

94-123

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL 21 1987

FCC
Office of the Secretary

In the Matter of)	
)	
Amendment of Section 73.658(k))	RM No. _____
of the Commission's Rules to)	
Delete the "Off-Network")	Docket No. _____
Program Restriction)	

COMMENTS IN SUPPORT OF APPLICATION FOR REVIEW

Capitol Broadcasting Company, Inc. (Capitol), licensee of WRAL-TV, Raleigh, North Carolina, by its attorneys, hereby respectfully submits its Comments in support of the Application for Review filed by Channel 41, Inc. (Channel 41), seeking review of the Mass Media Bureau's dismissal of Channel 41's Petition for Rulemaking to delete the "off-network" program ban of the Prime Time Access Rule (PTAR):

On April 24, 1987, Channel 41 filed its Petition for Rulemaking in which it demonstrated that dramatic changes in the television and video entertainment industry since the "off-network" ban was adopted in 1970 have eliminated whatever justification may have previously existed for the rule and that, under judicial precedent construing the First Amendment subsequent to adoption of the rule, the off-network program ban is an impermissible intrusion into the First Amendment rights of affected local broadcasters. To Capitol's knowledge, the Petition was not opposed and the Petition conformed in all technical respects with the Commission's Procedural Rules. Nevertheless, on May 22, 1987, without offering interested

persons any opportunity to comment on the Petition,^{1/} the Mass Media Bureau summarily dismissed Channel 41's Petition.

REVIEW OF THE BUREAU'S DECISION IS WARRANTED

Channel 41 seeks review of the Bureau's action pursuant to Section 1.115 (b)(2)(i), (iii), and (iv) of the Commission's Rules. Capitol supports Channel 41 and also requests review of the Bureau's decision for substantially similar reasons. First, the Bureau's action is contrary to the Commission's procedural rules governing petitions for rulemakings.^{2/} The Bureau's letter dismissing the Petition does not state that the Petition did not meet the requirements of section 1.401; and it does not state that the Petition is moot, premature, repetitive, frivolous, or plainly does not warrant consideration, the only criteria by which a petition may be dismissed pursuant to section 1.401(e). Indeed, the Bureau states that "careful consideration" was given to the request, which would belie any suggestion that it did not warrant consideration. Thus, the

^{1/} Capitol is a network affiliate in the Raleigh-Durham, North Carolina market, which is ranked 35 out of the 214 Arbitron ADI's. Thus, Capitol is an interested party and would have offered comments in support of Channel 41's Petition had it been permitted to do so.

^{2/} Section 1.401 of the Commission's Rules provides that any interested person may petition for the amendment or repeal of a rule and sets out the technical requirements for such a petition. Subsection (e) states that petitions "which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed...." Section 1.403 of the Commission's Rules states that "[a]ll petitions for rulemaking [other than to amend the tables of assignments] meeting the requirements of § 1.401 will be given a file number, and promptly thereafter," public notice will be given that the petition has been filed and is available for inspection (emphasis added). Once that has occurred, interested parties have 30 days, pursuant to section 1.405 of the Rules, to file statements in support of or in opposition to the petition.

Bureau's action dismissing the Petition was clearly contrary to Commission regulation.

Second, the Bureau's action dismissing the Petition relied upon a rule and policy that should be revised. The Bureau's rationale is that the off-network ban is an essential part of the PTAR and it wishes to continue to apply the rule as it currently exists. Nevertheless, Channel 41 demonstrated convincing reasons why the off-network ban should be deleted, the most important of which was that the restriction is unconstitutional.

Third, the Bureau's action is premised on an erroneous finding as to an important question of fact. The Bureau's decision includes a finding that deletion of the off-network ban would deprive the PTAR of "most of its effect." The Bureau offers no clue as to the basis for this conclusory finding, which is clearly erroneous. As Channel 41 has demonstrated in its Application for Review, the rulemaking proceeding it requests would affect only one aspect of the PTAR.

