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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and ten copies of its Comments in MM Docket No. 95-92.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,

Sam Antar (RG)

Sam Antar

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	
47 C.F.R. §73.658(a), (b), (d), (e) and (g)	)	

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COMMENTS OF CAPITAL CITIES/ABC, INC.

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October 27, 1995

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Summary

Capital Cities/ABC agrees with Commission that the five rules at issue in this proceeding are ripe for review, amendment and, in most respects, for repeal. The rules impose costs on networking that undermine the strength of that system, and they do so at a time when other players in the video marketplace -- unfettered by the rules -- are taking a growing share of viewers at the networks' expense.

The networks do not have market power over their affiliates. Therefore, the rules are not necessary to insure that licensees retain sufficient control over their stations to fulfill their public interest obligations. Neither can the rules be justified in order to remove barriers to the entry of new networks. The vast increase in the number of independent stations, as well as the growth of non-broadcast outlets, provides a base for launching new networks.

Length of Affiliation Contracts

There is no reason for the Commission to reevaluate its 1989 decision not to regulate the length of affiliation contracts. The plethora of station outlets eliminates the possibility that long-term contracts could be used to foreclose the entry of new networks.

Right to Reject Rule

The rule was never designed as a device to allow affiliates to preempt network programs merely to pursue individual economic gain at the expense of the network enterprise. Therefore, if a rule is deemed necessary, we support the Commission's proposal to clarify the right to reject to provide that it may not be invoked "based solely on financial considerations." This clarification is faithful to the rule's original purpose -- to preserve licensee autonomy while curbing the potential for abuse that could destroy the economic base that makes networking possible.

Time Option Rule and Exclusive Affiliation Rule

These rules should be repealed or substantially cut back because they exact costs that outweigh their purported benefits. The concern that exclusivity would be used to foreclose new networks has been effectively eliminated as the result of the explosion in the number of video outlets.

Dual Network Rule

The rule skews the video marketplace by allowing opportunities for additional program services in cable while foreclosing additional free over-the-air broadcast services. On its face, the dual network rule is anticompetitive because it prevents innovation, the development of new products, and increased output -- the very goals of competition policy.

There is no longer any basis for concern -- if there ever was -- that dual networking would lead to network market power. The

Commission concluded in its fin/syn and PTAR proceedings that the networks do not have market power in the video production and distribution markets. Similarly, the national advertising market is so broad and unconcentrated that repeal of the rule would raise no market power issue.

The concern about possible foreclosure of new networks is also no longer relevant because of the substantial growth in full-power broadcast stations available for affiliation and the opportunity to fill in coverage gaps through cable and low power stations.

Finally, the concern that a dual network operator could tie up the available outlets in particular markets is speculative and would turn on local market circumstances and, therefore, is best left to the case-by-case application of the antitrust laws.

The Commission should reaffirm its decision to suspend the dual network rule for ATV and make it clear that the suspension allows a network to provide stations multiple program services on the ATV channel in addition to continuing to feed its NTSC affiliates NTSC programming for the NTSC channel.

Territorial Exclusivity Rule

The Commission should either repeal the rule or extend the permitted geographic exclusivity area to the affiliate's DMA. The DMA is the best available approximation of the area in which a station actually competes with its direct broadcast competitors for viewers, advertising and programming.

Conclusion

The "right to reject" rule modified as proposed in the Notice is the most that is necessary to protect affiliate programming freedom and allow opportunities for new networks. While it is possible to speculate that elimination of the remaining rules could in some extreme cases, in particular local markets, lead to anticompetitive results, that is not a basis for promulgating a rule of general applicability that would impose an anticompetitive ban on all dual networking in all markets. Reliance on current antitrust enforcement standards is adequate to protect the public.

Before the
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Washington, DC 20554

In the Matter of	)	
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Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	
47 C.F.R. §73.658(a), (b), (d), (e) and (g)	)	

To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Comments in response to the Notice of Proposed Rule Making in the above-entitled proceeding ("Notice").[1] Capital Cities/ABC is the owner of ten television stations and of the ABC Television Network, which has over 200 affiliated stations throughout the United States.

