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December 3, 1991

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments, Network Affiliated Stations Alliance
MM Docket No. 91-221

Dear Ms. Searcy:

Enclosed for filing in the above-referenced docket on behalf of the Network Affiliated Stations Alliance ("NASA") are an original and nine copies of the Comments of ABC, CBS, and NBC Television Network Associations, B.C. Docket 82-434 (October 24, 1988), which NASA stated in its November 21, 1991 comments would be filed under separate cover in this proceeding.

Questions or inquiries concerning this matter should be directed to the undersigned.

Very truly yours,



Kurt A. Wimmer

* MEMBER OF THE BARS OF KANSAS AND TEXAS
NOT ADMITTED IN THE DISTRICT OF COLUMBIA

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DEC - 3 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

JOINT COMMENTS
OF THE
ABC, CBS AND NBC
TELEVISION AFFILIATES ASSOCIATIONS

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SUMMARY

Affiliates are keenly aware of the changes which have taken place in the television industry and the regulatory environment in which it operates since the network/cable cross-ownership rule was adopted in 1970. These changes have affected affiliates no less than they have the national broadcast networks. Nevertheless, two basic facts--both of which are crucial to the Commission's consideration of the issues in this proceeding--have not changed: (1) The major broadcast television networks today, as they did 18 years ago, possess and exert market power over their affiliates, and (2) The three broadcast networks continue to be the single most dominant force in the procurement and distribution of television programming. For these reasons, the cable/network cross-ownership rule is as important, necessary and essential today as it was at the time of its adoption.

Armed with ownership of local cable systems, networks would control the final transmission path to the home. That, in turn, would give the networks ultimate control over their affiliates. It would be naive to think an affiliate could engage in anything approaching an "arms length" negotiation with its network on clearance of network programming or network compensation if the network, through its ownership of cable systems, could unilaterally decide whether to carry the affiliate's non-network programming.

The potential for network manipulation--overt and subtle--of its affiliates would be limitless. The ability of an affiliate to make independent program judgments about carriage or non-carriage of network programming would be virtually non-existent.

The Commission has long recognized the inherent imbalance in the network-affiliate relationship and the extent to which networks are in a position to exercise undue influence over the independent program decisions of their affiliates. Out of that concern, the Commission long ago adopted regulations designed to correct that imbalance. Whatever leverage networks have traditionally exerted over their affiliates, it pales in comparison to that which the networks would have were they allowed to own and control cable systems.

Cable television systems and local television stations compete head-on in local markets, both in local distribution of television programming and in the sale of local advertising. Cable operators have no obligation to carry local stations, and a network-owned cable system would, inevitably, take into account the impact that carriage of local affiliated and non-affiliated stations would have on the competitive program objectives of the network and the local advertising objectives of the network-owned cable system.

Moreover, network ownership of cable systems would not only adversely affect competition in local markets, it would also reduce competition in the national program production

industry by reducing the number of potential purchasers of television programming.

We urge the Commission to ask what single public interest benefit would be served by repeal of this rule? We can think of none. Indeed, we are persuaded that repeal of the rule would lead to an unprecedented level of concentration of the television media in the hands of the three broadcast networks--a result plainly at odds with this Commission's long-standing regulatory objectives and with 40 years of national communications policy.

The duty of the Commission to protect the independence of local broadcast stations and to structure an environment for fair and vigorous competition goes to the heart of its statutory and public interest responsibilities. Because the network/cable cross-ownership rule enhances market forces in achieving program diversity and competition, we respectfully urge that the rule be retained.

* * *

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of)
)
Amendment of Part 76, Subpart J,)
Section 76.501 of the Commission's)
Rules and Regulations to Eliminate) BC Docket No. 82-434
the Prohibition on Common Owner-)
ship of Cable Television Systems)
and National Television Networks)

Directed To: The Commission

JOINT COMMENTS OF
THE ABC, CBS AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Affiliates Association and the NBC Television Affiliates Association ("Associations") submit these comments, jointly, in response to the Commission's Further Notice Of Proposed Rule Making ("Further Notice") in the above-referenced proceeding. The Associations are comprised of some 600 local television stations located throughout the nation of which approximately 200 each are affiliated, respectively, with the ABC, CBS and NBC networks.

