

WUHQ-TV did go on the air, there were only three other television stations in the Grand Rapids-Kalamazoo-Battle Creek market -- all affiliated with a national television network. Viewers could subscribe only to limited-capacity cable systems, and that option was available in only a few communities in the market.²² Only two first-run syndication programs typically were broadcast by any station during the first hour of prime time.²³ Virtually no homes were equipped with video cassette recorders.

Today, vast differences in WUHQ-TV's market reflect dramatic changes in the television industry nationally, both in programming diversity and first-run syndication opportunities. Since 1970, the number of stations has more than doubled in the Grand Rapids-Kalamazoo-Battle Creek market.²⁴ Many viewers can subscribe to up to 16 cable networks, up from zero in most of the market. Eleven first-run syndication programs are broadcast during non-network prime time -- an increase of more than 500 percent. Another new national network, Public Broadcasting Service, is widely available. And, more than one-third of the market's 585,300

²² Television Factbook at 451-53a (1969-70 ed.).

²³ Based on programming as reported in TV Guide in 1970.

²⁴ See Broadcasting Yearbook at 32 (1970); Broadcasting/Cablecasting Yearbook at C-31-32 (1987).

television households are equipped with VCRs,²⁵ giving those viewers vast flexibility in programming options.

When the Commission adopted the "off-network" ban, it declared: "The facts which propel us to action are relatively simple and, we believe, quite compelling."²⁶ In Channel 41's judgment, the facts now are just as simple. They also are equally compelling.

Significantly, among the "relatively simple" and "compelling" facts singled out by the Commission in 1970 was the small number of independent stations in the top-50 markets. "[O]nly fourteen of these markets have one or more independent VHF stations,"²⁷ the Commission lamented. Now, however, that figure has more than doubled.²⁸

Furthermore, enormous growth has occurred in recent years in UHF independent stations, which are prime outlets for first-run syndication and "off-network" programming. Their numbers also more than doubled from 1970 to the present. Indeed, those 17 years since the ban's enactment have seen the total number of commercial television stations

²⁵ Arbitron Ratings for the Grand Rapids-Kalamazoo-Battle Creek Market at INT-1 (Nov. 1986).

²⁶ 23 F.C.C.2d at 385.

²⁷ Id.

²⁸ See Attachment hereto at 4.

-- affiliates and independents -- mushroom from 221 to 374 in the top-50 markets alone.²⁹

First-run syndicators are among the most notable beneficiaries of this growth. They are producing almost double the number of first-run programs as when the Commission promulgated the "off-network" ban in 1970.³⁰ As noted supra at 5, the Commission, relying heavily on existing market conditions to justify its action, pointed particularly to a perceived need for more first-run syndicated programs. Seven years after enactment of the "off-network" ban, the number of first-run syndication programs had soared from 45 to 73.³¹ By this year, 82 different first-run programs were available for next fall.³²

First-run syndication growth is apparent in other aspects of the industry. The biggest production houses in Hollywood received more orders last fall to produce first-run syndicated shows than network series. Among the notable

²⁹ Id. These numbers do not include the several hundred public-television stations established in recent years. Additionally, the syndication industry itself sees cable as another outlet for its product. Cable networks have been spending more money to buy both first-run and off-network programs that originally were pegged for station syndication. Glut of Programs, Stations Means Syndie Buyer's Market, Multichannel News, April 13, 1987, at 23.

³⁰ First-run Programming Fueling Syndicated Market at 106.

³¹ New Television Networks at 416.

³² First-run Programming Fueling Syndication Market at 106.

production companies involved in first-run syndication were Disney, Columbia Pictures, Lorimar-Telepictures, Embassy, Paramount, Hanna-Barbera, 20th Century Fox, Universal, and Viacom.³³

Similar figures regarding television-industry growth were tallied by the Commission itself when it recently proposed to modify its multiple ownership rules.³⁴ The Commission's conclusions strongly support WUHQ-TV's contention that any justification that once might have existed for the "off-network" ban has long since disappeared.

According to the Commission, significant changes have substantially eased concerns regarding sufficient competition and viewpoint diversity in local markets. "This seems to be particularly true in the top fifty markets where there is a plethora of broadcast outlets."³⁵ The Commission's findings generally cover the same period at issue here: the date of the "off-network" ban's adoption, 1970, to the present.

