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Federal Communications Commission
Office of the Secretary

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

IN THE MATTER OF)
)
REVIEW OF THE POLICY IMPLICATIONS) MM DOCKET NO. 91-221
OF THE CHANGING VIDEO MARKETPLACE)

TO: THE COMMISSION

COMMENTS

FOX BROADCASTING COMPANY

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NOVEMBER 21, 1991

SUMMARY

Dramatic changes in the structure of the video marketplace have completely shattered the perceived wisdom underlying forty years of regulatory policy -- namely, that over-the-air broadcast networks would never face meaningful competition from alternative distribution technologies. Yet competitive and technological developments that were unforeseeable as recently as twenty years ago, led by the advent of satellite program delivery and the explosive growth of unregulated cable program networks, have shaped the evolution of today's unconcentrated video marketplace in which broadcast networks are just one type, among many, of competing national program distributors. These developments compel a thorough study of the linkages between broadcast and non-broadcast video program distribution services and a reevaluation of the Commission's rules which restrain the business activities of broadcast networks.

The Commission's antiquated regulatory structure discourages entry into broadcast networking in favor of alternative distribution technologies, thereby directly, and discriminatorily, facilitating the rapid deployment and commercial success of non-broadcast distribution of video programming. Commission rules prohibit broadcast networks and station licensees from freely negotiating mutually beneficial relationships, and prohibit broadcast networks from owning more than 12 stations nationwide. Meanwhile, the relationships of cable networks and national program syndicators with local cable systems or broadcast outlets are totally free of government intrusion; cable networks, in addition, are permitted to hold an ownership interest in an unlimited number of the cable systems distributing their programming on a local basis.

New broadcast network entrants are doubly handicapped in today's video environment. Not only are they subject to the entire array of regulations limiting their freedom to contract with their affiliates -- irrespective of the mutual benefits to be derived -- but they are further handicapped vis-a-vis their established network counterparts by the limits imposed by technology and the Commission's frequency

allocation policy. It is virtually impossible, for example, for new entrants to achieve coverage comparable to that of the established broadcast networks, which have an insurmountable advantage with respect to total affiliate numbers and access to stronger, more mature VHF outlets.

In responding to the worsening broadcast economy and the competitive inroads made by other technologies, the traditional broadcast networks have begun to take steps that are in neither their own, nor their viewers', best interest. In particular, the networks create a potentially fatal downward spiral by scaling back their commitment to news and public affairs programming, which traditionally has been, and remains even in today's diverse and competitive video marketplace, their unique contribution to the public interest.

Fox is committed to breaking this cycle by providing its affiliates with the capability to function as credible sources of news and information in their communities. Fox is supporting its stations with market and budget analysis, equipment purchases, and by providing them with national and international spot news coverage. Yet the network rules hamper Fox's ability to assist its local outlets in developing their news capabilities by imposing arbitrary limits on its freedom to negotiate with them the terms of the network/affiliate relationship under which this joint enterprise will go forward.

The game has changed. Only the rules remain the same. If broadcast networks and their affiliates are not to be relegated to a position of obsolescence and irrelevance, they must be permitted to compete freely and on the same terms as their non-broadcast competitors. Only by eliminating anti-competitive restrictions on broadcast network operations will the Commission ensure that the public interest in high quality, over-the-air television, freely available to all citizens, will continue to be served.

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To: The Commission

COMMENTS OF FOX BROADCASTING COMPANY

Fox Broadcasting Company ("Fox") submits these Comments in response to the Commission's Notice of Inquiry, 6 FCC Rcd 4961 (released August 7, 1991) (the "Notice"), in the above-captioned matter.

