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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Limitations on Commercial)
Time on Television Broadcast)
Stations)

MM Docket No. 93-254

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

The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its reply comments to the Notice of Inquiry, MM Docket No. 93-254(released October 7, 1993)[hereinafter cited as Notice].¹

INTV opposes the reimposition of commercial time restrictions on broadcast television. Restricting the amount of commercial time allowed on broadcasting channels would have devastating and lasting effects not only on broadcasters, but also on the millions of Americans who rely on this form of free speech each and every day.

In 1984 the Commission looked into the commercial time restriction issue and concluded that the most stringent and efficient method of enforcement was that of self-regulation.² At the time the Commission made that decision, the media marketplace was an extremely competitive environment. The Commission

¹ Notice of Inquiry, MM Docket No. 93-254 FCC 93-459 (Released, October 7, 1993).

² Television Deregulation, 98 FCC 2d 1076 (1984).

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concluded that the market itself was so competitive that there was no need for the Commission to regulate this aspect of the industry. The price of non-compliance in such a competitive self-regulated environment could very well be the end for the violator. At the time, there were many players in the market, many trying to enter, and many that were working on new technology and planning to attempt entry as soon as possible.

As time has progressed, the market has become far more competitive than it was in 1984. The conclusions that were reached in 1984 are even more applicable today. The amount of time that a broadcaster devotes to commercial advertising is strictly regulated and the punishment for a violation of the unwritten rules is severe. The number of options that a viewer faces today, coupled with the possibility of many more in the near future, make compliance mandatory for every broadcaster.

In 1984 the Commission stated that "The significance of our new regulatory scheme lies not only on the impact on the programming behavior of licensees in today's marketplace, but also in its flexibility in accommodating the natural economic incentives of the developing video marketplace."³ In reaching this conclusion the Commission realized that the extremely competitive market that all competitors faced in the television industry was growing and would become even more competitive over time. Time has proven that the 1984 Order was correct. The market today is far more competitive than that of nine years ago. One can only imagine, with the entry of telcos, DBS, and the many other video services being developed, the level of competition and the number of choices that the market, in the not so distant future, will have to offer.

Of the many comments that were filed in response to the Notice,

³ Id., 98 FCC 2d 1076 at 1104.

pertaining to commercialism, a very small number advocated the reimposition of commercial limits. Further, of the few that did, none attempted to make the argument that the conclusions reached in the 1984 Order were incorrect. Even those who wish to see commercial limits reimposed cannot argue with the hard fact that the media marketplace is extremely competitive, becoming more competitive, and any advantage is tenuous at best. As the Commission has already discovered, there is no better regulator of such a market, than the market itself.

The Center for the Study of Commercialism *et al.* argues that advertising takes up time that could better serve the public interest. Nevertheless, in the comments filed on this issue they stated that " ...[T]he airwaves belong to the public and should be operated in the public interest, not the private interest of the licensees."⁴ The amount of time that broadcasters spend airing commercials is directly related to the public interest and vary according to sensibilities and interests of the public. To argue that the airwaves are not operated in the public interest flies in direct opposition to the goal of each and every broadcaster--which is to find the best way to serve the public interest.

Television commercials serve the public interest in many ways. Commercials provide information concerning new products and technology and better equip consumers in a vast and ever changing marketplace. The public interest must be served by each and every broadcaster, for if it is not, the public will find somewhere else to get what they need; today that is as easy as pressing a button on a remote control. If a viewer is not satisfied with what is on one station, there are many, many options. Broadcasters do not have a monopoly

⁴ Comments of the Center for the Study of Commercialism et. al., MM Docket No. 93-254 (filed December 20, 1993) at 5.

on the public; there are a multitude of choices when it comes to the media marketplace, and if you do not serve the interest of the public, someone else will.

Free off-air television is in jeopardy. Cable television, the most direct competition to broadcasters, has a large advantage-- while broadcasters are limited to one revenue stream, advertising, cable has two, subscriber fees and advertising revenue. To restrict the only revenue stream that the broadcasters possess would unfairly restrict one competitor as against another.

The rise of cable and other video services has already taken a great toll on broadcasters. Imposing commercial time limitations would only do further damage to an already disadvantaged industry. None of the few who advocated reimposition of commercial time limitations addressed the economic implications associated with such limitations. As noted by the Commission staff, "The broadcast television industry has suffered an irreversible, long term decline in audience and revenue shares, which will continue through the current decade."⁵ To restrict broadcasters' only source of revenue will add a further burden to an already suffering industry. The reimposition of limitations on commercial time could quite possibly threaten the economic viability of free television. Indeed, infomercials are a necessary source of income for many independent stations which have been struggling to survive in the face of lack of cable carriage, poor channel positioning, and stronger network competition.

To regulate the only source of income that broadcasters possess will not only further disadvantage their position against the cable industry, it will also hurt their competitive position against any and all new entrants that are sure to

⁵ Setzer, Florence, and Levy, Johnathan, "Broadcast Television in a Multichannel Environment," OPP Working Paper Series, No. 26(June, 1991) at 159.

be entering the market in the near future. To add further burdens to an industry already plagued with disadvantage would be devastating to our country's most highly utilized and free information medium.

A final issue of great importance when discussing the imposition of commercial time limitations is that of the First Amendment of the United States Constitution. None of those who advocated the reimposition of commercial time limitations did so much as to mention the First Amendment. Nevertheless, limitations on commercial programming would produce a chilling effect and constitute content based regulation in violation of the First Amendment.

In order for honest speech to be restricted, legislation must satisfy a two prong test. The legislation must be narrowly tailored to directly advance a substantial government interest and there must be a reasonable fit between the desired result and the legislation.⁶ In order for rules limiting commercial time to survive First Amendment scrutiny, they would have to satisfy all of the above criteria.

Finding a substantial government interest for limiting the amount of commercial time on television would be impossible, not to mention finding a fit between that interest and the legislation. The First Amendment protects speech of all kinds, and that includes commercial. As recent decisions and long honored First Amendment principles prove, television commercials are entitled to the same protection as other forms of speech. "It is clear, for example, that speech does not lose its First Amendment protection because money is spent to protect it."⁷ Imposing commercial time limitations would "not only muster scrutiny from

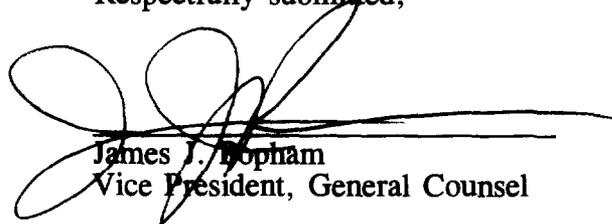
⁶ Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989).

⁷ Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993).

the courts, but will also saddle the government with a burden that it cannot meet."⁸

Thus, the Association of Independent Television Stations, Inc., urges the Commission to stand by the conclusions that were correctly reached in the 1984 Order. To impose commercial limitations on the broadcast industry would have catastrophic and irreversible effects on both the broadcast industry and the millions of Americans that rely every day on the free medium that off-air broadcast television supplies.

Respectfully submitted,



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⁸ Comments of the Association of Independent Television Stations, Inc., MM Docket No. 93-260(Filed December 20, 1993) at 14.