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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Limitations on Commercial Time on)
Television Broadcast Stations)

MM Docket No. 93-254

To the Commission:

STOP CODE 1800D

REPLY COMMENTS OF HOME SHOPPING NETWORK, INC.

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SUMMARY OF ARGUMENT

The Comments filed herein reflect overwhelming opposition to reimposition of any form of restrictions on televised commercial matter. The two comments which supported such action afford no basis for disagreement with the compelling and cogent arguments against resurrecting television commercial limits.

Although neither USC nor USCC even address the constitutional ramifications of governmental restriction of protected speech, they apparently recognize that such action must be supported by a compelling governmental interest and seek to contrive such an interest by citing several purported "harms" associated with the telecast of commercial matter. Only two of these alleged harms are even remotely relevant to home shopping programming. Neither is constitutionally cognizable.

First, the assertion that broadcast of commercial matter should be discouraged in order to encourage the broadcast of other, more "beneficial" programming does not afford a permissible basis for Commission action. The First

Amendment forbids governmental action which favors or disfavors particular programming based upon its content. Moreover, there is no guarantee that even if stations were required to restrict telecast of commercial matter, they would replace it with programming acceptable to CSC and USCC.

Second, CSC and USCC's assertions concerning the adverse societal impact of commercial matter are not only unproven: they raise issues clearly beyond the Commission's authority. The Commission has no mandate to engage in widespread social engineering. It must refuse the invitation to embark on that activity in this proceeding.

Finally, CSC's request that the Commission initiate an inquiry into the impact of televised commercial matter is, simply, astounding in light of the fact that this is such an inquiry.

Limitations on the broadcast of commercial matter in general and of home shopping programming in particular would be content-based restrictions prohibited by the First Amendment. There is absolutely no evidence of any governmental interest, much less a compelling interest, in such restrictions. The Commission cannot constitutionally reimpose restrictions on broadcast commercial speech.

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Home Shopping Network, Inc. submits herewith its
reply comments in the above-captioned proceeding.^{1/}

Introduction

The Notice herein invited comments concerning
possible reimposition of pre-deregulation^{2/} restrictions on
television stations' commercial practices. Virtually all
parties which responded to that invitation emphatically
opposed any such action.

HSN, for example, demonstrated that Television
Deregulation has fulfilled the Commission's most optimistic
expectations: deregulation's freedom produced extensive
innovation, and more particularly, permitted HSN to develop

1/ Notice of Inquiry, MM Docket No. 93-254 (October 7,
1993) ["Notice"].

2/ Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076
(1984) ["Television Deregulation"], recons. denied,
Memorandum Opinion and Order, 104 FCC 2d 358 (1986), aff'd
in part and remanded in part sub. nom., Action for
Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

and implement the home shopping format. This first practical application of interactive television has proven to be enormously popular with viewers and has facilitated the growth and development of many television stations, including a substantial number of minority-owned or UHF television stations.^{3/} The other affirmative public interest benefits associated with the home shopping format -- such as affording shopping opportunities to those who might not otherwise have them -- strengthen the case against singling out the home shopping format for repressive regulatory treatment.

Indeed, HSN established that such discriminatory regulation of the home shopping format would offend the First Amendment. HSN pointed to the lack of any demonstrated or demonstrable harm associated with the broadcast of commercial speech and the consequent lack of any governmental interest (much less a substantial interest) in its restriction. HSN's position was emphatically confirmed by the Statement of Professor Rodney A. Smolla, a recognized constitutional expert,^{4/} who demonstrated that this absence of a governmental interest, particularly when

^{3/} See, e.g., Comments of Blackstar Communications of Oregon, Inc.; Comments of Brunson Communications, Inc.; Comments of Miller Broadcasting, Inc.; Comments of WIIB-TV, Bloomington, Indiana.

