July 22, 1980

Dissenting Statement of
FCC Commissioner James H. Quello

In Re: Report and Order in Docket 20988 (Syndicated Exclusivity) and Docket 21284 (Distant Signal Carriage).

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Over the past years in office I have more than supported cable deregulation--I have advocated it. I actively supported: the removal of the leapfrogging rules and the feature film restrictions, the waiver for the ARTEC cable system in Arlington, the deregulation of earth stations, the exemptions for smaller systems, stabilization of franchise fees and a host of other measures that I believed--and continue to believe--advanced the development of cable.

However, I strongly believe that elimination of syndicated exclusivity is inequitable, not needed, not wanted by a significant number of cable TV owners and operators, and is counter to long-term public interest.

I have dissented to the Report and Order in its entirety in order to honor specific requests from the Chairman of the Committee which deals with copyright, the upcoming Chairman of the Commerce Committee, and a number of other interested Congressmen and Senators, all of whom have urged that this Commission, before undertaking any significant revision of the distant signal restrictions or syndicated exclusivity rules, should first coordinate such steps with appropriate committees in the Congress.

Congressional leaders most involved with communications and copyright specifically requested that the FCC defer action until after the Copyright Royalty Tribunal review in September 1980. Among those writing were Congressman Robert W. Kastenmeier, Chairman of the subcommittee with copyright responsibility and oversight, and Congressman John Dingell, upcoming Chairman of the House Interstate and Foreign Commerce Committee. Four key members of the Judiciary Committee, Congressmen Moorhead, Railsback, Swift and Sawyer in a jointly signed letter stated:

> "We know that Congressman Kastenmeier, Chairman of the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, stated in his March 13 letter to you on this subject, a willingness for his subcommittee to review the need for legislation in this area in the next Congress. He also stressed the importance of allowing the Tribunal the opportunity to complete its first full years of duties without changing the environment within which the affected industries must function. We would like to join in urging that the Commission postpone any significant revision of the syndicated exclusivity and distant signal rules until Congress has had the opportunity to revisit this issue with the benefit of the results of the Tribunal's first recommendations."

Other Congressional leaders who wrote letters urging deferring action were Senators Birch Bayh and Don Riegle and Congressmen Danielson and Mazzoli. I agree with

their expressed concern that precipitate action could upset the delicate balance of the copyright and communications policies under the 1976 Copyright Act. The action of the majority in adopting the Report and Order flaunts the requests of these concerned congressional interests.

Aside from congressional warnings, I would have urged the retention of the syndicated exclusivity rule but would have been willing to eliminate those rules limiting distant signal importation by cable systems. As to the matter of retransmission consent, I would prefer to reserve judgment as to the legality of such requirement as well as the advisability in light of the 1976 Copyright Act.

However, I am uncomfortable with the concept of expropriating a valuable property--a television program--with neither consent from nor compensation to the owner of that property. Although the Copyright Act of 1976 purported to deal with this problem, it is widely conceded that it has utterly failed to do so in any meaningful way. My second concern is the total disregard by the majority of the contract rights of both syndicators and broadcasters and the consequences of that disregard. Where the majority tends to view the importation of syndicated programs as some kind of free lunch for viewers, experience has taught me that there is no free lunch. Producers of programs must have incentives and the virtual total loss of control of their productions after the initial sale to a broadcaster goes a long way toward eliminating the necessary incentives and creating a condition of program anarchy.

Companies in both cable and broadcasting with a larger future stake in cable rather than broadcasting urge the retention of syndicated exclusivity (Storer, Cox, GE, etc.)

The Commission's Economic Report relied upon by the majority has received widespread criticism on methodology and objectivity. Statements in the Storer filing in response to the Notice of Proposed Rulemaking are particularly significant.

> "The Report's chief defect is that the outside economists retained to prepare them had previously and publicly prejudged the questions they were retained to study. In consequence their conclusions were merely expectable and can be described, at best, as seriously flawed and negligently so. This assessment is harsh but plainly correct: the Reports pick and choose among the record materials, favoring those which support the "desired" conclusions while discounting, distorting, or even ignoring those which do not. An NCTA submission on impact was accepted uncritically while a NAB submission (the Wharton Study) was not. Two Cooper studies on behalf of INTV were not even discussed in the Report; nor was the study by Professor Fisher of MIT or ABC's smaller market study.
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> "Even the Broadcast Bureau's telling critique of the economic analyses was largely ignored. Significantly, the Bureau had pointed

out that they lacked analytical depth, failed to use current data, and should have employed a 'more balanced appraisal.'

"Not content with elevating selective analysis to an art form, the economists also ignored completely the question of impact during fringe time--the period of cable's greatest impact and independent television's greatest vulnerability. Moreover, they dealt with 'average audience losses' in a way which recalls the six-footer drowning in a lake with an 'average' depth of only three feet. The Park study had projected audience losses of 41% and 30% in single-station and two-station markets below the top 100, respectively, but the Economic Inquiry Report concludes that 'in all but the most extreme cases the additional audience loss will be less than 10 percent in the foreseeable future.' (Par. 117). The 'averaging' process, of course, shrouds the true and devastating impact on at least 50 single-station markets subject to Park's predicted 41% audience diversion.

"In short, the economic 'analyses' are objective only in the same sense that PLO might objectively analyze the Egyptian-Israeli peace treaty. And this would be apparent to a reviewing court which, although not permitted to substitute its policy judgment for that of the agency, can and does require that the agency base its rulings on a coherent record."

If a study or any evidence indicated that the syndicated exclusivity rule imposed a significant burden hampering the growth and development of cable television, I would carefully weigh that factor. To the contrary, the current pace of cable growth is exploding! Broadcasters are in an almost desperate rush to get into the business.

Also, if it could be shown that the public stood to gain more than it will lose through abandonment of the rule, my choice would be clear; the public must be served. Arguments extolling the virtues of "time diversity" notwithstanding, we are abandoning an incentive for true diversity of programming---the production and distribution of programming not now available. We are simply providing more conduits for recirculation of the same material over and over again. I believe we can do better in promoting the public interest than assuring the presentation of "Bonaza" at all hours of the day and night.

During the Commission's deliberation of this issue, I considered a possible moratorium on abandonment of the rule. This course seemed attractive at first glance because it would protect existing syndication contracts for a period of time. However, I could not reconcile my fundamental concern about the inequity of unbridled use of a product by some entity which neither produced it nor purchased its use.

The Congress has recognized that the existing Copyright Law is flawed. As mentioned before, leading members of Congress who are most responsible for eliminating these flaws have asked the Commission to postpone action on both syndicated exclusivity protection and unlimited signal carriage until the Congress and the Copyright Tribunal have more opportunity to deal with the problems. I fail to understand why--despite those reasonable entreaties--the majority felt constrained to move with such unseemly haste.

Finally, I note that the television industry today is generally prospering quite admirably, and cable television continues to expand by leaps and bounds. Cable with all types of program and pay products available is now viable for major markets. It is a very desirable additional service to those consumers who can afford to pay a monthly fee. It is not a boon to the poor in the ghettos who must rely on a TV service free of additional financial requirements. I believe there is a vital public interest in both preserving a free TV service to the consumer and yet encouraging a diversified pay service to those who can afford a monthly fee. The viewing public today has the present advantage of program diversity in various forms with more options assured for the future. It seems to me that this Commission in its efforts to readjust public interest benefits must not take out of one and put into the other until the scales are completely unbalanced. In my opinion, the long-term public interest considerations in retaining syndicated exclusivity requirements are more persuasive than those elusive benefits proclaimed by the majority in the Report and Order.

I dissent to adoption of the Report and Order.