REEXAMINATION OF THE OFF-NETWORK BAN OF THE PTAR
IS WARRANTED AT THIS TIME

The practical effect of the off-network ban is that 157 of the nation's 1315 television stations^{3/} cannot carry certain programming for one hour each day, not because the programming is indecent or obscene but solely because it formerly appeared

^{3/} See FCC Public Notice "Broadcast Station Totals as of June 30, 1987" (released July 15, 1987). Of the total, 1003 stations are commercial television stations.

on a national network.^{4/} As Channel 41 has cogently demonstrated, the rule is unconstitutional and anticompetitive. It limits licensee programming discretion, artificially dictates the prices for off-network programs, and effectively prevents network affiliates in the top 50 markets from competing for the most popular off-network programs.

In adopting the PTAR and the off-network ban in 1970, the Commission explained its action as follows:

"The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time. To remedy these problems, we have decided first to open access directly to the top 50 markets for independent programming by prohibiting network affiliates in these markets where there are at least three commercial television stations from taking more than 3 hours of network programs between 7 p.m. and 11 p.m.... Off-network programs may not be inserted in place of the excluded network programming; to permit this would destroy the essential purpose of the rule to open the market to first run syndicated programs."

Network Television Broadcasting, 23 F.C.C.2d 382, 394-95 (1970) (footnote omitted). The Commission indicated that it was compelled to act by certain facts, including: (1) there were only three national networks; (2) in the top 50 markets there were only 224 stations of which 153 were network affiliates; (3) in the U.S. there was a total of 621 stations of which 499 were network affiliates; (4) of the top 50 markets only 14 had at east one independent VHF television station; (5) and there was a

^{4/} The restriction does not apply to all television stations or to all commercial television stations or even to all network affiliates, only to the network affiliates in the top 50 markets. It does not prohibit only network produced programs but precludes any program that has ever been carried on any network.

"virtual disappearance of high cost, prime time, syndicated programming, the type of programming ... which must be most relied upon as competition for network-supplied entertainment programs." Id. at 385. As a result of these and other factors, the Commission concluded that the market was seriously unbalanced to the disadvantage of independent producers. The Commission indicated that it believed its action would provide "a healthy impetus to the development of independent program sources" and that it hoped that diversity of program ideas would be encouraged by its action. Id. at 395.

The constitutionality of this government regulation over program content was immediately challenged. 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 purpose was to encourage the diversity of programs and 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).

As Channel 41 demonstrated in its Petition, 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); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). See also Inquiry into

Section 73.1910 of the Commission's Rules and Regulations
Concerning the General Fairness Doctrine Obligations of Broad-
cast Licensees, 102 F.C.C.2d 143 (1985) (Fairness Doctrine).

Indeed, the Commission's own Network Inquiry Special Staff, which conducted the most recent inquiry into "the matter of alleged dominance of the nation's commercial television industry by the three major commercial networks,"^{5/} 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.****.

Moreover, the nature and structure of the television industry has changed dramatically since 1970. Today the sources of programming in competition with the networks at prime time are many and varied. Even if the off-network ban was at one time constitutionally defensible, the tremendous changes that have occurred in the industry have clearly eliminated the need for the rule and have eliminated the justification offered to defend the rule from attack on Constitutional grounds.

In its recent Fairness Doctrine 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

^{5/} See Commercial Television Network Practices, 62 F.C.C. 2d 548 (1977).

Court's decision concluding that the Commission's Fairness Doctrine was constitutional. Fairness Doctrine, 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 Doctrine, 102 F.C.C. 2d at 151 n. 28 (emphasis added).

In many of its major actions with respect to television in recent years, the Commission has recognized and been influenced by the explosive growth of video technologies that have affected and will continue to affect the television industry (by increasing competition) and lessened the influence of the three national television networks. For example, in its Deregulation of Commercial Television, 56 R.R.2d 1005 (1984), the Commission deleted rules and policies concerning television licensees' programming performance in part because of its conclusion that the growth and development in the television market place rendered such regulations unnecessary.^{6/}

^{6/} The Commission noted that the emergence and growth of new, alternative technologies, such as STV, MDS, SMATV, LPTV, DBS, MMDS, and ITFS,

"coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace. Given the market-based demand for these types of programming evidenced by our studies of past broadcast performance, this increased level of competition can, in our view, only further ensure the presentation of sufficient amounts of such programming."

