

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FILE

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DEC 19 1991

Federal Communications Commission
Office of the Secretary

MM Docket No. 91-221

In the matter of

Review of the Policy Implications
of the
Changing Video Marketplace

**REPLY COMMENTS OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.**

In the holiday spirit, the Association of Independent Television Stations, Inc. ("INTV") hereby dispenses with the usual rhetoric, legal memoranda, data, and stentorian prose, and submits the attached exhibits as its reply comments in the above-captioned proceeding.

EXHIBIT ONE:

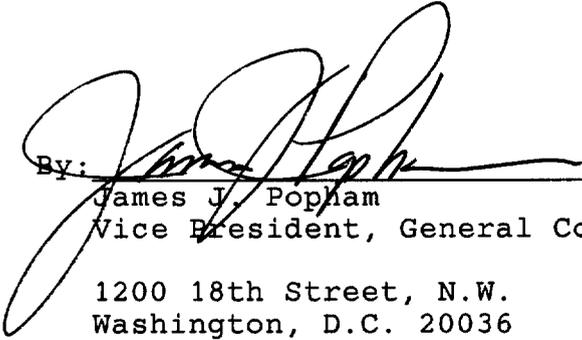
Letter (undated) from "THE NETWORKS" to Santa Claus.

EXHIBIT TWO:

Letter of December 19, 1991, from INTV to Santa Claus.

HAPPY HOLIDAYS!

THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

By: 

James J. Popham
Vice President, General Counsel

1200 18th Street, N.W.
Washington, D.C. 20036
(202) 887-1970

December 19, 1991

INTV

EXHIBIT ONE

It is late November at the North Pole. Elves scurry hither and yon, putting the final touches on a few last-minute items, sorting completed gift packages by Zip Code, and recalibrating the avionics in Santa's sleigh. The DHL van has just landed delivering the fresh turkey for Mr. and Mrs. Claus's Thanksgiving dinner. Santa sits wearily at his desk by the fireplace paying bills -- Exxon (heating oil/\$392.65), American Express (trip to New York for Macy's parade/\$1298.00), Cooke Cablevision (basic, two additional sets, the Disney Channel/\$53.90), etc., etc., etc. Two hefty elves enter with a package the size of a legal size file folder about eight inches thick. They carefully unbundle it, and Santa begins to thumb through the stack of paper in the folder....

Yes, Virginia...

There is a cable system at the North Pole!

NORTH POLE—Cooke Cablevision, 3990 S. Cushman St., Fairbanks, AK 99701. Phone: 907-452-7191. County: Fairbanks North Star. Also serves North Star Borough. Population: N.A. (area served). TV Market Ranking: Below 100. Original franchise award date: N.A. Franchise expiration date: N.A. Began: November 1, 1982.

Channel capacity: 35 (2-way capable).
Channels available but not in use: 7.

Basic Service

Subscribers: 494 (11/30/89).

Programming (received off air): KATN (A.N), KTVF (C.A), KUAC-TV (P), Fairbanks; KJNP-TV (I) North Pole.

Programming (via satellite): WTBS (I) Atlanta; WGN-TV (I) Chicago; Arts & Entertainment; C-SPAN; CNN; Discovery Channel; ESPN; Family Channel; Headline News; Inspirational Network; Learning Channel; Lifetime; MTV; Nashville Network; Nickelodeon; QVC Network; USA Network; Video Hits One.

Current originations: Bulletin board.

Fee: \$35.00 installation; \$36.90 monthly, \$3.50 monthly (each additional set).

Pay Service 1

Pay Units: 146 (11/30/89).

Programming (via satellite): Cinemax.

Fee: \$8.95 monthly.

Pay Service 2

Pay Units: 129 (11/30/89).

Programming (via satellite): Disney Channel.

Fee: \$10.00 installation; \$10.00 monthly.

Dear Santa,

We have been very good this year. Our ratings are up a bit, no indecency complaints have been filed against our stations, we covered some big news stories and lost a bunch of money doing that, and, of course, we'll be sure that everyone (not just cable subscribers) can watch you in the Thanksgiving Day parades. By the way, thanks for the relaxation of the financial interest and syndication rules. That was a gift, and we know you did your best. Would you consider filing an *amicus* brief? We'll have our lawyers call you after New Years on that. We know that you enjoy the bowl games and would hate to bother you before that. At least they're still on free television.

As for this year, here is our list:

1. Repeal of the network-cable television cross-ownership prohibition.
2. Repeal of the national ownership restrictions.
3. Relaxation of rules governing the network-affiliate relationship.
4. A profitable fourth quarter.

We would like a few other things, too, but this would be a great start. Oh, and CBS wants to repeal the off-network prohibition of the Prime Time Access Rule. That'll be a hot one.