Among the Commission's most salient findings nationwide were these:

³³ The Producers, Channels 1987 Field Guide at 15.

³⁴ Broadcast Multiple Ownership Rules, 2 F.C.C. Rcd. 1138 (1987).

³⁵ Id. at 1140 (emphasis added). In its ownership NPRM, the Commission also pointed to "significant other media services contributing to the communications marketplace," e.g., VCRs, reaching approximately 40 percent of the nation's television households.

-- the number of operating cable television systems jumped from 2,490 to 7,600³⁶;

-- within four years of its inception in 1982, low-power television service spread by last year to 160 licensed UHF and 247 VHF stations;

-- multi-point distribution systems had signed up 260,690 subscribers as of last June; and

-- up to 600,000 subscribers were receiving satellite master antenna signals ("private cable") by August 1986.

This dynamic growth has resulted in 96 percent of all television households in the United States being able to receive five or more television signals, and more than 60% being able to receive nine or more.³⁷

³⁶ Among the many new basic networks that have emerged due to the growth of cable are:

ACTS Satellite Network, The Arts & Entertainment Network, Black Entertainment Television, Cable News Network, Christian Broadcasting Cable Network, Country Music Television, The Discovery Channel, Entertainment & Sports Programming Network, Financial News Network, The Learning Channel, Music Television, The Nashville Network, Nickelodeon, Satellite Program Network, USA Cable Network, Video Hits One, and The Weather Channel.

Broadcasting/Cablecasting Yearbook at D-8 (1987).

In all, there are approximately 28 basic cable networks and 10 pay cable networks. Fairness Doctrine, 102 F.C.C.2d 143, 210-11 (1985).

³⁷ Id. at 205.

There are other indications of vast changes. A new national network is forming,³⁸ and erosion persists in the three major networks' dominance over the prime-time audience. The major networks once controlled more than 90% of the prime-time audience, but by 1984, that figure had dropped to 80 percent.³⁹ And, by the end of this prime-time season, the three major networks' shares had dropped even more -- to a total of only 75 percent.⁴⁰

B. Changes in the Marketplace Render the "Off-network" Ban Unnecessary and Highlight Its Anti-Competitive Effects

The Commission has placed WUHQ-TV and scores of other stations in a competitive straitjacket. The independent stations with which network affiliates must compete directly for local audiences face no programming restriction such as the "off-network" ban. They operate in a regulatory environment more oriented to the free-market, giving them built-in, government-created advantages lacking any current justification. When the Commission decided in 1970 to restrain top-50 stations' programming options, the vast

³⁸ Fox Broadcasting Network; see, e.g., Hollywood's New Low-End Market, Channels 1987 Field Guide at 13.

³⁹ Commercial TV Stations, 98 F.C.C.2d 1076, 1139, (1984).

⁴⁰ Washington Post, Apr. 22, 1987 at c-10, col. 2.

majority of those local independents did not even exist, as the Attachment hereto clearly demonstrates.

A second important factor exacerbating the "off-network" ban's anti-competitive effect is the importing by cable distributors of so-called "super-stations" from Chicago, New York, and Atlanta. Even if local independents did not air the programs that top-50 affiliates are prohibited from broadcasting during prime time, the affiliates still face unfair competition via satellite. Like the locals, "super stations" also are free of any Commission prohibition in offering former network programming during prime time.⁴¹

Putting aside the Commission's original intent, such shackling of local stations is now unjustified and unjustifiable. The ban's negative side-effects are not restricted to the Grand Rapids-Kalamazoo-Battle Creek market but are nationwide. They include squeezing competition from an important segment of the broadcast economy. By forbidding more than 150 stations to broadcast "off-network" programming, the Commission has forced out players from that market who otherwise would play significant roles:

The consequence of restricting the suppliers from whom an affiliate can purchase a program and giving independent stations a competitive edge in program

⁴¹ In our market at WUHQ-TV, yet another factor exacerbates the rule's anti-competitive results. That factor is the reach of competing stations from smaller market areas where the "off-network" ban does not apply into Grand Rapids-Kalamazoo-Battle Creek.

choices is almost necessarily to increase the prices for both first-run and off-network programs.⁴²

The Commission should lift the artificial restraints it has imposed on the affiliates and their suppliers and let market forces determine what programming all local stations may offer during non-network prime time, also known as "access" time.