I. INTRODUCTION

There is universal agreement that a technological and competitive revolution has transformed the video marketplace over the last twenty years, literally restructuring the industry. With this Inquiry, observing "that television broadcasting now exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead," [1] the Commission has taken the crucial next step of beginning

[1] Notice, 6 FCC Rcd at 4961 (¶ 3).

to assess the regulatory implications of those market changes. [2]

"The statistics in this regard," the Commission notes, "are well known." [3] Indeed, the "expansion in the availability of outlets and programming," and the corresponding fragmentation of the television audience, are taken as givens of the current -- and future -- video environment. At the same time, ongoing developments in the video industry, such as the anticipated launch of DBS systems and the concurrent dissemination of video compression technology, are already treated as virtual realities. [4]

In light of these developments, Fox shares the Commission's "general concern that some of [its] television rules and policies may no longer be in step with current industry circumstances . . . ." [5] In particular, Fox believes that continued and unnecessary regulation of only one sector of today's diverse and competitive video marketplace jeopardizes the

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[2] The Office of Plans and Policy staff working paper that is one of the bases for this Inquiry stated a more pointed conclusion. See Office of Plans and Policy Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996 (1991) (the "OPP Paper"). "The broadcast television industry," the OPP Paper concludes, "has suffered an irreversible long-term decline in audience and revenue shares, which will continue throughout the current decade." Id. at 4097. In particular, the staff observed, "[t]he power of the [broadcast] networks that the Commission has historically sought to curb has succumbed to technology and competition." Id. at 4102. In this regard, it should be noted that the OPP Paper, released in June 1991, relies on data reflecting market conditions as of -- at the latest -- the first quarter of this year. Since then, as frequent reports in the trade and popular press make clear, the competitive position of the broadcast networks has continued to deteriorate. See, e.g., "The TV Networks in Play," Broadcasting, Nov. 11, 1991 at 3-4 (citing reports that "both the CBS and NBC networks have been put on the block. But with business being so bad nobody wants to buy.")

[3] Notice, 6 FCC Rcd at 4961 (¶ 3).

[4] See Notice, 6 FCC Rcd at 4961 (¶ 4) ("it appears likely that satellite services such as direct broadcast satellite (DBS), increasingly well-financed cable programming services, and greater cable television channel capacity will perpetuate erosion of broadcast network audience share").

[5] Notice, 6 FCC Rcd at 4961 (¶ 1).

emergence and growth of new broadcast networks and poses a threat to the continued viability of over-the-air networking in general.

II. A RATIONAL REGULATORY POLICY MUST TAKE INTO ACCOUNT THE LINKAGES BETWEEN BROADCAST AND NON-BROADCAST VIDEO PROGRAM DISTRIBUTION SERVICES

The structural transformation of the video marketplace, which has been extensively documented and analyzed, need not be recapitulated here. When the current restrictions on broadcast television network activities were promulgated, satellite delivery of video programming did not exist. Only the three traditional broadcast networks had nationwide terrestrial distribution systems. Cable television systems functioned merely as reception enhancers for over-the-air signals. Program syndicators distributed product by bicycling tapes to station clients. Yet the advent of satellite program delivery and multichannel distribution technology, and the concomitant proliferation of cable program networks and broadcast syndicators, have within just a few years blurred the distinction between broadcast networks and other, competing national program packagers. [6]

As a result, broadcast television networks now constitute just one type among many competing sources of nationally distributed video programming. These competing program packagers, whether broadcast networks, cable networks, or syndicators, all rely on satellite distribution technology as an efficient means to aggregate national audiences for their

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[6] The Commission has recognized that:

> As space satellite relay systems have replaced microwave routes as the principal technology for delivery of programming to local broadcast stations, programs increasingly are available nationwide rather than on a local or regional basis. . . . Today satellites are used not only to relay numerous channels of video programming to cable systems within the U.S. (and around the world) but to deliver network and syndicated programming to both regular and low power television stations.

Notice, 6 FCC Rcd at 4963 (¶ 11).

programming. Satellite technology, unavailable twenty years ago, enables even independent local broadcast outlets to function as national programming services. [7]

For the viewer, however, the ultimate source of any of the myriad available video programming choices is immaterial. Whether it originates in his local community or hundreds of miles away; whether it is delivered over the air or by satellite or through a wire -- the viewer perceives only a single source of programming: the television screen in his living room.

Nevertheless, the proliferation of functionally equivalent programming sources facilitated by the new distribution technologies has benefited program producers and syndicators, advertisers, scores of national and regional cable program networks, cable system operators and equipment suppliers. In fact, the only losers in the new video environment have been broadcast networks, which remain handicapped by the limitations inherent in broadcast technology and, perhaps more important, by an array of outmoded regulations governing their economic behavior, program practices and relations with their affiliates.

