

What CBS and the other networks ignore is the fact that most commercial television stations will be affiliated with some form of network in the future. In the vast majority of markets, there will probably not be any "independent stations" to carry ACC basketball games if the network affiliates were prohibited from preempting network programs. Most of the independent stations already have affiliated with one of the new emerging networks. The fact that the UPN and WB networks are forced to rely on secondary affiliations in many markets demonstrates that there are simply not enough independent stations left. Moreover, the remaining stations which are able to carry syndicated ACC basketball, games must be in an economic position to afford the games. Regional syndication, like ACC basketball can be fairly expensive. Absent clearances on major stations, it may not be economically feasible to produce the games for off-air syndication in the first place.

CBS then asserts that cable systems in Raleigh or Charlotte would be likely to offer such games if the network affiliates were precluded from carrying them.³² This wonderful public policy is contrary to the public interest. CBS provides no evidence that any of the cable channels would acquire the rights to ACC games. Even assuming that a regional or national cable network would purchase these rights, the result of the CBS position would be to drive sports off free off-air television and shift the games to cable – most likely pay cable sports channels.

The networks argue that the right to reject rule should not encompass a decision made for purely economic reasons.³³ As noted above, the right to reject rule grew out of a purely

³²CBS Comments at 21 n. 53.

³³See *Id.* at 23 (right to reject network programs for economic reasons is irrelevant to an affiliated station's ability to serve the public interest); *Capital Cities/ABC Comments* at 17 (the rule was never designed as a device to allow affiliates to preempt network programs merely to pursue individual economic gain.)

economic decision – the ability to carry the 1939 World Series. The rule never has been limited to preemptions involving specific public affairs programs.

Our initial Comments observed that it is impossible for the FCC to devise a rule which would permit preemptions in some cases, but prohibit them if the network program was rejected solely for economic reasons. As NASA's Comments correctly point out, there are no bright line tests to determine whether the preemption was made for financial reasons.³⁴ In effect, the FCC would be forced to conduct an examination of a station manager's state of mind at the time the network program was rejected. To its credit, NBC notes that making such a distinction is intrusive and difficult to make.³⁵

The example provided by CBS illustrates the problem. College basketball in North Carolina is not only popular, but borders on a transcendental experience. When a local station preempts network programming it is likely that the substituted program will be financially advantageous to the station. Indeed, most preemptions occur because there is substitute programming that is of particular interest to the local community – like ACC basketball. Because it is popular in the community, the substitute programming will draw high ratings, hence revenues to the station. In these cases the public's interest, as measured by the ratings and popularity of a program, coincide with the station's economic interest. As NASA points out it would be absurd to craft a rule which would permit preemptions only if programs were less highly demanded and less valuable to audiences and advertisers.³⁶

³⁴NASA comments at 14.

³⁵NBC Comments at 31. Of course NBC urges the Commission to let these decisions be determined by the "marketplace." As noted above, the networks continue to exert considerable leverage over their affiliates. Leaving preemption decisions to the "marketplace" is tantamount to preventing stations from preempting any network programs, for any reason whatsoever. Such a policy runs counter to the concept of local broadcasting.

³⁶NASA Comments at 15.

As several commenters note, imposing a "financial test" on the right to reject rule will effectively "chill" all preemptions, regardless of the station's justification. As the FCC noted when the right to reject rule was adopted, stations should not be placed in a position to justify their programming decisions to the network.³⁷ To make matters worse, the proposed rule would subject stations to an FCC inquiry. A station would be forced to open its books and divulge confidential information regarding the revenues received from broadcasting the substitute programming. A station manager's state of mind would become an issue to determine whether the decision to preempt was based on financial as opposed to other reasons. The result is that a local station's right to reject will be completely eviscerated.

There is no question that the need for the right to reject rule is essential in today's marketplace. In recent years the networks have become more aggressive on this issue. The Joint Comments of Cosmos Broadcasting, et al, and Blade Communications describe contractual provisions in both the Fox and NBC contracts that appear to run afoul of the existing rule.³⁸ At the very least, these provisions indicate that the power the networks have over their affiliates has not declined, but increased. If given the opportunity, the networks will attempt to impose programming on their affiliates that, in some instances, the affiliates would prefer not to broadcast.

