

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

In re

Review of the Syndication and
Financial Interest Rules,
Sections 73.659 - 73.663 of the
Commission's Rules

MM Docket No. 95-39

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COMMENTS OF
THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

James J. Popham
Vice-President, General Counsel

Association of Independent Television
Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

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The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its comments in the above-captioned proceeding.¹ The Commission has initiated this proceeding "to provide an opportunity for comment before the remaining fin/syn restrictions expire, with the burden of proof placed on those parties seeking continued restrictions."² The Commission also has sought "comment on whether to amend the timetable we established in 1993 so as to accelerate the expiration date for the remaining fin/syn rules in the event parties arguing for their continuation fail to carry their burden of proof."³

¹See *Notice of Proposed Rule Making*, MM Docket No. 95-39, FCC 95-144 (released April 5, 1995)[hereinafter cited as *Notice*].

²*Notice, supra*, at 1.

³*Id.*

INTV has maintained a consistent interest in retention of the network financial interest and syndication rules. Most recently, INTV joined with the Commission in defending the Commission's decision to retain modified financial interest and syndication rules for two years. INTV at that time also challenged the Commission's decision to sunset the rules no later than two years after the coterminous provisions of the network consent decrees were lifted. Nonetheless, the court affirmed the Commission's decision to retain the rules for the two year period.⁴



INTV now respectfully submits that in the wake of the record developed in 1993 and the Commission's findings based on that record, no rational basis exists for permitting the rules to sunset on November 10 of this year, much less some time prior to that date. In 1993, the Commission found that independent stations (then including affiliates of the Fox network and now including, as well, affiliates of the two other emerging networks, UPN and Warner Bros.) placed great reliance on the ability to acquire highly popular syndicated programming in order to sustain and improve their financial vitality and that of their programming service to the public. The Commission at the same time found that the three entrenched broadcast television networks had the incentive and ability to deprive independent stations

⁴ *Second Report and Order*, 8 FCC Rcd 3282 (1993), *recon. granted in part, Memorandum Opinion and Order*, 8 FCC Rcd 8270 (1993), *aff'd sub nom. Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994).

(and now emerging network affiliates) of access to such popular genres of syndicated programming. Thus, in 1993, the Commission made findings soundly based on substantial evidence, much of which was provided by INTV and other parties favoring retention of the rules. In the absence of equally substantial evidence of changed circumstances, providing a basis for a rational determination either that independent stations and emerging network affiliates no longer depend heavily on popular syndicated programming or that networks no longer have the incentive and ability to deprive independent stations of such programming, the Commission will have no reason to permit the rules to sunset in November. Indeed, the Commission will continue to have every reason to retain the rules.

INTV, therefore, urges the Commission to rescind the sunset of the rules scheduled for November, 1995, unless and until the Commission is in receipt of substantial evidence showing a material change of circumstances *vis-a-vis* its findings in 1993. INTV also urges the Commission to maintain its reporting requirements in the event it lets the sunset proceed as planned. Continuation of reporting requirements is particularly necessary because the networks would be more heavily involved in syndication than under the remaining rules, posing additional risks to independent television and the emergence of new networks.

In support whereof, the following is shown:

[REDACTED]

The ultimate goal of the off-network syndication and first-run syndication rules is to preserve and promote outlet and program diversity. The means by which they do so is assuring independent television stations -- local outlets or voices -- an unencumbered supply of the types of syndicated programming upon which they rely to compile their program schedules and generate revenue.⁵ If the revenue generating capability of independent stations were reduced, they would be less able to produce local programming or acquire popular programming desired by their viewers.⁶ In worst cases, the stations would perish. Thus, their contribution to outlet and program diversity in their local markets would be diminished.

