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FEDERAL COMMUNICATIONS COMMISSION JUN 14 1994
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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In the Matter of)	
)	
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction)	MMB File No. 920117A
)	
Amendment of Section 73.658(k) of the Commission's Rules to Delete the "Off-Network" Program Restriction)	MMB File No. 870622A
)	
Constitutionality of Section 73.658(k) of the Commission's Rules ("Prime Time Access Rule"))	MMB File No. 900418A
)	

COMMENTS OF THE MEDIA ACCESS PROJECT

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SUMMARY

MAP believes that PTAR continues to provide an important stimulus to the expansion of program diversity by promoting a viable independent TV industry and facilitating a vibrant first-run syndication market. However, to the extent that the Commission wishes to consider modification or repeal of PTAR, the FCC must create a full record. No action could be justified based on the dated and incomplete petitions pending before the FCC.

Channel 41 and Hubbard Communications urge repeal of PTAR's critical off-network restriction based on claims that "dramatic changes" in the telecommunications marketplace have adequately reduced the dominance of the three traditional networks and expanded the market for first-run syndicators. Petitioners also complain that PTAR curbs network affiliates' editorial discretion to compete with independent stations and cable. First Media argues only that the Commission's 1987 *Syracuse Peace Council* decision somehow compels the FCC to declare PTAR unconstitutional.

The petitioners are wrong. Hard evidence and practical experience reveals that PTAR continues to serve as a catalyst to the growth of a viable independent television market, the expansion of syndicated programming and the emergence of a new broadcasting network. The resulting benefits to the public are enormous. PTAR advances First Amendment goals through the increase in diversity of programming voices available to the public and the fostering of viable independent television stations.

PTAR provides a window through which independents can introduce audiences to the station's entire programming schedule and attract a significant portion of their total advertising revenue, much of which may be invested in new news and entertainment programming. The

public similarly benefits from the boost that PTAR gives to program syndicators, giving access to a wider diversity of programming from diverse programming sources.

Changes in the video marketplace do not reduce the need for PTAR and the off-network rule. In findings that accompanied the 1992 Cable Act, Congress determined that the cable industry has blocked competitors from developing alternative program delivery mechanisms and that no technology can yet replace over-the-air broadcasting as the primary source of information on *local* issues. Whatever inroads cable may have made to network power, it has not materially reduced network dominance. Furthermore, with the imminent elimination of the Commission's financial interest and syndication rules, network dominance will be further strengthened vis a vis both cable and independent broadcasters.

To the extent that First Media seeks to rely on the FCC's 1987 *Syracuse Peace Council* decision as a basis for declaring PTAR unconstitutional, it is a frontal challenge to all public interest regulation, including "equal time" and the 1990 Children's TV Act. The former FCC's findings in that decision have been wholly discredited by subsequent Congressional findings and judicial decisions.

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COMMENTS OF THE MEDIA ACCESS PROJECT

Media Access Project ("MAP") submits these comments in response to the Commission's Public Notice dated April 12, 1994. The Notice requests comment on three pleadings which variously request repeal or modification of the Prime Time Access Rule, 47 CFR §73.658 (k), ("PTAR") on various policy and constitutional bases.

One pleading, a Petition for Declaratory Ruling, filed April 18, 1990 by First Media Corporation ("First Media Petition"), asks the Commission to issue a declaratory ruling that PTAR is an unconstitutional restraint on speech in light of the Commission's 1987 *Syracuse Peace Council* decision. The other two pleadings, a June 22, 1987 Application for Review and attached Petition for Rulemaking filed by Channel 41, Inc. ("Channel 41 Petition") and a January 17, 1992 Petition for Rulemaking filed by Hubbard Broadcasting ("Hubbard Petition") each ask the Commission to initiate rulemakings to delete the so-called "off-network" provision of PTAR.

Hubbard and Channel 41 make two policy arguments. First they argue that "dramatic changes" in the telecommunications marketplace have reduced dominance of the three traditional

networks and expanded the market for first-run syndicators. Thus, they argue, there is no continuing need for PTAR. Second, they maintain that because PTAR curbs network affiliates' editorial discretion during the period of prime time reserved under PTAR for affiliates ("access time"), their ability to compete with independent stations and cable are unnecessarily impeded.¹

First Media makes only a constitutional argument. The Commission's 1987 *Syracuse Peace Council* decision, it asserts, rejects the notion of spectrum scarcity as a valid constitutional basis for broadcast regulation. Because the constitutionality of PTAR is predicated on the same notion, First Media argues, the Commission must reject PTAR as unconstitutional as well, and judge the rule by the standard laid out in the *Quincy* and *Home Box Office* cases.

