> would facilitate the continued provision of valued over-the-air services.
>
> The regulatory challenges of the next decade are to develop an equitable and efficient regulatory framework for all video service providers and to give single-channel advertiser-supported television broadcasters flexibility to compete more effectively with multichannel rivals that benefit from a dual revenue stream. Broadcasters should not be hindered excessively from diversifying to make efficient use of their core skills -- production, acquisition, and scheduling of programming, as well as selling advertising....
>
> Thus, the Commission should eliminate its broadcast multiple ownership and network-cable cross ownership rules, relax its duopoly rules, and seek Congressional authority to relax its cable-broadcast cross-ownership prohibition. Moreover, many of the Commission's network-affiliate regulations are ripe for re-examination...."

Id. at 4002 (emphasis added). The Commission is reviewing its ownership regulations and policies, as its staff proposed. It is now also time to review at least one of its network-affiliate regulations, the off-network program restriction in the PTAR.

IV. The Off-Network Restriction Prevents Licensees From Broadcasting the Programming They Deem Most Responsive to Local Interests, Needs, and Tastes, Contrary to the Objectives of PTAR and Contrary to the First Amendment

A. Licensees Cannot Program Stations Using Their Own Judgment and Discretion

As discussed above, one of the primary objectives of the Commission in adopting the PTAR was to free a portion of valuable prime time in which licensees of individual stations could present programs in light of their own judgments. Yet this objective is frustrated and impeded by the off-network restriction in the PTAR. The PTAR may guarantee local stations that are network affiliates in the top 50 markets an hour of

their own to program in prime time, but the off-network proscription unduly restricts what those licensees can program in that hour by making unavailable to them during that hour the most popular television shows available to their competitors. In the Comments of CBS, Inc. filed in the Commission's recent Video Marketplace Inquiry, CBS noted that in markets below the top 50, unaffected by PTAR, the three top rated syndicated off-network series in May 1991 -- MASH, GOLDEN GIRLS, and WHO'S THE BOSS -- each averaged a rating of 10.0 or above when scheduled in prime time "access" period (generally 7-8 PM ET), but achieved ratings of only 3.6, 6.8 and 5.5, respectively, when scheduled in the "early fringe" period (generally 4-5 PM ET). Comments of CBS at 61. Obviously local stations would want to carry these programs during the access period. Yet 164 stations cannot do so. Local stations are therefore prohibited from using their judgment as to when to present programs because of a rule designed with the objective of permitting them to exercise their programming judgment!

As the Special Staff noted in the Final Report of the Network Inquiry:

> "As a result of PTAR, affiliates in the top fifty markets have their access period program choices restricted to first-run syndicated or locally-originated material, while affiliates in other markets have the additional option of choosing off-network programs. Because all of these program choices, along with network programs, were potentially available to affiliates prior to the promulgation of the rule, PTAR reduced the scope of program choices to affiliates and in this manner reduced the extent to which the system achieves the goal of individual localism.

> Proponents of the rule have yet to devise a satisfactory method of arguing that affiliates' discretion was enhanced by removing one or two of their preferred choices."

Final Report at 512. Thus, the Commission's own Special Staff recognized and advised the Commission over 11 years ago that the PTAR and its off-network restriction did not and could not serve one of the primary objectives for which PTAR was adopted.

B. Licensees Cannot Compete in Their Local Markets

Also, as CBS noted in its Comments at 57, off-network programs are generally television's "vintage best -- the expensively produced programs that, as first-run network series, were able to achieve a level of popularity sufficient to permit their survival for numerous seasons of network exhibition." The off-network restriction prohibits network affiliates in the top 50 markets from showing television's "vintage best" programs during the non-network time period of greatest audience potential. This severely restricts the network affiliate's ability to compete with other stations and cable for viewers during a critical time period. Because the network affiliates cannot use off-network programs during the fourth hour of prime time, they often cannot compete with other stations in their own market for the most popular off-network programming. Since the time periods in which network affiliates can show the off-network programs are limited to non-prime time periods when audience levels are lower, they cannot afford to bid as high as independents and Fox affiliates (which can show the programs throughout prime time) for some of the most popular programs

available. Thus, the off-network ban restricts a network affiliate's ability to compete in its local market with non-network affiliates and Fox affiliates for viewers, programming, and revenues. There is no evidence that the off-network restriction has served to lessen network dominance. There is abundant evidence, however, that it is crippling local stations affiliated with a national network in the top 50 markets.