One final point should be emphasized. In many cases, the "off-network" ban effectively prevents affiliates in the top-50 markets from broadcasting the most popular "off-network" programs at any hour -- not just during prime time. This expansive effect occurs because of basic broadcast economics. The most desirable "off-network" shows are available at such a high per episode price that stations must broadcast them when most viewers tune in -- prime time. The inability of many affiliates to program certain "off-network" programs when necessary and desired thus diminishes or even eliminates their ability to purchase and air those shows at all.

42 New Television Networks at 425-26.

IV.

**The "Off-Network" Ban Unduly Burdens the First
Amendment Rights of Local Stations To Choose
Programming They Deem Most Responsive to
Local Needs and Tastes**

The "off-network" ban is a particularly egregious and direct affront to the First Amendment programming rights of local stations. The ban impinges sharply on editorial discretion⁴³ by forcing government programming choices on the affected stations without any discernible rationale. It far exceeds the incidental burdening of speech permissible under the First Amendment.⁴⁴

In banning "off-network" shows during access time in favor of first-run syndication, the Commission imposes its choice as to what class of speech some stations might select. Since adoption of the ban, the Supreme Court has ruled that

⁴³ Cf. Quincy Cable TV Inc. v. FCC, 768 F.2d 1434, 1453 (D.C. Cir. 1985) (prohibiting the Commission from ordering cable television systems to carry certain signals of broadcasters upon request, without compensation), cert. denied, 106 S. Ct. 2889 (1986).

⁴⁴ The First Amendment permits the government to regulate a news medium incidentally only if the regulations at issue promote an "important or substantial governmental interest," and the restriction is no greater than essential to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1969). If the burden a regulation imposes is more than merely incidental, courts uphold it only if the government can carry adequately a far heavier burden of justification. See e.g., *City Council v. Vincent*, 466 U.S. 789, 804-805 (1984). Clearly, the Commission's actions and justifications in adopting and enforcing the "off-network" restriction fail to meet the O'Brien test.

such government promotion of one class of speaker over another is unconstitutional. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). The Supreme Court reiterated that fundamental principle in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).⁴⁵

The ban has other flaws that render it more than incidental, and therefore unconstitutional, considering the lack of an acceptable rationale. The ban generates anti-competitive side-effects, including artificially inflating the price of some speech at the expense of other speech.⁴⁶ The Commission has specified only one interest at issue regarding the "off-network" ban -- promoting a vigorous first-run syndication industry to expand the diversity of mass-media speakers. That goal now has been achieved (with

⁴⁵ The Supreme Court decision in the Bellotti case, in fact, casts serious doubt on the validity of an earlier lower court ruling that upheld the constitutionality of PTAR in general. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). The Commission's Special Staff recognized Bellotti's likely effect on the lower court ruling. According to the Special Staff, Bellotti could be swept aside to uphold PTAR "[o]nly by falling back on assertions that broadcasting enjoys no First Amendment protection or that entertainment programs are less entitled to protection than news programs." See Network Inquiry Special Staff, Appendices to: An Analysis of Television Program Production, Acquisition and Distribution at 35 (1980).

⁴⁶ See note 42 supra and accompanying text at 19-20.

or without the ban), and the government has offered no new rationale that withstands even minimal scrutiny.⁴⁷

Regardless of whether the "off-network" ban helped trigger the growth in diversity and first-run syndication, or technological progress alone propelled the changes, the conclusion is the same. The Commission no longer may constitutionally excuse its flagrant intrusion into the First Amendment rights of some local stations.

V.

Conclusion

The marketplace conditions that seventeen years ago prompted the Commission to enact the "off-network" ban have changed dramatically. Those changes also undercut whatever constitutional rationale might have existed for such a direct restriction on the First Amendment rights of affiliated stations in the top-50 markets.

⁴⁷ See note 5 supra and accompanying text at 6.