INTRODUCTION

Much of the debate in this proceeding has focused on whether the FCC adequately justified the off-network prohibition at the time it was first developed and whether the goals the FCC originally intended for PTAR have been met. Such an inquiry is irrelevant to the issue properly before the Commission: whether the repeal of PTAR, in whole or in part, is in the public interest based on circumstances as they exist today.

PTAR has given Americans a wider choice of more diverse programming from all day long and not just during access time. This additional choice is particularly important for the 40% of Americans who cannot afford, or do not choose, to subscribe to cable. Whatever its original justifications may have been, there is no doubt that the off-network rule fueled the growth of first-run syndicated programming and thereby paved the way for the development of a viable indepen-

¹To the extent Hubbard and Channel 41 make constitutional arguments, they are essentially the same as those made by First Media.

dent television station sector. Those new stations have grown and begun to stabilize. They have gained audiences (and advertising revenues) by broadcasting off-network fare during access hours that previously were dominated by network affiliates. The revenues produced from this off-network programming also have permitted these stations to purchase first-run syndicated and sports programming, and in many cases to produce local news.

Most significantly of all, in the case of the Fox affiliates, PTAR revenues helped create a block of stations strong enough to coalesce into a new, fourth network. The benefits to the public have been substantial - more and different programming from more and different sources, a fourth network today, and the possibility of fifth and sixth networks in the near future.

Thus, MAP argues, retention of the off-network rule remains necessary to preserve the public interest. It will help maintain competitiveness of independent stations, most of which are small, UHF outlets. It bears particular emphasis in this regard that these properties are disproportionately owned by minorities and females.

Whatever "dramatic changes" have taken place in the video marketplace, the fact remains that over-the-air broadcasting continues to be the primary source of news and entertainment for Americans. Broadcast networks retain inordinate control over that marketplace, and their dominance will be strengthened by the imminent elimination of the Commission's financial interest and syndication rules ("FISR"). And network affiliates, most of which are larger, more established VHF stations, still have far superior bargaining power *vis-a-vis* independents.

Hubbard and Channel 41 argue that the off-network prohibition limits certain licensees' programming discretion, and impedes their ability to compete during the period each day when they are unable to carry off-network re-runs. It is true that the off-network rule tips the balance

slightly in favor of independent stations and independent producers for up to *one hour* in the entire broadcasting day,² although audiences and advertising revenues still show network affiliates to be overwhelmingly dominant. For the other twenty-three hours, network affiliates in the top 50 markets have an even greater competitive advantage, especially during prime time, when resources and programming of the networks give them unmatched strength.

First Media's argument that PTAR cannot be reconciled with the First Amendment in the face of the Commission's 1987 *Syracuse Peace Council* decision is specious. Whatever the Commission said about spectrum scarcity in 1987 -- in findings that have been subject to withering criticism -- is irrelevant here. Broadcast spectrum scarcity is more clearly a fact of life today, in the wake of a new law in which Congress authorized auctions but expressly excluded broadcast spectrum those auctions. The basic principle of trustee obligations imposed in exchange for exclusive use of spectrum, notwithstanding demand for such spectrum, remains fully operative, as does the unanimous United States Supreme Court decision in the *Red Lion* case. To the extent First Media argues that spectrum is no longer scarce, it is just plain wrong.

I. The Commission Cannot Properly Make a Final Determination On PTAR In This Proceeding.

Although others will surely use this proceeding to make full scale arguments for or against PTAR, the Commission has properly limited this proceeding to comments on the arguments raised in three pleadings described above, the most recent of which is two and one-half years old. The

²Under PTAR, the networks may, and typically do, use one-half hour of access time for network news programming. See 47 CFR §73.658 (k)(3).

age and the limited scope³ of these pleadings make any broad inquiry into the validity of the Prime Time Access Rule unwarranted here.⁴ Should the Commission decide that based on the comments submitted in this proceeding that re-examination of the rule is warranted, it may, at most, choose to inaugurate a broad-ranging inquiry intended to result in a fresh record of the effects of PTAR on diversity of voices and programming.⁵

II. Whatever Its Intended Goals, the Prime Time Access Rule and the Integral Off-Network Rule Have Resulted in a Diversity of Voices and a Diversity of Programming to the Public's Benefit.

PTAR and the off-network rule were adopted as a public interest, content-neutral regulation designed to open the television market to new and more diverse forms of programming, and especially to promote local programming. *See e.g., 1970 Report and Order*, 23 FCC2d 382, 384 (1970).⁶ It will doubtless be debated in this proceeding whether PTAR and its off-network provisions ever really accomplished the purpose for which it was originally intended. To the extent that some, like Channel 41, will make qualitative judgments about the independent programming that has developed as a result of PTAR, it is not the role of the Commission, or

³Indeed, Hubbard and Channel 41 ask only for rulemakings to determine whether the off-network prohibition should be repealed. First Media makes only a narrow constitutional argument.