Finally, NBC argues that network affiliate contracts should be treated the same as contracts for individual syndicated programs.³⁹ NBC notes that the provisions contained in the program contracts for syndicated programs are very strict with respect to preemptions and claims that the networks are placed at a competitive disadvantage.

³⁷*Chain Broadcasting Report* at 66.

³⁸Joint Comments of Cosmos Broadcasting, et al at 4-7; Comments of Blade Communications at 6-9.

³⁹NBC Comments at 25-26.

The networks are not placed at a competitive disadvantage relative to program syndicators. With the relaxation of the financial interest and syndication rules, the networks are free to distribute programs as syndicators. They can compete head to head with any syndicator in the country using the same terms and conditions. If they believe that syndication is a superior way to distribute programs because of the contractual provisions in program contracts, they have the freedom to do so.

Moreover, NBC's argument ignores the key differences between the syndication market and network programs. A network affiliate contract locks in network distributed programs for prime time, late night and certain day time periods for years in advance. A typical network contract runs for ten years. In effect a station is agreeing to distribute a package of programs, for various dayparts, without knowing the exact content of the shows. In this situation the station assumes the risk that most, if not all of the network's programs will be popular. From the network perspective it is able to lock in time slots for its network feed years in advance. By contrast, syndicated shows are sold on a program by program basis. The station is not contracting for a package of unknown programs years in advance. As a result, it makes sense that a station should be granted greater leeway to reject network programs than individually purchased shows.

Most commenting parties agree that the current right to reject rule should not be modified. It is the cornerstone of a local station's editorial discretion. It must be preserved in its present form.

B. The Time Option Rule Should Not Be Modified

Every local station commenting in this proceeding opposes elimination of this rule. Network assertions that there is no need for a time optioning rule ring hollow. Nowhere do the networks demonstrate that they will not attempt to engage in time optioning. More importantly, the networks provide no evidence whatsoever that time option arrangements are critical to the continued viability of the established networks. Neither ABC, NBC or CBS provide any examples of network programs that were cancelled, or revenues lost because they were unable to option time on local affiliated stations. As in most proceedings, the burden is on those seeking to modify a rule to justify the change. The networks have failed to meet this burden.

The FCC's proposal to modify the rule and permit time option arrangements with some advanced notification requirement received little or no support. Most comments agree with our initial comments that a notification period was tried by the Commission and simply did not work. In today's marketplace, stations must secure non-network programming for specific time periods years in advance. For a notification period to be effective, it would have to be set so far in advance as to have no discernable benefit to a network. NBC agrees with this analysis observing that the network schedule is constantly being modified throughout the broadcast season, often on very short notice.⁴⁰

Eliminating the rule or adopting some modified rule with a notice requirement would not only hurt local stations, but independent programmers as well. The FCC must remember that the elimination of the financial interest and syndication rules coupled with the elimination of the Prime Time Access Rule will have a tremendous impact on programmers and television stations. In fact, modifying the rule would give the established networks an unfair competitive advantage relative to independent syndicators.

⁴⁰NBC Comments at 34.

Assuming the rule were eliminated, a network is in a strong position to leverage its network status and force affiliates to clear option time in key time slots. (With the elimination of the Prime Time Access Rule, it is likely that the access period would be a prime candidate.) Once these slots are locked up by the networks, no other independent programmer would have access to them. Moreover, the networks would be in a position to provide programming via the network feed, or in the alternative, provide network owned syndicated programming for these time slots if the option is not exercised. Even if a notice period is enacted, a local affiliate would be hard pressed to find substitute syndicated programs if the network did not provide "network" programming for the time slot. In this situation, a local affiliated station would have no alternative but to rely on its own network's syndicated programs to fill the time slot. In either case, eliminating the time optioning rule would give the networks an unfair advantage in the program syndication market and could squeeze out independent programmers.

In much the same fashion, eliminating the time option rule could prevent the development of new, emerging networks. Time optioning is just another means through which existing established networks can lock up time slots, thereby preventing their affiliates from becoming "secondary affiliates" with new emerging networks. Eliminating this rule would completely undermine the exclusive affiliation rule.

C. The Exclusive Affiliation Rule Should Be Retained in All Markets.

Again, all local television station commenters support retention of this rule in all television markets. Only the big three established networks urge its repeal. The rule should not be modified.