For the foregoing reasons, petitioner respectfully requests that the Commission move promptly to repeal that part of 47 C.F.R §73.658(k) that restricts local affiliates such as WUHQ-TV from broadcasting "off-network" programs in prime time.

Respectfully submitted,

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ATTACHMENT

Changes in Top 50 Television Markets, 1970-1987

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Changes in Top 50 Television Markets, 1970-1987*

| <u>Markets</u> | <u>Network</u> | | <u>Ind.</u> | | <u>VHF</u> | | <u>UHF</u> | |
|----------------------------|----------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> |
| New York ¹ | 3 | 3 | 3 | 11 | 6 | 6 | 0 | 8 |
| Los Angeles ² | 3 | 3 | 7 | 14 | 7 | 7 | 3 | 10 |
| Chicago | 3 | 3 | 4 | 8 | 4 | 4 | 3 | 7 |
| Philadelphia ³ | 3 | 4 | 3 | 8 | 3 | 3 | 3 | 9 |
| San Francisco ⁴ | 3 | 4 | 5 | 10 | 4 | 5 | 4 | 9 |
| Boston ⁵ | 3 | 4 | 2 | 9 | 3 | 4 | 2 | 9 |
| Detroit ⁶ | 3 | 3 | 3 | 5 | 4 | 4 | 2 | 4 |
| Dallas- Ft. Worth | 3 | 3 | 3 | 7 | 4 | 4 | 2 | 6 |
| Wash. D.C. | 3 | 3 | 3 | 6 | 4 | 4 | 2 | 5 |
| Houston | 3 | 3 | 2 | 4 | 3 | 3 | 2 | 4 |

* Compiled from Broadcasting Yearbook, 23-53 (1970); Broadcasting/Cablecasting Yearbook, C144-C217 (1987); and Television and Cable Factbook, A-22-1128. Some of these markets, as defined by Arbitron Television according to its Areas of Dominant Influence, have expanded or contracted since 1970. The markets are listed here according to the 1987 Yearbook rankings. The listing does not include stations licensed but not on the air, nor does it include the several hundred educational television stations.

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- 1 Includes Poughkeepsie.
 - 2 Includes Corona and San Bernadino-Fontana.
 - 3 Includes Allentown and Reading, PA; Vineland and Wildwood, NJ
 - 4 Includes San Jose and Santa Rosa.
 - 5 Includes Concord, Derry and Manchester, NH; Worcester, MA.
 - 6 Includes Ann Arbor, MI; CBS Station in Ontario, Canada.

| <u>Markets</u> | <u>Network</u> | | <u>Ind.</u> | | <u>VHF</u> | | <u>UHF</u> | |
|---------------------------------------|----------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> |
| Cleveland ⁷ | 3 | 4 | 2 | 7 | 3 | 3 | 2 | 8 |
| Atlanta | 3 | 3 | 1 | 4 | 3 | 3 | 1 | 4 |
| Pittsburgh | 3 | 3 | 1 | 3 | 3 | 3 | 1 | 3 |
| Miami ⁸ | 3 | 3 | 2 | 6 | 4 | 4 | 1 | 5 |
| Minneapolis- St. Paul ⁹ | 3 | 3 | 1 | 4 | 4 | 4 | 0 | 3 |
| Seattle- Tacoma ¹⁰ | 3 | 4 | 2 | 4 | 5 | 6 | 0 | 2 |
| Tampa- St. Petersburg | 3 | 3 | 2 | 4 | 3 | 3 | 2 | 4 |
| St. Louis | 3 | 3 | 2 | 3 | 4 | 4 | 1 | 2 |
| Denver | 3 | 3 | 1 | 5 | 4 | 6 | 0 | 2 |
| Sacramento- Stockton ¹¹ | 3 | 3 | 1 | 4 | 3 | 3 | 1 | 4 |
| Baltimore | 3 | 3 | 1 | 3 | 3 | 3 | 1 | 3 |
| Phoenix ¹² | 3 | 3 | 2 | 6 | 4 | 5 | 1 | 4 |
| Hartford- New Haven | 4 | 3 | 1 | 4 | 2 | 2 | 3 | 5 |
| Indianapolis | 3 | 3 | 1 | 3 | 4 | 4 | 0 | 2 |