Similarly, the changed circumstances in the television broadcast industry also provided one of the bases for the Commission's action in its Tentative Decision and Request for Further Comments in Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), 94 F.C.C. 2d 1019 (1983) (hereinafter Syndication and Financial Interest). In Syndication and Financial Interest, the Commission examined subsection (j) of Section 73.658, the financial interest and syndication rules, in light of the economic context of the rules for the "video industry." The Commission noted that since 1970 there had been a 44% increase in the number of television signals received in the average TV household. 94 F.C.C. 2d at 1057. In addition, the percentage of homes passed by cable had increased from 15.3% in 1970 to 54.2% in 1983.^{7/} Id. at 1058. The Commission also noted that the networks' share of the television audience had dropped to 80% by 1982 (from 90% in 1970), id., whereas, the independents and other over-the-air TV stations had increased their viewing share from a 9% to 17% share. Id. The Commission also discussed the growth of several new technologies distributing video programming, including STV, MDS, and SMATV. Id. at 1059-60. In addition, the Commission noted that other new forms of visual product delivery, including video cassette recorders,

56 R.R.2d at 1014 (emphasis added).

^{7/} With respect to cable, the Commission stated that since 1970, when cable "was principally a retransmission technology," cable television had become much more than a means of distributing broadcast signals. A "wide variety of cable networks" had come into being since the mid-1970's. There were 23 advertiser-supported basic service networks, 11 networks supported directly or indirectly by subscriber fees, and 17 pay networks (including HBO, Showtime, The Movie Channel). Syndication and Financial Interest, 94 F.C.C.2d at 1056-58.

compete with television and cable. Id. Thus, the Commission's own findings confirm that the facts that it found to compel adoption of the off-network ban 17 years ago no longer exist today. In view of these changes and the Commission's expressed aversion to program content regulation, Channel 41's Petition was entitled to consideration.

CONCLUSION

The Commission has in recent years and with increasing frequency recognized that the First Amendment is not served by restrictions and regulations affecting program content and quality. See, e.g., Subscription Video, 62 R.R.2d 389, 399 (1987) (in which the Commission noted that it was motivated by "the [Communications] Act's general preference for regulatory policies that enhance, rather than impede, the exercise of a licensee's editorial discretion...and [acting] in accordance with [its] own general policies to foster first amendment rights"); Fairness Doctrine, 102 F.C.C.2d at 156 (in which the Commission stated that in light of the "substantial increase in the number and types of information sources," it believed that "the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas").

Having been presented with arguments that seriously questioned the constitutionality of the off-network ban, the Bureau should have instituted a rulemaking proceeding to study the issue. The Commission's discussion of its recent review of the Fairness Doctrine is equally applicable to the Channel 41 request for review of the off-network ban:

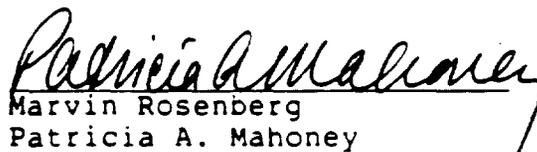
"[C]onstitutional considerations are an integral component of the public interest standard and we believe that an evaluation of the constitutionality of [a rule] is necessary in order to make a meaningful evaluation as to whether or not retention of the [rule] is in the public interest."

Fairness Doctrine, 102 F.C.C.2d at 155.

WHEREFORE, Capitol Broadcasting Company, Inc. respectfully requests that the Commission grant the Application for Review filed by Channel 41, Inc.

Respectfully submitted,

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INC.

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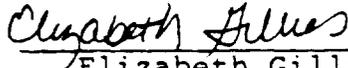
July 21, 1987

CERTIFICATE OF SERVICE

I, Elizabeth Gillies, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that true copies of the foregoing "Comments In Support of Application for Review" were sent this 21st day of July, 1987, by first-class United States mail, postage prepaid, to the following:

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