⁴Faced with a similar problem when it reviewed FISR, the Commission closed its old docket and started a completely new proceeding with a fresh record. *Evaluation of the Syndication and Financial Interest Rules*, 5 FCC Rcd 1815, 1815 (1990).

⁵For reasons discussed below, MAP believes that further inquiry into PTAR or the off-network prohibition at this time is premature in light of the fact that the Commission's most recent modifications of FISR are currently under judicial review, and, in any event, are to be phased out in 1995.

⁶For an extended discussion of the rationale behind the Commission's adoption of PTAR and the off-network rule, *see* Comments of the Association of Independent Television Stations at 8-21 ("INTV Comments").

mission, or anyone else, to make such content-based judgments.⁷

Whatever the intended goals of PTAR and the off-network rule, their results have enured to the benefit of television viewers, and continue to do so today. PTAR, in combination with the essentially contemporaneous FISR, fueled the growth of a vibrant independent television sector and first-run syndication industry. The net result of PTAR is that we have more voices providing more diverse programming. This promotes the public's First Amendment right to receive the broadest range of information from the greatest diversity of sources over the broadcast media. *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 567 (1990), *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Both Hubbard and Channel 41 seem to suggest that the growth of independent television stations and first-run syndicated programming occurred in spite of PTAR - that "technological advances," Hubbard Petition at 18, and "sweeping changes in the marketplace," Channel 41 Petition at 11, alone caused the number of stations in this country to double and the first-run syndication market to achieve a modicum of success. Channel 41 even goes so far as to claim that the first-run syndication industry was already "successful financially" before PTAR was enacted. Channel 41 Petition at 8-9.

These claims have no validity. Technology has undoubtedly been a contributing factor, but it is equally clear that PTAR was a driving force. It was PTAR, not technology - that resulted in first-run syndication being carried in prime time. It was PTAR - not technology -

⁷Relying on findings in the 1980 Network Inquiry Special Staff Report, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* at 417 ("Network Inquiry Report"). Channel 41 states that "game shows have become the heart of non-network, prime time schedules." Channel 41 Petition at 9.

that made independent stations fully competitive in program offerings for even a portion of the broadcast day. It is well documented that prior to PTAR, first-run syndicated programming had almost no access to network affiliates, which were, for the most part, the only place to get access. *See generally, Report and Order, supra.* In fact, Channel 41 admits that "only two first-run syndication programs typically were broadcast by any station during the first hour of prime time. Channel 41 Petition at 13. The Commission concluded: "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." *Report and Order, supra,* at 395.

It is impossible to overstate the impact of PTAR on independent stations. Off-network reruns - for the first time - gave them familiar programming that attracted new audiences and new advertisers as well. The audience, enticed by the off-network fare on independents, were thus introduced to a station they had in all likelihood never previously watched. That audience would be more likely to stay tuned to that station and watch more of its prime time programming, especially if that programming was promoted, as is often done, during the off-network fare. The new advertisers also established new relationships and learned about other audience segments they could attract at other hours. Moreover, additional prime time programming, which independents were now able to purchase with the significant revenues generated from the access hour has most often consisted of other first-run syndicated or sports programming. Thus, first-run syndicated programming benefitted doubly from PTAR - it got access to prime time on network affiliates and got access to newly invigorated independents which could now afford to broadcast first-run syndicated programming during prime time.

Thus, the growth of independent stations and first-run syndicated programming are directly linked to PTAR and the off-network rule. The resulting benefits to the public have been enormous. The public has been provided with new outlets for programming controlled by different sources and with new, diverse programming produced by different sources. The strongest of these new outlets became the basis for the fourth network,⁸ once thought impossible.⁹ Indeed, possible fifth and sixth networks are about to begin operations as a result of PTAR's positive effect on independent stations.

III. Changes in the Video Marketplace Do Not Reduce the Need For The Prime Time Access Rule and the Off-Network Rule to Preserve Diversity of Voices and Programming.

Hubbard and Channel 41 assert that the off-network rule is no longer necessary because of changes in the video marketplace, including the growth of independent stations and cable television. These changes, they argue, have lessened both the dominance of the networks over their affiliates and of the network affiliates over the independent stations. Hubbard Petition at

⁸It is utterly illogical, but nonetheless inevitable, that Fox's exemption from PTAR and its concomitant success will be offered as a rationale to eliminate the rule. See, e.g., Wright, "What Fox Can Teach Us," Wall Street Journal, June 9, 1994 at A14. But it makes no sense to discard PTAR solely because Fox has benefitted from this exemption. If the Commission wishes to retain the "level playing field" upon which the "big three" networks insist, it must be level for independents as well. Thus, the better solution would be to commence an inquiry as to whether this exemption is still warranted in light of Fox's successes over the past several years.

⁹The members of the Commission's own network inquiry special staff were perhaps the biggest pessimists about the possibility of a fourth network. In the *Network Inquiry Report*, the staff concluded that "[S]hort of a radical restructuring of the existing television assignment plan, a fourth full time over-the-air network is unlikely to emerge in the near future. The required increase in coverage, and/or the reduction in the UHF handicap, and/or the increase in advertising revenues are simply too great to expect them to occur soon. While we may experience an increase in the number of part-time or ad hoc networks, it is unlikely that these will evolve into full-scale competitors to the three incumbent networks." *Network Inquiry Report* at I-76.

13. Channel 41 at 18.

In arguing that "technological advances and economic realities" make PTAR unnecessary, Hubbard places a great deal of reliance on the Commission's Office of Plans and Policy Working Paper, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd 3996 (1991) ("*OPP Working Paper*"). The *OPP Working Paper* concludes that there has been a dramatic increase in the number of video options available to the American public, and that these options render unnecessary regulations intended to curb market power or concentration of control over programming. *Id.* at 3999. It also concludes that the growth of cable and other technologies has rendered the broadcast networks "big losers," and predicts dire outcomes for them and their affiliates. *Id.* at 4000.

Most of OPP's conclusions about the role of new technologies in promoting diversity have been discredited by Congress in its findings under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Congress found the so-called "explosion" in new media is largely a fallacy - thanks to the cable industry's monopoly over its systems and programming. 1992 Cable Act §§2(a)(4)-(6). Congress also found that what technologies do exist do not replace over-the-air broadcasting as the only real-time, day-to-day, minute-to-minute source of information on *local* issues. 1992 Cable Act §§2(a)(9)-(11).

The Commission should look to facts, not speculation. To the extent that the *OPP Working Paper* predicts the demise of the three major networks, recent history has proven it wrong. In fact, the overall share of the audience controlled by the three major networks grew last year, while cable viewership remained steady. "Broadcast TV Fortunes on the Rise," *Broadcasting and Cable*, April 25, 1994 at 14; "Rebound for Broadcast TV, Cable Viewership

is Steady," *New York Times*, April 20, 1994 D1.¹⁰

Whatever inroads cable television may have made to network power, they are minimal when viewed from the perspective of the networks' continuing dominance. The networks are the only programmers who can reach essentially 100% of American households, and their advertising rates reflect that fact. A full 40% of Americans either cannot afford or choose not to get cable television and in any event, 70% of what is viewed on cable is broadcast television. The combined audience share of *all* of the national cable networks combined does not even remotely approach any *one* of the three major broadcast networks.¹¹ Moreover, the networks, including Fox, still retain the rights to the vast majority of major sporting events, including most NBA and NFL games, the major league baseball playoffs and World Series Games, the finals of the four tennis grand-slam events, and the major golf tournaments in the men's, women's and seniors' classes. Thus, OPP's prediction of the demise of CBS, NBC and ABC at the hands of cable is proving to be a complete miscalculation.¹²

¹⁰The rise in network viewership was accompanied by a decline in viewership of first-run syndicated fare on independent stations. *Id.*

¹¹The combined weekly average share for the top five cable networks programming in the 8 to 11 p.m. time slot is less than the weekly average share for any one of the three major broadcasting networks in this time period. The top five cable networks tallied a 15 share for the week May 30 to June 5, 1994. By contrast, ABC, CBS, and NBC each attained a 17 share over this same time period. "Ratings Week," *Broadcasting & Cable*, June 13, 1994 at 29; "Top Cable Shows and Nets," *Broadcasting & Cable*, June 13, 1994 at 30.

¹²The *OPP Working Paper* is a flawed document for a number of other reasons. See generally, December 19, 1991 Reply Comments of Telecommunications Research and Action Center and Washington Area Citizens Coalition Interested In Viewers' Constitutional Rights in MM Docket No. 91-221. The *OPP Working Paper* was written at a time of severe economic distress for everyone throughout the world - not just broadcasters. Thus, the OPP's conclusions are geared exclusively toward protecting industry profitability, and not services to the public. Commissioned by an FCC that was determined to eliminate the television ownership rules, the

