> of broadcast frequencies" makes government involvement inevitable. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Whatever the validity this analysis may have been thought to have some two decades ago, its factual premise has been eroded by the proliferation of new video services that supplement those provided by traditional broadcasters. Accordingly, a constitutional challenge to this legislation may provide the Supreme Court with an occasion to reconsider its decision in Red Lion.[15/]

15. That statement implicitly recognizes that radio and television stations were historically the only means of simultaneous audio/video transmission to a mass audience. In 1969, when Red Lion was decided, broadcasters exclusively controlled what programming was available to the public. Thus, they could act as private gatekeepers simply by controlling access to their facilities. PTAR was designed to prevent the major broadcast networks and their affiliates from exercising such control by denying independent producers access to the airwaves during prime time. Now, more than twenty years later, however, independent producers have access to a wide array of program outlets. As noted above, a program supplier who cannot gain access to a broadcast frequency can transmit programming to mass audiences by other means -- principally by cable, which has no spectrum limitation, but also by low power television stations, MMDS or wireless cable systems, or direct broadcast satellite. Neither broadcast licensees nor the networks are able any longer to act as private gatekeepers.

15/ Statement by the President, October 17, 1990.

16. Therefore, while not everyone with the economic means can hold a television license, anyone with the economic means today can transmit television programming to a mass audience by another technology. Since those who hold broadcast licenses no longer control access, the First Amendment analysis traditionally applied to broadcasters is no longer valid. Broadcasters today no more control video access to mass audiences than print publishers control print access. Just as access to publishing is physically unlimited, so too is access to video transmission. Thus, the Commission correctly determined in Syracuse that the concept of broadcast spectrum scarcity no longer justifies content regulation under the First Amendment. That determination does not rewrite the laws of physics. It merely recognizes that technology has brought fundamental changes to the media marketplace.

17. Some have argued that the Supreme Court in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), reaffirmed the constitutionality of regulations based on spectrum scarcity. That claim fundamentally misreads Metro. The Court did recite that it has historically recognized spectrum scarcity as justification for regulations designed to ensure that the public receives a diversity of views and information. Id. at 566-67. However, the Court did not purport, and has never purported, to make its own independent finding of spectrum scarcity. It has simply recognized the spectrum scarcity finding of Congress and

the Commission, whose province it is to make such factual determinations. The current state of spectrum scarcity (as found by the Commission in Syracuse) was not at issue in Metro. Therefore, Metro cannot be read as resolving, or even addressing, the issue of whether content-based regulation can constitutionally survive the Syracuse findings.

D. PTAR Is an Unconstitutional Abridgement of Broadcasters' Right of Free Speech

18. If PTAR can no longer be justified under a special First Amendment standard for broadcasting because the scarcity rationale no longer applies, it must be judged by First Amendment standards of general applicability.

19. Under the most lenient First Amendment standard, a regulation restricting speech will be sustained only if it furthers an important or substantial governmental interest and imposes only an incidental burden on speech. Quincy Cable TV, Inc. v. FCC, supra, 768 F.2d at 1450-51. See also, Home Box Office, Inc. v. FCC, supra, 567 F.2d at 48. The test is even stricter, however, if the regulation is content-based. Content-based regulations are presumptively invalid. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548-2549 (1992). Thus, a speech restriction that turns on content is subjected to strict scrutiny and is justified only if it is necessary to serve a **compelling** governmental interest and is narrowly drawn to

achieve that end. Burson v. Freeman, 112 S. Ct. 1846, 1851 (1992).

1. PTAR Is Content-Based

20. PTAR is subject to this strict constitutional scrutiny because it imposes a time restriction that turns on program content. The rule exempts programs of a certain subject matter from the prime time restriction, such as news, public affairs, documentary, children's, live sports, and feature film programs. See Section 73.658(k)(1)-(6) of the Commission's Rules. These program categories are defined in PTAR, and the definitions inescapably turn on content.

21. For example, Note 2 to Section 73.658 defines "documentary programs" as programs that are nonfictional and "educational or informational." This requires the Commission to determine whether or not a program is "educational." Likewise, the Commission's definition of "public affairs programs" requires the Commission to determine whether the program "primarily" concerns "local, national, and international public affairs." The movie of George Orwell's "1984" might well qualify as a public affairs program under this definition, since it is quite arguably a "commentary" on "international public affairs." Other topical programs in entertainment format might qualify as commentary on public issues (abortion, affirmative action, AIDS, etc.). Moreover, prime time network schedules

carry many fact-based programs, such as "Rescue 911," which provides information about emergency procedures through the re-enactment and presentation of actual emergency responses to 911 telephone calls, and "Unsolved Mysteries," which often seeks public help in solving actual crimes. Such programs might or might not be deemed to qualify for exemption from PTAR as documentaries or public affairs programs. The point in all of these examples is that the Commission would have to make the determination based solely on the content of the program. Thus, PTAR is unquestionably a content-based regulation.[16/]