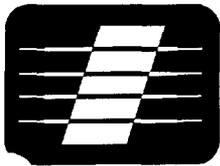
Well, have a safe trip. We've checked the tower lights at all our O&Os and their flashing and blinking to beat the band, but do be careful. Don't forget how your reindeer got tangled up in the Empire State Building in 1968. It kept you from getting to Washington in time to bring us a victory in the *Fortnightly* case. We never got over that, you know.

Don't forget to call about the weather before you leave. It's Willard's year.

THE NETWORKS

P.S. Pay no attention to those silly affiliates of ours. We know what's best for them. And those upstart independents, well, you know how they are...

EXHIBIT TWO



Independent Television

December 19, 1991

Dear Santa,

We know you have always suspected we had a mole in your elf corps; in truth we must tell you that Donder and Blitzen have been wired for several years, and you know how those mail room elves gossip when they're out behind the barn getting a little nip to warm them up.

In any case, we couldn't let what those networks asked for go without a response. Who do they think they are, anyway? Their long-suffering cries for relief and deregulation (for them, that is) are so presumptuous. Before the FCC abandons caution and rushes headlong to rescue them (again!), it really needs to consider whether they really need the helping hand.

We know the networks and the Commission staff have observed a decline in real network revenues, to the point that the networks as a whole will fail to have operated at a profit in 1991. (But hey, nobody else in the business has had such a great 1991, either.) So, all we hear about in Washington is shrinking audience shares in prime time and near marginal daytime shares, fear that the trend may continue as cable continues to expand and signal compression technology permits a substantial increase in the number of channels of programming available to consumers.

Frankly, Santa, we're dubious of the networks' doomsday scenario, but they seem to want to frame the issue as "deregulation versus doomsday" for the networks. If the Commission accepts the networks' invitation to so frame the issue, then the Commission must have to figure out whether doomsday really is at hand, don't you think?

After all, the networks could be pulling the sky down on top of themselves. Think about it! Maybe the networks just need more time to learn to be competitors and adapt to the newly competitive video marketplace. Look at AT&T, for example. It weathered the transition from monopoly provider to dominant carrier in a crowded market quite well. You know they approach the long distance telephone business much differently today than it did in 20 years ago. Hey! Independent stations always have had to compete. We can't imagine why networks and affiliates could not adjust their attitudes and approaches to the television business so as to become true and effective competitors. If they keep crying

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gloom and doom, we'll be tempted to start believing that the networks are true dinosaurs, inherently unprofitable in a multichannel environment. Look what happened to the large-circulation general interest magazines like Life, Look, and The Saturday Evening Post in the mid-to-late-60s. Their extinction may be no more troublesome in the long run than the demise of the ocean liner. (Hey, have you done a cruise? Fantastic. Those ship owners knew how to adapt, huh?)

So, okay, maybe we need them. We know we've said the networks are important to the success of independent stations. Even the FCC has agreed that top-rated off-network programming is the critical ingredient in independent stations' program schedules. The loss of that programming could devastate independents. There's just nothing else like it. We know their news coverage has become part of the information infrastructure, and we can't forget the news service they traditionally have provided. But still, they are making much ado about cutting their news staffs and budgets and, you know, networks aren't the only sources of national and international news. Local stations (even we independents) and (we must admit) cable networks also have begun some pretty respectable coverage of national and international news, too. So, no disrespect intended for the networks, but if they keep predicting that the sky is falling, someone really ought to ask just what really would happen if the sky did fall.

You really begin to wonder what they're up to when you see what they've asked for? They want to get into other businesses where they think will be able to make money. The Commission's already let them back into syndication. Oh, and, we did appreciate your help on that one. We're still really anxious about what's going to happen in the syndication market, but it could have been worse! They're nervous in Hollywood, too. Those aren't timorous network fingers in the production and syndication pies, those are iron gorilla fists. You better keep an eye on that one. It's still in court, you know.

Anyway, so here they come now, they're in the syndication and production businesses, and what else what do they want? They want to own cable systems!!! We'll have a lot more to say about that later, but think about it....here's a sneak preview of our comments:

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What the networks would have the Commission do is permit them to enter yet another segment of the video marketplace, where they apparently think they can make money. Inasmuch as they wish to enter a business in which each local unit is a monopoly in all but the rarest of cases, that wish appears quite rational. In essence, they would subsidize their network operations from cable system earnings.¹ One might rightly ask, "What's wrong with this picture?" At the risk of answering one question with another, INTV respectfully wonders, "Why would the networks remain in an unprofitable business?" No law requires them to stay in the network business. Would it not make more sense for the networks' owners to divert as much revenue as possible to cable system acquisitions and bleed the network operations to a hasty extinction. This would make even more sense for a cable MSO which acquired a network.