Meanwhile, the disparity in technical innovations (and their attendant commercial opportunities) between broadcast networks and other, alternative distribution technologies continues to widen. The cable television industry, for example, is already taking steps to

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[7] See OPP Paper, 6 FCC Rcd at 4049-50 (noting that "superstation" WTBS(TV), Atlanta, Georgia, was the second most popular cable channel (next to co-owned CNN) in the country for prime time and total day viewing during the first quarter of 1991). The 1991 Edition of the Television and Cable Factbook lists a total of seven superstations, each of which serves between 1.3 and 51.4 million subscribers nationally.

implement video compression technology,[8] which also will be a standard feature of DBS services.[9] Yet the extent to which broadcast networks will be able to benefit from compression techniques -- which are not likely even to be available to broadcasters in the foreseeable future -- is unclear.

Similarly, fiber distribution technology now permits vast increases in cable system channel capacity,[10] while broadcast networks are constrained by technology and Commission rules to provide a single channel of programming to a single local outlet in each market they serve. And, unlike cable operators, broadcasters' implementation of HDTV technology is contingent on spectrum reallotment, which likely will be opposed by other spectrum users.

New broadcast network entrants must contend not only with non-broadcast distributors, but also with their established broadcast network competitors. Thus, the long term viability of Fox or any new broadcast network entrant is a struggle against even greater odds, attributable largely to the inherent limitations of broadcast technology and, just as important, the Commission's regulatory policies. Television allotment policies, for example, make it

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[8] See "Satellite Digital TV Coming Into Focus," Broadcasting, Oct. 28, 1991 at 36 (reporting that TCI and Viacom have jointly issued RFP for digital video compression systems, with objective of applying compression technology to cable program satellite delivery by mid-1992).

Some premium and basic cable program networks, meanwhile, have begun multiplexing experiments in an effort to enhance their value to viewers. See, e.g., "HBO, Cinemax to Split Services into Three Channels Each," Broadcasting, May 13, 1991 at 33 (quoting HBO President and CEO, Michael Fuchs, as stating that move anticipates "an explosion of channels. Compression is not a fantasy. Fiber optics is not a fantasy."); "MTV Announces its Move to Multiplexing," Broadcasting, Aug. 5, 1991 at 39 (noting that MTV's multiplexing plan will exploit transponder compression, enabling a single transponder to accommodate all three planned channels).

[9] See OPP Paper, 6 FCC Rcd at 4034.

[10] See, e.g., "Cablevision Plans Fiber Conversion of N.Y. Cable TV System," Fiber Optic News, Aug. 26, 1991 at 4 (fiber conversion of nation's largest single cable television system will facilitate "almost unlimited channel capacity").

virtually impossible for a new network to reach the potential audience available to the three established networks and their mature affiliates. The three established networks have an insurmountable advantage over new entrants with respect both to total affiliate numbers and to the relative distribution of affiliates among VHF and UHF outlets. At the same time, new broadcast networks, like their established counterparts, are prevented by an array of archaic FCC-imposed behavioral controls from competing effectively with alternative distribution technologies, such as cable, which are subject to no comparable FCC regulation on their program practices or business relations.

III. CURRENT REGULATORY POLICY HANDICAPS BROADCAST NETWORKS VIS-A-VIS THEIR UNREGULATED SYNDICATION AND MULTICHANNEL COMPETITORS

The Commission has recognized that "regulatory policies . . . adopted to respond to problems caused by limitations on entry and concentration of control . . . should reflect the amount of diversity and competition that exists and any remaining barriers to entry." [11] Consequently, regulatory policy must address the reality that structural changes in the video marketplace have ameliorated the market imperfections that prompted adoption of restrictions on network behavior.

In today's unconcentrated video marketplace, broadcast networks compete with cable networks and syndicators for viewers, advertisers and programming. Accordingly, continuing to place severe constraints on the activities of participants in only one segment of the national program distribution marketplace -- broadcast networks -- has the perverse effect of replicating the market distortion the rules were intended to correct. As Commissioner Ervin S. Duggan observed in a Separate Statement accompanying the Notice in this proceeding:

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[11] Notice, 6 FCC Rcd at 4961 (¶ 5).