Any determination by the Commission that the network financial interest and syndication rules no longer are necessary logically must rest on one or more of several conclusions. Either independent stations no longer rely on syndicated programming, the networks lack the incentive or ability to deprive independent stations of access to the syndicated programming independent stations rely on, or, even if the networks could deprive independents of the types of syndicated

⁵*Memorandum Opinion and Order*, 8 FCC Rcd at 8294, n.64

⁶*Id.*

programming upon which independents rely, a sufficient supply of truly substitutable programming is available in the marketplace.⁷

In 1993, however, the Commission's findings were to the contrary in each respect. First, the FCC did not swerve from its view that independent stations -- and, consequently, outlet diversity -- would be harmed if independent stations were denied access to attractive syndicated programming:

The record clearly establishes that off-network hits draw successful ratings for independent stations during early fringe hours, which is the single greatest revenue producing period for these stations....We also find support in the record for the idea that independent stations would be harmed if they could not obtain "hit" off-network shows....Contrary to CBS' refrain on the question of "cross-subsidization," we believe that by enhancing the financial well-being of independent stations, the "fringe hour" revenue stream inevitably helps to support local programming efforts.... [S]uch efforts further enhance program diversity.⁸

Similarly, with respect to first-run programming, the FCC stated its continuing belief that "local broadcast stations need an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime-time periods." The FCC also had rejected the contention that first-run programming might be a substitute for off-network programming.⁹ Thus, the

⁷These factors interrelate. For example, the matter of harm also is a factor in assessing the network incentive to deprive independent stations of syndicated programming. If depriving independents of some programs would cause no harm, less incentive would exist to deprive them of syndicated programs. Similarly, if adequate substitutes were available, then the resultant harm would be diminished.

⁸*Memorandum Opinion and Order*, 8 FCC Rcd at 8294, n.64.

⁹*Memorandum Opinion and Order*, 8 FCC Rcd at 8294, n.64. See also Comments of the Association of Independent Television Stations, Inc., MM Docket No. 94-123 (filed March 7, 1995) at 52 [hereinafter cited as "INTV PTAR Comments"]; see also Law and Economics

Commission found in 1993 that independents continued to need access to popular syndicated programming types and concluded that "the record indicates that independent stations would be harmed" if the networks engaged in either warehousing or favoritism.¹⁰

Second, the Commission also found that the networks had the incentive and ability to engage in anticompetitive practices which would deprive independent stations of syndicated programming:

There is evidence in the record to raise concerns that the networks may have the ability and incentive to steer popular off-network shows toward affiliates or otherwise give them an advantage, either by withholding from syndication programs still in the network run or by favoring affiliates during the sale of off-network programs.¹¹

Indeed, the FCC went on to confront and discount the network argument that they had no incentive to favor affiliates because they would sell to the highest bidder.

The FCC posited:

Consulting Group, Inc., *The Economic Effects of Repealing the Prime Time Access Rule: Impact on Broadcasting Markets and the Syndicated Program Market*, MM Docket No. 94-123 (filed March 7, 1995).

¹⁰*Memorandum Opinion and Order*, 8 FCC Rcd at 8294-8295. INTV consistently has taken the position and continues to believe that a flat ban on active network involvement in syndication is the only effective measure with respect to prevention of anticompetitive network favoritism. Affiliate favoritism prohibitions would tend to be ineffective and arbitrary. Detecting affiliate favoritism in the complex web of syndication negotiations and other transactions between a network and its affiliate would be all but impossible. At the same time, presumptions that particular patterns of distribution constitute favoritism would be arbitrary, sweeping into the net distribution patterns which may result not from anticompetitive actions, but from common programming preferences among affiliates of the same network. Only a flat ban provides the assurance that distribution is competitive and negates any reason for concern if distribution patterns do skew in favor of a particular network's affiliates.

¹¹*Memorandum Opinion and Order*, 8 FCC Rcd at 8294-5.