^{4/} See Comments of Silver King Communications, Inc. ["SKC"].

combined with the home shopping format's clear public interest benefits, deprive any potential restrictions on this form of commercial speech of constitutional validity. To the contrary, limitations on televised commercial matter in general and home shopping programming in particular would not withstand First Amendment scrutiny.

With only two exceptions, other comments reflected unanimous agreement that reimposition of television commercial limits would be unconstitutional; would ignore the impact of the radical and continuing changes in the video marketplace; are unnecessary in light of the myriad of alternatives to programming which viewers consider overly commercial; would have an unfair, disparate impact on broadcast television stations, creating a substantial disadvantage vis a vis their cable television competitors; and would stifle innovation. The near-unanimous opposition to an "anachronistic"^{5/} return to pre-deregulation commercial limitations must weigh heavily in the Commission's decision.^{6/}

^{5/} See Comments of CBS, Inc. at 2; Comments of Tribune Broadcasting Company at 2.

^{6/} Cf., Telocator Network of America v. FCC, 691 F.2d 525, 538 (D.C. Cir. 1982).

Indeed, only two comments supported further proceedings herein.^{1/} Those comments are as enlightening for what they do not say as for what they say. For example, they fail to suggest a constitutional basis for restricting television stations' commercial practices, nor do they indicate how such restrictions could be reconciled with the First Amendment. They fail to acknowledge, much less address, the impact of the changes in the video marketplace which have occurred not only since Television Deregulation, but since commercial restrictions were first discussed and imposed. And they fail to document any specific harm associated with the broadcast of commercial matter in general and the home shopping format in particular. Such critical omissions deprive them of all credibility.

The Commission cannot simply ignore obvious constitutional requirements. It cannot disregard the realities of the contemporary video marketplace. And it cannot act without a factual and legal predicate for its action. Two comments' isolated calls for governmental paternalism are not a legitimate basis for regulatory decision-making.

^{1/} Comments of the Center for the Study of Commercialism, Center for Media Education, Consumer Federation of America, and Office of Communication of the United Church of Christ ["CSC Comments"]; and Comments of the United States Catholic Conference ["USCC Comments"].

The "Harms" CSC and USCC Cite are Nothing More Than Subjective Dislike of Particular Program Content

CSC cites several purported "harms" associated with "excess"^{8/} advertising: it displaces broadcast time which would be better used by the presentation of other types of programming;^{9/} it deceives viewers; it encourages "...viewers to be especially interested in acquiring material goods for themselves, to the detriment of other aspects of life and the general society;"^{10/} it facilitates advertiser involvement in program content; and program length commercials directed at children are harmful. Only two of these objections are even remotely relevant to home

^{8/} CSC never attempts to define, or even suggest a definition for, "excess" advertising.

^{9/} This is USCC's only objection to commercial programming.

^{10/} CSC Comments at 4.

shopping programming.^{11/} Neither affords a basis for the action CSC and USCC request.^{12/}

Program Substitution. The assertion that commercial time should be limited so that stations can present other, more "beneficial" types of programming, is nothing more than a request that the Commission discourage one type of program content -- commercial matter -- and favor another. The First Amendment clearly forbids this

^{11/} CSC makes no claim (and thus submits absolutely no evidence) that home shopping programming in general, and HSN programming in particular, is deceptive. The home shopping format precludes advertiser involvement in stations' programming, so that this purported "harm" is likewise inapplicable. Finally, the only children's programming which many HSN-affiliated stations broadcast is commercial-free educational and informational programming, so that CSC's concerns in this regard (which were, in any event, rejected by the Commission in reconsidering the rules adopted pursuant to the Children's Television Act of 1990, see Memorandum Opinion and Order, MM Docket No. 90-530, 6 FCC Rcd 5093 [1991]) are likewise irrelevant.