> I have been troubled by the asymmetry between our regulation of broadcasting and multichannel video industries. We expect broadcasters to continue serving the public interest while competing for ever more scarce advertising revenues. Broadcasters' competitors, on the other hand, are not so constrained when it comes to regulation, to revenue streams, or to channel capacity. [12]

A few examples will suffice to illustrate the extent to which current regulatory policy exacerbates the already significant technological and competitive disparities between broadcast networks and alternative national program suppliers. Completely free of regulatory restraints, for example, cable program networks enjoy a triple revenue stream restricted only by market exigencies. [13] Thus, in addition to direct subscriber payments and advertising revenues, cable networks are free to reap unlimited financial benefits from television program production and from participation in the program aftermarket, which, even under the "modified" fin/syn regime, remains largely off limits for major broadcast networks.

While FCC rules strictly control broadcast networks' relationships with their affiliates, [14] the Commission imposes no restrictions on the amount of programming cable networks may provide to system operators or the terms under which carriage is obtained. Similarly, broadcast networks are constrained to provide only one channel of programming to a single local outlet, [15] while cable programmers are permitted to operate an unlimited number of

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[12] 6 FCC Rcd at 4966.

[13] Analysis of the disparity between broadcast and cable network revenues typically focuses on "the change from advertising as virtually the sole revenue source for distributors to an environment in which a significant portion of distributors receive both advertising and direct consumer revenues." Notice, 6 FCC Rcd at 4962 (¶ 9).

[14] See 47 C.F.R. § 73.658(a)-(e). These rules restrict broadcast networks' ability to secure clearances of their programs, proscribe exclusive affiliation agreements and option time, and limit affiliates' ability to obtain territorial exclusivity from their networks. See also pp. 12-17 below.

[15] See 47 C.F.R. § 73.658(g). The rule prohibits the simultaneous operation of more than one broadcast network by a single entity.

parallel networks. Time-Warner operates both HBO and Cinemax, for example, while Viacom programs Nickelodeon, MTV and VH-1. [16]

The inequity of the current regulatory scheme is placed in even sharper relief by examining the extent to which program syndicators have devised ways to engage in activities equivalent to broadcast networking while remaining totally free of regulation. Paramount, and Disney subsidiary Buena Vista Television, for example, offer in-house produced programs by satellite interconnection on a regular basis to television stations around the country. [17]

These and other first-run program syndicators share other characteristics commonly associated with traditional broadcast networks. For example, they retain and sell commercial advertising time in the programs they distribute; they control the selection, content, writing, production and scheduling of the programming produced for broadcast on their "networks;" and they require affiliated stations to devote promotional resources and time to their "network" programs. Indeed, syndicators often act aggressively to position themselves as "networks" in order to attract and retain advertisers and viewers, and may include a liquidated

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[16] See Note 8, above, regarding these and other cable networks' plans to multiplex their services. In addition, as noted above, these entities are free to take financial interests and syndication rights, without limitation, in programming produced for and presented on their respective networks. Such activities are narrowly circumscribed, however, for broadcast networks.

[17] The Commission previously has recognized the inconsistency in the regulatory treatment of broadcast networks and syndicators. See Notice of Proposed Rulemaking, Network Affiliation Agreements (Two-Year Rule), 3 FCC Rcd 5681, 5685 n.10 (1988). There the Commission acknowledged that:

> The term "network" in this rule, as in many of the "chain broadcasting" rules, refers to all electronically interconnected over-the-air-networks, whatever their size. Thus, today the rule technically may apply to syndicators that distribute shows to numerous stations by satellite for simultaneous broadcast, even though obviously such application was not contemplated when the Commission applied the rule to television in 1945.

damages clause in program contracts -- imposing cash penalties for unauthorized rescheduling of programs -- to ensure in-pattern clearances of their barter product. [18] To the extent that networks are inhibited by existing rules from competing with syndicators who can ensure in-pattern clearances, those rules should be repealed.

