OCT 13 1988

Separate Statement
of
Commissioner James H. Quello

Concurring in Part

In re: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries (General Docket No. 87-24)

541

I concur with issuing a Further Notice in this proceeding because it proposes to expand syndicated exclusivity protection to noncommercial broadcasters. The geographic scope of our syndicated exclusivity rules is also worthy of discussion. Unfortunately, I am unable to support various parts of the Further Notice of Proposed Rule Making.

I am primarily concerned with the Commission's treatment of the non-network territorial exclusivity rule. It is interesting to note that the item is not as conclusive as the Notice of Inquiry or the Report and Order in this proceeding. While the change in tone is a step in the right direction, I must nevertheless disagree with the Commission's approach to reexamining the rule.

The existing non-network territorial exclusivity rules were adopted to correct market imperfections caused by the Commission's allocation plan. Stations in markets that are located adjacent to larger television markets may be excluded from obtaining program product. After careful consideration, the Commission adopted the 35 mile non-network territorial exclusivity rule to ensure that stations in fringe areas and overshadowed markets have access to programming.

There is nothing in the record to indicate that the problem of overshadowed markets has been resolved. On the contrary, several commenters state that expanding the 35-mile rule will have a disastrous effect on their ability to purchase quality programming. Indeed, WMUR-TV, which was one of the examples cited by the Commission when it first adopted the non-network territorial exclusivity rules, aptly illustrates the problems facing stations in fringe markets. The Motion Picture Association of America stated that the 35-mile rule actually enhanced program distribution. Weighed against this uncontroverted evidence is the unsubstantiated belief that the 35-mile non-network territorial exclusivity rule may somehow impair program production and distribution. Apart from an unflinching belief in marketplace theory, there is no support for this contention.

What is troubling about the Commission's decision, is that it places an evidentiary burden on the parties to disprove the majority's preconceived economic theories. The evidence already submitted in this record appears to satisfy most of the Commission's questions. Curiously, the Commission solicits data not only on the issue of whether stations in fringe areas will have access to programming, but also what effect the lack of access to top-ranked programming has on these stations. The answer to this line of questioning should be self evident. This is especially true, given our previous conclusions that loss of audience due to duplication is harmful. If duplication is harmful, then lack of access to programming is obviously damaging to local broadcasters.

No one disputes that private contractual freedom is necessary for a properly functioning program market. However, the freedom to contract must be tempered by competing communications policy objectives. In this case, the Commission's policy allocating stations to specific local communities defines the local programming market. Consistent with this policy, it is incumbent upon the Commission to ensure that stations have access to program product. Reliance on antitrust enforcement simply will not ensure that fringe stations will have access to programming. Given the paucity of evidence in this proceeding demonstrating a need for a change in our existing rule, I see no need to question its public interest value at this time.

The Further Notice also solicits comment on the network territorial exclusivity rule. At first glance, it would seem that the problem of overshadowed markets would be equally applicable to this rule. However, because networks attempt to clear advertising in all markets, there is an incentive to make sure that stations in all markets have access to network programming. Thus, unlike the non-network programming market, there may be a natural self-policing function with respect to the distribution of network programming. Nevertheless, depending on the strength of the affiliate, it is possible that larger stations may attempt to limit additional network affiliation with stations located on the fringe of their market. Such a strategy would make sense where the affiliate would gain access to fringe markets through cable importation and without the limiting effect of the network nonduplication rule. Thus, I cannot agree with the tentative conclusion in the item that private parties are in a better position to determine the appropriate market boundaries.

Finally, the item reaches the tentative conclusion that the geographic limits, if any, should be the same for all of the program exclusivity rules. While this approach has the appeal of consistency, I cannot agree with the tentative conclusion. Each rule is based on a different communications policy.

For example, the non-network territorial exclusivity rule is necessary to ensure television stations have access to programming in small markets. The syndicated exclusivity rule is designed to prevent duplication by cable systems and help rectify the imbalance created by the compulsory copyright. Thus, it is quite possible that the underlying purpose of each exclusivity rule requires a different geographic limit.

While I compliment the majority for taking a more neutral stance on this issue, I simply do not believe the case has been made for questioning the efficacy of the 35-mile non-network territorial exclusivity rule. Moreover, I am concerned that modifications to our network exclusivity rule will create similar "overshadowing" problems. Finally, I disagree that our program exclusivity rules must have the same geographic limits. I would ask commenters to address these issues.