CBS suggests that the networks would generally sell their shows to the highest bidder regardless of affiliation, and that the networks would have no conceivable basis for favoring their affiliates except perhaps in the so-called "marginal" cases. While the economic theory behind CBS' analysis is well known, we continue to have doubts that the practical outcome would follow theory.¹²

Similarly, concerning warehousing, the FCC stated:

Even in the presence of the finsyn rules we adopt today, the networks could have an incentive to withhold popular programs from the syndication marketplace during the two-year period following modification of the consent decrees, in order to maintain the exclusivity of the original network run.¹³

Again, the FCC considered network arguments to the contrary, but maintained its position based on record evidence which contradicted the networks' assertions.¹⁴

Third, the networks continue to be vertically-integrated and increasingly so. First, the networks function as exhibitors not only via their network role in the national market, but also via their ownership of and affiliation with individual television stations in virtually every local television market in the country. The incentive to deprive independent stations of syndicated programs derives directly from the networks' vertically-integrated position in the television syndication and

¹²*Memorandum Opinion and Order*, 8 FCC Rcd at 8295.

¹³*Second Report and Order*, 8 FCC Rcd at 3322.

¹⁴*Second Report and Order*, 8 FCC Rcd at 3322, n.104 [J.A. at 3216] ("See Statement of Laurence Tisch, *En Banc* Hearing Transcript at 66 (December 14, 1990). On the other hand we acknowledge the evidence in the record that networks could have an economic incentive to syndicate programs because it increases their ratings during network exhibition. See CBS Reply Comments at 15 and n.61. In addition, withholding syndication for too long would dissipate the value of the network's interest in the program. A network that withheld an off-network series from syndication, or delayed its entry into syndication beyond the optimum time, would be sacrificing syndication revenues it paid for when it bought the syndication rights.").

exhibition markets. In its 1983 *Tentative Decision*, the FCC crystallized its concerns in that regard:

Another rationale for the rules, touched on only briefly when the rules were adopted, but now the central focus of much of the current debate, relates to the question of whether the networks through participation in the syndication of programming could competitively damage independent television stations' operations in order to *protect their affiliates and their own stations from competitive injury* or otherwise cause public injury through manipulation of the syndication market.¹⁵

In 1991, the FCC again emphasized that network incentives to engage in warehousing or affiliate favoritism "are not based on the networks [*sic*] power in the overall syndication marketplace, but rather derive from the networks [*sic*] *structural relationships with its affiliates in local television markets.*"¹⁶ The first-run syndication ban likewise rested in large part on concerns related to the networks' position *vis-a-vis* their affiliates and O & Os in the television exhibition market.

The FCC posited that:

[A]llowing the networks into first-run syndication could enable them to exploit their owned-and -operated stations and their web of affiliates serving the entire United States to handicap the launch of new, first-run programs by independent syndicators, which would be detrimental to the maintenance of a diverse, competitive marketplace.¹⁷

¹⁵*Tentative Decision*, 94 FCC 2d at 1095-1096 [emphasis supplied].

¹⁶1991 *Report and Order*, 6 FCC Rcd at 3134 (1991) [emphasis supplied]. As the FCC recognized in adopting the 1993 rules, even in vacating the FCC's 1991 rules, the court still had recognized that "the Commission could properly be concerned if independent stations had little choice but to obtain off-network programming (which is an important revenue source for them) from 'the networks with which they compete.'" *Second Report and Order*, 8 FCC Rcd at 3314, n.78, citing *Schurz v. FCC*, 982 F.2d 1043, 1055 (7th Cir. 1992).

¹⁷*Second Report and Order*, 8 FCC Rcd at 3329. Commissioner Barrett has acknowledged the ongoing network-affiliate relationship:

At this time, I believe that the networks, through their owned and operated

Thus, the basic relationship of the networks with their affiliates continues to be a dominant element of the broadcast and video marketplaces -- and one which provides a solid, rational basis for retention of the financial interest and syndication rules.¹⁸

stations and their long-term relationship with a nationwide web of affiliates, retain a unique ability to influence program distribution practices with respect to independent stations and emerging networks. Thus, I support our decision today to retain a more simplified, but direct form of restrictions on network syndication activities.

Second Report and Order, 8 FCC Rcd at 3353-3354 (Separate Statement of Commissioner Andrew C. Barrett.)

