

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Network Affiliated Stations Alliance (NASA))
Petition for Inquiry into Network Practices and)
Motion for Declaratory Ruling)

DECLARATORY RULING

Adopted: August 20, 2008

Released: September 3, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Inquiry into Network Practices (“Petition”),¹ a Motion for Declaratory Ruling (“Motion”)² and a Joint Request of Network Affiliated Stations Alliance (“NASA”) and the ABC, CBS, NBC and Fox Television Networks (“Networks”) to Resolve NASA Petition.³ NASA and the Networks request that the Commission affirm a number of basic principles relating to the Commission rules governing network/affiliate relationships to avoid future disputes. Pursuant to section 1.2 of the Commission’s rules,⁴ we grant NASA’s request for declaratory ruling in part and grant the Joint Request in full.

II. BACKGROUND

2. In its Petition, NASA asked the Commission to institute an inquiry as to whether certain alleged practices of the Networks regarding their affiliates were consistent with the Commission’s network rules, the Communications Act, and the public interest.⁵ NASA subsequently filed the Motion, in which it sought a declaratory ruling that certain specified practices engaged in by the Networks are inconsistent with the Communications Act and the Commission’s rules and policies.⁶ In response, the

¹ Petition for Inquiry into Network Practices (“Petition”) filed by Network Affiliated Stations Alliance (Mar. 8, 2001).

² Motion for Declaratory Ruling (“Motion”) filed by Network Affiliated Stations Alliance (June 22, 2001).

³ Joint Request of NASA and the ABC, CBS, NBC and Fox Television Networks to Resolve NASA Petition (“Joint Request”) filed by NASA and the ABC, CBS, NBC and Fox Television Networks (June 9, 2008). These four networks will be referred to herein as “the Networks.” The Joint Request is attached to this Declaratory Ruling.

⁴ 47 C.F.R. § 1.2.

⁵ Petition at 1.

⁶ In order to permit a full exchange of views on the multiple issues raised in the Petition, and given NASA’s clarification that it was seeking a declaratory ruling rather than specific enforcement action, the Commission classified this proceeding as permit-but-disclose under the *ex parte* rules, permitting interested parties to make *ex parte* presentations to the Commissioners and Commission employees and requiring that these presentations be disclosed in the record of the proceeding. See *Public Notice*, Comment sought on “Petition for Inquiry into Network Practices” filed by Network Affiliated Stations Alliance; “Permit But Disclose” *Ex Parte* Status Accorded, DA 01-1264 (rel. May 22, 2001).

Networks contended that it would be improper for the Commission to involve itself in the private contractual relationships between networks and affiliates.⁷

3. On January 19, 2005, NASA filed a Third Update of Record and Continued Request that Commission Issue Declaratory Ruling on Basic Principles in which it stated that each of the Networks has reformed its contracts to address the central issues raised by NASA. At the same time, NASA asked the Commission to clarify the meaning of the existing network/affiliate rules, consistent with the reformed affiliation agreements. In response, the Networks asked the Commission to reject NASA's request and to close this proceeding, arguing that there is no longer any basis for Commission action.⁸

4. On June 9, 2008, NASA and the Networks filed the Joint Request, stating that they had revised their standard affiliation agreements to address the issues raised by NASA with respect to particular contractual provisions, and that a Commission ruling regarding the resolved contractual issues is unnecessary. Nevertheless, they state that "NASA and the Networks have a mutual interest in avoiding future controversies regarding the meaning of the Commission's network/affiliate rules and in assuring that the rules of the road for the network/affiliate relationship are clear."⁹ The parties thus request that the Commission issue an order ratifying a number of principles "with which both NASA and the Networks agree, consistent with the revisions to the standard affiliation agreements by the Networks and the amendments negotiated by the Networks and their affiliates to their current affiliation agreements."¹⁰

III. DISCUSSION

5. Under section 1.2 of the rules, the Commission "may ... issue a declaratory ruling terminating a controversy or removing uncertainty."¹¹ The Commission has broad discretion whether to issue such a ruling.¹² We agree with NASA and the Networks that additional guidance concerning licensee control, the right-to-reject rule, and the option-time rule would be helpful to avoid future disputes, and that the principles identified below are consistent with the Act and our rules.