NASA's comments raise an important point. Under the present rule, local stations have the ability to become the exclusive outlets for their network's programming.⁴¹ The majority of network affiliates have *de facto* exclusive affiliations. The rule does not prohibit exclusive affiliations, but only operates to prevent stations from being required to execute such contracts. It rests the power to make the decision where it should be – with the local station. If a station determines that it will only broadcast the programs of one network, then it is free to do so. On the other hand, if the station determines that its local community would like to see the programs of more than one network, it is free to enter into a secondary affiliation with another network. Nothing presented in the established network's comments justifies restraining a local station's editorial decisions.

The Notice proposed eliminating the rule in the largest markets, but retaining the rule in smaller markets. The theory behind this proposal was that in the largest markets there appear to be a sufficient number of television stations to permit the new networks to secure primary affiliations. According to this approach, secondary affiliations are more important in smaller markets where there are fewer television stations. Most television station comments filed in this proceeding reject this theory.

First, the Notice presumes that the public interest will be satisfied if the two new emerging networks have a sufficient number of stations with which to establish primary affiliations. INTV does not dispute the critical importance of these new networks, but wonders why the FCC should base its decision solely on two new networks. Would not the public be served by the establishment of a seventh and eighth off-air television network? If this is true, then the existing rule will be necessary in all markets for those networks to secure secondary affiliations and gain a competitive foothold. In short, this rule is essential to promote

⁴¹NASA Comments at 25.

competition among off-air television networks. Competitive network entry should remain open for whatever number of new networks that develop.

Second, even looking solely at the four established networks and the two new networks, the rule should be retained in all markets. Granted, if given the option, the new networks prefer full time primary affiliation compared with a secondary affiliation. Nevertheless, as the Comments of the Warner Brothers Television Network point out, this decision is not simply a function of market size. The WB network has secondary affiliations in Cleveland (13th largest market) and West Palm Beach (45th largest market).⁴² According to UPN's analysis, only 35 television markets, representing only 52.9% of the total television households, have six or more television stations.⁴³

If the FCC were to eliminate the rule in the largest markets, it would have a difficult time determining which markets would be subject to the rule and which would not. As noted above DMA market size is not a determining factor. If the FCC decided to eliminate the rule in markets with six or more stations, what would happen if one or two of the station's went dark. Would the rule then apply to the market? Moreover, what if there were six commercial frequencies, but one or more of the owners decides that it did not want to affiliate with a new network. This could certainly be the case in markets where religious stations are operating on commercial frequencies. The owners of these stations may make their affiliate decisions on religious rather than purely economic grounds.

Third, the networks argue that they could not prevent new network entry because there are a sufficient number of alternative media available. For example, Capital Cities/ABC notes that

⁴²Comments of the Warner Brothers Television Network at 12.

⁴³Comments of the United Paramount Network at 18. According to UPN, 22 markets have 6 television stations, only 4 markets have 7 stations, 8 markets have 8 stations and 1 market has 9 stations.,

new, emerging networks can use "cable and LPTV stations to supplement their broadcast coverage..."⁴⁴ While the WB network is using cable to help expand its national audience reach, relying on cable put the network at a considerable disadvantage in terms of audience reach. As for low power stations, not only do they have a limited off-air television signal, but they have no guaranteed must-carry status on cable systems. The Commission should apply some reality test to the network's arguments. As UPN correctly notes, it takes at least 80% national audience reach to create a viable off-air television network. This task becomes much more difficult, if not impossible, when an emerging network has to rely on cable and low power television stations to reach stations in key local markets.⁴⁵

Finally, the Commission must remember that one of the key public policy issues in this proceeding is the development of new off-air television networks. Free, over-the-air television networks are important because they can be seen by all Americans. For the networks to now argue that these new networks can rely on a subscription service, like cable, to reach consumers is disingenuous. The FCC's concerns should be the development of these new networks as free off-air services.

D. The Geographic Scope Of The Territorial Exclusivity Rule Should Be Modified, But The First Part Of The Rule Should Be Retained.

INTV agrees that the geographic scope of the network territorial exclusivity rule should be modified. As we noted in our initial comments, a station's local market is better defined in

⁴⁴Comments of Capital Cities/ABC at 21.