Introduction

The Commission has undertaken in recent years an ongoing review of regulatory restraints on the television networks' business activities to eliminate those that are anachronistic and

[1] MM Docket No. 95-92, Notice of Proposed Rule Making, FCC 95-254 (released June 15, 1995).

anti-competitive under current market conditions.[2] The network/affiliate rules at issue in this proceeding are properly included within the scope of that effort.[3]

Capital Cities/ABC agrees with Commission that the five rules at issue in this proceeding are ripe for review, amendment and, in most respects, for repeal.[4] The rules, which impose various restrictions on the programming arrangements network suppliers are permitted to negotiate with their affiliated station distributors, were first applied to television almost 50 years ago. At the time, those restrictions were thought to be necessary to ensure that licensees retain sufficient control over their stations to serve the public interest and to remove barriers to entry of new networks. But in view of the revolutionary increase in the number

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[2] See Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd 3282, 72 RR 2d 1044 (1993) ("Fin/Syn Second Report and Order"); Report and Order, MM Docket No. 95-39, FCC 95-39 (released Sept. 6, 1995) ("Fin/Syn Expiration Order"); Report and Order, MM Docket No. 94-123, FCC 95-314 (released July 31, 1995) ("PTAR Report and Order"); Report and Order, MM Docket No. 91-221, 77 RR 2d 453 (1995) ("Network Ownership/Secondary Affiliation Report and Order"); Notice of Proposed Rulemaking, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 94-324 (released Jan. 12, 1995) (ownership attribution and cross-interest policy); Notice of Proposed Rulemaking, MM Docket Nos. 91-22 and 87-8, FCC-94-322 (released Jan. 17, 1995) ("Multiple Ownership Notice"); Notice of Proposed Rulemaking, MM Docket No. 95-40, FCC 95-145 (released April 5, 1995) (affiliation contract filing); Notice of Proposed Rulemaking, MM Docket 95-90, FCC 95-226 (released June 14, 1995) (network control of advertising rates and network advertising representation).

[3] The five rules are: (1) the right to reject rule (Section 73.658(e)); (2) the time option rule (Section 73.658(d)); (3) the exclusive affiliation rule (Section 73.658(a)); (4) the dual network rule (Section 73.658(g)); and (5) the network territorial exclusivity rule (Section 73.658(b)). Notice, par. 1.

[4] See Notice, pars. 4-5.

of outlets for video programming -- both broadcast and non-broadcast -- since that time, the restraints cannot be justified on those grounds.

Indeed the restrictions in their current form -- which go far beyond the antitrust law restrictions that apply to distribution arrangements in any other sphere of business -- simply cannot be justified as necessary either to avoid the exercise of some form of network market power which would interfere with a licensee's discharge of its public interest obligations, or to prevent the entry of new networks.

Competition policy teaches that distribution patterns can be presumed to be responsive to consumer interests (viewer interests, in the case of television) unless the structure of the market leads to market power. We will show in these comments that the networks do not have market power over their affiliates. Therefore, there is no basis in competition policy for more stringent regulation of television networks in order to insure that licensees retain sufficient control over their stations to fulfill their public interest obligations.[5] As we will show, moreover, other concerns about maintaining licensee autonomy can justify, at most, an appropriately tailored right to reject rule.

We will also show that the goal of fostering diversity by removing barriers to the entry of new networks no longer requires imposing restrictions on the original networks. The vast increase in the number of stations in the top 50 markets not affiliated with

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[5] See Notice, pars. 6, 20-21.

ABC, CBS or NBC -- from 1.4 stations per market in 1970 to 5.6 stations per market in 1994[6] provides a base of affiliates for new networks. However one characterizes the relative attractiveness of VHF and UHF outlets, it is perfectly clear that the growth of cable has reduced whatever "UHF handicap" remains.[7] That same growth, along with the growth of DBS and other non-broadcast vehicles for delivery of video programs, has spawned a cornucopia of new video services that must be taken into account in assessing the need for any remaining restrictions on the networks.