IV. ASYMMETRICAL APPLICATION OF NETWORK RULES DISSERVES THE COMMISSION'S CORE GOALS OF LOCALISM, DIVERSITY, NATIONWIDE AVAILABILITY OF SERVICE AND SERVICE TO THE PUBLIC

For more than four decades, free, over-the-air television networks have been the mainstay of the U.S. video marketplace. The broadcast networks have supported the development of high quality news, documentary, sports and entertainment programming on the national level. More important, the financial stability that network affiliation provides has enabled hundreds of local outlets to serve the needs of their communities.

As the OPP Paper makes clear, however, the age of broadcast network dominance has ended. The broadcast networks' cable counterparts, among other competitors, have taken their place at the table, and are claiming bigger and bigger slices of the television pie.

As discussed above, cable networks have been permitted to emerge and grow totally free of FCC restrictions on their business and programming practices. Indeed, their growth historically has been subsidized by a regulatory policy expressly intended to hobble the broadcast networks, purportedly in the interest of competition and diversity. The reality of the current competitive environment, however, turns this policy on its head. Now the rules actually threaten the viability of the broadcast networks -- the only source of free, universally

[18] For example, the standard contract for one late night syndicated program requires the payment of a significant cash penalty for any failure to provide in-pattern clearance of the nightly program (with the exception of "valid" preemptions, which are limited by the contract to "events of public importance"). Alternatively, the syndicator may at its sole discretion elect to terminate the license and receive as liquidated damages an amount representing the diminution in revenues (if any) attributable to the program's placement on another local outlet.

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available video programming -- while encouraging new entrants toward non-broadcast distribution alternatives. [19]

Continued failure to address the broadcast networks' growing competitive disadvantages will weaken the foundations of communications policy, [20] as networks and local stations react to the declining broadcast economy by taking steps that are clearly in neither their own, nor their viewers', best interest. Cutbacks in non-entertainment programming at the national level, for example, have already begun to have an adverse impact on the public interest in an informed citizenry and electorate, putting at risk the unique "common set of facts and sense of community" that broadcast network news coverage historically has created. [21]

Declining network capabilities in turn limit the ability of affiliates to respond to their communities' needs, interests and concerns at the local level. Thus, ironically, by scaling back their unique and valuable public interest contribution -- the presentation of high quality, credible news and public issues coverage -- the networks trap themselves and their affiliates in a potentially fatal downward spiral as another important distinction between broadcasters and their non-broadcast competitors is further eroded.

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[19] In this connection, the OPP Paper echoes the conclusions of the 1980 Network Inquiry Special Staff report when it states that, "to the extent that regulations restrict their ability to expand their broadcast activities, the networks will have significant incentives to diversify into non-broadcast media." OPP Paper, 6 FCC Rcd at 4099. More than ten years ago, the Network Inquiry Special Staff found that rules governing network behavior had the effect of skewing network entry toward alternative distribution modes, e.g., cable and pseudo-network broadcast syndication. See Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Vol. I at 489-90 (1980) ("Network Study") (rules regulating network-affiliate relationships "may inhibit the development of new networks" and "provid[e] artificial inducement to bypass conventional broadcast outlets" in favor of new technologies), 515 (rules affecting network program supply contracts create incentive for program suppliers to bypass existing broadcast outlets in favor of alternative distribution technologies).

[20] The Notice identified those "core" goals as "localism, diversity, nationwide availability of service, and the public interest standard . . . ." 6 FCC Rcd at 4961 (¶ 12).

[21] See Auletta, "Look What They've Done to the News," TV Guide, Nov. 9, 1991 at 4, 5 (discussing continuing downward pressure on broadcast network news budgets in light of poor network financial performance).

Fox seeks to break this cycle, and to enable its affiliates to respond more effectively to community needs and interests, by providing them with everything they need to make an early entry as credible, high quality sources of local, national and international news. Fox provides support and guidance to its affiliates ranging from market and budget analysis, to hardware purchases, to spot news coverage collected from Fox affiliates and other sources around the country and from international sources.