You understand?

Now, we know only CBS said anything about the Prime Time Access Rule and they only went after the off-network part of it, but even that is far too important for us to put off and worry about after the holidays. Listen to what CBS says:

"...off-network programming newly introduced to syndication generally attracts far larger audiences than first-run programming entering the syndication market for the first time."²

Of course it does, with some exceptions. But established first-run programs, you know, like "Wheel" and "Jeopardy" do dynamite ratings in access time on the affiliates, a lot

¹INTV is not referring to efficiencies or economies from vertical integration. They may or may not exist. The networks have been a bit glib in that respect. INTV reminds the Commission that the benefits expected from relaxation of other structural rules have been delineated in detail and amply supported by extensive record evidence. No less is called-for with respect to the purported benefits from relaxation or repeal of the cable-network cross-ownership ban.

²Comments of CBS, Inc., MM Docket No. 91-221 (filed November 21, 1991) at 57-58 [hereinafter cited as "CBS"].

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better than the independents do against them. Hobbled affiliates? Ha! Like, they win, and that's not enough!? Furthermore, diversity implies some risk. Isn't this what the Commission wanted? Something new and different for an hour, instead of the proven network fare. Hey! Do network affiliates outside the top 50 markets spurn first-run for off-network programming even though they could air it in access time? No way! CBS didn't come up with any facts on this, did they? Guess why....Then they say:

"By removing off-network programming from the access schedules of top 50 market affiliates, the PTAR rule significantly reduces a producers potential return on that programming....[T]he PTAR inevitably reduces the amount that a top 50 market affiliate can bid for an off-network program. Three potential high-bidders are effectively removed from the auction for the best off-network series, thus inevitably depressing after-market revenues that these series can generate."³

Now, let's get real here. CBS itself admits that the proliferation of independent stations "has resulted in an exponential growth in the amount of air time open to all syndicated programming."⁴ This undoubtedly has expanded the aftermarket for syndicated programming considerably. Adding network affiliates, and only one hour of their time each day at that, to the buyers' pool for off-network prime access programming would not necessarily upgrade the bidding for attractive off-network programs. Moreover, by relaxing the rule, the gain easily could be offset by the resultant decrease in the numbers and strength of independent stations in the market.

³CBS at 60, 62.

⁴CBS at 71. Independent stations bidding for off-network programs for access period use benefit from the same HUT levels during the access period. Furthermore, HUT levels in 6-7 pm period preceding access approach the prime time HUT level, according to data submitted by CBS. Whereas the HUT level 6-7 is 41% higher than the 4-5 pm HUT level, it is only 7.7% less than the 7-8 prime time HUT level.

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You know, CBS really appears anxious to kill the goose that laid the golden egg by having its affiliates supplant independent stations as the prime market for the most attractive off-network programming. Independents have been able to secure off-network programming, clearly the next most attractive genre of programming to original network programs, for use during a time of day nearly as attractive as prime time (early fringe and access time). This double second-best franchise has enabled many independent television stations to develop into formidable competitors to the networks. Like CBS says, more over-the-air service is available today than ever before. Eliminating the off-network restriction would erode independent stations' beachhead in the local video marketplace. CBS leaves no doubt about what it wants. In CBS's vision of the future the market's purported high bidders, the affiliates, would bid away attractive off-network programming from independent stations.⁵ If independents are weakened or fail, then the market for off-network programming would be weakened, thereby negating any benefit to syndicators.

Moreover, of course, the viewing public loses if independent stations are depleted of their vitality or viability. Then viewers would have to subscribe to cable....No wonder CBS wants in.

Anyway, CBS does say the most amazing things, like suggesting the rule has failed to serve the purpose for which it was intended. In addition to enabling independent stations to be competitive, it also has spawned a vibrant, competitive first-run syndication market -- just as was intended when it was adopted. First, the first-run syndication market has thrived on production of access time programming for affiliates. The flaw in CBS's analysis is its self-contradictory failure to acknowledge its own appreciation that a syndicator's access to prime time (and, perhaps, the hour

⁵If the network were the syndicator of the program, one might yet question whether the affiliate truly would have to outbid the other stations in the market to secure rights to the program. The Commission has remained sufficiently concerned about such affiliate favoritism to limit the amount of programming a network may syndicate and to forbid affiliate favoritism.

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of early-fringe time immediately preceding prime time)⁶ is more valuable than access to other dayparts. C'mon, CBS, is prime time special or not? If off-network programming replaces first-run programming on affiliates during access time, a precious market for first-run programming would be lost! Really, Santa, how many first-run programs are going to succeed without access time clearances on affiliates or O&Os in the network O&O markets?