^{12/} The flimsy nature of these purported harms is emphasized when compared with the growing number of studies concerning violent programming, such as the recent survey sponsored by Senator Byron L. Dorgan which demonstrated the high level of violence on television programming. Significantly, even in the face of numerous similar studies and Congressional and other calls for restrictions on violent programming, Congress has thus far been reluctant to regulate such programming because of constitutional and censorship considerations. Here, in the absence of similar studies demonstrating tangible harm associated with home shopping programming (not to mention the existence of countervailing public benefits), such reluctance must become total forbearance.

type of content-based regulatory preference.^{13/} As the comments demonstrate,^{14/} the constitution prohibits the government from favoring one program format and restricting another.^{15/}

Congress, the Commission and the courts have long recognized and deferred to the constitutional and statutory limitations on Commission involvement in licensees' program content decisions. Congress enacted Section 326 of the Communications Act, which specifically prohibits censorship by the agency.^{16/} Consistent with that prohibition, the Commission has repeatedly refused to mandate licensees' programming selections or to base regulatory decisions upon

^{13/} As the Supreme Court observed over twenty years ago, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content...The essence of this forbidden censorship is content control." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

^{14/} See, e.g., Comments of the National Association of Broadcasters at 5 et seq.; Comments of the Virginia Association of Broadcasters and the North Carolina Association of Broadcasters at 5 et seq.; Comments of the New Jersey Broadcasters Association at 7 et seq.; Comments of Capital Cities/ABC, Inc. at 11 et seq.

^{15/} It is hornbook law that broadcasting is entitled to First Amendment protection. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); United States v. Paramount Pictures, 334 U.S. 131 (1948).

^{16/} "The historic aversion to censorship led Congress to enact § 326 of the [Communications] Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973).

determinations as to what constitutes a "good" or "bad" program.^{17/} And the courts have confirmed that the Commission cannot become involved in program content decisions.^{18/}

These constitutionally- and statutorily-mandated restrictions on Commission interference with licensees' programming decisions mean that the Commission cannot take action designed to discourage presentation of particular programming and to favor another type of programming. In particular, it cannot limit the presentation of home shopping programming in order to encourage television stations to present other types of programming which it (or CSC or USCC) finds to be more "beneficial" to the public.^{19/}

^{17/} See, e.g., Report and Statement of Policy re: Commission en banc Programming Inquiry, 20 RR 1901, 1908 (1960) ["The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision"]; The Evening News Association, 35 FCC 2d 366 (1972); Radio Akron, Inc., 62 FCC 2d 987, 995 (1977); Television Wisconsin, Inc., 58 FCC 2d 1232, 1235-1236 (1975); KSD/KSD-TV, Inc., 61 FCC 2d 504, 511 (1976).

^{18/} See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); Muir v. Alabama Ed. Television Comm., 688 F.2d 1033 (5th Cir. 1982).

^{19/} Indeed, the record in MM Docket No. 93-8 demonstrates that many find the availability of home shopping programming to be beneficial. Why should the Commission deem CSC and USCC's evaluation of the relative "worth" of home shopping programming to be superior to that of viewers of such programming?

Presumably, CSC and USCC would also prefer that stations broadcast public affairs and public service programs instead of soap operas, violent dramatic programs such as "NYPD Blue," or sexually-oriented talk shows, yet they do not suggest that the Commission limit such programs. Nor do they suggest a legitimate basis for disparate restrictive treatment of commercial and home shopping programming.

There is no guarantee that, even if the Commission ignored its constitutional obligations and limited the broadcast of commercial matter or home shopping programming, television stations would substitute public affairs or public service programming acceptable to CSC or USCC. Certainly, the Commission cannot force stations to do so. As a practical matter, they are likely to carry programming with greater public appeal -- entertainment programming with proven audience-attracting capability such as movies, game shows, sexually-oriented talk shows, etc. CSC and USCC do not indicate why such programming is so preferable to commercial or home shopping programming that the government must ignore its constitutional and statutory obligations in order to favor it.

