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MAR - 6 1991

Federal Communications Commission
Office of the Secretary

BEFORE THE

Federal Communications Commission

In re:)
)
 Amendment to Section 73.658)
 of the Commission's Rules)
)
 Affiliation Agreements and)
 Network Program Practices)

SUMMARY

McKinnon Broadcasting Company is the licensee of TV Station KUSI-TV, San Diego, California. It files this Petition because its treatment by Fox Broadcasting Company has suggested a serious deficiency in the Commission's present network rules. The Fox affiliate for San Diego is a Mexican station, XETV. That station is not governed by and does not operate in compliance with many of the FCC requirements adopted to serve the public interest. McKinnon's station, on the other hand, provides at least comparable technical service to the San Diego market, operating in the UHF, and is in full compliance with all United States public interest requirements.

The Petition proposes a rule which would require FCC approval for a network affiliation with a foreign station if a United States station provides comparable service to the market and is willing to affiliate with the network. Such approval would be required

regardless of the method by which the network's programming is delivered to the foreign affiliate.

There is compelling precedent, as well as logic, for the assertion of such jurisdiction by the Commission in its own prior rulings and those of the U.S. Court of Appeals. Although the proposed rule would apply in a limited number of circumstances, the Commission has made clear that this is an appropriate subject for rule making. Moreover, the proposed rule would not inhibit speech any more than the existing network rules, which are not considered to violate the First Amendment.

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PETITION FOR RULE MAKING

McKinnon Broadcasting Company ("McKinnon"), licensee of television broadcast station KUSI-TV, San Diego, California, by its attorneys, respectfully requests that the Commission amend Section 73.658 of its Rules to add a new sub-section (n) to prohibit any national network from affiliating with a foreign television station without seeking authorization from the Commission to transmit its programming to said foreign station, regardless of the method employed for such transmission, when there exist in the United States market served by said foreign station one or more operating unaffiliated domestic stations with facilities comparable to those of the foreign station insofar as service to the United States market is concerned. A proposal for the text of such sub-section is:

"(n) Affiliation with Foreign Stations. No television network shall affiliate with any foreign station which serves a United States market unless the following conditions are met:

1. There is no operating unaffiliated domestic station with comparable facilities for service to the United States market, or the network has offered a regular affiliation to such a domestic station and that offer has been rejected; or

2. The network has filed with the Commission an application on FCC Form 308 for authority to transmit its programs to said foreign station, regardless of the method employed for such transmission, and such application has been granted by the Commission. (Note: The definitions of the operative terms in this sub-section shall be those set forth in sub-section (1) of this section except to the extent that "reasonably comparable facilities" is modified as set forth above.)

McKinnon will demonstrate herein that the public interest requires enforcement of the proposed Rule in order to increase the competitive position of UHF television stations, to provide better service to the viewing public, and to provide for the public the benefits of a stronger competitive UHF service subject to the ultimate control and policies adopted by the Commission and other United States governmental agencies. In support of this request, McKinnon states:

Background

1. This Petition is prompted by the unusual competitive situation in which McKinnon finds itself in San Diego. Each of the three traditional national networks has an affiliate in that market. The CBS affiliate is Station KFMB-TV, Channel 8, the ABC affiliate is Station KGTV, Channel 10 and the NBC affiliate is Station KNSD, Channel 39. Fox Broadcasting Company ("Fox") also has an affiliate which serves the San Diego market, Station XETV,

licensed to Tijuana, Mexico, Channel 6.^{1/} McKinnon attempted and has been unsuccessful in its attempts to acquire an affiliation with Fox.

2. Although Fox may not yet have attained the status of a national network for application of some of the network rules set forth in Section 73.658, it is now clear that it will shortly attain that status, so that all of the network rules will apply to the Fox operation. In Fox Broadcasting Co., MMB File 900130A, the Commission on May 8, 1990, released a Memorandum Opinion and Order (FCC 90-186) in which the Commission granted a temporary waiver to Fox of the provisions of Section 73.658(j)(4) of the Rules. The Commission noted (at par. 5) that the Fox network includes 129 affiliates which reach 90.3% of United States television households and that Fox plans to offer 18-1/2 hours of programming for the Fall 1990 season. There can be no question but that Fox will shortly be a national network within all of the definitions of Section 73.658.