The Commission has long recognized the inherent efficiency and public interest advantages afforded by a robust network-affiliate distribution system.[8] As we show in these comments, the rules at issue impose artificial constraints on that system that cannot be justified by prevailing market conditions,[9] and do so at a time when competing forms of video distribution -- unfettered by the rules -- are taking a growing share of viewers at the networks'

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[6] PTAR Report and Order, par. 27. In the same period the total number of stations nationwide not affiliated with ABC, CBS or NBC increased over 400%, from 82 to about 340. Id.; 1994-95 Nielsen Station Index at 2.

[7] PTAR Report and Order, pars. 74-80; see Economists Incorporated, An Economic Analysis of the Prime Time Access Rule (March 17, 1995), submitted in MM Docket No. 94-123, Appendix C at 83-88 ("PTAR Economic Analysis").

[8] See Report and Order, MM Docket No. 88-396, 4 FCC Rcd 2755, 66 RR 2d 190, par. 13 (1989) ("Two-Year Order"); Report in Gen. Docket No. 86-336, 2 FCC Rcd 1669, 62 RR 2d 687, par. 159 (1987). See also PTAR Economic Analysis at 28-31 (describing efficiency benefits of network operations).

[9] The Commission acknowledges the several potential costs and disabilities imposed uniquely on networks by the rules at issue. See Notice, pars. 22, 30, 36, 39, 47.

expense. We submit that under market conditions that now prevail -- where there is no network market power over affiliates and no substantial barriers to the entry of new networks -- the rules at issue impose costs on networking that undermine the strength of that system without any furtherance of competition or diversity.[10]

I. In the Modern Video Marketplace, the Rules Are No Longer Necessary Either to Insure Affiliate Autonomy or to Guard Against Foreclosure of New Networks.

A. Networks Do Not Have Market Power Over Their Affiliates and Cannot Interfere With Station Autonomy to Program in the Public Interest.

Changes in the broadcast industry have significantly altered the network/affiliate relationship. If it was ever true that the networks had market power over their affiliates to force them to take unwanted programming -- and we do not believe this was ever the case -- it cannot be argued that such a situation prevails today. In evaluating the changes in the network/affiliate relationship, the Notice points to two factors that have resulted in shifting power from networks to affiliates: increased network competition for broadcast outlets and greater group ownership of those outlets.[11] We agree with the Commission's analysis on both

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[10] See Notice, par. 7. See also Report and Order, Gen. Docket No. 87-24, 3 FCC Rcd 5299, 64 RR 2d 1818, par. 51 (1988) ("Competition is generally far more reliable than regulation for fostering fair and efficient use of the means of mass communication."); Report and Order, in Docket No. 83-1009, 100 FCC 2d 17, 56 RR 2d 859, par. 112 (1984 ("Undue regulatory intervention can be one of the most significant hindrances to assuring that the public receives the best possible service from the telecommunications scheme adopted by Congress.").

[11] Notice, pars. 12, 16.

points.

The stations' alternative of affiliation with other networks provides a powerful check on network bargaining power. The financial rewards of operation as a Fox affiliate are increasingly comparable to those of operation as an affiliate of ABC, CBS or NBC.[12] And the result is an unparalleled number of affiliation switches. Since May 1994, when Fox embarked upon its strategy to upgrade its affiliation line-up, some 90 television stations in 43 local markets have changed affiliations or have announced their plans to do so.[13] This heightened competition for affiliates has caused an increase in network compensation to affiliates estimated to be on the order of $200 million or more.[14] The affiliation upheaval and the resulting huge increase in network compensation flowing to affiliates has provided stations the capital to expand their local newscasts into early morning, weekend and other time periods.[15]

As the Commission recognizes in the Notice, the trend toward

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[12] PTAR Economic Analysis at 53.

[13] Broadcasting & Cable, December 5, 1994 at 50-56; ABC Affiliate Relations Research, Sept. 7, 1995.

[14] PTAR Economic Analysis at 15.

