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Federal Communications Commission
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BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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| In the Matter of | ) |
| | DOCKET FILE COPY ORIGINAL |
| Petition for Declaratory | ) |
| Ruling Concerning Consti- | ) |
| tutionality of Section 73.658(k) | ) |
| of the Commission's Rules | ) |
| (Prime Time Access Rule) | ) |

To: The Commission

## OPPOSITION TO PETITION FOR DECLARATORY RULING

The ABC Television Affiliates Association ("ABC Affiliates" or the "Association"), which is comprised of over 200 local television stations across the country affiliated with the ABC Television Network, hereby opposes and respectfully requests the Commission to dismiss the Petition filed by First Media Corporation on April 18, 1990 (the "Petition").

## Introduction And Summary Of Argument

In its Petition, First Media asks the Commission to issue a declaratory ruling that the Commission's Prime Time Access Rule ("PTAR") [47 C.F.R. §73.658(k)] is invalid under the First Amendment to the United States Constitution. Contrary to the argument advanced by First Media, however, PTAR is and has been held on judicial review to be a valid, content-neutral form of structural regulation that serves the government's interest in

promoting diversity in broadcast programming. The Commission's decision in Syracuse Peace Council, upon which First Media relies, is readily distinguishable and does not call into question the validity of PTAR. Moreover, the U.S. Supreme Court in Metro Broadcasting, Inc. v. FCC, 497 U.S.___, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990)(hereinafter "Metro Broadcasting"), has now reaffirmed that the "spectrum scarcity" rationale continues to provide a sound basis underlying the constitutionality of the Commission's structural regulations--including PTAR. Accordingly, there is no "uncertainty" over the constitutional status of PTAR,[1] and the Commission should dismiss First Media's Petition.

I.

First Media's Petition Should Be Dismissed

ABC Affiliates have long been on record with the Commission in support of PTAR. Neither the passage of time nor the changes that have taken place in recent years in the television industry have caused network affiliates to waver in their support of this important rule. ABC Affiliates support the rule because it has long provided and it continues today to provide a crucial window in prime time for independently produced, non-network and syndicated programming. Thus, PTAR advances the Commission's long-standing policy objective of fostering competition and diversity

[1]Under §1.2 of the Commission's Rules, 47 C.F.R. §1.2, the Commission may issue a declaratory ruling to "terminat[e] a controversy or remov[e] uncertainty."

in the distribution of television programming and furthers the right of the public under the First Amendment to receive broadcast programming from diverse and antagonistic sources.

In its Petition, First Media does not dispute the public interest benefits of PTAR or otherwise challenge the rule on its merits. Instead, First Media argues that the factual basis supporting the constitutionality of the rule under the First Amendment--spectrum scarcity--was eliminated by the Commission's decision in Syracuse Peace Council,[2] in which the Commission abolished the Fairness Doctrine.

The Petition rests on an erroneous reading of Syracuse. That proceeding dealt specifically with the Fairness Doctrine, not the Commission's scheme of structural regulation. PTAR is a structural rule which merely preserves one hour out of prime time for programming other than network programming. It thus promotes, directly and in a narrowly tailored manner, the Commission's diversity goals and in the process serves the public's First Amendment right to receive programming from diverse sources. First Media's reading of Syracuse is thus overly broad.

Further, First Media overlooks an integral component of the Fairness Doctrine analysis that is not present in the case of PTAR. Critical to the Commission's decision in Syracuse was the perceived "chilling effect" of the Fairness Doctrine on broad-

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[2]Syracuse Peace Council, 2 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, 110 S.Ct. 717, 107 L.Ed.2d 737 (1990) (hereinafter also "Syracuse").

casters. The Commission concluded that rather than promoting speech, the doctrine, in fact, suppressed speech. Referring to its 1985 Fairness Report,[3] the Commission recounted:

> Based upon the compelling evidence of record, the Commission determined that the fairness doctrine, in operation, thwarts the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance, the Commission found that the fairness doctrine, in operation, "chills" speech.[4]

Far from chilling diverse speech, PTAR promotes and facilitates it--and without governmental intrusion into content.

Moreover, notwithstanding First Media's argument, the spectrum scarcity rationale retains its full vitality in the federal courts. PTAR has twice been held to be a valid exercise of the Commission's regulatory powers and not to violate the First Amendment. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).[5] As the Court of Appeals said in Mt. Mansfield (at 477):

> [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".

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[3]Inquiry Into Section 73.1910 Of The Commission's Rules And Regulations Concerning Alternatives To The General Fairness Obligations Of Broadcast Licensees, 102 FCC 2d 145 (1985).

[4]Syracuse, supra, 2 FCC Rcd at 5049.