3. At the present time, Fox programming is delivered to Station XETV without utilizing any electronic transmission across the border. The Fox programming is recorded in Southern California from satellite transmissions and the recorded programs are "bicycled" across the U.S.-Mexican border to Station XETV.

^{1/} Also licensed to serve San Diego are Station KTTY, Channel 69 and Station KPBS-TV, Channel 15, a noncommercial station, in addition to Station KUSI-TV.

Accordingly, Fox has not filed any application for authority to transmit its regularly scheduled network programming outside of the boundaries of the United States for rebroadcast back into the U.S., as would be required by Section 325(b) of the Communications Act of 1934, as amended, if electronic transmissions were utilized. A "downlink" receive facility is located at Station XETV; since, however, Fox has not sought authorization from the Commission to transmit its regular network programming to Station XETV, it must be presumed that the facility is used for other purposes, and that the "bicycling" is used to avoid filing for Commission authorization. Consequently, McKinnon has not been afforded any procedural vehicle for urging before the Commission that the public interest is disserved by Fox relying on a foreign VHF station to provide service to the San Diego market, despite the existence in that market of Station KUSI-TV, which provides at least comparable service to that of Station XETV over the entire market.

4. At the present time Station XETV is not governed by U.S. political broadcasting requirements such as "equal opportunity" and lowest unit charge, it is not subject to the important equal employment opportunity and affirmative action requirements of American law, it will not be governed by the new requirements concerning children's TV programming, and it is under common control of another VHF television station at Tijuana, which would not be permitted under FCC regulations. In other words, none of the structural or content broadcast regulations which have been

adopted by the Commission to serve the public interest are applicable to or complied with by Station XETV. McKinnon does, of course, comply with all of them. This is a matter of direct and significant importance in the present case in light of the Court's holding in the ABC case, discussed infra. The public interest requires that the Commission formally consider whether a national network should be permitted, in these circumstances, to have a foreign affiliate.

5. The common notion that history is cyclical is borne out in this case. The questions which McKinnon seeks to have the Commission consider in formal rule making proceedings have been previously considered by the Commission in a strikingly analagous licensing situation. In 1955, the ABC network was in a position similar to the position of Fox. The only two television stations licensed to San Diego were affiliates of the CBS and NBC networks. ABC affiliated with Station XETV, Tijuana and applied to the Commission for authority under Section 325(b) of the Communications Act to transmit or deliver its network programs to that station. The two San Diego stations filed protests to the grant of that authority, and a full hearing was conducted. In American Broadcasting-Paramount Theatres, Inc., 21 F.C.C. 624, 13 RR 1248 (1956), the Commission affirmed its grant of that authority. The matter was appealed to the United States Court of Appeals for the District of Columbia Circuit sub nom Wrather-Alvarez Broadcasting, Inc. v. Federal Communications Commission, 248 F 2d 646, 15 RR 2108

(1951). The Court reversed and remanded the matter to the Commission, holding that the Commission had not given adequate consideration to the actual programming at Station XETV. After the remand, the Commission reaffirmed its decision, American Broadcasting-Paramount Theatres, Inc. , 24 F.C.C. 296, 17 RR 69 (1958). It held, in effect, that because there were only two domestic stations licensed to San Diego, the public interest required authority for ABC to affiliate with Station XETV, and that the programming of that station was not sufficiently deficient to override this consideration.

6. It is very important to note that when the Court of Appeals remanded the matter to the Commission it held expressly that the Commission could not, "in deciding whether a foreign station is to be permitted to affiliate with an American network" exclude from consideration such serious defects of that station's programming as would affect the public interest. In the proceeding on remand the Commission considered such matters as the absence from station XETV programming of religious and discussion programs, and the presence of broadcast lotteries and "double spotting."