Fox believes its affiliates -- most of which, like other, largely UHF independents, historically have had no news capability -- can reach a large "news disenfranchised" audience by presenting a relevant, prime time news broadcast, responsive to the needs, and the high standards, of that audience. Fox affiliates, in turn, are discovering that their local credibility is enhanced as they emerge as meaningful sources of news in their communities. At the same time, their revenues improve as they tap into advertising budgets earmarked for the local news market. This year alone, the number of Fox affiliates producing and presenting news coverage locally (and providing material to Fox News Service for distribution to other Fox affiliates around the country) has more than doubled from 18 to 40. Their developing news gathering capabilities also enable these Fox affiliates to participate in the burgeoning "off-network" news market by providing material to third party purchasers, such as syndicated news services and satellite distributors, thereby furthering the public interest in a diverse range of viewpoints while bettering their bottom line.

But Fox's plans to assist local outlets in developing their broadcast news capabilities are hampered by arbitrary limits on its freedom to negotiate with its affiliates. Responsible regulatory policy should be designed to encourage, rather than impede, the development of such programming, which so clearly serves the Commission's goals of diversity and competition.

V. IT IS TIME TO REEXAMINE THE NETWORK RULES

It is a basic tenet of responsible regulation that any rules must be based on a rational prediction that they will remedy an identified harm. [22] It follows that the Commission "should not continue to regulate unless it can clearly identify the harm it seeks to remedy." [23] Indeed, if, as a result of changes in market conditions since a regulation was adopted, it no longer achieves its desired objectives, the Commission is under a public interest obligation to modify or repeal it. [24]

This principle is particularly applicable in an industry undergoing dramatic technological and economic change. As the Supreme Court has observed:

> "Underlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." [25]

The Commission repeatedly has recognized that natural market evolution necessarily affects the behavior of market participants. [26] It follows, as the Commission has

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[22] See Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 40-42 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[23] N.A.A.C.P. v. F.C.C., 682 F.2d 993, 1000-01 (D.C. Cir. 1982).

[24] See id.

[25] United States v. Southwestern Cable Co., 392 U.S. 157, 172-73 (1968) (quoting F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).

[26] See, e.g., Further Notice of Inquiry, Commercial Television Network Practices, 69 F.C.C.2d 1524, 1529 (1978) (noting that "changes in the structure of the [broadcast television] industry can also change its practices"); Network Study, Vol. I at 514 (increase in viewer options through emergence of new networks reduces dominance of traditional broadcast networks and mitigates regulatory concerns).

acknowledged, that "it is frequently preferable to adopt policies that protect or foster an industry structure that may obviate or reduce the need to supervise its practices." [27]

This is precisely the situation confronting broadcast networks -- and the Commission -- today. While the Commission has expended considerable time and energy during the last two years in reassessing the continued validity of the financial interest and syndication rules, [28] it has not focused on other even more antiquated regulations regarding the relationship between a broadcast network and its affiliates. These network-affiliate regulations include, among others, the "exclusive affiliation rule," which prohibits network-affiliate agreements which would prevent, hinder or penalize the affiliate for broadcasting the programming of another network; the "territorial exclusivity rule," which permits an affiliate territorial exclusivity only to its community of license; the "option time rule," the "right to reject rule," and the "dual network rule." [29]

Most of the network-affiliate rules date back fifty years to the 1941 Report on Chain Broadcasting ("1941 Report"), which was adopted during the pre-television era at the conclusion of the Commission's first extensive investigation -- begun in 1938 -- into radio network structure and operations. Recognizing the significant benefits to the public from network operations, the 1941 Report recommended regulations regarding network-affiliate practices and agreements which were intended to foster the development of new networks and to ensure "that licensees will exercise their responsibilities under the law" by preventing

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[27] Commercial Television Network Practices, 69 F.C.C.2d at 1529 n.8.

[28] See Report and Order, Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094 (1991), recon. denied, Report No. DC-1974 (released Oct. 24, 1991).

[29] The texts of the rules discussed in this Section and in Section VI are set out in an Appendix attached to these Comments.

existing networks from using what was perceived to be their dominant power to exact coercive contractual concessions that were not in their affiliates' best interest. [30]

In 1946 the regulations recommended in the 1941 Report were applied to television networking -- then in its infancy -- without any careful analysis. [31] It was not until 1955 that the Commission initiated a comprehensive study of television networking, which resulted in the issuance of the 1957 Barrow Report. [32] In 1957, broadcast television was still the only means of distributing television programming to home viewers. While the Barrow Report reaffirmed the need for continued regulation of the network-affiliate relationship, its recommendations were premised on the belief that over-the-air, advertiser supported broadcast television would face no alternative or competitive television delivery systems.[33]

Following the Barrow Report, the network rules remained largely intact, and the Commission's regulatory scheme remained unexamined for over twenty years. Then, in 1979-80, the FCC staff conducted yet another extensive analysis of network television. This

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[30] 1941 Report at 88.