[5]See also NAITPD v. FCC, 516 F.2d 526 (2d Cir. 1975).

Mt. Mansfield in turn rested squarely upon a line of Supreme Court decisions articulating the principle that, because of technological limitations upon the availability and use of spectrum, there are limits upon the number of those who may become broadcasters and the First Amendment does not confer an absolute right of unfettered use by broadcast licensees of this scarce resource. See Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 391, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); National Broadcasting Co. v. FCC, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

Mt. Mansfield, Red Lion and NBC v. FCC remain good law. The Commission in Syracuse proposed to depart from the settled concept of spectrum scarcity (so-called "allocational" scarcity). Documenting the growth of cable and other technologies, the Commission in Syracuse found that with the abundance of media outlets now available, the Fairness Doctrine should be eliminated on constitutional as well as public interest grounds.[6] On review, the Court of Appeals upheld the Commission's action; however, the Court's decision was grounded solely on the Commission's "authority to reject the doctrine if it concludes, without being arbitrary or capricious, that it no longer serves the public interest." Syracuse Peace Council v. FCC, 867 F.2d at

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[6]The Commission was responding to a suggestion by the Supreme Court in FCC v. League of Women Voters of California, 468 U.S. 364, 376, n.11, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), that a Commission (or congressional) determination that scarcity no longer prevails might cause the Court to revisit its Red Lion analysis.

657. The Supreme Court in turn denied certiorari and thus declined to reconsider the Red Lion rationale.

Finally, subsequent to denying certiorari in Syracuse, the Supreme Court decided Metro Broadcasting, supra, in which it upheld the Commission's minority ownership and distress sale policies against constitutional challenge based upon the core principles of allocational scarcity and diversity. The Court stated:

> We have long recognized that "[b]ecause of the scarcity of [spectrum] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." [Citing Red Lion, supra, 395 U.S. at 390.] The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic officer," [citing National Broadcasting Co. v. United States, supra, 319 U.S. at 215]; 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, 89 L.Ed. 2013, 65 C. Ct. 1416 (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.[7]

Even though Metro Broadcasting was a 5-4 decision of the Supreme Court, these principles received support from all nine Justices. Justice O'Connor, in a dissenting opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, stated:

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[7]Metro Broadcasting, Inc. v. FCC, supra, 111 L.Ed. 2d at 464 (hereinafter also "Metro Broadcasting").

> The Court has recognized an interest in obtaining diverse broadcasting viewpoints as a legitimate basis for the FCC, acting pursuant to its "public interest" statutory mandate, to adopt limited measures to increase the number of competing licensees and to encourage licensees to present varied views on issues of public concern. [Citations omitted.] We have also concluded that these measures do not run afoul of the First Amendment's usual prohibition of Government regulation of the marketplace of ideas, in part because First Amendment concerns support limited but inevitable Government regulation of the peculiarly constrained broadcasting spectrum. [Citing Red Lion, supra, at 389-390.][8]

In these circumstances, First Media's argument fails. Its core premise--that spectrum scarcity no longer supplies a viable basis for the First Amendment analysis in a broadcast context--has been rejected by the Courts. Moreover, as shown above, the Fairness Doctrine at issue in Syracuse and PTAR are not comparable when viewed from a First Amendment perspective. The Commission itself has made clear that "its decision to abrogate the fairness doctrine does not in its view call into question its 'regulations designed to promote diversity.'" Metro Broadcasting, supra, 111 L.Ed.2d at 470, n.41 [quoting Syracuse Peace Council, 3 FCC Rcd 2035, 2041, n.56 (1988)]. PTAR is designed specifically to promote diversity and it has effectively served that objective. Indeed, First Media does not even attempt to challenge the rule on its merits or out of any failure to serve

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[8] Id., at 496.

the public interest. In short, there is no basis on which the Commission properly may entertain the Petition.

Indeed, the Commission should proceed promptly to dismiss the Petition. Continued pendency of the Petition might in some quarters be taken to imply the existence of "uncertainty" or "controversy" on the issues it purports to raise. Because First Media's argument amounts to a broad First Amendment attack on the Commission's very authority to engage in structural regulation, the Commission should act promptly and decisively to dispel any implicit uncertainty in this respect by dismissing the Petition.

## CONCLUSION

For the foregoing reasons, ABC Affiliates respectfully submit that the Petition of First Media for Declaratory Ruling should be dismissed.

Dated: October 22, 1990.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Kathy Shearer, hereby certify that a copy of the foregoing Opposition To Petition For Declaratory Ruling was served by first-class mail, postage prepaid, on the following:

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This the 22nd day of October, 1990.

Kathy Shearer

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