7. By 1968, the factual situation had changed dramatically. The Commission thereafter once again considered an application of the ABC network for authority to deliver its network television programming to Station XETV for broadcast back to the San Diego market. However, by this time, a UHF station, KCST-TV, Channel 39, had been licensed in San Diego and the licensee of that station

filed a Petition to Deny the ABC application to renew its Section 325(b) authority. In American Broadcasting Companies, Inc. , 35 F.C.C. 2d 1, 24 RR 2d 471 (1972), the Commission, after a full hearing, denied the ABC application. The grounds of its decision were summarily set forth, and they apply with equal force to the current activities of Fox, as follows (35 F.C.C. 2d at 12):

19. We turn now to the ultimate issue -- i.e. whether a renewal of the ABC authorization would be in the public interest. As we noted in our 1956 Decision, supra, under the authority of Section 325(c), "when the public interest factors upon which we based our determination are no longer present..." the authorization would be terminated (21 FCC at p. 649). We conclude that the principal public interest factor upon which we based our 1956 Decision -- absence of a third television facility for the carriage of ABC network programming -- is not and has not been present at least since 1968, when KCST commenced operations on channel 39 in San Diego. Moreover, KCST is ready, willing and desirous of becoming ABC's San Diego affiliate, and, as the Hearing Examiner found, the station possesses all of the facilities and equipment necessary to be a network affiliate. (Initial Decision at p. 41 n.1). We find that there now is a local "third television station in the San Diego area" by which the public can view ABC programming.

20. In the same context, the original grant was also made subject to the condition that "...when for other reasons which may at some future time obtain, the continuation of the permission shall no longer be in the public interest..." the authorization would be terminated (21 FCC at P. 649). We find that these "other reasons" also now exist which weigh decisively against renewal, viz, the Commission's policy of fostering UHF television development, Onondaga UHF-TV, Inc.(WONH), 21 FCC 2d 525 (1970). The fact that the existing third San Diego station available for network service to the local community is a UHF station serves to reinforce our conclusion that renewal of the ABC authorization is neither required by, nor warranted in the overall public interest.

21. The record clearly demonstrates that KCST's authorized facilities can cover the San Diego area

effectively; that, as an ABC affiliate, KCST's programming would meet the needs and interests of the community more effectively than the existing ABC affiliate; and that upon affiliation with KCST, ABC network programming could be made available to the San Diego viewing public, even if the instant authorization were not renewed.

[Footnotes omitted.]

8. The parallels between the ABC proceeding and the situation which now exists with the Fox network are uncanny.^{2/} As recently as May, 1990, in the Fox Broadcasting Co. decision, supra, the Commission set forth as the very first reason why the requested waiver would further the public interest that "*** it will lend stability to the program plans of the 112 UHF outlets that are affiliated with FBC during the pendency of MM Docket No. 90-162, thereby advancing our longstanding public interest goal of fostering a competitive UHF service." In a footnote to that statement, the Commission referred to other very recent proceedings in which it took action based on its continuing strong public interest goal and its long standing concern about the continued and overall health of the UHF service. Indeed, in its Further Comments in that proceeding, Fox asserted that the dispensation which it sought from the Commission would help its efforts to advance fundamental communications policies, because its operation was "Saving

^{2/} It is important to note, in determining whether Station KUSI-TV can serve the needs of San Diego more effectively than Station XETV, that Station XETV broadcasts no news programs. Station KUSI-TV presents a nightly newscast.

or strengthening scores of its weak UHF independent station partners." (Further Comments, p. 3).

Section 325 and the First Amendment

8. The rule proposed in this Petition suggests the filing of FCC Form 308 for use in acquiring Commission consent to the delivery of programming to a foreign station if a domestic station is available as an affiliate in the market to be served. It must be understood that the reference to this form is purely for convenience. This form is currently used for seeking authorization under Section 325 of the Communications Act. However, McKinnon's position does not depend on Section 325. It is grounded, as has been shown, in the public interest jurisdiction of the Commission. For the reasons set forth above, the Commission should consider and decide every case in which a network seeks to affiliate with a foreign station when a domestic station exists which could provide comparable service to the market. ^{3/}

10. The American Broadcasting-Paramount case, supra, involved an application for authorization pursuant to Section 325. This was the most convenient vehicle at the time, because the network programming was transmitted electronically to the foreign affiliate. There have been other situations, however, in which the

^{3/} A separate form could be devised for seeking such authority, or, indeed, authority could be sought by a letter request which sets forth the circumstances and reasons why the public interest would be served, subject to the "Petition to Deny" thirty day filing period.