[31] 11 Fed. Reg. 33 (1946).

[32] Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. (1958).

[33] In describing its mandate, the Barrow Report noted:

> To a considerable extent, public policy leaves regulation of broadcasting to the free interplay of competitive forces. The basic problem for study is whether under the existing structure and practices of the industry there is effective competition, and, if not, whether the public interest would be served by legislation or Commission rules designed to insure the degree of competition necessary for the effectuation of Commission policy.

Id. at 3.

time, however, an FCC Network Inquiry Special Staff raised serious questions about the continued efficacy of the network rules. Among other things, the Special Staff noted the emergence of cable television as an alternative distribution system for television programming, and concluded that the rules might actually be hindering their intended goal of fostering the development of additional networks. [34]

Notwithstanding the recommendations of the Special Staff, the Commission did not take any significant action with respect to the network-affiliate rules until 1989. In response to the changes occurring in the video marketplace, the Commission effected the first significant reduction of its television network rules by eliminating the rule which had previously limited the term of affiliation to two years. [35] The Commission noted the tremendous increase in the number of television broadcast stations, and particularly independent stations, since the rules were first adopted, the explosive growth of cable television, and the fact that broadcast networks were now competing with over 85 national cable networks. [36] It further found that

> [t]he data on the growth of non-broadcast participants in the market have an added importance as a reminder that in focusing on how best to use the regulatory process to mediate the network broadcast station relationship, it is critical that regulations, like the 'two-year' rule, not adversely distort the competitive interplay between broadcast networks (and their affiliates) and the newer cable networks (and their affiliates). The broadcast networks and their affiliates now face, and will increasingly face in the future,

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34 Network Study, Vol. I at 23.

35 Network Affiliation Agreements (Two-Year Rule), 4 FCC Rcd 2755 (1989).

36 Id. at 2756-57 (¶¶ 13-14).

> the need to compete aggressively both for programming and for viewers with nonbroadcast networks. Elimination of [the two-year] Rule thus could be of considerable importance to strengthening the ability of broadcast network-affiliates to respond to the competition from new technologies. [37]

The Commission went on to conclude that "[f]or networks, longer term agreements make possible a more stable system of affiliates" and that a "more stable affiliate system should, in turn, make it easier for the networks to plan their programming schedules, attract advertisers, and attract capital that can be used for expanding and improving service to the affiliates." [38]

In its Notice proposing the modification or elimination of the "two-year rule," the Commission had stated:

> We feel it is necessary and important to reexamine the two-year rule for two reasons. This rule was adopted nearly a half-century ago for the radio industry and then applied to television, without evaluation or modification, in 1945. Our foremost concern is that the factual predicates underlying the adoption of the rule may no longer be valid in today's television industry and that therefore the rule may no longer assist in the development of new networks. Moreover, we believe the rule may inhibit the ability of broadcast services to withstand competition from new delivery systems. [39]

This reasoning applies with equal force to all of the network-affiliate rules. The Commission was careful to note in 1988 that it was not undertaking "a sweeping review of our network television rules but rather . . . one specific rule which may no longer be justifiable from a public interest perspective." [40] The changes in the marketplace since 1988, and the

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[37] Id. at 2757 (¶ 16).

[38] Id. at 2757 (¶ 17).

[39] Network Affiliation Agreements (Two Year Rule), 3 FCC Rcd at 5681 (¶ 2).

[40] Id. (¶ 3).

continuing trends relating to the health of broadcast television, now mandate such a "sweeping review." This "balance sheet" analysis should examine the origin and rationale of each rule, and should determine whether its application to broadcast networks continues to serve the public interest in diversity and competition.