¹⁸If anything, the FCC appears to embrace the network-affiliate-O&O relationship as the basis for maintaining the syndication rule:

Without the syndication ban, we believe there is a risk that the networks could engage in affiliate favoritism. For example, by steering an off-network "hit" to an affiliate, the network engenders goodwill with its affiliate and presumably helps the performance of that station, which may help boost overall network ratings. The potential for this market behavior further supports our decision to prevent active syndication.

Second Report and Order, 8 FCC Rcd at 3324. In 1993, the Commission did suggest that marketplace trends had been a basis for its decision to sunset the rules, but its reasoning remained totally opaque. *Second Report and Order*, 8 FCC Rcd at 3319. Only by way of footnote did the FCC make its only reference to actual marketplace trends pertinent to the syndication market that it apparently was relying on -- an increase in the number of syndicated program distributors and the fact that "14 of the top 20 syndicated programs were first-run shows in the 1991-92 season." *Second Report and Order*, 8 FCC Rcd at 3319, n.90. No explanation was ventured as to why or how these particular marketplace factors affect network incentive or ability to warehouse programs or engage in affiliate favoritism. The FCC might have explained that an increase in the number of syndicated program distributors would dilute the effect of any network efforts to warehouse programs or favor affiliates, lessen the harm to independents, and thereby diminish the network incentive to engage in such conduct. It similarly might have argued that the increasing attractiveness of first-run programming would create a new supply of syndicated programming substitutable for the attractive off-network programming necessary to independent viability. Neither explanation, however, makes sense in light of the Commission's findings. Again, the FCC had stated that "the record indicates that independent stations would be harmed" if the networks engaged in either warehousing or favoritism. *Memorandum Opinion and Order*, 8 FCC Rcd at 8294-8295. The FCC also had rejected the contention that first-run programming might be a substitute for off-network programming. *Memorandum Opinion and Order*, 8 FCC Rcd at 8294, n.64.

Moreover, the networks have taken advantage of their new found freedom to produce network programming in-house. The percentage of prime time entertainment series produced in-house by the networks increased from less than one percent in the 1984/85 season to 7.6 percent in the 1993/94 season.¹⁹ By September, 1994, *Broadcasting & Cable* magazine reported:

For the first time, the in-house production units of ABC, CBS, and NBC are the leading suppliers to their networks. And the pace is expected to accelerate, making studios' television production operations pale in comparison.

The in-house production units of ABC, NBC, and CBS together are supplying 14 hours [21 percent] of prime time programming . That output is expected to accelerate even further after the finsyn rules limiting network ownership of their shows and syndication activities sunset next November.²⁰

The networks also are poised to step heavily into the first-run syndication market. A multifaceted agreement between CBS, Inc., and group owner Group W includes:

[A] joint venture to produce programming for Group W and CBS O&Os. If the FCC prohibition against networks entering the domestic syndication business expires as expected in November 1995, the joint venture then will syndicate the shows.²¹

This greatly extends network tentacles into the programming and syndication marketplaces. Thus, if anything, the networks have enhanced their incentives and

¹⁹Economists Incorporated, *An Economic Analysis of the Prime Time Access Rule* (March 7, 1995) at 24 [hereinafter cited as *Economic Analysis*].

²⁰ "Production big business for Big 3," *Broadcasting & Cable* (September 12, 1994) at 6.

²¹ "CBS, Group W form historic alliance," *Broadcasting & Cable* (July 18, 1994) at 14.

abilities to act anticompetitively in the syndication marketplace since the Commission made its findings in 1993.

Thus, the Commission previously found -- in an order enjoying judicial affirmation -- that independent stations would be injured if deprived of access to popular syndicated programming, that no substitutes for such programming exists, and that the entrenched networks continue to have the incentive and ability to engage in anticompetitive conduct which would deprive independent stations of popular syndicated programming essential to their vitality and viability.

The Commission hardly may pretend these findings do not exist or simply abandon them without supporting evidence and explanation.²² If it is to go forward with the sunset of the rules, it must make contrary findings based on substantial evidence. Unless and until it can do so, the rules must remain in force.