[15] Variety, September 4-10, 1995 at 25, 30. In the wake of affiliation switches, new network affiliates started full-service, multi-daypart news operations from scratch, and former network-affiliated stations have expanded their news programming to fill time formerly occupied by network programs. Broadcasting & Cable, Sept. 4, 1995 at 31. See The Hollywood Reporter, July 31, 1995 (newly affiliated, former independent stations building news operations from ground up); Electronic Media, July 10, 1995 at 4 (new Fox affiliate in Dallas added 40 news staffers and increased news output from three and one-half to six hours daily).

group ownership in television broadcasting likely also tends to increase affiliate bargaining power in dealing with networks. Group-owned stations are predominantly network-affiliated stations.[16] This is not surprising since networks naturally seek to affiliate with the strongest stations in each market. Group-owned stations tend to be the strongest stations because they generally have superior resources to devote to local news and community service which translates into commercial success.[17] And, as the Notice indicates, networks necessarily must take into account the effects that contract negotiations with a group owner in one market may have on other negotiations the network undertakes with the same owner in other markets.[18]

These facts rebut any suggestion that affiliates operate at the mercy of their networks. While it is undoubtedly true that affiliates need the ready supply of proven programming a network provides, it is equally true that a network needs an effective outlet in substantially all local markets, particularly since the network's ability to offer advertisers full nationwide coverage is a critical advantage in competing against media (such as cable

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[16] Of the top 25 group owners based on total group coverage (excluding the traditional networks, Fox, UPN, WB, Univision and Telemundo), about 83% of their stations are affiliated with ABC, CBS, NBC or Fox, about 3% are affiliated with WB or UPN, and about 14% are independent. Broadcasting & Cable, July 10, 1995 at 8-9. The Commission notes that the majority of commercial stations are owned by entities that hold more than one television broadcast license. Notice, par. 16.

[17] See Reply Comments of Capital Cities/ABC (filed May 16, 1995) in MM Docket Nos. 91-221 and 87-8 at 6-8.

[18] See Notice, par. 16.

networks) that cannot offer advertisers the same benefit.

Indeed, it has never been (and certainly is not today) in a network's interest to constrain an affiliate in discharging its public interest obligations to its local community. To the contrary, an affiliate's willingness and ability to support the network's service with the strongest possible local service is an important factor that differentiates station outlets. As we have shown in another proceeding, the success of each network's prime-time schedule is closely linked to the strength of the lead-in provided by its affiliates' local news programs.[19] That contribution by the affiliate to the network/affiliate venture takes on added importance in the context of competition with cable networks that are only now beginning to attempt to offer a mixture of local and national service. Thus, the affiliate with a dominant position in local news gives its network an advantage and the affiliate enjoys a correspondingly strong position in dealing with its network.

Some have suggested that high clearance levels by affiliates of network programs are evidence of network market power. But that is simply not true. Affiliates clear programming not because they are forced to but because they recognize that high clearance levels

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[19] See Comments of Capital Cities/ABC, Inc. (filed March 23, 1992) in MM Docket No. 82-434 at 13 and Exhibit D. See also Reply Comments of Capital Cities/ABC, Inc. (filed July 10, 1995) in MM Docket Nos. 91-221 and 87-8 at 6-7 and Exhibit A (in a study reviewing television markets 1-10, 41-50, 91-100 and 141-150 for February, 1995, in 37 of the 40 markets the station with the number one early local news program -- all of them affiliated with ABC, CBS or NBC -- was also the number one station sign-on to sign-off).

are necessary for their own success. A network and its affiliates are partners in an enterprise whose success is dependent on attaining the nationwide circulation necessary to attract the advertising dollars which is in turn necessary to support the expensive and high-quality programs that make up the network schedule. If, as a group, affiliates did not clear, their network would fail and they would be competitively outmatched by network-quality programs on competing stations in their markets. It is for that reason that clearance levels are high and have always been high in prime time.[20]

Since the networks do not have market power over their affiliates, the concern for preserving affiliate autonomy would have continuing validity only if a station's commitment to clear network programming left no room for local programming or if there was some other basis for equating a commitment to a network with abdication of a station's responsibilities. Both of these propositions are demonstrably false. First, the original networks program only about two-thirds of the typical station's sign-on to sign-off day, leaving ample opportunity for local programming.[21]

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[20] See PTAR Economic Analysis at 90. The historical pattern of clearances shows that affiliates have the ability to reject network programming and have done so. Between 1977 and 1994, the original networks were forced to cut their daytime programming back substantially because of their inability to persuade their affiliates to clear programs they had offered; in 1994, the original networks collectively programmed 25 fewer hours per week than they had in 1977. PTAR Economic Analysis at 23 & Appendix D.

