Dissenting Statement of
Commissioner James H. Quello,
in which Chairman Alfred C. Sikes concurs.

In Re: Supplemental Brief filed in *Schurz Communications, Inc. v. FCC*, No. 91-2350 (7th Cir.).

The Court's initial Order in this case quite properly vacated the financial interest and syndication ("finsyn") rules as being "unreasoned and unreasonable." *Schurz Communications, Inc. v. FCC*, No. 91-2350, *slip op.* at 22 (7th Cir.). In response, the Commission majority asks the Court to retain the discredited rules pending the results of "further expedited proceedings . . . consistent with the Court's opinion." *Supplemental Brief for FCC* at 2 ("*Majority Brief*").

While I do not object to reopening a proceeding to examine finsyn issues, there is little to be gained by starting with rules that are unsupported by fact or logic. Six months may give the majority enough time to grow a new coat for the rules, but in the end, I fear we would be stuck with the same scrawny cat.

Because I share the Court's concern that we should not simply encourage the creation of "a more polished rationalization" on remand, *slip op.* at 12, I believe it makes more sense to start with a clean slate. Accordingly, I dissent from the majority's request to retain the 1991 finsyn rules.

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I. The 1970 Finsyn Rules Are Dead, Gone and Awaiting Interment.

The only issue properly before the Court is whether to retain the new rules for a brief period or to eliminate finsyn rules entirely. There is no basis for the Court's concern (or the majority's insinuation) that vacating the Commission's order would cause the 1970 finsyn rules to "spring back into effect." *Slip op.* at 22. None of the parties appealed that portion of the order that deleted the old rules. Even the most ardent supporters of regulation, who urged the Court to require ever more onerous restrictions, did not challenge "the Commission's decision to eliminate many of the restrictions imposed by its former Rule." *Joint Brief of Petitioners Coalition to Preserve the Financial Interest and Syndication Rule, et. al.* at 32.[1] In contrast, network petitioners specifically asked the Court to vacate the *1991 Report and Order* and *Reconsideration Order* "except to the extent that they repeal the fin-syn regulations imposed in 1970." *Brief of Petitioners CBS, Inc., CBS Television Network Affiliates Association, amd Schurz Communications, Inc.* at 49 & n.194. It also is noteworthy that the only aspect of this proceeding about which all five FCC commissioners agree is that the 1970 rules are obsolete and should be deleted.

The majority's brief suggests that it is "beyond the Court's authority" to vacate the 1991 rules but to uphold the Commission's elimination of the 1970 finsyn rules.[2] This is absurd. The U.S. Court of Appeals for the D.C. Circuit faced a very similar situation in *Home Box Office, Inc. v. FCC*, where it set aside the Commission's "pay cable" rules while upholding essentially the same regulations for subscription television stations. 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

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[1]The Coalition on reconsideration argued that "retention of the financial interest and syndication rules would best serve the public interest and question[ed the Commission's] decision to relax the rules." *Memorandum Opinion and Order, Evaluation of the Syndication and Financial Interest Rules*, 7 FCC Rcd. 345, 349 (1991). However, this position was abandoned on appeal.

[2]*Majority Brief* at 6. The proffered 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.").

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.

Not only does the Court have clear authority to uphold the Commission's deletion of the 1970 rules, such a ruling would be consistent with the Commission's intent. It is beyond dispute that the Commission has no interest in reviving the old regulations.[3] For almost a decade the Commission has believed that the rules are obsolete.[4] 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

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[3]*See, e.g., Majority Brief* at 8.

[4]*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).

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.[5] Given my status as the last hold-out to support the 1970 finsyn rules, I can testify that it is long past time to put them to rest.

II. There is No Reason to Retain Unreasonable Rules.

The majority brief urges the Court to remand rather than vacate the 1991 rules, thereby keeping them in force for a limited time. The only reason offered for this purported compromise is to avoid the disruption of replacing rules that have been in effect for some 18 months.[6] But like the repeated incantation of the term "diversity" in the *Report and Order*, the majority's references to disruption are devoid of content.

Frankly, I am at a loss to understand what type of disruption could occur during the remand period the majority proposes even if all finsyn regulations are lifted. Ironically, the majority demonstrates a similar inability when it warns that "a return to the [1970] rules would effectively moot the potential modification of the antitrust consent decrees." *Majority Brief* at 8. The unstated premise of this statement is that the antitrust consent decrees essentially will preserve the status quo, even if the Commission has no rules. While the majority suggests that modification of the consent decrees may be forthcoming, this will occur only if reviewing courts are

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

[6]I agree with the majority that the Court should balance "the seriousness of the order's deficiencies" with "the disruptive consequences of an interim change that may itself be changed." *United Mine Workers v. FMSHA*, 920 F.2d 960, 966-67 (D.C. Cir. 1990). But since this Court seconded Chairman Sikes' prediction that the *Report and Order* would "produce a milestone case on what constitutes arbitrary and capricious decisionmaking," the majority's chosen standard requires some tangible demonstration of the "disruptive consequences" to be avoided. Yet the majority provides none and instead focuses its discussion of potential disruption on the consequences of reimposing the 1970 finsyn rules. This speaks volumes.

convinced that such action would serve the public interest.[7] This process undermines the purported concerns about disruption.

