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April 11, 1991

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BY HAND

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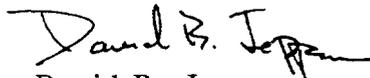
Re: **In re Constitutionality of Section
73.658(k) of the Commission's Rules
("Prime Time Access Rule")**

Dear Ms. Hull:

On behalf of NATPE International, please find a copy of the
Opposition to First Media Corporation's Petition for Declaratory
Ruling on the constitutionality of the Commission's Prime Time Access
Rule. NATPE's Opposition was filed April 9, 1991.

Please direct any questions regarding this matter to the
undersigned.

Sincerely,


David B. Jeppsen

Enclosures

cc: Certificate of Service List

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

In re)
)
)
Constitutionality of)
Section 73.658(k))
of the Commission's Rules)
("Prime Time Access Rule"))
_____)

RECEIVED

APR - 9 1991

Federal Communications Commission
Office of the Secretary

To: The Commission

**MOTION FOR LEAVE TO FILE
LATE-FILED OPPOSITION**

NATPE International ("NATPE") hereby requests leave to file an Opposition to the above-referenced Petition for Declaratory Ruling ("Petition") on the constitutionality of the Commission's Prime Time Access Rule (the "PTAR") filed by First Media Corporation on April 18, 1990. To date, the Commission has not yet acted on the Petition. Because NATPE's members are intimately involved in all aspects of the entertainment industry, and since the PTAR has a direct impact on the entertainment industry and NATPE's members, it is in the public interest and significant that the Commission consider the issues raised within this Opposition. For the foregoing reasons, NATPE respectfully requests that the Commission grant it leave to file the attached Opposition.

Respectfully submitted,

NATPE International

By: Michael R. Gardner

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(202) 785-2828

Its attorney

Dated: April 9, 1991

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

In re)
)
)
Constitutionality of)
Section 73.658(k))
of the Commission's Rules)
("Prime Time Access Rule"))
)
)

To: The Commission

OPPOSITION TO PETITION FOR DECLARATORY RULING

NATPE International ("NATPE"), by its attorneys, hereby opposes the Petition for Declaratory Ruling ("Petition") filed by First Media Corporation ("First Media") on April 18, 1990. First Media requests a declaratory ruling that the Prime Time Access Rule ("PTAR"), 47 C.F.R. § 73.658(k), is an unconstitutional abridgement of free speech under the First Amendment of the Constitution of the United States. Since NATPE's diverse members are intimately involved in all aspects of the entertainment industry, including the production, syndication and distribution aspects of broadcast and cable programming, and since the PTAR has a direct impact on the entertainment industry and NATPE's members, NATPE has a direct and immediate interest in the issues raised by First Media's Petition.

As a regulation, the PTAR is as least intrusive and necessary today as it was when it was originally adopted in 1970. Rather than abridge the First Amendment, the PTAR has helped advance the First Amendment's goals by fostering a diversity of broadcast programming. Recent changes in the video marketplace have not eliminated the need for the PTAR, nor have they eliminated the PTAR's constitutional framework. The Commission should see First Media's Petition for what it is--an attempt to sacrifice the public interests served by the PTAR in order to advance a single company's self interest. Viewed appropriately in this context, First Media's

Petition should be denied.

I. BACKGROUND

After an exhaustive analysis of the U.S. broadcast and programming marketplace, the Commission adopted the PTAR in 1970 to remedy the anti-competitive and diversity stifling environment in which the networks single-handedly controlled "the entire network television program production process from idea through exhibition." Competition and Responsibility in Network Television Programming, 23 FCC 2d 382, 389 (1970). Prior to the rule's adoption, network owned and operated stations and their affiliates typically filled all of their prime time schedules with network and off-network programming. The networks' ability to totally control the prime time schedule with their own programming or programming of their choice resulted in the virtual disappearance of independently produced prime time programming.

Recognizing the serious harm to the public interest resulting from an ever shrinking source of independent program producers, the Commission adopted the PTAR to limit network monopolization of programming and to promote the diversity of television programming sources. Great care was taken by the Commission to craft the PTAR in the least intrusive means possible. The rule was narrowly tailored to prohibit network affiliated television stations in the top 50 markets from broadcasting more than three hours of network or off-network programs during prime time. In 1975, the rule was narrowed yet further by exempting children's programs, public affairs programs, documentary programs, on-the-spot news programs, political broadcasts by candidates, regular network news broadcasts and sporting events from the three-hour limitation. See Second Report and Order (PTAR III), 50 FCC 2d 829 (1975) (hereinafter referred to as the "exemptions"). As a practical effect

of these exemptions, the PTAR window has been confined generally from one hour to thirty minutes as the majority of network affiliates choose to air the half-hour nightly network news broadcasts during prime time.