A. The Network Affiliates Continue to Have Superior Competitive Position Vis-A-Vis Independent Stations.

Hubbard and Channel 41 prove nothing by merely citing to the increase in the number of broadcast stations. Hubbard Petition at 16-17, Channel 41 Petition at 14-15. Indeed, as Hubbard itself notes, 75% of new stations are independents. Hubbard at 16-17. These stations typically tend to be more marginal, less established UHF stations that are disproportionately controlled by minorities and women. National Telecommunications and Information Administration, *Analysis and Compilation by State of Minority Owned Commercial Broadcast Stations*, 1993.¹³ These stations, devoid of a position on the VHF band, the programming, resources and name recognition of the networks, are in a vastly inferior position vis-a-vis network affiliates.¹⁴ Stripped of the off-network rule, the outlook for independent stations, and consequently the public, is grim. Repeal of the off-network rule would create more buyers for off-network programming, thereby increasing the price. The stronger, richer network affiliates will almost certainly be able to outbid most independents, and certainly the most marginal ones for this programming. Those independents that do outbid the affiliates will have fewer revenues

OPP's conclusions are based largely on the blind and often discredited assumption that creation of economies or efficiencies through repeal of structural regulation will inevitably redound to the benefit of the public in the form of improved or increased public service. However, there is no recognition that the claims of industry distress have been proceeded by the massive repeal of many FCC ownership rules over the course of a decade.

¹³An unpublished informal survey conducted by the Association of Independent Television Stations showed that 13% of general managers of independent stations are women. This rate considerably exceeds that of larger stations.

¹⁴In addition, the recent acquisition of new affiliates by Fox has motivated at least one network to at least temporarily increase compensation paid to its affiliates. The others are likely to follow suit. "ABC Rescinds Compensation Cuts For 2/3 of Its Affiliates," *Communications Daily*, June 10, 1994 at 4.

to put into new first-run programming, sports or local news.

The smaller independents that are shut out of network fare will in all likelihood lose much of the audience that chose their stations initially solely because of the familiar network programming. The loss of audience will result in a loss of advertisers, a loss of cross promotion opportunities and consequently a loss of revenue. This revenue loss, again, will prohibit independent stations from buying good first-run syndicated programming which makes up the core of their prime time, and will eliminate any possibility of local or sports programming.

Thus, modification or repeal of PTAR not only puts the many independent stations at risk, it also makes the formation of a fifth or sixth network nearly impossible. Few will dispute that it was a core of strong independent stations, aided by PTAR, that made the Fox network a reality. Removing the benefit of the exclusive use of off-network fare for one hour of prime time will prevent another core of independents from gaining the revenue base to form another network.

The losses to independent stations are documented above. But the public would perhaps be the biggest loser from the repeal of the off-network rule. They would have fewer choices of programming and outlets and likely will lose the opportunity to view a fifth or sixth network, all sacrificed at the altar of giving network affiliates "discretion" to broadcast off-network fare between the hours of 7 and 8 p.m. It is a poor trade-off for the public.

B. The Networks' Power Will Increase With the Demise of the Financial Interest and Syndication Rules.

Not only have the networks remained the most powerful force in broadcasting, *see* discussion at 10-11, *supra*, that power has been increased by the recent modification of FISR. *Second Report and Order*, 8 FCC Rcd 3282 (1993), *reconsideration granted in part and denied in part*, 8 FCC Rcd 8270 (1993), *petitions for review pending sub nom. Capital Cities/ABC, Inc. v. FCC*,

Nos. 93-3458 *et al.* (7th Cir., filed May 24, 1993). This modification removes all restrictions on network acquisition of financial interests and syndication rights in network programming and permits network ownership and syndication of all non-prime time programming. *Id.* Assuming judicial approval of these modifications,¹⁵ the networks will be engaged in these activities as soon as fall of 1994.¹⁶ What remains of the rules will sunset in November 1995, unless the Commission decides otherwise. *Second Report and Order, supra.*

Thus, the networks may now acquire financial interest and syndication rights in television shows. These ownership rights give the networks even more ability and incentive to wield power over affiliates and independent stations. If the off-network rule is eliminated, networks with ownership interests in off-network programs will have both the ability and the incentive to pressure affiliates to run those programs during access periods, and favor their affiliates with off-network fare to the detriment of independent stations. Given documented history of just such misconduct in the past, makes it more than speculation to expect reversion to these practices. The result will be no different than that which spurred the adoption of PTAR and FISR - affiliates will lose the opportunity to program access at they see fit, and independents will be kept from the programming upon which they so greatly depend.

Thus, because of the integral relationship between PTAR and FISR, the Commission

¹⁵The Commission's modifications are presently subject to review in the United States Court of Appeals for the Seventh Circuit. However, given the Court's remand of the Commission's previous and more restrictive modifications, *Schurz v. FCC*, 982 F.2d 1043 (7th Cir. 1992) it is unlikely that the Court will disapprove of the Commission's decision to permit networks obtain financial interests and syndication rights in their programming.