22. PTAR's most direct effect is to regulate the time during which a broadcaster may air (or may not air) certain programs. Without a compelling governmental interest, however, that is impermissible. A regulation governing the time, place, or manner of speech may not be based on the content or subject matter of speech. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); Consolidated Edison v. Public Service Commission, 447 U.S. 530, 536 (1980). Indeed, in Regan the Court held that a regulation was unconstitutional if it permitted the government to decide whether or not the content of a message was "educa-

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[16/] It is immaterial that the program content restrictions in PTAR do not operate to favor any particular viewpoint over another. The Supreme Court has made abundantly clear that content-based regulations are constitutionally suspect whether or not they favor any particular viewpoint. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1993); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501, 509 (1991).

tional" -- the very determination the Commission would have to make under PTAR's exemption for "educational" programs.

23. In sum, PTAR permits licensees to broadcast favored programs throughout prime time but non-favored programs during only a portion of prime time -- the distinction depending solely on the content of the program. The rule thus imposes the programming value judgments of the government in limiting the freedom of broadcasters to choose what they will broadcast. This is clearly impermissible, absent a compelling governmental interest (something the Commission has never claimed, much less shown). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., supra, at 648-49.

2. PTAR Discriminates Between Classes of Speakers

24. PTAR is also constitutionally infirm because it discriminates between classes of speakers. Indeed, the rule is explicitly designed to favor one class of speakers over another. In the favored class are independent program producers; in the disfavored class are the national networks (ABC, CBS, NBC) and the network affiliate stations in the top 50 markets. In order to create access for independent producers during the specified time period, the rule denies access to the networks and circum-

scribes the affiliates' freedom as licensees to choose what they will broadcast in the exercise of their judgment.

25. This discrimination among speakers inherent in PTAR fundamentally offends First Amendment principles. As the Supreme Court has held, "the concept that government may restrict 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). PTAR directly restricts the speech of the networks and their affiliate stations in markets 1-50 in order to enhance the relative voice of independent producers and independent stations in those markets. A rule that prefers some speakers at the expense of others merits the strictest constitutional scrutiny. Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 789 (1988) (direct restriction on protected First Amendment activity will be subjected to "exacting First Amendment scrutiny"). Because PTAR serves no compelling governmental interest, it does not pass that strict test.

26. Moreover, a rule that regulates how a speaker may speak is a direct, not merely an incidental, burden on First Amendment rights. Riley v. National Federation of the Blind of North Carolina, supra, at 789 n.5 (1988). PTAR directly affects speech in two ways: (1) it directly and deliberately precludes networks from airing certain programs in the major markets during peak viewing hours; and (2) it directly and deliberately

forces affiliate stations in those markets to broadcast programs they might otherwise choose not to broadcast. In both purpose and effect these are far more than "incidental" burdens on the First Amendment rights of those so burdened.

E. Conclusion

27. The Commission recognized in Syracuse that a dramatically altered communications landscape calls for reexamination of the constitutional framework of broadcast regulation. The abundance of video channel outlets now available nullifies the scarcity rationale as a justification for continued regulation of broadcast program content. If the Fairness Doctrine is no longer constitutionally enforceable, neither is the Prime Time Access Rule. Continued enforcement of PTAR is fundamentally at odds with the legal principles announced in Syracuse and with basic First Amendment free speech protections. The Commission, therefore, should promptly declare PTAR unconstitutional and rescind the rule.

Respectfully submitted,

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June 14, 1994

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B

APPENDIX B

Reply Comments of First Media, L.P. Filed July 14, 1994

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling	)	MMB File No. 900418A
re	)	
Constitutionality of the	)	
Prime Time Access Rule	)	

To: The Commission

REPLY COMMENTS OF FIRST MEDIA, L.P.

FIRST MEDIA, L.P.

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July 14, 1994

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling	)	MMB File No. 900418A
re	)	
Constitutionality of the	)	
Prime Time Access Rule	)	

To: The Commission

REPLY COMMENTS OF FIRST MEDIA, L.P.

First Media, L.P. ("First Media"), by its counsel, submits the following reply to the comments of other parties on First Media's "Petition for Declaratory Ruling" filed April 18, 1990, concerning the constitutionality of the Prime Time Access Rule ("PTAR").

A. Introduction

1. The comments filed in this proceeding primarily focus not on whether PTAR is constitutional, but on the merits of PTAR (and particularly the off-network portion of the rule) as a matter of public policy. First Media concurs with those who assert that PTAR is bad public policy and should be repealed. If the Commission repeals PTAR on policy grounds -- an action First Media would welcome -- then the constitutional issue would be moot and need not be reached. However, the constitutional

question must be confronted if the Commission proposes to retain PTAR. Even a regulation that brings public interest benefits cannot stand if it unconstitutionally abridges free speech in the process.

2. In its Petition for Declaratory Ruling and its Comments in this proceeding, First Media has urged that PTAR is no longer a constitutionally permissible exercise of the Commission's regulatory power in light of the Commission's own findings and conclusions in Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). There, the Commission found that technological developments have eliminated spectrum scarcity as a justification for broadcast content regulation. If the scarcity rationale no longer supports content regulation, then PTAR can survive only if it passes muster under First Amendment standards of general applicability. However, PTAR fails that test, because no substantial or compelling government interest underlies the rule.

3. Certain commenters defending PTAR dispute First Media's constitutional argument, contending essentially that Syracuse Peace Council is not authoritative, that broadcast content regulation is justified because spectrum remains scarce, and

that Red Lion is dispositive of the issue.[1] For the reasons stated below, these arguments are unpersuasive.

B. The Findings in Syracuse Peace Council Are Valid

4. Contrary to the suggestion of some,[2] the Commission's spectrum scarcity findings and its constitutional analysis in Syracuse Peace Council are not invalidated by the fact that the Court of Appeals affirmed that decision on other grounds without reaching the constitutional issue. As the Court itself noted, courts invariably decline to address constitutional questions when they need not do so. Syracuse Peace Council v. FCC, supra, 867 F.2d at 658. Hence, the Court's resolution of that case implies no judicial criticism of the merits of the Commission's views on the constitutional issue.[3]

5. Likewise, the Commission's findings on spectrum scarcity in Syracuse Peace Council have not been "discredited" by Congress, as one commenter suggests.[4] That contention

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[1] Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).

[2] "Comments of the FBC Television Affiliates Association" ("**FBC Comments**"), p. 5; "Comments of Viacom Inc." ("**Viacom Comments**"), pp. 8-9; "Comments of the Association of Independent Television Stations, Inc." ("**INTV Comments**"), p. 43.

[3] Indeed, Judge Starr stated in his concurring opinion that he would have upheld the Commission's constitutional judgment because, inter alia, it was based on "an adequate factual record." Id. at 681 (Starr, J., concurring).

[4] "Comments of the Media Access Project" ("**MAP Comments**"), pp. 18-20.

relies principally on statements in 1987 and 1989 committee reports accompanying legislation to reinstate the Fairness Doctrine. Significantly, however, that legislation was not enacted. Legislative history lacks authority when it concerns "a proposal that does not become law." Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990); United States v. Wise, 370 U.S. 405, 411 (1962).[5/]

6. Also without merit is MAP's reliance on provisions in the 1992 Cable Act for the proposition that adequate diversity does not exist in cable despite an abundance of channels. MAP Comments at 18, 20. If control of cable programming is excessively concentrated, that stems from economic dominance, not inherent spectrum limitations. Economic (as opposed to physical) barriers to mass media access do not constitutionally justify restrictions on speech. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

C. The Concept of Spectrum Scarcity Is Obsolete

7. MAP asserts that broadcast spectrum must still be considered scarce simply because the demand for broadcast frequencies exceeds the supply. MAP Comments at 21-22. But

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[5/] MAP also cites language from the Senate Commerce Committee Report accompanying the Children's Television Act of 1990 generally endorsing the concept of spectrum scarcity. MAP Comments at 19, n. 24. However, the quoted passage contains no focused analysis of the Commission's findings and conclusions in Syracuse Peace Council and is hardly dispositive of the issue.

that argument is undermined by the availability of cable transmission to reach a mass audience. Any person with the economic means can transmit video programming by cable, because cable has no spectrum limitation. Since video transmission by cable produces the same picture as video transmission by broadcast, it is irrelevant that broadcast spectrum is limited.

8. Although cable transmission and broadcast transmission produce equivalent pictures, MAP contends that the two cannot be aggregated when considering scarcity. They must be treated differently, says MAP, because unlike cable channels broadcast stations (i) are required by law to cover local issues and (ii) are free to the public. MAP Comments at 18. This contention lacks merit. First, it is circular to argue in effect that content regulation in broadcasting is constitutionally justified because broadcasters are subject to content regulation. Second, the fact that over-the-air broadcast signals are available free to the public hardly justifies imposing First Amendment restrictions on those who choose to transmit by broadcast rather than by cable. Many newspapers are likewise distributed free to the public, yet nobody would suggest that this constitutionally subjects their content to government regulation.

