

programming in a world without PTAR would be the result of competitive market forces, not arbitrary decisions by private parties with market power to deny viewers access to the programs they desire. By contrast, PTAR's interference with the competitive market constrains the content available to the public and denies viewers programs they desire.

There is thus no "diversity" reason for the Commission to continue distorting the market -- inflicting serious harms on the competitive process and on viewers, networks, affiliated stations, producers and over-the-air broadcasting as a whole -- in order to support otherwise uneconomic stations, networks or syndicators (while subsidizing VHF stations and syndicators who need no subsidy). Indeed, it is the repeal of PTAR that would serve diversity, by eliminating a protected enclave in prime time in which viewing shares are more concentrated than they are in prime time as a whole.^{41/}

C. The Fin-Syn Sunset Provides No Reason to Delay the Repeal of PTAR

Several parties seek to stave off the inevitable by urging that any repeal of PTAR be deferred for some period after the sunset of remaining fin-syn restrictions, now scheduled to occur in November 1995. They point to the lingering fears of "affiliate favoritism" by network syndicators expressed by the Commission when it deferred

^{41/} EI Supp. Analysis, 54-55.

final fin-syn repeal, and they suggest the maintenance of PTAR as a backup protection against such misconduct after the scheduled sunset takes effect.^{42/}

There is a short and entirely sufficient answer to this argument. If (as we hope and expect) the Commission declines to interfere with the fin-syn sunset, it will do so because it believes (as do we) that fears such as those identified no longer provide sufficient reason for any regulatory restraint on networks. The ebbing life of PTAR cannot properly be prolonged by tacking it onto the sunset of fin-syn.

II. The Commission Should Reject as Inadequate Proposals for Partial Repeal of PTAR

As we have noted, some parties urge the elimination of PTAR's restraint on the broadcast of off-network programs but the retention of its restraint on network programs.^{43/} Their arguments against the off-network restriction parallel ours. Their arguments in support of the network restriction are inconsistent with their own description of the video marketplace and are, in any case, untenable.

^{42/} See Viacom Comments, 43-44; INTV Comments, 18-20.

^{43/} Comments of Network Affiliated Stations Alliance ("NASA Comments"), filed March 7, 1995, in MM Docket No. 94-123, passim; Comments of Group W ("Group W Comments"), filed March 7, 1995, in MM Docket No. 94-123, passim; and Comments of The Coalition to Enhance Diversity ("CED Comments"), filed March 7, 1995, in MM Docket No. 94-123, passim.

At the heart of those arguments lies a claim that PTAR is needed to protect affiliate autonomy -- to limit the alleged ability of the original networks to dictate affiliate program choices. We now show (A) that this claim is baseless and (B) that the arguments built upon this indefensible premise fall with it.

A. The Contention that the Original Networks Exert Market Power Against Their Affiliates Is Baseless

Our opening comments show that networks generally need affiliates as much as affiliates need networks.^{44/} The very fact that stations affiliated with the original networks (or, nowadays, with Fox) are substantially more valuable than others demonstrates the point: If networks could exercise market power against affiliates, they could extract all of the value created by the network-affiliate joint venture above the bare minimum needed to induce affiliation. Their failure to do so is what produces the greater value of affiliated stations.^{45/}

Network market power is not shown, moreover, by high rates of affiliate clearance for network programs that are so attractive as to be more profitable, considering all of

^{44/} Capital Cities/ABC Comments, 8-10.

^{45/} The Commission recently reaffirmed the 1987 statement by its Review Board that "it can no longer be said that the power of a network television supplier over an affiliate amounts to 'life or death.'" Seven Hills Television Co., 2 FCC Rcd 6867, 6881 (Rev. Bd. 1987). See BBC License Subsidiary, L.P., FCC 95-179, released April 27, 1995, at ¶ 39.

their direct and indirect benefits to affiliates, than non-network alternatives.^{46/} Contrary to what is said by the Disney coalition,^{47/} no such power is shown by long-term affiliation and clearance commitments for which networks have bargained by offering sufficient compensation to make those commitments more profitable for affiliates than the alternatives.

Lack of such power is shown by the many instances in which affiliates have refused to clear. As our opening comments note, clearance problems forced the original networks to cut back their daytime programming substantially between 1977 and 1994.^{48/} In 1982, CBS shelved a five-year crusade to expand its evening news to one hour, as a result of affiliate opposition.^{49/} In February, 1993, after ABC's premier late-night public affairs show Nightline had been on the air for thirteen years, it was cleared live in markets containing only 57.78% of TV homes. In February 1994, after ABC offered special incentives for live clearance such as additional spot availabilities in prime time, live clearance

^{46/} This is the case with respect to prime time (8-11 p.m., EST). It is also the case, we suggest, with respect to the clearance of the late-night Letterman show by CBS affiliates. Cf. NASA Comments, 6-8.