Second, weakening independent television ultimately would weaken the market for first-run programming. Whereas independent stations still rely on off-network programming in early-fringe and prime access, they are buyers, like the affiliates, for syndicated programming for other dayparts. Reducing the number of competing buyers or weakening a segment of the buyers would adversely affect the first-run market.

You know what else? You think producers would shave the price of network licenses because they knew the backend looked better? For successful network shows, the producer holds the cards, as the networks well know and often complain. The producers know that the syndication value of a successful program will be substantial; the networks never have suggested, however, that producers award price concessions in renegotiating license fees for successful programs because syndication rights are more valuable. Yeah, it's a convenient argument today, but somehow, it just doesn't ring true. Hey, look, the networks appear quite capable of avoiding serious harm, at least with respect to program license fees, on their own. Recent press reports tend to confirm precisely what major studios asserted in the Commission's network financial interest-syndication rule proceeding: That the networks have held program license fees flat since the mid-80s. This suggests that the networks have exerted considerable power over network license fees regardless of the precise extent of the potential aftermarket. Their going to squeeze more price concessions from producers up front, when the nets have all the cards. When the producers have the power, forget it.

What we are concerned about, Santa, is that CBS actually may be motivated by a desire to exploit more fully the product the networks themselves would be syndicating under the newly-

⁶See CBS Exhibit 1 for a comparison of HUT levels for hours between 4 pm and 8 pm.

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relaxed syndication rules. They want another market, especially one they could better exploit by way of affiliate relationships. You know we think those "anti-favoritism" safeguards won't work. The Commission's worried, too. With all those walls comin' down at once, well, they might just stampede right over us.

While we're on the subject of the prime time access rule, the Commission really can't be blinking or winking at what's happening already, can it? Look at Sacramento and now San Francisco. Those stations are "experimenting" with shifts in their prime time schedules from 8-11 p.m. to 7 to 10 p.m. You know what effect the prime time access rule has when they do that -- zip! Sure, they're in technical compliance with the letter of the prime time access rule.⁷ But what they are doing guts the rule of any significant effect. Look what happens -- the first-run "window" in access time, gone, poof, vanished. The Commission said long ago that's bad news. Go look at the WISH case. They said:

[W]e are not at this time prepared to endorse, by Commission action, an individual arrangement which results in all or most of the cleared access half hours being at the end of the evening, following network programming.⁸

Now, what's happening in San Francisco and Sacramento -- bingo, network programming at the beginning of prime, access at the end. And do they run syndicated programming? No, they run news and on KCRA, network programming. KCRA got a waiver, you know.

So the rule's meaningless. The window for first-run syndicated programming is gone. If that wasn't bad enough, the independents get socked at both ends of the schedule. The cream of our schedule now goes head-to-head with network

⁷The San Francisco stations will broadcast news in the fourth hour of prime time (10-11 p.m.); KCRA in Sacramento broadcasts news and then The Tonight Show, pursuant to its waiver in the 10-11 p.m. hour of prime time.

⁸Request for Waiver of the Prime Time Access Rule, 28 RR 2d 495, 498 (1973) [emphasis supplied]. (Sorry about the footnote, Santa. You know us lawyers, yeah, of course, Miracle on 34th Street, you were in court....)

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programming in what used to be access time, and our news is right up against the affiliates' news at 10 -- pulls the rug right out from under our most important revenue producers.

The Commission better wake up to this one, Santa. If prime really isn't 7-11 p.m. on the West coast, then the Commission better update its rule to reflect what's really happening. Prime time, as a practical matter, may be shifting. Consequently, the definition of prime time in the prime time access rule may be out of synch with trends in the industry. Indeed, the very basis for the "experiments" is the perception that audience potential is greater between 6 and 7 p.m. than between 10 and 11 p.m. In Sacramento, for example, the HUT level between 6 and 7 p.m. (53) now is comparable to the 10-11 p.m. HUT level (54).⁹ We're not sure they're right, but whatever they're thinking, they have managed to throw all the benefits of the prime time access rule right out the window. And, Santa, a lot of our folks are going to hurt real bad if the Commission just sits around and let's 'em get away with that one.

Santa, losing must carry was bad enough for us. If the cable giants control our access to our audience and the network giants can take our best programming away from us, that kind of double whammy is a killer. Next year we'll all be ringing bells on street corners. Don't let 'em do it to us Santa. We'll be good. Hey, more independents are doing news. Really, Santa, we are, and, how else you gonna keep them cable grinchies from raising rates? Gotta have some off-air competition out there somewhere. And, Santa, you know, we could use a good fourth quarter, too.

With best wishes for a safe sleigh ride in 1991, we are

Very truly yours,

INTV

⁹See Opposition of INTV, MMB File No. 910723A (filed August 5, 1991) at 13.

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