It is particularly unfair that network affiliates should suffer from a regulation designed to curb the networks when it is network affiliates that produce most locally produced news and public affairs programs in a market. As the Commission's OPP Paper observed, network affiliates spend far more for news than do independent stations. 6 FCC Rcd at 4031. In fact, "most independents spend relatively little on local programming ...." Id. at 4088. Thus, declining revenues that force local stations to cut back on costs affect the quantity and quality of local news and public affairs programming available to the public more when network affiliates face such cutbacks than when independents face such cost cuts. Id. at 4087-88.

C. The Off-Network Ban Is Unconstitutional

It is apparent that the original objectives for which the PTAR was adopted are not served by the off-network restriction and that one primary objective is actually impeded and frustrated by the off-network ban. It is also apparent that the continued enforcement of that restriction is contrary to the First Amendment to the Constitution. Under any standard of

analysis, the off-network ban, which sharply impinges on the editorial discretion of a small class of broadcast licensees by forcing government programming choices on those licensees without any justification is clearly unconstitutional.

The constitutionality of the PTAR was challenged immediately after its adoption. In reviewing the constitutionality of the PTAR in 1971, the U.S. Court of Appeals for the Second Circuit held that the rule was consistent with the First Amendment, since its purposes were to encourage the diversity of programs,7/ to foster the development of diverse and antagonistic sources of program service, and to correct a situation where only "three organizations control access to the crucial prime time evening television schedule." Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971) (footnote omitted). In so holding, the court relied upon the scarcity rationale employed in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

Decisions of the U.S. Supreme Court, the Court of Appeals for the D.C. Circuit, and the Commission itself subsequent to Mt. Mansfield raise serious questions about the validity of that decision and the constitutionality of the off-network ban. See e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied,

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7/ Yet the Commission itself acknowledged that program diversity was only a hoped for result--not an objective. See Prime Time II, 50 F.C.C.2d at 835.

476 U.S. 1169 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). See also Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) (Fairness Report). Indeed, the Commission's own Network Inquiry Special Staff stated at the outset of its discussion of the PTAR that:

> "We should note at the outset that the rule at least raises very serious First Amendment questions that seem inadequately treated in the Second Circuit's decision affirming the rule in Mt. Mansfield Television v. FCC, 442 F.2d 470 (2d Cir. 1971)."

FCC Network Inquiry Special Staff, Preliminary Report, An Analysis of Television Program Production, Acquisition and Distribution (June 1980) at 482 n.****. The Special Staff later concluded that the only way PTAR had reduced network dominance was to mandate a reduction in the prime time schedules of the three networks and that

> "The assertion that a reduction in 'network dominance,' thus defined, could be in the public interest amounts simply to the assertion that certain programs are objectionable solely because of their source. Such a position is wholly at odds with elementary First Amendment principles."

See Final Report at 511.

In its 1985 Fairness Report, the Commission questioned the continuing validity of the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), at least in part because of the "transformation of the broadcast marketplace" in the sixteen years following the Court's decision, concluding that the Commission's Fairness Doctrine was constitutional.

Fairness Report, 102 F.C.C.2d at 157. The Commission found particularly persuasive a passage in the Supreme Court's decision in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973):

> " `Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty....The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.' "

Fairness Report, 102 F.C.C.2d at 151 n. 28 (emphasis added).

Thereafter, in Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), the Commission rejected the scarcity rationale as a basis upon which content regulation can be reconciled with the First Amendment and rescinded its Fairness Doctrine, as a result. The Commission noted that its review of Supreme Court precedent in the application of First Amendment principles to the electronic media leads to the inescapable conclusion that the Supreme Court has repeatedly emphasized that its "constitutional determinations in this area of the law are closely related to the technological changes in the telecommunications marketplace." 2 FCC Rcd at 5052. The Commission concluded that its comprehensive study of the communications market in the 1985 Fairness Report had convinced it that the scarcity rationale that had supported the Fairness Doctrine in years past "is no

longer sustainable in the vastly transformed, diverse market that exists today. Consequently, we find ourselves today compelled to reach a conclusion regarding the constitutionality of the fairness doctrine that is very different from the one we reached in 1969." 2 FCC Rcd at 5053.