^{47/} CED Comments, 33.

^{48/} Capital Cities/ABC Comments, 8.

^{49/} See CBS Ends Plan for an Hour of Nightly News as TV Stations Cling to Valuable Ad Time, Wall St. Journal, April 7, 1982.

had improved to 65.46%. In February 1995, after ABC had entered into a number of long-term affiliations at sharply increased compensation (in exchange for, among other things, commitments to clear Nightline live), Nightline's live clearance coverage stood at only 75.93%.^{50/} To paraphrase Patrick Henry, if this be market power, let our opponents make the most of it.

The recent affiliation switches in many markets also negate network market power claims. Those switches are far too widespread to be dismissed, as some have done,^{51/} as idiosyncratic products of a single agreement between Fox and producer/station owner New World or as evidence that only VHF stations have bargaining leverage against networks. Consider, for example, the recent switches from ABC to Fox by WJSV, South Bend-Elkhart, Indiana (a UHF station in an all-UHF market with four outlets) and WLOV-TV, Tupelo, Mississippi (a UHF station in an intermixed 2V/1U market).^{52/}

Indeed, the Disney coalition's economic consultants implicitly concede the absence of network market power: They say that PTAR does for affiliates of the original networks generally what they would otherwise have to do by

^{50/} Source: ABC Research and NSI.

^{51/} NASA Comments, 6.

^{52/} See Broadcasting & Cable, April 17, 1995, at 80; id., April 24, 1995, at 64-5.

some form of "collective action" -- it guarantees that, if an ABC affiliate carries a non-network program in the access period, its local CBS and NBC competitors will not respond by carrying CBS or NBC programs in that period.^{53/} This is to say that, when affiliates are not constrained by the rule, they choose network over non-network programs, not because they are coerced, but because original network shows are their best alternative in a market where they may have to compete against original network shows on other stations.

The same analysis exposes the flaw in the Disney coalition's contention that support by affiliates for PTAR's invasion of their freedom to broadcast network programs is proof of network market power.^{54/} The suggestion is that, if the market were freely competitive, affiliates would have every incentive to resist government interference with their opportunities to choose network programs. For in such a market network-affiliate dealings would be governed by the pursuit of maximum joint profits, and the interests of both parties would be served by clearance of the superior program (whether network or non-network).^{55/}

^{53/} See Oliver E. Williamson, Glenn A. Woroch, A Comparative Efficiency Analysis of the FCC's Prime Time Access Rule ("Williamson/Woroch Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 29-30.

^{54/} See CED Comments, 33-34.

^{55/} See Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation ("New Television Networks"), vol. II at 237-42 (1980).

While joint profit maximization prevails as a general rule,^{56/} an affiliate might well find it in its interest to clear a non-network program, at the margin, in the pursuit of unilateral advantage.^{57/} For example, a syndicator can afford to offer an affiliate a larger share of program revenues than the network, because it can (in effect) take a "free ride" on the general benefits that flow from the station's relationship with its network.^{58/} By insulating each affiliate against the most formidable competition it might otherwise face in broadcasting non-network programs (the competition of original-network shows broadcast by its local rivals), PTAR enables affiliates to pursue this advantage. The rule thus makes it feasible for the affiliate to devote a narrow slice of prime time to non-

^{56/} See id. at 288 ("While one of the parties may be able to increase its share only by reducing the total to be divided, such circumstances are likely to be exceptional.").

^{57/} It is undisputed that various factors unrelated to market power can prevent joint profit maximization. See Williamson/Woroch Comments, 38. Prominent among those factors are (i) the strategic use by one party (e.g., the affiliate) of information known to it but not the other (e.g., how much the affiliate really expects to earn if it broadcasts a non-network program), (ii) the transaction costs involved in individualized bargaining about the clearance of particular programs, and (iii) Commission rules that restrict the clearance incentives networks can offer. See New Television Networks, vol. II at 242-44.

^{58/} In defending PTAR, King World vigorously argues that the syndicator reaps a major benefit from placing its show on the stations in top markets that generally attract the most viewers, i.e., on affiliates of the original networks. See King World Comments, 13-14. That benefit is obviously produced largely by the attractiveness of network programming.

network programs that may produce less overall revenue than network shows, but from which the affiliate expects to retain a larger share and (therefore) greater profit.