Commission was asked to prohibit delivery of network programming to foreign stations by other than electronic means. Some discussion of those cases is warranted because, so far as can be ascertained, the Commission has never prohibited such delivery except under the rubric of Section 325. Upon analysis, the reason for this is that in those instances in which the Commission refused to prohibit mechanical delivery, it was concluded that the ultimate effect of such delivery and rebroadcast of the programming back to the U.S. would not adversely affect the public interest.^{4/}

11. The principal matter in which this question was raised was Pre-released TV Programming, 75 F.C.C. 2d 304, 46 RR 2d 1301 (1979). In that case, the Commission considered whether it should prevent television viewers in the United States from receiving U.S.-produced programs from Canadian stations before they are broadcast by stations affiliated with a U.S. network. The inquiry was inaugurated by the Commission primarily out of concern as to whether the consequent diversion of audience from U.S. television stations would result in impairment of services rendered to American viewers by their local television stations. The question, as posed by the Commission, was whether it should adopt restrictions "generally prohibiting the pre-release practice." (75 F.C.C. 2d at 306). In that proceeding, some of the participants contended,

^{4/} Under the current network rules, because Fox "bicycles" its programs to Station XETV, the public interest questions are never addressed.

inter alia, that Section 325(b) of the Communications Act empowered the Commission to forbid U.S. television producers to deliver programs by non-electronic means to Canadian stations. The Commission discussed the decision in Baker v. United States, 93 F 2d 332 (1937), cert. denied, 303 U.S. 642 (1938). In that case, it had been held that Section 325(b) applied only to electronic transmission to foreign stations and not to physical delivery and that therefore the Commission's jurisdiction was limited to the transmission of programs by wire or over-the-air means. The Commission concluded that its jurisdiction under Section 325(b) is limited only to transmission by means of wire or radio, but it stated expressly that that conclusion was only for the purposes of its Order holding that the pre-release of programs would be permitted. The basic holding of the Commission's Report and Order was that such pre-release would not have an adverse effect on U.S. stations.

12. In its discussion of its jurisdiction, the Commission expressly stated (75 F.C.C. 2d at 329-330) that it had difficulties with the Baker case. It noted that the Court had adopted a strained reading of the language of Section 325, ignored a basic principle of statutory interpretation, and that the Court considered Section 325 to be a "penal" law. The Commission stated its own view that Section 325 is more regulatory than penal and that the rule of strict construction followed by the Court should probably be relaxed. McKinnon respectfully urges that, if the

Commission had concluded that the pre-release of TV programming to foreign stations would have an adverse effect on U.S. stations, it would have reached a contrary conclusion concerning its jurisdiction under Section 325.

13. The Baker case was decided in 1937. Since that time, very considerable doubt has been raised about the correctness of that decision, particularly as applied in a regulatory rather than a penal context. As early as 1957, the U.S. Court of Appeals for the District of Columbia Circuit, in the Wrather-Alvarez case, supra, expressly declined to hold that the Baker construction of the statute was correct. In 1980, shortly after the Pre-released TV Programming case, discussed supra, the Commission refused to hold that the physical delivery of programs to a Mexican station for re-broadcast back to the United States was in violation of Section 325(b). Media Productions, 48 RR 2d 160 (1980). Here again, the Commission ruled that the delivery to Mexico and the rebroadcast of those programs did not have an adverse effect on the public interest.^{5/} However, in doing so, the Commission did rule that, under Baker it had no jurisdiction over this matter and that, if it were to distinguish Baker, significant First Amendment considerations might be raised.^{6/} Commissioners Washburn and

^{5/} The complainant in that case was the licensee of a VHF station in Weslaco, Texas.

^{6/} The Commission stated that the First Amendment consideration is especially strong where no compelling need for the restriction is shown. 48 RR 2d at 161.

Quello filed a vigorous dissent in which they argued, based on logic and legislative history, that the Baker interpretation was incorrect, at least as applied in an administrative proceeding.

14. The present status of the Baker interpretation thus permits a determination under Section 325(b), even if Fox continues its affiliation with Station XETV utilizing only physical delivery of its programs, whether that practice has a serious adverse effect on the public interest. However, as McKinnon has demonstrated, the matter of Section 325(b) is not raised by this proposal at all. Even if it were, a rule making proceeding in which the Commission could determine the effect of Fox' affiliation with Station XETV under Section 325(b) would be justified.