[21] PTAR Economic Analysis, Appendix D, Table D-2 (in 1994, the three networks offered average of 84.5 hours of programs per week out of 126 hours available in seven 18-hour broadcast days).

Second, there is no basis for equating the carriage of network programming, as opposed to local or syndicated alternatives, with a failure of licensee responsibility. Taken to its extreme, this line of reasoning would lead to the absurd conclusion that any station program commitment to a network would be a derogation of the station's duty to its local community. Just the opposite is true. Based on their ratings performance, network programs are the most popular programs in their time periods in virtually all local markets and many of them provide an important source of news and information. Therefore, an affiliate's decision to clear programming that is the most desired by its local viewers is the essence of responsible local service.

B. Networks Do Not Have the Power to Foreclose the Entry of New Networks. The Elimination of a Length-of-Affiliation Rule Has Not Created Such Power.

1. The Growth in Video Outlets.

The huge increase in the number of broadcast outlets has made it virtually impossible for the traditional networks to block the entry of new networks by dominating the supply of outlets. In its 1989 order, the Commission adverted to the growth of the Fox network, then reaching 88% of television households, as a result of the increase in broadcast stations.[22] Since that time, Fox has increased its national penetration to 97%,[23] and two new networks -- WB and UPN -- have been launched and are in their second season of

[22] Two-Year Order, par. 19.

[23] Nielsen Television Index, Sept. 11-17, 1995.

operation. Today, there are over 1160 commercial television broadcast stations, including roughly 340 stations not affiliated with ABC, CBS, NBC or Fox.[24]

In addition to the growth in the number of full-power broadcast stations, the growth of cable and other non-broadcast media and the increase in low power stations have created opportunities for new networks to supplement their broadcast coverage. Today, cable systems pass about 96% of television households and there are 1300 low power stations, most of which broadcast no network programming.[25] Thus, the Commission recently concluded that "networks are not as dependent on broadcast markets for coverage as was the case before the advent of cable," noting that Fox has filled gaps in its national coverage with cable affiliations.[26] The experience of the newer networks bears this out. Currently the WB Network reaches about 81% of television households, with 24% coming from cable carriage of superstation WGN. In addition, Fox, WB and UPN have used affiliations with low-powered television stations to increase their national coverage.[27]

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[24] 1994-95 Nielsen Station Index at 2; See PTAR Report and Order, par. 27 (noting that in 1970 there were only 82 independent stations).

[25] Notice, par. 10; Economists Incorporated, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership, and Radio Cross-Ownership Rules (May 17, 1995), submitted in MM Docket No. 91-221, Appendix Table A-1 ("Ownership Economic Analysis") (television households passed by cable went from 32% in 1975 to 96% in 1994); PTAR Economic Analysis at 10.

[26] Network Ownership/ Secondary Affiliation Report and Order, par. 9.

[27] Broadcasting & Cable, Sept. 11, 1995 at 28.

Not surprisingly, the increase in the number of broadcast and non-broadcast video outlets has led to a significant decline in network ratings. In 1980 ABC, CBS and NBC each had an average prime-time share of 30.2% By 1994 the network average prime-time share (including Fox) had diminished by one-third to 20.2%, and that average was down to 17% during the May 1995 sweeps.[28] Meanwhile, basic cable networks saw a 25% increase in their ratings between September 1994 and September 1995.[29] The decline in ratings of the established networks is a strong indication that they do not occupy a market position that would enable them to foreclose the entry of new networks.

2. Length of Affiliation Contracts.

There is no reason to impose regulatory curbs on stations' freedom to enter into long-term network contracts because such freedom leads to significant public benefits and does not foreclose the entry of new networks.