⁴⁵The networks' position is somewhat inconsistent. If cable or low power stations are a true alternative for an off-air network, then it would seem that the established networks have an alternative to their existing affiliates. If true, this would give the established networks tremendous leverage in future negotiations. Stations that do not clear sufficient programs or dispute compensations will simply be bypassed by the networks. Alternatively, if cable and low power stations are not viable alternatives for the established networks, then why should the new emerging networks be forced to rely solely on these mediums to gain clearances in key markets.

terms of its Designated Market Area. This geographic zone is the result of predominant viewing patterns in counties surrounding a television stations. INTV does recognize, however, that there may be some exceptions to this general rule. The Commission should examine overlapping market situations to ensure that consumers are not denied access to over-the-air network signals.

INTV does not believe that the first part of the rule should be eliminated. This part of the rule gives a network the opportunity to clear a program on other stations in a market when its affiliate has decided to preempt the program. While ABC, CBS and NBC stated that they do not need the rule, this rule provides an important safety net for those situations where a program is not cleared by an affiliate. For example, NBC notes that when a program is not cleared by an affiliate other stations in the market often reject the network's program.⁴⁶ Nevertheless, NBC documents that during the 1994-95 season there were 65 placements of "one-time only" rejections on other stations in a local market. Thus, while such placements may be rare, they are significant enough to retain the rule. As INTV noted in its initial comments, a one time only placement may offer the community a chance to see important programs - like post season baseball games.⁴⁷

Neither the Commission nor any party to this proceeding has provided any evidence to indicate that this rule harms the public, local stations or the networks. Indeed, one would expect the network affiliations to have the strongest interest in eliminating this part of the rule. After all, this would prevent rejected network programs from appearing on rival stations. NASA, which represents the established network affiliates, is silent on this issue. Absent any evidence demonstrating any harm caused by the rule, the FCC should keep this part of the rule in its present form.

⁴⁶NBC Comments at 43.

⁴⁷INTV Comments at 19-21.

E. The FCC Should Defer Action On The Dual Network Rule

Our initial comments urged the Commission to retain the current dual network rule. The original purpose of the rule was to avoid the coercive effects that could result from one company operating two networks. At this point in time, the FCC should examine this rule from the perspective of the new emerging networks. Obviously, the public interest and diversity are best served by new, independently owned off-air networks becoming successful in the marketplace.

The Commission should consider the ability of the established networks to impair competition from new network, if the dual network rule was repealed. For example, an established network could create a new off-air network that is designed to occupy time slots on affiliates that may be needed by the new networks for secondary affiliations. Also, the established networks already have their network infrastructure in place, giving them a tremendous advantage over the new networks. Permitting the established networks to begin a second or third, off-air network could place the new networks at a competitive disadvantage. Finally, at the very least, the Commission must insure that eliminating the rule will not result in the merger of the established networks.

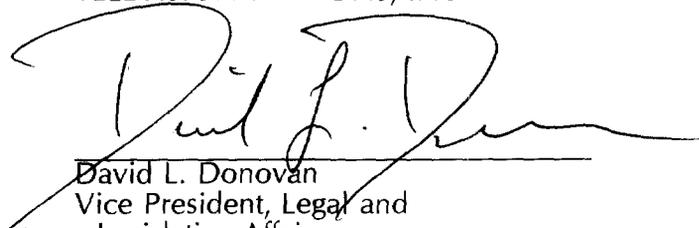
INTV recognizes that the move to digital transmission will give rise to dramatic changes in the off-air television industry. Once digital television becomes a reality, there may be no need for the dual network rule. Until that time, however, INTV believes the rule should remain in place.

IV. CONCLUSION

The network affiliate rules are vitally important to this nation's system of free, local over-the-air broadcasting. After reviewing the comments in this proceeding, INTV is struck by the fact that there is absolutely no evidence to demonstrate that the current rules harm the public interest or the networks' economic interests. At best, the FCC and the established networks raise theoretical issues. This should be balanced against the real concerns raised by almost every local television station representative that filed comments in this proceeding. These stations deal with the networks every day. They are in the best position to understand the leverage that the networks can exert over a local television stations.

The FCC's primary obligation is to regulate local television stations. In this proceeding they have spoken with one voice. The right to reject, time optioning and exclusive affiliation rules should not be changed. The network territorial exclusivity rule should be modified to expand the zone of exclusivity to a station's DMA. Finally, the FCC should defer action on the dual network rule.

Respectfully submitted:
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