¹⁶While the modifications, as a legal matter, took effect on June 5, 1993, for all practical purposes they will not be operative until the 1994 fall television season commences.

should postpone any broad inquiry on PTAR until there has been a final resolution on its sister regulation.¹⁷

IV. PTAR Justifiably Tips the Balance in Favor of Independent Stations for up to One Hour in the Entire Broadcast Day.

Both Hubbard and Channel 41 decry the fact that PTAR limits licensees program discretion and impedes their competitive ability for up to one hour each day. Hubbard Petition at 20-22, Channel 41 Petition at 3, 4-5. This may well be true. But PTAR was intended to disadvantage the network affiliates because of the huge advantage they have for the other twenty-three hours of the broadcast day. As discussed at , *supra*, the result has inured to the benefit of the public.

It is debatable whether the off-network rule limits or expands licensee discretion in the access hour. To the extent that it frees an affiliate from the yoke of the networks, it actually increases that discretion. In reviewing the rule in 1975, the Commission noted that PTAR "provided a significant public benefit in freeing licensees to exercise their own programming judgments." *Second Report and Order*, 50 FCC 2d 829, 836 (1975). The hope was that the licensees would then choose to broadcast some local programming in furtherance of their fiduciary duty to cover issues of interest in their communities. *Id.*; *Report and Order*, 23 FCC2d at 397.¹⁸ But it is apparent from their pleadings that network affiliates like Hubbard's stations

¹⁷See footnote, *supra*. Channel 41 argues that the Commission's attempts to deal with FISR are irrelevant to the off-network prohibition and its impact on local stations. Channel 41 Petition at 10, n. 15. This is just wrong. As the Supreme Court recognized in *Mount Mansfield Television, Inc., v. FCC*, 442 F.2d 470 (2d Cir. 1971), the Commission adopted FISR, *inter alia*, "essentially to prevent indirect circumvention of the prime time access rule...." *Id.* at 476 .

¹⁸The Commission stated, "[d]iversity of programs and development of diverse and antagonistic sources of program service are essential to the broadcast licensee's discharge of his duty as

and Channel 41 do not want to exercise their discretion in a way that serves their communities. They simply want the right to broadcast old network reruns.¹⁹

Similarly debatable is the extent to which PTAR and the off-network rule "severely restrict[] the network affiliate's ability to compete with other stations and cable for viewers during a critical time period," as Hubbard claims. Hubbard Petition at 21. The first-run syndicated programming shown by network affiliates is very competitive with the off-network programming shown by independents. As INTV notes in its comments at page 27, first-run programming shown on UHF affiliates in the top 50 markets during prime access in November 1992 had an average rating of 7.4, while off-network programming shown on UHF network affiliates had an average rating of 4.9. INTV Comments, Exhibit 2. This 51% ratings advantage for one hour out of the day is hardly a "severe restriction" on the competitive ability of network affiliates. *Id.*²⁰

Moreover, to the extent that Hubbard and Channel 41 assert that they are prevented from purchasing off-network fare, that is simply not the case.²¹ Hubbard Petition at 21; Channel 41

'trustee' for the public in the operation of his channel." *Id.*

¹⁹Hubbard's citation to the Special Staff Report for the proposition that PTAR "reduced the extent to which the system achieves the goal of localism" is laughable in the midst of its all-out battle for the right to run off-network fare during access. Hubbard at 19-21.

²⁰It is well known that network affiliates are not in danger of going out of business. In fact, affiliates revenues have increased over the last several years. "Good revenue gains spark dazzling profit growth," *Broadcasting & Cable*, April 25, 1994 at 18; "Station-group revenue on comeback course," *Broadcasting & Cable*, April 25, 1994 at 18.

²¹Contrary to Channel 41's complaints, the operation of the off-network rule currently has almost no effect on the prices of the first-run syndicated programming it purchases. Channel 41 Petition at 6-7 While prices may have risen at the onset of the rule, when demand greatly outweighed supply, the current demand for first-run programming is constant and the market for first-run access programming is competitive, keeping prices stable. See INTV Comments at 28-

Petition at 20. Network affiliates in the top 50 markets can, and do, buy as much off-network fare as they like. They can show it in the morning, during prime time or in late night. They just cannot do so during the access hour.

But even assuming *arguendo*, that PTAR and the off-network rule limit discretion and tips the competitive balance toward independents for an hour a day, those results are fully justified by the concomitant benefits. That one hour of prime time access is the only advantage independents have over network affiliates in the entire broadcast day. For the remaining twenty-three hours of the day, affiliates in top 50 markets have an enormous competitive advantage because of their channel position and the resources, programming, and name recognition of the networks. In light of the benefits that the access hour has conferred to the public in increased source diversity and programming, the affiliates' sacrifice is a small one indeed.