Since the rule's adoption, the PTAR has been challenged twice on the same constitutional grounds First Media now raises. On both occasions, the constitutionality of the PTAR was upheld. See Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971); and National Ass'n of Indep. Television Producers and Distrib. v. FCC, 516 F.2d 526 (2d Cir. 1975) (NAITPD).

In Mt. Mansfield, supra, the networks and their affiliates argued that the PTAR constitutes a direct restraint on speech in violation of the First Amendment because the programs of network distributors are barred during the PTAR window, the freedom of choice of licensees is restricted, and viewers are denied access to programming they might have preferred. The court rejected these arguments stating:

[T]he prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "[d]iversity of programs and development of diverse and antagonistic sources of program service" and to correct a situation where "[o]nly three organizations control access to the crucial prime time evening schedule."

Id. at 477. Thus, not only did the court reject the argument that the PTAR is unconstitutional, the court held that the PTAR significantly promotes fundamental First Amendment values.

In support of its decision, the court noted that regulation of the broadcast media is subject to a different First Amendment standard than other forms of communication due to the "peculiar characteristics" of the broadcast media. Mt. Mansfield Id. at 477. For example, the court noted that the right to broadcast can only be exercised by a tiny percentage of the general population due to the

technological limits of the broadcast spectrum and that existing broadcasters have a substantial advantage over new entrants, advantages which are "the fruit of a preferred position conferred by the Government." Id., citing Red Lion Broadcasting v. FCC, 395 U.S. 367, 400 (1969). Thus, the court concluded that "the First Amendment confers no right on licensees . . . to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." Id., citing Red Lion at 391.

Four years later, the constitutionality of the PTAR was challenged again in NAITPD, supra. Once again, the attack was unsuccessful. The NAITPD court rejected the petitioners' claim that the constitutional underpinning of the PTAR had disappeared and soundly reaffirmed their earlier opinion in Mt. Mansfield, supra. The court observed that "[f]ree speech in television is a balance between encouragement of access to the medium and the prevention of non-access to the medium," and once again held that far from infringing upon the First Amendment, "the [PTAR] is designed . . . to open up the media for those whom the First Amendment primarily protects--the general public." Id. at 532.

In addition, the NAITPD court upheld the constitutionality of the PTAR exemptions discussed above. Much like the argument First Media now raises, the petitioners in NAITPD argued that the PTAR exemptions were content-based regulations and therefore in violation of the First Amendment. The court rejected this argument noting that the Commission was not mandating the content of any programs nor were they mandating what particular programs could be aired by licensees through enacting the exemptions. Rather, the court found the "newly exempted categories [were] more a function of the time factor than of editorial policy." Id. at 538. Hence, the court rejected any argument that the PTAR imposed content-based restrictions on speech.

Now, after more than two decades of the PTAR's success in promoting progressing diversity and competition in the programming marketplace, First Media reiterates the arguments rejected by the courts in Mt. Mansfield and NAITPD and asks the Commission to eliminate the PTAR. Regardless of the apparent procedural problems accompanying this Petition,¹ First Media's request must be denied as it is wholly unsupported by prevailing law. In effect, First Media asks the Commission to overturn a fundamental principle of constitutional law--that the Commission may reasonably regulate the scarce resources of the broadcasting media in order to assure diversity of broadcast programming. The Supreme Court has recently reaffirmed this principle in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990), leaving no doubt that First Media's petition must fail.