In 1989, in deciding to eliminate the two-year length-of-contract rule applicable to television affiliation contracts, the Commission identified a "significant potential public benefit in allowing networks and their affiliates, including in particular the

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[28] PTAR Economic Analysis, Appendix Table A-1 at 66; Broadcasting and Cable, May 29, 1995 at 11. See also PTAR Report and Order, par. 29. The average total household share for each of the four networks since the start of the new television season was about 16%, down from roughly 17% in same period last year. ABC Affiliate Relations Research, Oct. 26, 1995; see also Broadcasting & Cable, October 2, 1995 at 28-29.

[29] Variety, Sept. 18-24, 1995 at 27.

newer developing networks and their affiliates, to reach their own balance as to what term of affiliation should be agreed upon."[30] Reiterating its long-standing view that "networking operations are of great importance, because of their reach and efficiency, in providing the public with news, information, and entertainment programming,"[31] the Commission believed that permitting longer-term contracts would give networks a more stable affiliate system, which would make it easier for networks to plan program schedules, attract advertisers and attract capital that could be applied to provide better service to affiliates.[32] In addition, the Commission believed that longer affiliation contracts could reduce the risk and cost of acquiring programming, an effect that would be of particular importance to new networks.[33]

Freedom to contract for longer-term affiliation contracts yields these efficiency benefits without foreclosing the entry of new networks. Even if attention is concentrated solely on the development of new broadcast networks, the plethora of outlets not affiliated with the traditional networks eliminates the possibility of foreclosure.

In sum, there is no reason for the Commission to reevaluate its 1989 decision not to regulate the length of affiliation contracts. As the Commission recognized in 1989, a rule limiting

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[30] Two-Year Order, par. 12.

[31] Two-Year Order, par. 13.

[32] Two-Year Order, par. 17.

[33] Two-Year Order, par. 18.

affiliation terms impairs competitive incentives to meet consumer demands efficiently.[34]

C. Diversity Would Not Be Compromised If the Rules Were Eliminated.

The fact that affiliates retain control over their programming and the opportunities for new networks that have been created by the increase in video outlets insure that the Commission's diversity goals will continue to be met without the rules at issue.

Moreover, diversity is also served by the availability of alternative programs both on cable channels and in non-video media. In that connection, the Notice asks whether multichannel video programming distributors provide sufficient local news and other programming responsive to community needs to satisfy the Commission's longstanding diversity goal that the public receive these types of programming.[35] Such programming is now available on cable systems and the trend is toward expansion of such services. Many cable operators carry local news and public affairs programs produced by the operator or supplied by local broadcast stations.[36]

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[34] Two-Year Order, pars. 16, 22.

[35] Notice, par. 10.

[36] See, e.g., Broadcasting & Cable, Sept. 11, 1995 at 45-46 (cable operator and regional newspaper forming partnership to create news channel serving 275,000 subscribers in New Jersey with six hours daily of state, regional and local original news programming); The Atlanta Constitution, August 3, 1995 at 7R (cable systems around Atlanta carry local public affairs program reaching over 150,000 homes); Broadcasting & Cable, June 19, 1995 at 27 (cable systems will deliver 24-hour local news channel in entire New York metropolitan area by end of 1995); Broadcasting & Cable, March 27, 1995 at 18 (KRON-TV, San Francisco, produces daily,

In retransmission consent deals negotiated in 1993, 75 broadcast stations obtained the right to place a five-minute local news insert twice each hour into the "Headline News" channel of 171 local cable systems serving over seven million cable households.[37] The existence of these arrangements demonstrates that if broadcasters in a particular community were to reduce their carriage of such programming, other media would have the opportunity and incentive to serve the unsatisfied demand in order to increase their audiences and profits.[38]

II. Analysis of Specific Rules

A. Right to Reject

The right to reject rule, 47 C.F.R. §73.658(e), provides that an affiliation contract may not prevent or hinder a licensee from rejecting a network program that it believes is contrary to the public interest, or substituting a program which it believes is of greater local or national importance.[39] We have shown above that

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eight-hour news and information channel on cable available to one million subscribers; WPXI-TV, Pittsburgh, supplies "Cable News Channel" to cable systems in Pittsburgh); Mediaweek, March 6, 1995 at 9 (KSFM, Fort Smith, programs two local news cable channels in Arkansas); The Sun (Baltimore), December 4, 1994 at 1C (county government produces local daily news program on cable channel); Los Angeles Times, April 7, 1992, part D at 2 (KFMB, San Diego, produces half-hour local newscast for cable system).