The Associations oppose repeal of the Commission's rule which prohibits the ownership of cable television systems by

television broadcast networks.^{1/} In support, thereof, it is shown as follows.

I.

INTRODUCTION

1. Affiliates are keenly aware of the changes which have taken place in the television industry and the regulatory environment in which it operates since the network/cable cross-ownership rule was adopted in 1970.^{2/} These changes have affected affiliates no less than they have the national broadcast networks. Nevertheless, two basic facts--both of which are crucial to the Commission's consideration of the issues in this proceeding--have not changed: (1) The major broadcast television networks today, as they did 18 years ago, possess and exert market power over their affiliates; and (2) The three broadcast networks continue to be the single most dominant force in the procurement and distribution of television programming. For these reasons, the cable/network cross-ownership rule is as important, necessary and essential today as it was at the time of its adoption.

^{1/} 47 C.F.R. §76.501(a)(1) (1987).

^{2/} Second Report and Order, Docket 18397, 23 FCC 2d 816, 19 RR 2d 1775 (1970), recon. denied, 39 FCC 2d 377, 26 RR 2d 739 (1973).

2. Assessment of arguments for repeal of the rule must necessarily begin with an understanding of the policy objectives the rule was designed to serve. The Commission cited three reasons for the rule:

- (1) Cable in 1970 was an emerging industry, and the Commission was concerned that network ownership of cable systems would "hinder" the development of cable networks.
- (2) Since the broadcast networks were established and entrenched, the Commission was concerned the networks would use their ownership of cable systems to restrain the diversity of cable programming to maximize their broadcast network audiences.
- (3) And, finally, the Commission concluded that the broadcast networks had a "predominant" share of television programming in prime time, a "predominant" position nation-wide and a "predominant" share of the national television audience. 3/

3. It is obvious that the cable television industry today does not need protection from the broadcast networks. It is unlikely that the broadcast networks would or could now exploit the ownership of cable systems to "hinder" the development of cable programming. Indeed, the broadcast networks have invested and are continuing to invest millions

3/ Second Report and Order, 23 FCC 2d at 819, 821.

to develop cable programming. Clearly then, the rule no longer serves its first policy objective.

4. The same, however, is not true with respect to the rule's second and third policy objectives. At the core of the Commission's concern with network ownership of cable systems in 1970 was the networks' "predominant" influence in the television industry. That influence, in fact, was so pronounced that the Commission considered the "ownership and control" of cable television systems by the networks to be "per se undesirable."^{4/} Although the three networks' national viewing audience shares have declined from over 90 percent in 1970 to around 70 percent today,^{5/} that 70 percent share is nearly two and one-half times greater than the shares of all other television (independent, public broadcasting, and cable) program services combined! A 70 percent market share, in television as in any other business, carries with it an extraordinary degree of market clout.

5. Although it does not appear to have been a consideration at the time of its adoption, the network/cable

^{4/} Memorandum Opinion and Order, Docket 18397, 39 FCC 2d 377, 26 RR 2d 739, 754 (1973).

^{5/} CBS projects the three networks' audience shares, at worst, will level off at 65 percent within five years, a projection shared by ABC network and cable television economic consultant, Paul Bortz. Time, Oct. 17, 1988, p. 61; "The Network Affiliate Relationship," Bortz and Company, Inc., 1988, p. 19.

ownership rule is necessary today to check the economic influence which each of the three broadcast networks exerts over its affiliates. It is this concern which lies at the heart of affiliate opposition to the rule's repeal. It is a concern that was, apparently, overlooked by the Commission's Office of Plans and Policy in its 1981 recommendation for repeal and one which was not addressed by the National Telecommunications and Information Agency in its June 1988 report recommending repeal.^{6/} The Commission, itself, however, has specifically invited comment on the issue, stating in its Further Notice:

" . . . [W]e solicit comment on whether network ownership of cable systems in markets where they have affiliated stations may influence the negotiation of affiliation contracts."^{7/}

6. It is understandable that back in 1970, neither network affiliates, nor the Commission, would have perceived the ownership of cable systems by broadcast networks to be a threat to the independence of affiliates. The channel capacity of cable systems was quite limited; the number of homes passed by cable was relatively low; the must carry

6/ "FCC Policy on Cable Ownership," Staff Report, November 1981; Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, June 1988 ("NTIA Report").

7/ Further Notice at paragraph 7.

rules were in effect (and thought to be sacrosanct); cable was viewed, on the whole, as a supplemental rather than competitive television service; only a handful of cable television systems were selling local advertising; cable networks (such as they were) were not engaged to any meaningful degree in the sale of national or regional advertising; the prime time access rule and the network syndication and financial interest rules had only recently been adopted to serve as a check on network influence; the networks were barred from representing their affiliates in the sale of spot advertising; and the networks, at the time, owned only a few cable systems. In short, there was nothing to suggest to anyone in 1970 that cable system ownership and operation by the networks would contribute to a further imbalance in the network-affiliation relationship or, for that matter, that it might give networks an unfair competitive advantage over local stations not affiliated with that network. While this was not a concern in 1970, it clearly is today.

7. In response to the question posited by the Commission in its Further Notice, we believe, unequivocally, that network ownership of cable systems in markets where they have affiliates would not only "influence"--it could control absolutely--the "negotiations" between networks and their affiliates. Those negotiations, for the most part, center around two issues: the extent to which the affiliate clears, rather than pre-empts, network programs and the level of compensation paid to the affiliate for carriage of

network programming. Networks, understandably, attempt to maximize program clearances and minimize affiliate compensation. That is no less true today than it was when networking began.

8. Armed with ownership of local cable systems, networks would control the final transmission path to the home. That, in turn, would give the networks ultimate control over their affiliates. It would be naive to think an affiliate could engage in anything approaching an "arms-length" negotiation with its network on clearance of network programming if the network, through its ownership of the local cable system, could unilaterally decide whether to carry the affiliate's non-network programming. The potential for network manipulation--overt and subtle--of its affiliates would be limitless. The ability of an affiliate to make independent program judgments about carriage or non-carriage of network programming would be virtually non-existent.

9. The Commission has long recognized the inherent imbalance in the network-affiliate relationship and the extent to which networks are in a position to exercise undue influence over the independent program decisions of their affiliates. Out of that concern, the Commission long ago adopted regulations designed to correct that imbalance. Whatever leverage networks have traditionally exerted over their affiliates, it pales in comparison to that which the

networks would have were they allowed to own and control local cable systems.

10. We wish to note at the outset that our belief in the importance of this rule is grounded not in blind, unquestioning allegiance to an historical regulatory scheme; rather, it is grounded in the conviction that structural regulation is not only appropriate, it is essential, where conventional market forces do not function. The rule prohibiting national network ownership of local cable television systems is a local structural regulation. The principal utility of the rule today is the extent to which it fosters competition and program diversity at the local level by limiting the influence the national broadcast networks have over local stations.

11. In adopting its new 12-12-12 broadcast ownership rules, the Commission expressly noted that its "focus" on media "diversity and economic competition" would be directed to "local markets."^{8/}

". . . [T]he most important idea markets are local. For an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local broadcast market."^{9/}

8/ Multiple Ownership, 100 FCC 2d 17, 56 RR 2d 859, 861 (1984).

9/ Multiple Ownership, 56 RR 2d at 860.

12. The efficacy of the rule, in the final analysis, must be judged by the extent to which it fosters and promotes diverse and independent views in local television markets. Clearly, it achieves that objective.

13. If networks were permitted to own cable systems, the question must then be addressed, what limits should be placed on that ownership? It is inconceivable that the three major networks, each of which reaches 98 percent of the nation's homes through its affiliated local stations, 20-25 percent (depending on the network) through its owned and operated stations, and another significant percentage through its owned cable networks, ^{10/} would be given absolute control of access to local television markets through the ownership of cable systems.

14. We urge the Commission to ask what single public interest benefit would be served by repeal of this rule? We can think of none. Indeed, we are persuaded that repeal of the rule would lead to an unprecedented level of concentration of the television media in the hands of the three broadcast networks--a result plainly at odds with this Commission's long-standing regulatory objectives and with 40 years of national communications policy.

^{10/} An exception is CBS which, at the moment, does not own a cable network.

15. These comments address the unique nature of the network-affiliate relationship, the traditional regulatory framework which governs that relationship and the extent to which ownership of cable systems by broadcast networks could foreclose the exercise by affiliates of independent program judgment concerning carriage of network programming, and, in turn, impair their ability to serve the needs of their local communities. We also address the extent to which network ownership of local cable systems would lessen competition overall in local television markets (for affiliates and non-affiliates) and the extent to which repeal of the rule would adversely affect competition at the national level in the procurement of television programming. Finally, we address the procedural deficiencies in the Commission's Further Notice, in particular, its failure to comply with the requirements of the Regulatory Flexibility Act.

II.

BROADCAST TELEVISION NETWORKS EXERT MARKET POWER OVER THEIR AFFILIATES

16. The relationship between the television networks and their affiliates as it has evolved over the years reflects a delicate balance of shared, as well as disparate, purposes and interests. It is a unique relationship and one which has played a central role in the development of the nation's free over-the-air television service. The

relationship is one which the Commission, the networks, and their affiliates all agree has served the industry and the public well.

The Commission: "This is a long-standing, long accepted arrangement that has some important efficiency properties." 11/

"The network-affiliate relationship is a true partnership serving the interest of both partners and the public interest by combining efficiencies." 12/

The Networks: "The network-affiliate partnership obviously serves the business interests of the partners. We suggest that it also serves the broader public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. And it provides a highly effective means whereby the special strengths of national and local program service can be made to support each other. There may be other ways to reconcile the values served by both centralization and decentralization in television broadcast service. This way, we submit, serves the country well." 13/

11/ Scrambling of Satellite Television Signals, Notice of Inquiry, Gen. Docket No. 86-336, 51 Fed. Reg. 30,267, Aug. 25, 1986, paragraph 85.

12/ Scrambling of Satellite Television Signals (Report), 2 FCC Rcd 1669, 62 RR 2d 687, 732 (1987).

13/ Comments of Capital Cities/ABC, Inc., Gen. Docket No. 86-336, Oct. 17, 1986, p. 3.

The Affiliates: The network-affiliate partnership "is a highly efficient and productive relationship" which serves not only the interests of the partners, but the public's interest as well. 14/

17. In many ways an affiliate is a joint venturer or partner with its network; at the same time, the two are customers of each other--the affiliate for the network's national programming, the network for the affiliate's local audience. From the network's standpoint, its affiliates provide an exclusive national distribution system for network programming. The arrangement is a profitable one for affiliates which, in turn, enhances their ability to provide local programming. The Commission noted in its scrambling inquiry:

"By adjusting the flow of monetary compensation to affiliates and the number of advertising minutes held out for network use, it is possible to provide the affiliate with the marginal incentives and wherewithal to provide popular programming. Such programming not only enhances the network's reputation, but it also can enhance the audience for network programming as well." 15/

14/ Comments of the CBS Affiliates, Gen. Docket No. 86-336, Oct. 17, 1986, p. 14.

15/ Scrambling of Satellite Television Signals, Notice of Inquiry, Gen. Docket No. 86-336, 51 Fed. Reg. 30,267, Aug. 25, 1986, paragraph 85. A cable television network typically sells its programming at wholesale to the local cable distributor, which in turn provides
(Footnote Continued)

18. In other respects, however, the affiliate and its network are direct competitors. They compete head-to-head for national advertising dollars. Networks attempt to channel national advertising dollars to the network; the national sales representatives of affiliates attempt to channel those dollars to the spot advertising market.

19. The Commission has long recognized that the networks have the upper hand in the relationship. As the Commission noted in adopting the network sales rep rule:

"While it is true as a general proposition that networks need affiliated stations to provide nationwide coverage, the individual television station has a greater need, in most cases, for the network affiliation. The economic survival of the station may well depend on such affiliation." 16/

20. The prospect of disaffiliation looms large over every network-affiliation negotiation. As one station manager once put it, "Next to protecting the station's

(Footnote Continued)

programming at retail to viewers. A broadcast network, on the other hand, pays its local affiliate for airing its programs, and the home viewers receive the programs at no fee.

16/ Report and Order, Docket 12746, 21 FCC 697, 713 (1959); recon. denied, 28 FCC 447 (1960), aff'd sub. nom., Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C. Cir. 1961).

license, my most important job is to hang onto our network affiliation." ^{17/}

21. The financial importance today of a station's network affiliation is perhaps best illustrated by NBC's recent acquisition of a local Miami station and the accompanying loss of affiliation by the local NBC affiliate. The Wall Street Journal reported the value of the station, WSVN(TV), to be \$325 to \$400 million with an affiliation, but only \$200 million without it. ^{18/} Similarly, a jury in a recent Springfield, Missouri, network disaffiliation case involving KDEB-TV attributed one-half of the station's value to the existence of its ABC network affiliation. ^{19/} One broadcast valuation expert has placed the value on a per ADI household of a UHF affiliate at \$75 to \$80, compared to about \$15 per ADI household for a non-affiliate. ^{20/} Broadcasting magazine's annual report of 1987 television station sales indicates that, on average, an affiliated station brought about five times more per ADI household than

^{17/} Comment by Harold Essex (deceased), former manager of Station WXII-TV, Winston-Salem, North Carolina, and TV Board Chairman of the NAB.

^{18/} The Wall Street Journal, July 6, 1987, p. 15.

^{19/} Broadcasting, May 16, 1988, at 37; June 20, 1988, at 48. (The verdict was subsequently set aside on the merits of the contractual claim--not on the amount of damages.)

^{20/} Broadcasting, December 21, 1987, p. 24.

the price paid for the average independent station. ^{21/} These differences in sales prices are supported by striking earnings differentials: For 1987, network-affiliated stations had an average pre-tax profit of \$4,078,087, while independent stations, on the average, lost \$68,531. ^{22/} It is the economic value of network affiliation that enables local network affiliates to provide expensive local public interest programming. As noted earlier, the Commission has long acknowledged the public interest benefits of the network-affiliate arrangement.

22. Certainly, the value of affiliation varies with the network in question and with the rise and decline in the network's relative fortunes over time. Plainly, however, the presence or absence of network affiliation has a profound effect on a television station's value. The ability of the networks to grant or revoke affiliation gives them enormous market power and economic leverage over their affiliates. ^{23/}

^{21/} Broadcasting, February 8, 1988, pp. 61-97. Independent stations sold for \$.83 to \$27.26 per ADI household, averaging \$10.09; network affiliate stations ranged from \$12.30 to \$370.39, averaging \$55.67.

^{22/} National Association of Broadcasters and Broadcast Financial Management Association, 1987 Television Financial Report, pp. 34, 64.

^{23/} We use the term "market power" throughout these Comments to refer to economic "leverage" and "control." The term is not used in an antitrust sense.

23. Another less critical, but nevertheless important, source of network leverage is affiliate compensation. In large market stations, compensation for the carriage of network programming tends to represent only a small percentage of total station revenues and may not be a significant factor. For smaller market stations, however, affiliate compensation might typically represent 15 or 20 percent of an affiliate's total revenues--obviously, a significant revenue source. Given the relatively thin margins on which many smaller market stations operate, compensation for carriage of network programming can easily mean the difference between black or red ink and solvency or insolvency.

24. In short, the network-affiliate relationship has, over the years, provided a method for national distribution of television programming which the Commission has repeatedly recognized achieves marketplace efficiencies and serves the public interest. In recognition of the efficiencies and public interest considerations underlying this arrangement, the Commission has crafted a comprehensive structural regulatory scheme designed to foster the network-affiliate relationship while at the same time preserving the freedom and independence of local affiliates to make independent local program judgments. We now turn to a discussion of that regulatory scheme.

III.

A PRIMARY PURPOSE OF NETWORK REGULATION
IS TO PROTECT THE INDEPENDENT
PROGRAM JUDGMENT OF NETWORK AFFILIATES

25. The Commission has long recognized that the unique relationship between broadcast networks and their affiliates raises important considerations affecting the public interest. ^{24/} In recognition of the disproportionate economic power the radio broadcast networks then held over their affiliates, the Commission in 1941 enacted a number of rules in an effort to create a reasonable degree of balance in that relationship. The Commission's concern was that the leverage the networks held over their affiliates could compromise the independent judgment of affiliates in the acceptance or rejection of network programming, thereby impairing the ability of the affiliates to serve their local communities. However, as the influence of radio networks declined over the years, the Commission repealed, and appropriately so, most of its radio network rules. The influence of the television networks over their affiliates, of course, has not declined, and it is concern over that

^{24/} See, e.g., FCC Report on Chain Broadcasting (1941); "Report of the Network Study Staff to the Network Study Committee," FCC, Washington, D.C. (1957) reprinted as H. Rep. No. 1297, 85th Cong. 2d Sess. (1958); Application of Section 3.658(a) and (e) of the Commission's Rules, 45 FCC 21, recon. denied, 45 FCC 334 (1962).

continuing influence which lies at the core of the Commission's current television network regulatory scheme.

26. Corresponding network regulations have not been enacted for cable networks and their cable system affiliates for two reasons: (1) Cable systems have no federally-imposed public trusteeship responsibilities; television stations do. (2) Cable systems have no federally-imposed local program responsibilities; television stations do. And as long as the public trusteeship scheme of broadcast regulation continues in effect, a need will exist for appropriate regulatory oversight of the national broadcast networks. 25/

27. Among the various rules and policies adopted by the Commission to check the undue influence of the national television networks are the following:

1. Exclusive Affiliation. Networks cannot require local stations to carry the programs of a single network or penalize affiliates for carrying the programming of other networks. 26/

25/ That, of course, is not to say that the existing network regulatory scheme should not be subjected to continuing review and scrutiny in light of changes in the industry. We will support (indeed advocate) changes in regulation of the networks where there are demonstrated public interest benefits to be achieved.

26/ 47 C.F.R. §73.658(a) (1987).

2. Term of Network Contracts. Networks cannot contract for affiliation for a period in excess of 2 years. 27/
3. Option Time Rule. Networks cannot contract with local television stations for the option to acquire the right to broadcast programming on the local station. 28/
4. Right To Reject Programming. Networks cannot require local stations to carry all network programming. Local stations must maintain the right to (a) reject network programming which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest and (b) substitute a program which, in the local station's judgment, is of greater local or national importance. 29/
5. Network Compensation. Network compensation cannot be structured in a way that would compromise the independent judgment of affiliates in their acceptance or rejection of network programming. 30/
6. Local Station Rates. Networks cannot control the rates charged by local stations for advertising and non-network program time. 31/
7. Prime Time Access. Networks cannot require local stations in the top 50 markets to

27/ 47 C.F.R. §73.658(c) (1987). [The Commission is currently considering repeal of this rule.]

28/ 47 C.F.R. §73.658(d) (1987).

29/ 47 C.F.R. §73.658(e) (1987).

30/ Application of Section 3.658(a) and (e) of the Commission's Rules, 45 FCC 21, recon. denied, 45 FCC 334 (1962).

31/ 47 C.F.R. §73.658(h) (1987).