Here, too, the Commission must reject the scarcity rationale and conclude that the off-network ban is unconstitutional. On numerous occasions over the last two years, the Commission has recognized that broadcast television now competes for audiences, programming, and revenues with cable television and other video services. As is clear from the OPP Paper, there is today no scarcity of video outlets or programming. Under these circumstances, and in view of the Commission's decision in Syracuse Peace Council, the constitutionality of the Commission's "can't carry" off-network restriction should not be analyzed under the scarcity rationale employed by Red Lion but should be analyzed under the traditional First Amendment standard of review employed by the Court reviewing the must-carry rules in Quincy Cable, 768 F.2d 1434, and Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). Under this analysis, there is a distinction between incidental burdens on speech and regulations that are intended to curtail expression either directly or indirectly by favoring certain classes of speakers over others. See Quincy, 768 F.2d at 1450.

As with the objectives behind the must-carry rules, at

least two objectives behind the PTAR and its off-network restriction (to lessen network dominance and to encourage alternative sources of programs not passing through the three-network funnel) are a "far cry" from the sort of interests that typically have been viewed as imposing a merely incidental burden on speech. Id. Moreover, as with the must-carry rules, the off-network restriction was clearly designed to favor certain classes of speakers over others.

The "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. at 48-49. The off-network restriction places substantial limitations on the television licensee's otherwise broad discretion to select the programming it wishes to offer to its viewers. Cf. Quincy, 768 F.2d at 1452. Even for broadcasters, regulations that transfer control over programming content to others have met with approval only grudgingly and then only in highly specialized circumstances. Id. at 1453.

There are today no compelling reasons, no important, substantial government interest to be served, and no highly specialized circumstances that warrant or justify the off-network ban. More than 20 years ago the Commission concluded that the three major national networks essentially controlled the video programming available to U.S. consumers during prime time. As a result, to lessen the dominance of these "speakers" and to promote other speakers (producers of programming other

than the networks), the Commission enacted the PTAR and the off-network ban, by which the First Amendment editorial rights of another class of speakers, a small group of broadcasters, are impinged.8/ With the changes in the video marketplace, as demonstrated above, the underlying facts that induced the Commission to enact the off-network ban and any conceivable justification for the ban no longer exist. Thus, the off-network ban is unconstitutional and should be immediately repealed.

V. Conclusion

Television licensees have sought repeal of the off-network ban. Television networks have requested and supported its elimination. Program producers have petitioned for its deletion. The Commission's staff has called for a re-examination of network-affiliate regulations. Clearly the time has come to initiate a rule making proceeding to consider elimination of the off-network restriction of the PTAR. The Commission has received ample expressions of interest and concern about the effect of this regulation, which unnecessarily and unfairly restricts a minority of television stations in the country from competing with other television stations and cable programmers for television programming to air during prime time. The facts and concerns that led to the imposition of this

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8/ Moreover, the off-network ban has also had a chilling effect to the extent that program producers will not sell first run programming to the networks, because if their programs are carried on a network, the value of such programs in syndication is sharply reduced. See, e.g., Columbia Petition at 14.

regulation no longer exist. As the Commission itself has recognized, the video marketplace today is dramatically different from the marketplace that existed in 1970, when the PTAR was first adopted, and 1975, when it was codified in its present form. Both the outlets for programming and the sources of programming have increased. The increase in outlets for programming has been primarily in independent television stations and cable and has brought fierce competition to network affiliates in the top 50 markets. Under these circumstances, continued enforcement of the off-network ban is unnecessary and unconstitutional.

WHEREFORE, for the foregoing reasons, it is respectfully requested that the Commission initiate a rule making proceeding to amend Section 73.658(k) of its Rules to eliminate the off-network ban.

Respectfully submitted,

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