intent of the parties, not the government, should govern. It is unreasonable to expect parties to have had the clairvoyance to anticipate the language envisioned by the Commission years after the contracts were executed.

Simply stated, I do not believe the decision goes far enough in correcting the gross disparities now existing in the broadcast marketplace. The procedural hurdles created by this decision place local broadcasters in a position where they will be forced to renegotiate their contracts with program syndicators. In other words, they will be forced to rely on the good graces of program syndicators to determine the scope of their exclusivity rights. I believe the Commission should not delegate its public interest responsibilities on this issue.

I am also troubled issuing a Further Notice of Proposed Rulemaking concerning the non-network territorial exclusivity rule. The rule is essential to ensure that television stations in overshadowed markets are able to negotiate for programming in areas they are licensed to serve. The Commission licenses these stations to serve their local communities. Accordingly, while I agree that the freedom to contract for exclusive rights is essential to the operation of the marketplace, it must, nevertheless, be balanced against countervailing communications policy, in this case localism. Moreover, unlike syndicated exclusivity, we are not confronted with a marketplace imbalance that is attributable to the compulsory license.

There is little or no evidence in the record contradicting the Commission's previous conclusions regarding the need for the current non-network territorial exclusivity regulations. The rule is essential to ensure the distribution of quality program product to small markets that are adjacent to large television markets. I see no need to question the rule at this time.