[37] Broadcasting & Cable, March 27, 1995 at 18. In early 1995, 37 of those stations had begun inserting the local-news cut-ins on 71 local cable systems serving 3.5 million cable households. Id.

[38] See Ownership Economic Analysis at 52-53.

[39] Notice, par. 20.

the networks do not have market power over their affiliates; networks cannot force their affiliates to take unwanted programming. The only remaining concern is whether an affiliate's program arrangement with a network could operate as an abdication of the station's autonomy. While we believe that the concern is unwarranted, to the extent that any regulatory response is deemed necessary, it is satisfied by an appropriately tailored right-to-reject rule.

The Commission is correct in recognizing that network economics would be undermined -- indeed, destroyed -- if a Commission rule gave affiliates the arbitrary right to revoke their contractual clearance obligations opportunistically to pursue a greater short term economic gain.[40] The network distribution system works because of (and is utterly dependent on) the mass clearance of programs by affiliates. But it is precisely because each affiliate benefits from the mass clearance of all other affiliates that the system carries with it the potential for abuse. Each affiliate, standing alone, can be subject to the temptation to take a "free ride" on the general benefits of the network/affiliate relationship by engaging in selective preemptions, unrelated to the needs of its local community, solely for its own economic reasons (such as when it will retain a greater share of revenue from the substituted programming). But an individual affiliate can afford to engage in such economically motivated selective preemptions only if the vast majority of other affiliates continue to clear the

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[40] Notice, par. 22.

network program. If all other affiliates elected to preempt the network program, the mass circulation advertisers require and, in consequence, the underlying economic value of the network/affiliate enterprise would be destroyed. As the Commission has said, if enough affiliates engaged in such preemptions, the network advertising revenue base could be so diminished that it would no longer support the production and distribution of high-quality network programming, thus reducing the public benefits of networking recognized by the Commission.[41]

The rule's original purpose was to prevent networks from forcing stations to broadcast programs they believe are not in the public interest.[42] But the rule was never designed as a device to allow affiliates to preempt network programs merely to pursue individual economic gain at the expense of the network enterprise. The Commission's proposal to clarify the right to reject to provide that it may not be invoked "based solely on financial considerations" is faithful to the rule's original purpose -- to preserve licensee autonomy while curbing the potential for abuse that could destroy the economic base that makes networking possible.

As we understand the Commission's proposed clarification, an affiliate's non-economic reason for a preemption must be tied to the affiliate's service to its local community. In the words of the rule, the reason must be that in the affiliate's reasonable

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[41] Notice, par. 22. See Two-Year Order, par. 13.

[42] See Notice, pars. 20-21.

judgment the network program is "unsatisfactory or unsuitable or contrary to the public interest" in its local area or because the program it would substitute for the network program is of "greater local or national importance." If a rule is deemed necessary, we believe the Commission's proposal strikes the appropriate balance between protecting the licensee's program discretion and protecting the economic viability of the network system.

B. Time Option Rule

The Commission proposes to amend the time option rule, 47 C.F.R. §73.658(d), to allow affiliation agreements by which networks may have an option on specified time periods of an affiliate's schedule, subject to a minimum notice period for the exercise of the option.[43] We support the proposal because it promotes economic efficiency in program planning and development. Network program development is inherently a risky enterprise because production costs are high and advertising returns depend upon ratings, which are in turn contingent on the unpredictable factors of circulation and popularity. Time optioning would reduce the risks of program development by allowing networks to contract in advance for an assured base of circulation. This would help networks attract advertisers and thus create incentives for greater investment in new program production.[44]

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[43] Notice, par. 32.

[44] As the Commission explains, time optioning may be a particularly useful device for new networks by allowing them to rely on a guaranteed level of coverage during development and