V. The Constitutional Bases for the Prime Time Access Rule are Still Valid.

First Media argues that the Prime Time Access Rule is an unconstitutional "restraint on broadcasters' freedom to choose what they broadcast." First Media Petition at 1. Its bases argument almost exclusively on the FCC's 1987 *Syracuse Peace Council* decision. *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *affirmed on other grounds sub nom.*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Because that decision rejected spectrum scarcity as a valid constitutional basis for broadcast regulation, First Media argues that the Commission must reject

30. Moreover, with respect to its identical claim that PTAR has raised the price of off-network fare, Channel 41 ignores the fact that repeal of PTAR will surely increase the purchase price for that programming precipitously. See discussion at 11-12, *supra*.

PTAR as well, because it too, is predicated on that notion.²²

First Media's argument has no merit. The findings underlying the Commission's rejection of the notion of spectrum scarcity in *Syracuse Peace Council* have been discredited by both Houses of Congress and more recently, questioned by the Commission itself. Despite what the Commission may have said in 1987, broadcast spectrum is more scarce today than ever. First Media's reliance on an agency decision pays lip service to the unanimous Supreme Court decision in *Red Lion* which affirmed the notion that in exchange for the use of scarce public spectrum, broadcasters must serve as trustees for the public. This basic principle has been reaffirmed by the Supreme Court and Congress on numerous occasions. Thus, any other constitutional analysis for PTAR is inappropriate.

A. The Premises Upon Which *Syracuse Peace Council* Rests are Wrong.

First Media accepts, without question, the former FCC membership's finding that "dramatic changes in the electronic media" render the concept of spectrum scarcity obsolete. First Media Petition at 8, quoting *Syracuse Peace Council*, *supra*, at 5053. The changes to which the Commission refers are the mere increase, since the early seventies, in the absolute number of television stations and the increase of the number of homes which have access to, and/or subscribe cable and the number of homes that subscribe to cable. *Syracuse Peace Council*, *supra*, at 5048.²³

These changes, First Media argues, have "turned spectrum scarcity into channel abundance." First Media Petition at 11. Adopting the rationale promulgated in *Syracuse Peace*

²²Hubbard makes the same argument at pp. 25-26 of its Petition.

²³These statistics are taken from the *1985 Fairness Report*, 102 FCC2d 143 (1985).

Council, First Media argues that cable and broadcast stations are fungible because both "bring video programs to the screen." *Id.* Thus, First Media agrees with the Commission's decision in *Syracuse* to "aggregate broadcast channels and cable channels when assessing the diversity of program sources available to the public,..." First Media Petition at 12.

First Media's argument rests mainly on two flawed propositions raised in the *Syracuse Peace Council* case. The first is that there is a great abundance of channels, and source diversity in, cable. The second is that, from a First Amendment perspective, those cable channels are equivalent to broadcast stations, and therefore must be taken into account when determining the existence of scarcity.

It is well documented that adequate diversity does not exist in cable - in fact, the cable industry is highly integrated both vertically and horizontally. See 1992 Cable Act §§2(a)(4)-(5). Nor are cable channels equivalent to broadcast stations. Cable channels, unlike broadcast stations, do not use scarce public airwaves. Broadcast stations, unlike cable channels, are required by law to cover *local* issues. Cable channels usually program to niche audiences, and with but a few exceptions, do not engage in programming on local issues. And most importantly of all, broadcast stations, unlike cable channels, are available for free to essentially 100% of the American public.

These propositions, *Syracuse Peace Council* and the 1985 *Fairness Report* on which it was based, have been discredited by the relevant Committees in both houses of Congress. In considering legislation to reinstate the fairness doctrine, the House Commerce and Energy Committee in 1987 and the Senate Commerce Committee in 1989 found that the supposed explosion of new technologies had not occurred and what new technologies there were did not undermine

the scarcity rationale for broadcast regulation. See S. Rep. No. 101-41, 101st Cong., 1st Sess. (1989) ("S. Rep."); H.R. Rep. No. 100-108, 100th Cong., 1st Sess. (1987) (H. Rep.).

Specifically, the Senate Committee Report states:

The Committee rejects arguments [that new technologies undercut the scarcity rationale] for several reasons. First, scarcity is not a matter of the absolute number of broadcast outlets or new forms of electronic media; as long as more people seek licenses to use the spectrum than can be accommodated, there is scarcity. Second, as noted above, the arguments ignore the fact that broadcasters are statutorily obligated to serve as public trustees, and are granted the use of valuable resources. In return, they can and should be subject to modest requirements to assure that their trust is exercised in the public interest. Third, we disagree that scarcity is a thing of the past, even in absolute terms. Of these new technologies cited by the FCC, only cable television has begun to reach a significant number of households, and a great deal of what cable offers and what its audience watches is retransmitted "conventional" television stations.