In short, the fact that broadcast time devoted to the presentation of commercial matter or home shopping programming could be used to present other types of

programming is not the type of societal "harm" necessary to support a governmental interest in the suppression of speech.^{20/}

Adverse Social Impact. To contrive additional "harms" associated with home shopping programming, CSC relies on hysterical hyperbole, claiming that commercial programming encourages societal materialism.^{21/}

Restriction of home shopping programming, it suggests, will cure social problems such as "greater pollution and environmental degradation; personal financial difficulties; health problems related to excessive drinking, smoking, and poor diet; and disinterest in government and society at large."^{22/} The fashion of blaming television for all of society's problems is not, however, a legitimate basis for Commission programming regulation.

^{20/} The Commission has previously refused to restrict television advertising of over-the-counter drugs because of the lack of any evidence of harm associated therewith. Petition to Promulgate a Rule Restricting the Advertising of Over-the-Counter Drugs on Television, 62 FCC 2d 465 (1976) ["Drug Advertising"].

^{21/} CSC fails to afford any evidence to support this speculation.

^{22/} CSC Comments at 15. Among other flaws in CSC's extraordinary claims, it seems unlikely that excessive broadcast commercialism contributes to excessive smoking in light of the fact that broadcast advertisements for tobacco products have long been banned -- cigarette advertising was first prohibited almost thirty years ago. See 15 U.S.C. §§ 1331 et seq.; 15 U.S.C. § 4402.

Not only does CSC fail to document its biased social commentary: it fails to cite any FCC authority to act based upon the private moral concepts inherent in that commentary.^{23/} The Commission has no mandate to engage in social engineering. It must decline CSC's invitation to do so.^{24/}

Further Studies. Apparently recognizing the flimsy nature of its showing, CSC urges the Commission to conduct further studies to demonstrate the harms associated with commercial programming.^{25/} That, however, is the purpose of this inquiry. The Commission has asked interested persons, including CSC, to submit information which might support reregulation. This is the inquiry that CSC is asking for.

^{23/} As the Commission concluded almost twenty years ago, "...research focusing on emotionally and politically charged issues relating to the supposed effects of television on social attitudes and human behavior should best be left to independent organizations which are expert in such matters and which have no direct responsibility for the regulation of the broadcast industry." Drug Advertising, supra, at n. 11.

^{24/} As demonstrated by Professor Smolla's Reply Comments (filed with SKC's Reply), such a refusal is also constitutionally required.

^{25/} CSC Comments at 24 et seq. CSC's bias is evident in the fact that it has apparently determined what the results of these studies will be, as it suggests that it will enable the Commission to "establish appropriate commercial limits for broadcasters."

Conclusion

The comments herein overwhelmingly confirm HSN's showing that Commission action limiting television stations' broadcast of commercial matter in general or adoption of a home shopping format in particular would be content-based regulation clearly prohibited by the First Amendment. The two comments filed in opposition do not even address constitutional considerations, much less demonstrate a governmental interest sufficient to warrant content-based regulation of speech. The "harms" they cite are nothing more than particularized expressions of aversion to commercial programming and private preferences for "more beneficial" types of programming. Such subjective program preferences are not constitutional bases for Commission regulation.

The Commission must reject the call to engage in widespread social engineering by dictating the types of programs which the American public can watch. Rather, it should stay on the course which began with Television Deregulation, facilitating broadcast stations' continued innovation and experimentation, and with it, their continued ability to be vigorous competitors on tomorrow's information superhighway.

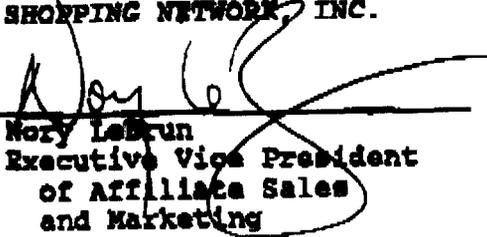
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Home Shopping Network, Inc., therefore respectfully requests that the Commission terminate this inquiry.

Respectfully submitted,

HOME SHOPPING NETWORK, INC.

By


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