7 Includes Akron, Canton and Sandusky.

8 Includes Fort Lauderdale.

9 Includes St. Cloud.

10 Includes Bellingham.

11 Includes Modesto.

12 Includes Prescott.

| <u>Markets</u> | <u>Network</u> | | <u>Ind.</u> | | <u>VHF</u> | | <u>UHF</u> | |
|------------------------------|----------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> |
| San Diego ¹³ | 3 | 3 | 1 | 3 | 3 | 3 | 1 | 3 |
| Portland | 3 | 3 | 1 | 3 | 4 | 4 | 0 | 2 |
| Orlando ¹⁴ | 3 | 3 | 0 | 5 | 3 | 3 | 0 | 5 |
| Cincinnati | 3 | 3 | 1 | 2 | 3 | 3 | 1 | 2 |
| Kansas City | 3 | 3 | 0 | 3 | 3 | 3 | 0 | 3 |
| Milwaukee | 3 | 3 | 1 | 4 | 3 | 3 | 1 | 4 |
| Nashville | 3 | 3 | 1 | 3 | 3 | 3 | 1 | 3 |
| Charlotte ¹⁵ | 3 | 3 | 1 | 3 | 2 | 2 | 2 | 4 |
| New Orleans | 3 | 3 | 1 | 2 | 3 | 3 | 1 | 2 |
| Columbus | 3 | 3 | 0 | 2 | 3 | 3 | 0 | 2 |
| Raleigh-Durham ¹⁶ | 3 | 3 | 0 | 3 | 2 | 2 | 1 | 4 |
| Buffalo | 3 | 3 | 0 | 2 | 3 | 3 | 0 | 2 |
| Oklahoma City | 3 | 3 | 0 | 4 | 3 | 3 | 0 | 4 |
| Greenville ¹⁷ | 4 | 3 | 0 | 5 | 3 | 3 | 1 | 5 |
| Memphis | 3 | 3 | 0 | 2 | 3 | 3 | 0 | 2 |
| Grand Rapids ¹⁸ | 3 | 4 | 0 | 3 | 3 | 3 | 0 | 4 |

13 Includes Tijuana, Mexico.

14 Includes Daytona Beach, Melbourne and Leesburg.

15 Includes Hickory.

16 Includes Fayetteville.

17 Includes Spartanburg and Anderson, SC; Asheville, NC; Toccoa, GA.

18 Includes Kalamazoo and Battle Creek.

| <u>Markets</u> | <u>Network</u> | | <u>Ind.</u> | | <u>VHF</u> | | <u>UHF</u> | |
|---------------------------|----------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> | <u>1970</u> | <u>1987</u> |
| Salt Lake City | 3 | 3 | 0 | 2 | 3 | 3 | 0 | 2 |
| Providence ¹⁹ | 3 | 3 | 0 | 2 | 3 | 3 | 0 | 2 |
| Birmingham ²⁰ | 3 | 3 | 0 | 4 | 2 | 2 | 1 | 5 |
| San Antonio | 3 | 3 | 1 | 2 | 3 | 3 | 1 | 2 |
| Harrisburg ²¹ | 5 | 4 | 0 | 2 | 1 | 1 | 4 | 5 |
| Norfolk ²² | 3 | 3 | 1 | 2 | 3 | 3 | 1 | 2 |
| Charleston- Huntington | 3 | 3 | 0 | 2 | 3 | 3 | 0 | 2 |
| Dayton ²³ | 3 | 3 | 2 | 3 | 2 | 2 | 3 | 4 |
| Louisville | 3 | 3 | 0 | 2 | 2 | 2 | 1 | 3 |
| Greensboro ²⁴ | 3 | 3 | 1 | 5 | 3 | 3 | 1 | 5 |
| <hr/> | | | | | | | | |
| TOTALS | 154 | 157 | 67 | 217 | 163 | 169 | 58 | 205 |

¹⁹ Includes New Bedford, MA.

²⁰ Includes Anniston and Gadsden.

²¹ Includes York, Lancaster and Lebanon.

²² Includes Portsmouth, Newport News and Hampton.

²³ Includes Richmond, IN.

²⁴ Includes Winston, Salem, High Point and Burlington.