II. THE PTAR IS BASED ON VALID CONSTITUTIONAL GROUNDS

The constitutional underpinning of the PTAR rests on the fundamental principle of spectrum scarcity and the Commission's statutory mandate to use this scarce spectrum resource in order to promote diversity and competition. In its simplest form, the principle of spectrum scarcity is based on the fact that there are far more applicants for broadcast licenses than there are frequencies to award. Accordingly, the Supreme Court has repeatedly held that the Commission may regulate broadcasting under a different First Amendment standard than that imposed on other forms of communication. National Broadcasting Co. v. FCC, 319 U.S. 190 (1943); Red Lion, *supra*. Moreover, the law is clear that the principle of spectrum

¹ A serious question exists as to whether the Commission even has the authority to rule on this petition. Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) and Section 1.2 of the Commission's Rules state that a declaratory ruling may be issued only to terminate a controversy or remove uncertainty. As there is no uncertainty or controversy as to the issues raised in this petition, it is questionable whether the Commission has authority to issue a declaratory ruling on First Media's behalf.

scarcity is a valid justification for the constitutionality of the PTAR. See Mt. Mansfield and NAITPD, supra.

A. **The Commission Did Not Reject The Spectrum Scarcity Rationale In Syracuse.**

First Media's Petition hangs solely on their inaccurate conclusion that the Commission thoroughly rejected the rationale of spectrum scarcity in its 1987 Syracuse Peace Council decision² which rescinded the Fairness Doctrine. However, First Media's conclusion is mistaken and their portrayal of Syracuse is patently misleading.

First Media fails to address the substantial efforts of the Commission in distinguishing spectrum scarcity, the rationale supporting the constitutionality of the PTAR, from numerical scarcity, the lack of which prompted the Commission to rescind the Fairness Doctrine in Syracuse. While technological advancements and the expansion of the video marketplace may alleviate the numerical scarcity of video outlets, in the Commission's own words, "technological advancements and the transformation of the telecommunications market...have not eliminated spectrum scarcity." 2 FCC Rcd, at 5055 (emphasis added).

Contrary to First Media's assertion, therefore, the Commission in Syracuse **never** intended its ruling to act as a rejection of the spectrum scarcity rationale as it relates to the PTAR. The Supreme Court in Metro Broadcasting, supra, summed it up best by stating:

[a]lthough the Commission has concluded that "the growth of traditional broadcast facilities" and "the development of new electronic information technologies" have rendered "the fairness doctrine unnecessary,"...the Commission

²2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), aff'd sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 107 L.Ed.2d 737 (1990).

has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its "regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 F.C.C. Rcd 2035, 2041, n. 56 (1988).

Id. at 3022 n. 41 (emphasis added). Since the fundamental purpose of the PTAR is to promote diversity of programming sources, the Commission's position in regard to the PTAR is without question; the principle of spectrum scarcity is a valid constitutional foundation for the PTAR.

B. The Supreme Court Recently Reaffirmed Spectrum Scarcity As A Constitutional Basis For Broadcast Regulation.

Any doubts raised by First Media as to the continued validity of the spectrum scarcity rationale were resolved when the Supreme Court recently reaffirmed spectrum scarcity as a valid constitutional basis for government regulation of broadcasting in Metro Broadcasting, supra. In Metro Broadcasting the Court explicitly reaffirmed the validity of broadcast minority ownership and distress sale policies aimed, like the PTAR, at promoting a diversity of views and information. Relying on the principle of spectrum scarcity, the Court emphasized that the public interest in enhancing diversity of viewpoints is, at the least, an important governmental objective, and that diversity on the airwaves serves important First Amendment values. The Court also recognized that safeguarding and promoting the public's right to a diversity of views is central to the FCC's mission and stated:

We have long recognized that "[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic officer," National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943); rather, it is axiomatic that broadcasting may be regulated in

light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. United States, 326 U.S. 1, 20 (1945). Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission.

. . . .
 Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . [T]he diversity of views and information on the airwaves serves important First Amendment values.

Metro Broadcasting, at 3010. Thus, the Supreme Court's recent landmark decision in Metro Broadcasting, released after First Media filed the instant Petition, conclusively disposes of any doubts raised by First Media regarding the continued validity of spectrum scarcity as the constitutional basis for the PTAR. Additionally, the decision affirms the important governmental interest in enhancing broadcast diversity, the Commission's stated interest in adopting the PTAR.

C. Changes in the Video Marketplace, Including the Growth of Cable, Have Not Affected Spectrum Scarcity.

First Media's attempt to convince the Commission that technological advancements have eliminated spectrum scarcity is simply unconvincing. In Red Lion the Supreme Court noted that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace." Red Lion, 367 U.S. at 397. Similarly, as demand for broadcast spectrum space continues to exceed supply in today's video marketplace, spectrum scarcity continues to exist.