S. Rep. at 24. See S. Rep. No-101-227, 101st Cong., 1st Sess. at 11 (1989)²⁴; H.Rep. No. 101-385, 101st Cong., 1st Sess. at 8-9.

Similarly, the House Energy and Commerce Committee found that

the reality is that developments have not advanced so far that a revision of the system of broadcast regulation is required. Of the new technologies cited by the Commission, only cable television has even begun to reach a significant number of households, and a great deal of what cable offers is retransmitted broadcast signals.

H. Rep. at 15.

²⁴In its report on the Children's Television Act of 1990, Public Law 101-437, *codified at* 47 U.S.C. 303a, the Senate Commerce Committee stated: "In *Red Lion*, broadcasters argued...that technological developments...had reduced the scarcity of broadcast facilities to the point that the challenged rules were no longer a permissible attempt to further other First Amendment values and increased opportunities for speech. The Court rejected these contentions. The scarcity of spectrum permitting broadcast regulation does not turn on the absolute number of broadcast facilities overall or in particular markets, but rather on whether many more people want to broadcast than there are available frequencies or channels. The Court observed that 'comparative hearings between competing applicants are by no means a thing of the past.' The Court further held that 'nothing in this record or in our own research convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated....' *The Committee believes this conclusion remains correct.*" *Id.* [emphasis added]

In addition, with respect to technologies other than cable, the House Committee found that

Direct Broadcast Satellite Service and Multichannel Multipoint Distribution Systems can be found in the Commission's Rules, but not in the marketplace. In general, the Committee has received no hard evidence that any of these new over-the-air services will succeed. Further, the Committee believes it is highly questionable whether these new services will provide the public with news and public affairs programming.

Id. at 16.

More recently, Congress has rejected the notion that cable provides a diversity of programming, and specifically distinguished it from broadcasting. In its findings under the 1992 Cable Act, Congress found that the cable industry's monopoly over its systems and programming has restricted the growth of new media and consequently diversity. 1992 Cable Act §§2(a)(4)-(6). It also found that broadcasting differed from cable in that broadcast television stations "continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." 1992 Cable Act §§(2)(a)(11).

As demonstrated above, repeated Congressional rejection of *Syracuse Peace Council* renders spectrum scarcity useless as a rationale for modification or repeal of the Prime Time Access Rule. Moreover, to accept the "discredited numerical scarcity" versus "allocational scarcity" arguments advanced in *Syracuse Peace Council* is to abandon all public interest regulation of broadcasting, including Commission regulations requiring equal time for candidates and sponsorship identification, policies on news staging and news suppression, as well as rules limiting commercials on children's television shows. If the aphorism of "throws the baby out with the bathwater" is ever applicable, it applies here.

B. Broadcast Spectrum Remains Scarce.

Few would argue that broadcast spectrum is not a scarce resource. Even the Commission in *Syracuse Peace Council*, while it said that the abundance of cable and other technologies rendered obsolete the notion of spectrum scarcity as a basis for broadcast regulation, did not quibble about the fact that broadcast spectrum is indeed scarce. *Syracuse Peace Council, supra* at 5054-5055.

Indeed, broadcast spectrum is as scarce as ever been. Demand for all spectrum has skyrocketed as new wireless technologies evolve, but Congress has repeatedly declined to alter their reservation of broadcast spectrum, or to consider reallocation which has been permitted in other bands.

Nowhere is this more apparent than in the auction of spectrum provided for in the 1993 Budget Reconciliation Act. Public Law 103-66, August 10, 1993. The Act provides a thorough review of spectrum allocation, and the auction of electromagnetic spectrum for cellular telephone services and personal communications services. 1993 Budget Reconciliation Act §115, *codified at 47 U.S.C. §309(j)*. However, broadcast spectrum is specifically exempted. 1993 Budget Reconciliation Act §115(j)(6)(B) *codified at 47 U.S.C. §309(j)(6)(B)*.²⁵

Other reliable indicators of spectrum scarcity are the economic value of broadcast licenses and the demand for stations. S. Rep. at 20; H. Rep. at 13. Recent news reports demonstrate

²⁵That section reads: "Nothing in this subsection, or in the use of competitive bidding, shall (A) alter spectrum allocation criteria and procedures established by the other provisions of this Act; (B) limit or otherwise affect the requirements of...section 301, 304, 307, 310, or 706 or any other provisions of this Act...." Sections 301, 304, 307 and 310 are the broadcast licensing and renewal provisions of the 1934 Cable Act.