

decision.¹⁰⁶ There is no need to duplicate that protection through an otherwise outmoded regulation.

Nor do we believe that elimination of the Option Time ban would lead to a licensee's "abdicating" his public interest programming duty. The licensee's obligation to program his station is protected sufficiently by the "right to reject," which has been described by the Commission as the "key to essential licensee responsibility."¹⁰⁷ Finally, no amount of option time can save a program that does not "stand on [its] merits."

D. Territorial Exclusivity

This rule assures the network the freedom to distribute its programming to a station outside the community of license of its affiliate (regardless of the carriage of that programming by the affiliate), and to distribute programming not cleared by its affiliate to any station in the

¹⁰⁶ In adopting the prime time access rule, the Commission made a judgment that new sources of programming should be protected for a portion of prime time by eliminating competition that network and off-network programming would otherwise produce in that time period. Specifically, the Commission sought to establish access to a widely-viewed time period for independent producers' programming which had not had the benefits of national exposure through a network distribution structure. The rule was intended to further the growth of new program sources and independent stations, including possibly a new network. See, generally, Reply Comments of Capital Cities/ABC in MM Docket No. 90-162 In the Matter of Evaluation of the Syndication and Financial Interest Rules (filed August 1, 1990), pp. 82 et seq.

¹⁰⁷ ABC Radio Network Proposal at paragraph 9.

same community.¹⁰⁸ The Commission regarded the rule as important to promote the development of television service, by encouraging wide availability of network programming to stations.¹⁰⁹

The Territorial Exclusivity rule was the only Chain Broadcasting Rule not eliminated in the Radio Deregulation Order. The Commission indicated that the rule was "designed to prevent networks from making concessions on exclusivity to stations, to an extent contrary to the public interest ..."¹¹⁰

¹⁰⁸ The rule provides: "Territorial exclusivity. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, or which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its community upon the programs of the network organization. As employed in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station." 47 C.F.R. §73.658(b)

¹⁰⁹ In 1955, when the Territorial Exclusivity Rule was amended to limit the geographic area of permissible exclusivity, the Commission stressed the importance of the rule to the "orderly development of television service to the public." Amendment of the Television "Territorial Exclusivity" Rule, 12 Rad. Reg. 2d (P&F) 1537 (1955), at paragraph 10. The Commission also stated that, "[a]t this stage in the development of the television industry, network programming is essential to the profitable operation of most stations; and, in many instances, its availability may be determinative of a station's ability to survive and furnish a needed television service to the public ... we believe maximum opportunity should be given to all stations to compete for network programming." Id. at paragraph 9.

¹¹⁰ Radio Deregulation Order at paragraph 16.

It cited "decreased network dominance" as a reason to retain the rule,¹¹¹ presumably because it perceived lessened network power as leading to increased affiliate market power.¹¹² The Commission also apparently continued to believe that the rule helped to make network programming more available.¹¹³

When they are examined in the light of present-day conditions, the reasons for the rule no longer support its retention. Networks do not require the assistance of regulation to protect against concessions to affiliates that would harm the public interest. Networks have a primary interest in the broadest possible circulation. In pursuing their own business interests, networks can be reliably expected to avoid unreasonable exclusivity demands by affiliates that would restrict their circulation. Moreover, in view of the expansion in program supply, including the Fox network, there is no longer a need for a government policy which imposes distribution conditions or restrictions on networks and no other entities. Exclusivity is a key term of contract in the negotiation of distribution arrangements between suppliers and exhibitors. To the extent that such arrangements would unreasonably block access to program product, antitrust law remedies are available to the aggrieved

¹¹¹ Id. at paragraph 21.

¹¹² 1980 Network Inquiry Report at IV-26-27.

¹¹³ Radio Deregulation Order at paragraph 17.

parties.

There is accordingly no strong public interest served by the rule. We believe, as the Commission stated in the Two-Year Rule proceeding, that it is preferable to allow the parties the freedom to structure the most efficient arrangement in light of competitive necessities.¹¹⁴

¹¹⁴ "The network-affiliate relationship is a complex contractual relationship that will likely result in different terms for different types of stations and networks. We believe the preferable course is to give the parties freedom to negotiate what they mutually agree to be the most efficient arrangement in their individual circumstances." Two-Year Rule at paragraph 21.

Conclusion

For the foregoing reasons, Capital Cities/ABC urges the Commission to modify its regulations in the manner described in these Comments.

Respectfully submitted,

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EXHIBIT A

Prime Time
Monday-Sunday 8:00-11:00 PM
Cable Homes Only
September 1990 - August 1991

	<u>Rating</u>	<u>Share</u>
Affiliated Stations	32.4	54
Independent Commercial Stations	11.5	19
Public Television Stations	1.9	3
Total Cable	22.1	37

Source: NTI Monthly Cable TV Stations Report
September 1990-August 1991