First Media argues that "the enormous growth of cable television alone has turned spectrum scarcity into channel abundance." Petition at 11. This argument is both factually and legally misleading. Factually speaking, it is clear that broadcast

and cable channels are not equivalent sources of program diversity. In theory, cable channels could provide program producers with additional outlets in which to disseminate their product. However, the reality is that cable is not a viable prime time alternative to broadcast because the networks still dominate prime time viewing despite changes in the video marketplace since 1970. The major broadcast networks (ABC, CBS and NBC) reach 98% of American households, nearly twice the number of households that receive cable television.³ Despite cable's substantial growth in the last decade, the networks' prime time audience share is still a substantial 64%,⁴ and their actual audience size has actually increased since 1970.⁵ Simply put, the networks are still the dominate force in determining what the public sees or does not see during prime time, the exact situation the PTAR is designed to curtail. As neither the growth of cable nor any other development cited by First Media has significantly reduced this network domination, the PTAR is as essential today as it was when it was adopted.

First Media's further claim that cable and broadcasting are functionally interchangeable for constitutional purposes is absolutely baseless. In fact, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), the case cited by First Media in support of its proposition, holds inapposite to what First Media would have us believe. The Quincy Court explicitly recognized the fundamental difference between the broadcast and cable media is spectrum scarcity stating:

[B]eyond the obvious parallel that both cable and broadcast television impinge on the senses via a video receiver, the two media differ in

³Kagan Media Index, April 22, 1990.

⁴Cable Television Advertising Bureau Analysis of A.C. Nielson Data (figure shows the Networks' share of prime time viewing in total TV households for the 4th Quarter of 1990.)

⁵Television Bureau of Advertising Trends in Media, March 1990.

constitutionally significant ways. In light of cable's virtually unlimited channel capacity, the standard of First Amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable.

Id. at 1450. Contrary to First Media's assertion, therefore, the opinion in Quincy more aptly stands for the proposition that it is improper to aggregate broadcast channels and cable channels in determining what First Amendment standard to apply. As such, First Media's argument that technological advancements have rendered the rationale of spectrum scarcity obsolete is legally incorrect.

III. THE PTAR IS A REASONABLE CONTENT-NEUTRAL REGULATION

After misinterpreting the First Amendment standard to be applied to the PTAR, First Media erroneously claims the PTAR is an unreasonable content-based restriction and abridgement of affiliated broadcasters' right to free speech. This characterization is patently invalid since the PTAR is a narrowly drawn restriction on the **source**, not the content, of programming broadcast by network affiliates.

In promulgating the PTAR, the Commission determined that the broadcast by affiliates of network and off-network programming, regardless of the message conveyed, during all four hours of prime time does not serve the public interest. The PTAR serves to open up one hour⁶ of prime time to programming produced by non-network sources, again, regardless of the message conveyed.

Since the type of programming is not mandated or restricted, but merely the networks' origination, the PTAR is unrelated to the content of speech and does not distinguish among classes of speakers on the basis of the subject matter of their expression. See generally, Syracuse, 2 FCC Rcd, at 5070 n. 227. As the court

⁶As previously mentioned, the reality is that the PTAR access period is most often a thirty-minute programming window since the exemptions, particularly network news programming, reduce the PTAR hour to one-half hour.

explicitly recognized in Mt. Mansfield, "[t]he Commission does not dictate to the networks or licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast." Mt. Mansfield, 442 F.2d at 180 (emphasis in original).

Further, First Media's argument that the PTAR exemptions constitute a content-based regulation is the exact argument already disposed of in NAITPD. Although the exemptions might appear to be content specific, the application of the exemptions imposes no content-based requirements or restrictions on network affiliates. As the Court of Appeals has aptly stated:

The Commission by this amendment of the rule is not ordering any program to be broadcast in access time. It has simply lifted a restriction on network programs if the licensee chooses to avail himself of such network programs in specified categories of programming.

NAITPD, 516 F.2d at 537. In other words, the network affiliates are still free to pick and choose the content of their programming as they please, regardless of the exemptions. The exemptions merely provide more flexibility in determining the source of certain programs. They are neither content-based requirements nor content-based restrictions. The Court of Appeals for the Second Circuit did not buy First Media's argument, and neither should the Commission.