It is important to specify the nature of the potential dislocations. The Commission would not be forcing industry participants to enter transactions that might later need to be undone. One would suspect that the various players may well be loath to make deals until they discern the Commission's final direction. In other words, the potential disruption is largely in the hands of the affected parties. Yet even if some changes are subsequently adopted, what will be the effect? In the case of off-network syndication, it would take several years for a network to acquire sufficient programming inventory even to enter the market. Any remand proceeding presumably would be long concluded by that time. With respect to financial interests, the record in the proceeding suggests that producers may not even realize when a network acquires an interest.[8] Given this evidence, it is uncertain what type of "disruption" the majority anticipates.

One final point requires some thought. Although the Commission concluded in 1983 that finsyn rules should be eliminated, the Court noted that "there was no follow-up to the tentative decision," thus leaving the regulations "in limbo." *Slip op.* at 5. The court attributed this inaction to political pressure. Some undoubtedly would like to see a sequel to the 1983 decision. And while I have no question but that that those who serve in this agency will dutifully uphold the Court's mandate, the trade

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[7]*See, e.g., Memorandum of the United States in Response to Motion of Defendant National Broadcasting Co., Inc. to Modify the Final Judgment* filed in *United States v. NBC*, Civil No. 74-CIV-3601 (C.D. Cal., filed May 7, 1992).

[8]*See, e.g., Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. at 3232 (Dissenting Statement of Commissioner Quello) (citing testimony of producer who was unaware that ABC had acquired ownership of his series).

press already has begun to fuel speculation that a change in administrations "might rescue the imperiled financial interest and syndication rules."[9]

Of course, there is no way to predict what political changes the future may bring. But speculation about politics can play no part in how the Commission discharges its responsibilities in this case. If under a new administration a new set of finsyn rules is proposed or even adopted by a newly-constituted FCC majority, that is fine (subject to the constraints of judicial oversight). However, it is essential to the integrity of this agency that this proceeding remain focused on the Court's immediate mandate. In another context, the U.S. Court of Appeals for the D.C. Circuit just last week chastised the FCC for engaging in what it called "an administrative law shell game . . . plainly engendered by a desire to keep the rule in effect as long as possible despite serious doubts that the rule could not withstand judicial review."[10] We should go out of our way to avoid the prospect of similar criticism here.

Under the circumstances, I see no reason to permit the Commission to enforce rules already found to be arbitrary and capricious.

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[9] Lambert, *Industry Looks at Life Under New Team*, BROADCASTING, November 9, 1992 at 12.

[10] *AT&T v. FCC*, No. 92-1053, *slip op.* at 8, 11 (D.C. Cir. November 13, 1992). It also is instructive that the D.C. Circuit vacated a Commission order that permitted "non-dominant" common carriers to avoid filing tariffs as required by Section 203(a) of the Communications Act of 1934. The Court apparently did not consider it "too disruptive" to subject virtually all common carriers to the possibility of damage suits in district court. By this standard, the majority's concern over possible disruption in the finsyn proceeding seems misplaced.

I do not mean to imply by citing *AT&T v. FCC* that I agree with the Court's rejection of the Commission's common carrier rules. I refer to it only as an example of the type of opinion we should seek to avoid, rather than invite.

PUBLIC NOTICE

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Released: November 20, 1992

COMMISSION RESPONDS TO COURT REQUEST
IN SCHURZ COMMUNICATIONS, INC. V. FCC,
Seventh Circuit No. 91-2350

On November 5, 1992, the United States Court of Appeals for the Seventh Circuit decided to vacate and return to the FCC for further proceedings the Commission's April 9, 1991 decision relaxing and modifying the financial interest and syndication rules. Schurz Communications, Inc. v. FCC, No. 91-2350 (7th Cir.). The Court stayed its order for 30 days, however, to permit parties to file supplemental briefs regarding the status of the rules pending the Commission's completion of the further proceedings directed by the Court.

In response, the Commission instructed the General Counsel to file a supplemental brief with the Court in accordance with the following information and to urge the Court to keep in place the amended financial interest and syndication rules pending remand.

As emphasized throughout the 1991 Report and Order, 6 FCC Rcd 3094 (1991), the Commission concluded that the 1970 financial interest and syndication rules should be relaxed and modified -- not eliminated. The text and ordering clause of that decision accurately reflect the Commission's unitary determination to amend the 1970 rules. The Commission did not make two separate or severable decisions to repeal the original rules and adopt new rules. Thus, the purely ministerial deletion of the text of the original rules in the Code of Federal Regulations (as set forth in Appendix B to the Report and Order) should not be misread as anything more than mere housekeeping. This ministerial act in no way reflected any Commission intention that the original financial interest and syndication rules be repealed regardless of whether the 1991 amended rules were later vacated.

Vacating the 1991 rules could therefore only have the effect of restoring the 1970 rules. Because returning to the original rules would potentially disrupt the marketplace for television programming, however, the Court should keep the amended rules in place temporarily until the Commission can complete a remand proceeding. The Commission intends to complete such a proceeding on or before its July 1993 open meeting.

Action by the Commission November 20, 1992 by Public Notice (FCC 92-520). Commissioners Marshall, Barrett and Duggan, with Commissioners Sikes (Chairman) and Quello dissenting and issuing statements.