In particular, Fox believes broadcast networks and their affiliates, like their cable and syndicator competitors, should be permitted to negotiate mutually beneficial agreements respecting not only the duration, but also the other substantive terms, of their relationship. Thus, for example, affiliates should be free to bargain for increased support from their network in exchange for a concommitant increase in their commitment to the network. In turn, the network would receive greater assurances of the consistent distribution of its programming. Both players would realize the benefits of greater long term stability, thereby improving their service to the public.

VI. THE COMMISSION SHOULD REEXAMINE THE 12-STATION MULTIPLE OWNERSHIP CAP

In its 1985 12 station rule Reconsideration Order,[41] the Commission added the audience reach cap to the 12 station limit. The Commission declined to replace the numerical cap with the audience reach cap primarily because it wished to "reduce the possibility of disruptive restructuring in small markets" which might result from elimination of the numerical cap.[42] The Commission further noted that the audience reach cap was an "untested regulatory mechanism as applied to multiple ownership regulation" and that "retaining the numerical limit will provide us with an opportunity to gain experience with this type of regulation without

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[41] 100 F.C.C.2d 74.

[42] Id. at 89-90 (¶ 37).

risking an entire regulatory system should we find that the audience reach approach proves unworkable." [43]

Over six and a half years have passed since the issuance of the reconsideration decision. The market for station ownership has had time to adjust to the twelve station/numerical cap limit, and the Commission has gained sufficient experience to determine that the audience cap is a workable mechanism. It is thus time to further the potential economies and benefits of expanded multiple ownership by either eliminating or substantially increasing the numerical cap while retaining the audience reach cap. The audience reach cap, by itself, should be more than sufficient to protect the Commission's interest in diversity of ownership. The numerical cap is now an unnecessary limitation on the ability of companies to realize the benefits of expanded multiple ownership in the smaller markets.

An arbitrary numerical limit on broadcast television station multiple ownership is unjustifiable from a competitive as well as from an economic standpoint. Cable multiple system operators, for example, are permitted to own or have attributable interests in an unlimited number of local systems -- each of which has a government sanctioned monopoly. Perpetuating this asymmetry will only further impair the competitive position of broadcast networks.[44]

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[43] Id.

[44] While Fox may not be subject to the Commission's cable/broadcast network cross ownership prohibition, which is limited by its terms to "national television network[s] (such as ABC, CBS, or NBC)," see 47 C.F.R. § 76.501(a)(1), Fox does not oppose repeal of this restriction, subject to appropriate anti-favoritism safeguards and such other safeguards as the Commission deems appropriate.

VII. CONCLUSION

"[T]elevision broadcasting," the Commission recognized at the outset of this Inquiry, "now exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead." [45] In particular, increasing competition in program supply on the national level, made possible by advances in program distribution technology, has dramatically altered the role of over-the-air networks. As the video marketplace has evolved, the once dominant established networks are now merely three among myriad competing sources of home video entertainment -- including cable networks, broadcast syndicators and, in the foreseeable future, direct broadcast satellite operators. Nevertheless, broadcast networks remain unique in that they alone are subject to an array of regulatory constraints on their business practices and relations with affiliates.

Emerging broadcast networks such as Fox find their ability to compete effectively with unregulated cable networks and program syndicators is doubly constrained. Like their established network counterparts, they are subject to governmental restrictions on broadcast network operations. In addition, however, emerging broadcast networks, consigned to less than nationwide coverage and an affiliate pool dominated by weaker UHF outlets, face a significant competitive disadvantage resulting from the shortcomings inherent in broadcast technology and allotment policy.

It is essential that outmoded Commission rules accommodate new competitive and technological realities. In view of recent dramatic changes in the structure of the video marketplace, perpetuation of the current restrictions on broadcast network operation and station ownership will only further hamper the ability of broadcast networks to respond to competition from other technologies. Freeing the broadcast networks from archaic and anticompetitive regulatory restraints, however, will serve the public interest in diversity and competition by

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[45] Notice, 6 FCC Rcd at 4961 (¶ 3).

increasing the likelihood that viewers will continue to have access to high quality, free, over-the-air television programming at both the national and local level.

Accordingly, Fox urges the Commission to institute a rulemaking proceeding to consider the elimination of restrictions on broadcast network operations and numerical station ownership.

Respectfully submitted,

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