IV. THE PTAR SERVES IMPORTANT GOVERNMENTAL AND PUBLIC INTERESTS.

Finally, it cannot be overemphasized that the PTAR furthers important governmental and public interests and does not intrude upon, but facilitates the fundamental goals of the First Amendment.

First, and most importantly, the PTAR has advanced the goals of the First Amendment by directly fostering diversity of views and information. As the court

in Mt. Mansfield, supra, observed, "the First Amendment stems from the premise that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" Id. at 477. Furthermore, the Supreme Court in Metro Broadcasting recognized that "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is...an integral component of the FCC's mission." Metro Broadcasting, 110 S.Ct. at 3010.

The PTAR serves this important governmental interest in diversity because it frees local broadcasters to choose from a vast variety of programming choices for the limited access period instead of being forced to rely on the network-selected programming that fills the majority of the prime time television schedule. Furthermore, by providing a safe harbor for independently produced prime time programming, the PTAR provides both large and small producers and program suppliers the opportunity to effectively compete for the prime time airing of their programs. The PTAR has been a remarkable catalyst for the development of a fiercely competitive and robust television programming and distribution industry which today provides Americans with an unlimited array of viewing options. The regulatory success of the PTAR is most evident at NATPE's annual convention, where thousands of American and foreign program producers and distributors display their diverse programming creations and compete vigorously for the prime time programming window opened up by the PTAR. Clearly, the PTAR has served an important governmental interest by stimulating the development of independent sources of prime time programming and, as a result, diverse programming.

Additionally, by stimulating a high degree of competition and diversity the PTAR has propelled the American programming industry into the lead role in the explosive global entertainment marketplace. U.S. programming has become one of the most successful and sought-after American exports, returning to the United

States \$3 billion annually in a positive trade balance. Not only has the PTAR provided this profound economic benefit, the explosion of U.S. programming at the international level has helped advance "the widest possible dissemination of information" worldwide. Mt. Mansfield, 442 F.2d at 477.

Moreover, in terms of local diversity, the PTAR has provided a vital ancillary public interest benefit. The substantial revenues generated for local broadcasters from advertisers who support the station's access period programming has enabled local stations to produce quality non-prime time programming that is responsive to the needs of the local community. As such, the PTAR has further advanced the longstanding and significant governmental interest in promoting local coverage, local autonomy and local creativity.

V. CONCLUSION

For more than twenty years, the PTAR has been a vitally effective and successful regulation that has promoted prime time television program diversity, enhanced competition in the U.S. programming marketplace, and provided financial resources to local broadcasters for diverse and public focused non-prime time broadcast periods. Through the use of the PTAR, the Commission has successfully limited stifling network domination of all prime time programming with the least intrusive form of content-neutral regulation. First Media has completely ignored these important and varied public benefits in its attack on the PTAR. The Commission should reject this company specific petition in favor of a limited regulatory device that continues to promote such clear public interest benefits for the vast American television viewing public.

The constitutional arguments proposed by First Media are illusory and without merit. The principle of spectrum scarcity is not a fossilized concept--rather, the

spectrum scarcity rationale is alive and well as the Supreme Court explicitly reaffirmed in Metro Broadcasting. Moreover, the PTAR is a content-neutral regulation and is not an abridgment of the network affiliates' right to free speech. Instead, the PTAR is an important mechanism in furthering the diversity of speech and ideas, the central purpose of the First Amendment.

The decisions in Mt Mansfield and NAITPD are still good law that recognize the important role the Commission must play in promoting broadcast programming diversity. Accordingly, the Commission should deny First Media's petition and strongly reaffirm the PTAR as a rule that serves the public interest.

Respectfully submitted,

NATPE International

By:



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Its attorneys

Dated: April 9, 1991

AMENDED CERTIFICATE OF SERVICE

I, Frances S. Wilson, hereby certify that copies of the foregoing "Opposition to Petition for Declaratory Ruling" and its accompanying Motion for Leave to File were served on this 9th day of April, 1991, by first-class mail, postage prepaid, to the following individuals at the addresses listed below:

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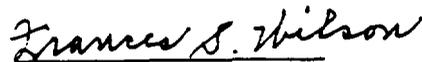
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*Hand Delivered

**Mailed April 10, 1991



Frances S. Wilson