Affiliate support for PTAR's restraint on networks therefore says nothing about whether networks have market power. It more likely reflects an affiliate perception that, by restraining competition in a manner that would otherwise require the formation of a plainly illegal group boycott,^{59/} PTAR makes the pursuit of unilateral advantage by each affiliate, at the margin of its relationship with its network, a paying proposition.^{60/}

B. Arguments for PTAR Based on the Network Market Power Thesis Are Invalid

It is apparent from what we have said that PTAR's restriction on network programs does not, as some have suggested,^{61/} serve "diversity" by preserving "autonomous contracting" between local stations and program suppliers, in contrast to "hierarchical" decision making by network bureaucrats. Once the market power assertion is laid aside, there is no reason why a decision by a station to clear a

^{59/} Even the euphemistic description of this service as solving a "collective action problem" reveals its essential nature.

^{60/} This was the explanation suggested by the Network Inquiry Special Staff for the fact that, in 1980, "[m]any affiliated stations profess to be happy with the Rule." New Television Networks, vol. II at 254.

^{61/} See CED Comments, 35-49; Williamson/Woroch Comments, 31-37.

syndicated program should be deemed more "autonomous" than a decision to clear a network program,^{62/} or why syndicators like Disney, Viacom or Fox should be regarded as less "hierarchical" organizations than ABC.

The remaining arguments made in support of the rule are equally feeble. The Disney coalition touts the fact that affiliates in the top 50 markets devote some 17% of their access period half-hours to local news and other local programming as evidence that PTAR fosters programming more responsive to local tastes than the "standardized fare" offered by networks.^{63/} But in the absence of data concerning local programming in the same time period before 1970 or local programming in adjacent time periods both before and after 1970,^{64/} the touted fact proves nothing about PTAR's contribution (or lack of one) to local programming in prime time.^{65/}

^{62/} There is evidence that contractual dealings between stations and leading syndicators can be more coercive and less protective of station autonomy than network-affiliate dealings. See Further Comments of Pappas Telecasting Companies in Response to the Further Notice of Proposed Rulemaking, filed Nov. 21, 1990, in MM Docket No. 90-162 (Evaluation of the Syndication and Financial Interest Rules) at 11-13, 16-17.

^{63/} See CED Comments, 36 & Figure 8.

^{64/} Networks rarely programmed the first half-hour (7-7:30 p.m., EST) during that era. EI Economic Analysis, 34.

^{65/} LECG claims that PTAR has stimulated local programming by independent stations; that claim, however, is seriously flawed. See EI Supp. Analysis, 49-50.

So, too, the Disney coalition claims that PTAR promotes responsiveness to local tastes by allowing affiliates in different markets to choose different syndicated shows for access period showing.^{66/} In the absence of market power in the hands of network or non-network program suppliers, however, stations choose nationally distributed programs -- network or syndicated -- when and if such programs are superior means of responding to local tastes. PTAR prevents affiliates from choosing one highly efficient form of such national programming (network) for broadcast during the access period. But that fact proves nothing about whether the resulting program mix offered in different markets is more or less responsive to local tastes. The evidence of access-period audience declines following the rule's adoption strongly indicates that PTAR caused affiliates generally to disserve local tastes.^{67/}

Finally, the Disney coalition says that PTAR counteracts potential foreclosure of new entry and innovation in

^{66/} See CED Comments, 36.

^{67/} The coalition may intend to imply that the presentation of different syndicated shows in different markets promotes "diversity." If so, it ignores (i) the fact that such "diversity" does not expand the program choices available to the public in any given market and (ii) the fact that PTAR has actually reduced the public's choices by fostering five-day-a-week "stripping" of the same first-run show from the same national source. See CED Comments, 36; EI Supp. Analysis, 54-5. Cf. CED Comments at Figure 8, which appears to assume that all programs on affiliates in the access period are "stripped," since it reports a total of 300 half-hours on three affiliates in each of 50 markets during the 7-8 p.m., EST hour, Monday through Friday.

program production, along with threats to the creative autonomy of program producers, arising from tendencies the coalition perceives toward vertical integration of networks and other program distributors into both program production and station ownership.^{68/} In part, this argument is a reprise of arguments about the supposed dangers to creative autonomy arising from network in-house production that were unsuccessful in the fin-syn proceeding.^{69/} In any event, there is no market power at any relevant level.^{70/} The coalition and its consultants supply no reason to fear that the sheer efficiencies of vertical integration will put smaller units in program production or station operation at such a disadvantage as to cause their exit or deter their entry. And there is every reason to believe the contrary --

^{68/} See CED Comments, 37-39; Williamson/Woroch Comments, 10-11.

^{69/} The Disney coalition quotes at length on this topic from the statement of producer Thomas Carter in the fin-syn proceeding. See CED Comments, 37-38. It neglects to note that, when ABC acquired ownership of the Carter program "Equal Justice" from Orion, the shift from independent to in-house production had so little effect on Carter's role that he was unaware it had even occurred. See Further Reply Comments of Capital Cities/ABC, Inc., in MM Docket No. 90-162, at 12-13 (filed Dec. 21, 1990).