Finally, INTV reminds the Commission that broadcast television is at a critical stage. The broadcast industry faces the challenge of competition from powerful non-broadcast media such as cable television.²³ At the same time,

²²As the court stated in *Schurz v. FCC*, 982 F. 2d 1043 (7th. Cir. 1992):

The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins.Co.*, supra, 463 U.S. at 43, quoting *Burlington Truck Lines, Inc. v United States*, 371 U.S. 156, 168, 9. L Ed. 2d 207, 83 S. Ct 239 (1962).

²³The threat of cable television to the broadcast industry has been documented by the Commission's staff in Setzer, Florence, and Levy, Jonathan, *Broadcast Television in a Multichannel Marketplace*, Office of Plans and Policy, Federal Communications Commission, OPP Working Paper No. 26 (June, 1991).

something thought utterly fanciful only several years ago -- a six network universe -
- now has entered the realm of the possible. It is by no means assured, and the
vision may mirage-like vanish into thin air in the heat of competition from the
entrenched networks and non-broadcast media. INTV respectfully submits that the
Commission must maintain conditions conducive to the ultimate success of the
new, emerging networks. Unchaining the entrenched networks to integrate more
widely and deeply into the various marketplaces of video production, distribution,
and exhibition only raises the ante for the emerging networks, two of which have
come to the table only this year.²⁴ Until such time as the emerging networks achieve
competitive parity with the entrenched networks -- very much an uphill struggle
considering the overwhelming advantage accorded the entrenched networks by
their pre-dominantly VHF affiliate bases --, the Commission ought not rush to
loosen the reins on the entrenched networks.

²⁴Fox, of course, already is paying an enormous ante, spending hundreds of millions of dollars to acquire highly popular programming like NFL football and to lure VHF affiliates of other networks into the Fox fold. Still Fox suffers from its predominantly UHF affiliate base and rarely garners ratings comparable to those of the entrenched networks. *See, e.g.,* "NBC wins May sweeps title, posts across-the-board gains, *Electronic Media* (May 29, 1995) at 4 ("Households: NBC rose 8 percent to an 11.8 household rating (percentage of TV homes) and 20 share (percentage of sets in use); ABC dropped 9 percent to 11.5/19; CBS dropped 11 percent to 10.1/17; and Fox dropped 8 percent to 7/12.").

[REDACTED]

In the event the Commission, nonetheless, determines that the sunset should occur as scheduled, then it still should refrain from walking away from the matter altogether. The health of independent television and, along with it, the prospect of success for emerging broadcast networks simply is too important to ignore. INTV, therefore, urges the Commission to retain reporting requirements which will enable the Commission to know what is happening in an unconstrained syndication marketplace. Whereas the Commission did retain reporting requirements during the current pre-sunset period, the networks have remained constrained in significant respects. They have been unable to actively syndicate programs. They have been subject to a four-year anti-warehousing provision. They have been restrained from holding continuing financial interests in or syndicating first-run syndicated programming. Obviously, until they are loosed from those constraints, their behavior could be predicted, but not monitored. INTV submits that potentially anticompetitive conduct in these areas would be detrimental to independent television and the hope of successful emergence of new networks.

INTV, therefore, urges the Commission to maintain its present reporting requirements. The Commission must remain knowledgeable and poised to take remedial action if entrenched network conduct threatens new competition and

diversity in broadcast television. This is possible only if the Commission retains its current reporting requirements.



In view of the above, the sunset of the network financial interest and syndication rules must be postponed. Only after the Commission can reverse its 1993 findings rationally and on the basis of substantial evidence may the Commission consider a sunset of the rules. If and when that time comes, the Commission still should keep a close eye on the affected markets and remain ready to take remedial action if competition and diversity are diminished by anticompetitive network conduct.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J. Popham', written over a horizontal line.

James J. Popham
Vice-President, General Counsel

Association of Independent
Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
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