D. Red Lion Does Not Preclude Fresh Analysis

9. A recurrent theme of some commenters is the notion that Red Lion precludes the Commission from revisiting the spectrum

scarcity rationale.[6] This contention, too, lacks merit. The Supreme Court itself in 1984 expressed a willingness to revisit the scarcity rationale upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376, n. 11 (1984). As this makes clear, the Supreme Court does not consider the scarcity rationale to be written in stone.[7] Moreover, the Court does not decree the existence or nonexistence of spectrum scarcity sua sponte, but will rely on agency fact-finding expertise concerning technological developments. Thus, the Commission is not precluded from making exactly the findings and analysis it made in Syracuse Peace Council.

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[6] INTV Comments at 42-44; FBC Comments at 5; Viacom Comments at 6; MAP Comments at 22-24.

[7] Addressing the cable television must-carry regulations in Turner Broadcasting System, Inc. v. FCC, No. 93-44 (June 27, 1994), the Court found no reason to revisit the scarcity rationale in that case because spectrum scarcity does not apply to cable television, the medium at issue there. Slip Op. at 13-14. In no way did the Court suggest that it would decline to revisit the scarcity rationale in a case involving broadcast regulations. Several Eighth Circuit judges have recently endorsed the idea that changed circumstances now make it appropriate to reevaluate the concept of spectrum scarcity. See Arkansas AFL-CIO, and the Committee against Amendment 2 v. FCC, 11 F.3d 1430, 1442 n. 12 (8th Cir. 1993) (suggesting that "the holding in [Red Lion] may well be reconsidered by the Supreme Court now that broadcast frequencies and channels have become much more available").

10. The commenters find it significant that the Supreme Court cited Red Lion with approval in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). However, the question of spectrum scarcity in light of new technological developments was not raised in Metro. As the Court indicated in League of Women Voters, it is quite prepared to review the scarcity rationale if the Commission believes that technological developments warrant such review. Moreover, the Court stated in Metro that "serious First Amendment issues" are raised if a government regulation denies a broadcaster the ability to "carry a particular program." Id. at 584, n. 36 (quoting Red Lion Broadcasting Co. v. FCC, supra, at 396). The prime time access rule does deny certain disfavored broadcasters the ability to carry particular programs during certain hours of the day.

11. Seizing upon a footnote in Metro, Viacom contends that the Commission itself has said that Syracuse does not call into question the "regulations designed to promote diversity." Viacom Comments at 9. However, what the Commission actually said is very different from the Court's footnote characterization. According to the Court (497 U.S. at 589, n. 41):

> ...the Commission 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 FCC Rcd 2035, 2041, n. 56 (1988).

What the Commission actually said was that its Fairness Doctrine decision did not call into question the constitutionality of

"our content-neutral, structural regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988) (emphasis added). The Court omitted the critical modifying language underlined above. While the minority preferences at issue in Metro are indeed structural in nature (they relate to ownership) and content-neutral (they do not turn on the substance of programming), PTAR is not a structural regulation and is not content-neutral.[8/] Thus, the Commission has never suggested that PTAR is exempt from the Syracuse rationale.[9/]

12. Finally, two commenters assert (with apparent disapproval) that First Media's constitutional argument would eliminate all regulation of program content. Viacom Comments at 9; INTV Comments at 43, n. 103. Neither commenter explains why that would be a reason to find PTAR constitutional. More to the

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8/ In Turner Broadcasting System v. FCC, supra, the Supreme Court strongly indicated that regulations are not content-neutral if they turn, inter alia, on the "subject matter" or the "format" of programming. Slip Op. at 21. In that vein, the Court plainly signaled that regulations incorporating such program definitions as "news," "informational," and "sport[s]" will be considered content-based. Id. at 19, n. 6. PTAR incorporates exactly those kinds of program definitions.

9/ Equally misguided is INTV's suggestion that Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992), rejected similar First Amendment challenges to the finsyn rules. INTV Comments at 42. Schurz did not purport to rule on any First Amendment challenge; indeed, the court stated "we do not understand any of the parties to question the Commission's authority" to enforce the regulations at issue there. Id. And certainly Schurz did not address the spectrum scarcity rationale at issue here.

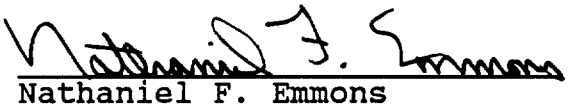
point, however, the commenters are wrong. Elimination of spectrum scarcity as justification for content regulation does not necessarily invalidate all program content regulations. It eliminates only those regulations that cannot pass muster under First Amendment standards of general applicability. Any program content regulation shown to be justified by a compelling government interest will survive. PTAR will not survive, because even its supporters can hardly claim that it serves a compelling government interest. But other regulations must be judged on their own merits.

E. Conclusion

13. The commenters opposing First Media's petition have advanced no persuasive argument in constitutional defense of PTAR. For the reasons stated by First Media, the Commission should promptly declare PTAR unconstitutional and rescind the rule.

Respectfully submitted,

FIRST MEDIA, L.P.

By: 

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