15. In any event, it seems highly probable that Fox will not in the future be able to rely solely on physical delivery of its network programs to Station XETV. The Commission noted in Fox Broadcasting Co., supra, that Fox intends to air live news events of national importance (at para. 15). A recent newspaper article states that Fox hopes eventually to provide a nightly newscast for all of its affiliates who want it, and that by the end of February 1991, it will feed Washington and European news to stations that already have news programming on a regular schedule. (Wash. Post, December 18, 1990, p. B-6). It is also probable that Fox, ultimately, will provide sporting events, which would lose significance if broadcast by affiliate XETV on a delayed basis. The imminent expansion of the Fox network service makes even more necessary the

consideration in a rule making proceeding of the public interest effects of the Fox affiliation with Station XETV. The same public interest considerations which resulted in the Commission's decision in American Broadcasting Companies, supra par. 7, and which were reiterated in the recent Fox Broadcasting Co., supra par. 8, are present here. They must be addressed. McKinnon cannot overemphasize, however, that its proposal is not related to or dependent upon Section 325(b) and would be equally valid, even if that section were eliminated from the Communications Act.

16. In both the Pre-released TV Programming and Media Productions cases, supra, the Commission raised the question whether the assertion of jurisdiction under Section 325(b) over the physical delivery of programming to foreign stations might constitute an unconstitutional limitation on speech. This First Amendment question was raised by the Commission in both cases only in connection with its interpretation of Section 325(b), in light of the Baker decision. Of course, the McKinnon proposal does not rely on Section 325(b), so that at least on its face, First Amendment questions are not implicated. The McKinnon proposal is based solidly on the Commission's authority to regulate network affiliate relations in the public interest.

17. It requires no more than reference to the existing Section 73.658 of the Commission's rules to recognize that such limitations on speech as result from the Commission's network regulations are not thought to be in violation of the First

Amendment. For example, subsection (j) prohibits networks from distributing certain types of programs; subsection (l) prohibits networks from distributing programs to stations which are affiliates of another network; and subsection (m) prohibits networks from refusing to provide programs to stations in special circumstances. Each of these provisions inhibits speech at least as extensively as the McKinnon proposal. That the Commission's network regulations do not violate the First Amendment has been a basic principle of broadcast regulation since National Broadcasting Company v. U.S., 319 U.S. 190 (1942).

18. Even if the First Amendment were implicated, whether the proposal would violate the First Amendment would depend on how narrowly tailored the proposal is for the accomplishment of a legitimate purpose of the Commission. Certainly, the regulation of network-affiliate relations has been a significant component of Commission regulation in the public interest for about fifty years. There can be no question about the Commission's jurisdiction in this area. The McKinnon proposal is, in fact, very narrowly tailored to accomplish only a legitimate public interest objective of this Commission -- an objective similar in content and form to subsection (l) of Section 73.658. If, however, the Commission considers that First Amendment questions are raised by the proposal, this matter is certainly one on which formal rule making proceedings would be warranted.

This is an Appropriate Subject for Rule Making

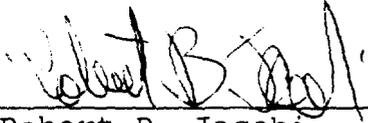
19. McKinnon at the present time does not know of any market other than San Diego in which a national network has a foreign affiliate even though domestic stations exist which could provide comparable service to the market. There are, of course, other U.S. markets along our country's borders where foreign stations exist which could become affiliates of national networks. The limited present applicability of the proposed rule should not stand in the way of addressing this problem by rule. In the First Report and Order in VHF-TV Station Network Affiliations, 28 F.C.C. 2d 169, 21 RR 2d 1638 (1971), which resulted in the adoption of subsection (1) of Section 73.658 of the Commission's rules, the Commission expressly stated "that the rule will be of limited applicability does not remove the need for it in the public interest in the situations to which it applies" (28 F.C.C. 2d at 185). In that case, the need for the rule was that NBC was thwarting the development of UHF stations in the market as viable truly competitive outlets capable of contributing to the full development of TV in the United States. This rationale applies with full force in the present case.

Respectfully submitted

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