^{70/} The Commission found in the fin-syn proceeding that no network can exert significant market power against its program suppliers, see Evaluation of the Syndication and Financial Interest Rule, Second Report and Order, 8 FCC Rcd 3282, 3307-08, recon., 8 FCC Rcd 8270 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994), and the coalition supplies no basis for thinking otherwise. We have shown above that no network can exert market power against affiliated stations.

that competition at every level will protect the autonomy of producers and stations.^{71/}

Once again, moreover, the coalition utterly fails to explain how and why PTAR's network restriction is a solution for the problem it perceives. The restriction's direct effect is upon horizontal competition among program distributors. The rule protects syndicated distributors at the expense of the original networks. It does not eliminate distributors as intermediaries between program producers and station outlets, and it neither directly nor indirectly favors or disfavors vertical integration.^{72/} Even if the tendencies toward vertical integration perceived by the coalition were the threat to diversity that the coalition claims, nothing in PTAR combats those tendencies.

III. The Proffered Defenses of PTAR's Constitutionality Are Wholly Inadequate

The parties who seek to defend PTAR's invasion of the First Amendment rights of the original networks and their affiliates rely heavily on Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), and its "frequency scarcity"

^{71/} EI Supp. Analysis, 55-56.

^{72/} Indeed, the protected syndicators include parties such as Fox (vertically integrated into program production and station ownership, as well as networking) and Viacom (vertically integrated into production, station ownership and cable networking, with an option to acquire an ownership interest in new broadcast network UPN).

thesis.^{73/} There is no need, however, for the Commission to consider the continuing validity of that thesis. As our opening comments show, Supreme Court decisions since Red Lion have made clear that, whatever the relevance of "frequency scarcity," the editorial discretion of broadcasters is entitled to considerable weight in the First Amendment calculus.^{74/} In light of those decisions, Red Lion can no longer be read to endorse the minimal level of First Amendment scrutiny that was applied to PTAR by Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

There is in fact a strong argument that PTAR should be subjected to "strict scrutiny" under the First Amendment. The rule's restraints are targeted at a handful of speakers (ABC, CBS, NBC, and their affiliates) and exempt their competitors in the same industry (e.g., Fox, Fox affiliates, independent stations and cable networks). Strict scrutiny has been applied to taxes that "targeted a small number of speakers, and thus threatened to 'distort the market for ideas,'" even though there was "no evidence that an illicit governmental motive was behind . . . the taxes."^{75/} It is

^{73/} See INTV Comments, 15-18; Viacom Comments, 52-53; Comments of Media Access Project and People for the American Way, filed March 7, 1995, in MM Docket No. 94-123, at 20-23.

^{74/} Capital Cities/ABC Comments, 21-23.

^{75/} Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445, 2468 (1994) (quoting Leathers v. Medlock, 499 U.S. 439, 448 (1991)).

not apparent, moreover, that PTAR is "'justified by some special characteristic'" of the original networks or their affiliates.^{76/}

At the very least, as Viacom wisely concedes, PTAR must be subjected to the "intermediate" level of scrutiny that Turner Broadcasting has mandated for the statutory must-carry obligations of cable television systems.^{77/} That standard requires a showing (i) that the harms at which a regulatory restraint is aimed are "real, not merely conjectural,"^{78/} (ii) that "the regulation will in fact alleviate those harms in a direct and material way,"^{79/} and (iii) that the regulation "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"^{80/}

These showings, moreover, must have an evidentiary basis that withstands constitutional scrutiny in the courts. Even congressional findings are not immune to judicial re-examination in this light.^{81/} Commission findings are plainly entitled to less deference. For all the reasons we

^{76/} Id. (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

^{77/} Viacom Comments, 53.

^{78/} Turner Broadcasting, 114 S.Ct. at 2470.

^{79/} Id.

^{80/} Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

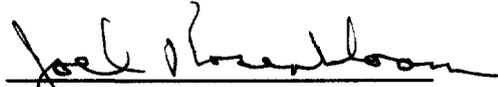
^{81/} Id. at 2471.

have discussed in our opening comments and in these reply comments, the requisite showings cannot be made.

CONCLUSION

For the foregoing reasons, the prime time access rule should be repealed.

Respectfully submitted,



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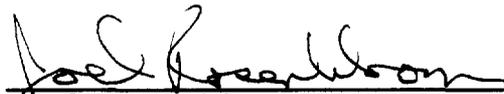
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CERTIFICATE OF SERVICE

I, Joel Rosenbloom, hereby certify that on this 26th day of May, 1995, I have caused to be served by first class, postage prepaid U.S. Mail, or by hand delivery, a copy of the foregoing Reply Comments of Capital Cities/ABC, Inc. to the parties on the attached service list.


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