A. Licensee Control

6. Section 310(d) of the Communications Act prohibits the direct or indirect transfer of control of any station license to another entity without a Commission finding that "the public interest, convenience, and necessity will be served thereby."¹³ We affirm that the following principle identified in the Joint Request is consistent with the Act and the Commission's rules:

- Affiliates, as the licensees of local television stations, must retain ultimate control over station programming, operations and other critical decisions with respect to their stations, and network affiliations must not undercut this basic control. Retention of this control by Commission licensees is required by Section 310(d) of the Communications Act and the Commission's Rules.

⁷ See, e.g., Comments of Walt Disney Company on behalf of ABC at 8, 13, 15, 24-27; Comments of Viacom, on behalf of CBS at 21, 27; NBC Comments at 6-8, 12, 15-18; Fox Comments at 7-9, 11-14, 24-27.

⁸ Networks' Response to NASA's Continued Request, filed jointly by the Networks (Feb. 24, 2005).

⁹ Joint Request at 1.

¹⁰ *Id.* at 2.

¹¹ 47 C.F.R. § 1.2.

¹² See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973); *Telephone Number Portability*, Order, CC Docket No. 95-116, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).

¹³ 47 U.S.C. § 310(d).

B. Right-to-Reject Rule

7. To ensure that licensees retain sufficient control over programming to fulfill their obligation to operate in the public interest, the Commission's right-to-reject rule prohibits a television broadcast station from entering into "any contract, arrangement, or understanding, express or implied, with a network organization" that prevents or hinders the station from "[r]ejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest" or from "[s]ubstituting a program which, in the station's opinion, is of greater local or national importance."¹⁴

8. We affirm that the following principles relating to the right-to-reject rule identified in the Joint Request are consistent with the Act and the Commission's rules:

- Pursuant to Section 73.658(e) of the Commission's Rules, networks and their affiliates are prohibited from "having any contract . . . which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from: (1) Rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or (2) Substituting a program which, in the station's opinion, is of greater local or national importance." This language does not give an affiliate the unfettered right to preempt network programs, but where a preemption is made pursuant to one of the two prongs of the right-to-reject rule, the economic consequence to the affiliate is irrelevant.
- Consistent with the Commission's right-to-reject rule, affiliation agreements should not include provisions that limit right-to-reject preemptions for "greater local or national importance" to breaking news events or any other specific type of programming. Affiliation agreements should not include provisions that prevent affiliates from rejecting a program as "unsatisfactory or unsuitable or contrary to the public interest" because they have carried a similar network program in the past. Affiliation agreements should not include provisions that impose monetary or non-monetary penalties on affiliates based on preemptions protected by the right-to-reject rule. Affiliation agreements should not include provisions that subject right-to-reject preemptions to, or count them against, contractual preemption limits (or "baskets") (though baskets are perfectly appropriate for preemptions not protected by the right-to-reject rule).

C. Option-Time Rule

9. The Commission's option-time rule proscribes any clause in an affiliation agreement that "prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."¹⁵ In its Petition, NASA argued that certain contract provisions, with respect to both analog and digital broadcasting, violated the option-time rule by allowing networks to reserve an option to use an affiliate's broadcast time without committing to supply programming for the optioned time.¹⁶ To clarify the reciprocal obligations of networks and affiliates under the Commission's option-time rule, we affirm that the following principles set forth in the Joint Request are consistent with the Act and our rules:

¹⁴ 47 C.F.R. § 73.658(e).

¹⁵ 47 C.F.R. § 73.658(d).

¹⁶ Petition at 12, 17.

- Consistent with the option-time rule, affiliation agreements should not include provisions that result in the optioning of the station's time to the network organization or that have the same restraining effect as time optioning. Network affiliation agreements may not, under the Commission's option-time rule, obligate stations to carry a network's programming or other content during certain time periods without reciprocally obligating the network to provide the content for those time periods. Similarly, network affiliation agreements may not require affiliates to carry, at some unspecified future date, unspecified digital content that the network may (or may not) choose to offer.

IV. ORDERING CLAUSES.

10. Accordingly, IT IS ORDERED that the Network Affiliated Stations Alliance's Motion for Declaratory Ruling filed June 22, 2001 IS GRANTED IN PART as discussed above.

11. IT IS FURTHER ORDERED that the Joint Request IS GRANTED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary