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# Contraband TV: An Analysis of NAFTA's Effect on the Federal Communications Commission Issue Responsive Requirement

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# CASE NOTE

# CONTRABAND TV: AN ANALYSIS OF NAFTA'S EFFECT ON THE FEDERAL COMMUNICATIONS COMMISSION ISSUE RESPONSIVE REQUIREMENT


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## I. INTRODUCTION

The effects of the North American Free Trade Agreement (NAFTA) on telecommunications among its member nations—Canada, the United States, and Mexico—are profound and far-reaching. NAFTA has shaped and will continue to shape the form of U.S. telecommunications through its influence on the Federal Communications Commission (FCC) and the U.S. courts.

This Case Note will examine *Channel 51 of San Diego, Inc. v. Fox Television Stations, Inc.*[1] (*Channel 51*), a 1996 decision by the U.S. Court of Appeals for the District of Columbia. The controversy giving rise to this case centers around XETV, a Fox Television affiliate based in Mexico. XETV applied for an FCC permit to broadcast live into the United States. Channel 51 of San Diego filed a petition opposing XETV's application. The conflict in this case hinges on the FCC's struggle to maintain its congressional statutory requirements while adhering to NAFTA's prohibition of trade barriers among its members. In *Channel 51*, the FCC and the U.S. Court of Appeals attempt to reconcile whether requiring issue-responsive programming, as mandated by Congress, is a discriminatory restraint of trade and thus violative of NAFTA. The FCC and the U.S. Court of Appeals concluded that requiring both domestic and foreign-based stations to demonstrate in their applications that they have met the requirement of issue-responsive programming was not a restraint of trade. The outcome of *Channel 51* illustrates the need for the FCC and the U.S. courts to expand their concepts of telecommunications in our new global community.

This Case Note examines NAFTA's effects on the telecommunications industry through discussions of the FCC and U.S. Court of Appeals opinions in *Channel 51*. Part II begins with a brief background of the FCC. Part III explores NAFTA's effect on the FCC. Parts IV through VII trace the history of the *Channel 51* controversy, including its facts and the decisions handed down by both the FCC and the U.S. Court of Appeals. Part VIII

1. Channel 51 of San Diego, Inc. v. FCC, 79 F.3d 1187 (D.C. Cir. 1996).

of the Case Note analyzes and reconciles the FCC and the U.S. Court of Appeals decisions. Part IX concludes the Case Note with this author's notions of new concepts of a global community and how these concepts relate to NAFTA's current effects on the telecommunications industry.

## II. THE FEDERAL COMMUNICATIONS COMMISSION

In 1934, Congress created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[2] Congress delegated rule-making authority to the FCC, and provided that each rule is guided by "public convenience, interest, or necessity."[3] Congress also gave the agency the power to grant or to deny applications for broadcast licenses.

A television station must obtain FCC approval before it can begin to broadcast live programming in the United States. Section 309 of the Communications Act of 1934 mandates that in considering the approval of an application, the FCC must determine

> whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.[4]

In an effort to evade the mandates provided in Section 309, broadcasters could transmit their signals across the U.S. border to a foreign station which could then rebroadcast the signal back into the United States. In response to these types of rebroadcasts, Congress enacted Section 325.[5] Section 325(c) prohibits

2. Communications Act of 1934, Pub. L. No. 416, § 1, 48 Stat. 562 (codified as amended at 47 U.S.C. § 151 (1988)).
3. 47 U.S.C. §§ 303, 307(a) (1994).
4. *Id.* § 309.
5. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1188.

transmissions for rebroadcast without an FCC permit.[6] Moreover, Section 325(d) states that the procedures of Section 309 govern the FCC's consideration of applications for any permit to conduct the cross-border electronic transmission otherwise prohibited by Section 325(c).[7]

Additionally, Section 325(d) provides, in relevant part, that "the granting or refusal [of an application for permit] thereof shall be subject to the requirements of section 309."[8] This language made it clear that the public interest, convenience, and necessity factors required by Section 309 apply to foreign-based television stations that wish to broadcast live programming into the United States.

In applying the Section 309 standards, the FCC has original jurisdiction to grant or deny a broadcast application.[9] The decisions to grant or deny these applications, however, are appealable to the U.S. Court of Appeals for the District of Columbia.[10]

In 1972, the FCC addressed the public interest requirements for a Section 325 permit when it evaluated a broadcast permit application submitted by American Broadcasting Cos., Inc. (ABC).[11] In its order denying ABC's application, the FCC opined that in enacting Section 325, Congress sought to stop broadcasting that was not in the public interest, and, equally important, to prevent the severe interference to U.S. stations caused by Mexican border stations.[12] The FCC's order concerning the public's interest relied in part on the 1929 case of Dr. Brinkley.[13] In that

6. *Id.*
7. *Id.*
8. 47 U.S.C. § 325 (1994).
9. *See Id.* § 307.
10. *See Id.* § 402.
11. *In re* American Broad. Cos., 35 F.C.C.2d 1 (1972).
12. *Id.* at 5.
13. Dr. Brinkley had been the licensee of KFKB, a radio station in Milford, Kansas, until 1929 when he assigned the license to KFB Broadcasting Association, Inc. Dr. Brinkley personally broadcast 3.5 hours daily over KFB during which he diagnosed and prescribed treatment for medical cases from letters that he received. In 1930, after a hearing, the Radio Communications Commission denied KFKB's renewal application. The Commission and the Court of Appeals found that the station's programming "is inimical to the public health and safety, and for that reason is not in the public interest." KFKB Broad. Ass'n. v. Fed. Radio Comm'n, 47 F.2d 671, 672 (D.C. Cir. 1931). After renewal was denied, Dr. Brinkley moved his operation to Del Rio, Texas. He then obtained a license from Mexico to operate a 500 Kilowatt station at Villa Acuna, Mexico, across from Del Rio. From this Mexican station, he broadcast the same type of KFKB programming originating from his Texas studio back into the United States. *Id.*

case, KFKB, a radio station broadcasting a doctor's medical treatment show, was denied the renewal of its application for not adhering to the public interest requirement.

The FCC applied these public interest factors to the application of XETV, a Mexican based television station that wished to broadcast into the United States as an ABC affiliate. The FCC denied XETV's application because its programming was deemed to be deficient.[14] The FCC noted that XETV did not render any local service that met the needs and interests of the community because it served as "little more than a passive conduit of national network programming."[15] The FCC further cited XETV's deletion of certain ABC programming, pursuant to Article 63 of the Mexican Radio and Television Federal law,[16] as a reason for denial of its application request.[17]

The FCC's final analysis of this application request focused on whether renewal of XETV's application would be in the public interest.[18] In addressing this issue, the FCC concluded that "the principal public interest factor upon which they based their 1956 original grant decision, namely the absence of a third television facility for the carriage of ABC network programming, was no longer present."[19] A new American-based television station entered the market; thus, it was no longer in the "public interest" to continue to allow XETV to transmit ABC television programming.

## III. NAFTA'S EFFECT ON THE FEDERAL COMMUNICATIONS COMMISSION

On December 8, 1993, President Clinton signed a bill enabling NAFTA to become effective, as scheduled, on January 1, 1994.[20] NAFTA was intended to remove barriers to both trade and investment in goods and services among Canada, Mexico,

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14. *In re* American Broad. Cos., 35 F.C.C.2d 1 (1972).

15. *Id.*

16. *Id.* This deletion of programming was due, in part, to the potentially offensive nature of these programs to the Mexican television viewing public. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. NAFTA, THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN THE INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 1 (J.H. Bello et al. eds., 1994).

and the United States.[21] Within a span of ten years, NAFTA provides for a systematic elimination of tariff and most non-tariff barriers affecting U.S.-Mexico and Canada-Mexico trade.[22] NAFTA's ultimate goal is to widen the scope of the market and to enlarge the range of available labor skills by enabling North American firms and workers to compete more effectively against foreign producers in the global marketplace.[23] Thus, the ability of the NAFTA countries to benefit from this agreement will depend on whether they can maintain domestic economic policies that facilitate economic growth.[24]

Complying with NAFTA, by removing the obstacles to telecommunications services, the market will now be open.[25] According to one commentator, "for the NAFTA negotiators telecommunications was a very slippery subject difficult to define, sensitive to regulate, and as between goods and services of a loose identity."[26] NAFTA's treatment of the telecommunications industry, found in Chapter 13 of the Agreement, is based largely on the telecommunications annex in the General Agreement on Trade and Services. NAFTA Chapter 13, however, never indicates whether this chapter pertains to "goods," "services," or "direct investment."[27] These measures relating to telecommunications apply to the access and use of public telecommunications transport networks or services.[28] All of the NAFTA members have the affirmative duty to "insure that persons of another party have access to and use of any public telecommunications transport network or service offered in its territory or across its borders ... under reasonable and non-discriminatory terms and conditions."[29] These "reasonable conditions" include, inter alia, the ability to lease private lines, to attach equipment to public networks, and to interconnect private circuits to public net-

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21. LESLIE ANN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT, LEGAL AND BUSINESS CONSEQUENCES OF NAFTA 13 (2d ed. 1993).

22. JEFFREY J. SCHOTT, INSTITUTE FOR INTERNATIONAL ECONOMICS, THE NORTH AMERICAN FREE TRADE AGREEMENT: AN ASSESSMENT 4 (1993).

23. *Id.* at 5.

24. *Id.*

25. GLICK, *supra* note 21, at 33.

26. NAFTA AND BEYOND: A NEW FRAMEWORK FOR DOING BUSINESS IN THE AMERICAS 171, 177 (Joseph J. Norton et al. eds., 1995) [hereinafter NAFTA AND BEYOND].

27. *Id.* at 177.

28. GLICK, *supra* note 21, at 34.

29. *Id.*

works.[30] Moreover, the standards related measures, which may be imposed by each country, can only be employed where they are necessary to prevent technical damage and interference with public networks and services.[31]

As a core principle, NAFTA emphasizes that NAFTA service suppliers can neither be required to establish a local commercial presence nor be compelled to meet any residency requirement.[32] Therefore, "NAFTA makes clear that its protection of cross-border trade in services embraces the full spectrum of service related activities."[33] Accordingly, all licensing or other authorization procedures for services, covered under NAFTA Chapter 13, are to be transparent and non-discriminatory and are to be applied expeditiously.[34]

Under NAFTA Annex VI, a companion to Chapter 13, the FCC "will not consider the nationality of the affected stations for the purpose of favoring a U.S. station that is competing with a Mexican station for affiliation with a U.S. programmer."[35] Moreover, this provision adds that in granting a license to a Mexican station, the FCC will apply the criteria for granting such permits under Section 309 in the same manner as they would be applied to a domestic broadcast station.[36] Further, Annex VI addresses the public interest, convenience, and necessity factors required by Section 325 in granting a Section 309 permit. It provides that in assessing these factors "the primary criterion will be avoiding the creation or maintenance of electrical interference to U.S. broadcast stations."[37] Specifically, conditions on access and use may be imposed only if they are necessary to protect public service responsibilities of network operators or the technical integrity of these public networks.[38] Finally, Annex VI provides that "[i]n evaluating this and any other criterion permitted under section 309, the United States will ensure that the Section 325 process is not conducted in any manner that would

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30. *Id.*
31. *Id.* at 35.
32. NAFTA AND BEYOND, *supra* note 26, at 174.
33. *Id.*
34. GLICK, *supra* note 21, at 35.
35. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., annex VI, 32 I.L.M. 289 (1993).
36. *Id.* annex VI.
37. *Id.*
38. GLICK, *supra* note 21, at 34.

constitute an unnecessary restriction on trade."[39] This language indicates that NAFTA's primary objective is to eliminate any restrictions of trade in the telecommunications market. However, as will be discussed further in Part VI of this Case Note, not all of the U.S. courts currently share this view.

## IV. FACTS

XETV is an affiliate of Fox Television Stations, Inc. (Fox) that broadcasts to the San Diego television market. XETV is an unusual affiliate because it is located outside the U.S. border. XETV began broadcasting as an affiliate of ABC in 1956.[40]

In 1956 the FCC granted ABC a Section 325 permit to "transmit its network programming to XETV, Channel 6, Tijuana, Mexico, for broadcast to San Diego, California."[41] The FCC based this Section 325 grant on the public interest as it existed at that time, stressing that unless the permit were granted, ABC would have no primary affiliate in San Diego and thus its viewers would be deprived of a significant increase in programming choice.[42] However, in 1972 XETV lost its permit to broadcast as an ABC affiliate because the FCC determined that the public interest no longer supported the ABC permit.[43]

XETV is currently broadcasting as a Fox affiliate.[44] As XETV did not have an FCC permit, Fox physically transported network programming destined for the San Diego market to XETV.[45] This type of arrangement, known as "bicycling," does not require an FCC permit.[46] Due to the delays inherent in bicycling, XETV was unable to transmit any live news or sports

39. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., annex VI, 32 I.L.M. 289 (1993).

40. *In re American Broad. Cos.*, 35 F.C.C.2d at 1.

41. *Id.* at 3.

42. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1189.

43. *In re American Broad. Cos.*, 35 F.C.C.2d at 12. The FCC stated that XETV simply served as "little more than a passive conduit of national network programming. The denial of this permit renewal application was based on the following factors: (1) a competing television station, based in San Diego, KCST, was capable of serving as an ABC affiliate for San Diego, (2) KCST was a UHF station, and denying the XETV permit would further the FCC's policy of encouraging the development of UHF television, and (3) "KCST's programming would meet the needs and interests of the community more effectively" than XETV's. *Id.*

44. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1189.

45. *Id.*

46. *Id.*

broadcasts.[47]

This situation proved to be problematic in early 1994 when Fox obtained the right to broadcast the play-by-play descriptions of the National Football League (NFL) National Conference Football games.[48] On February 17, 1994, Fox filed a Section 325 application, seeking the FCC's approval to broadcast these games across the border from XETV.[49] Soon thereafter, Channel 51 of San Diego, in opposition to Fox's application, filed a petition to deny this application.[50] Channel 51's main contention was that XETV's informational programming which was found to be deficient in the ABC 1972 decision was still deficient in 1994 because XETV did not meet the issue-responsive requirement.[51] To support its contention, Channel 51 conducted a two-week study of XETV's programming in April 1994, and found that "the station had no news programs and no regularly scheduled issues-oriented programs."[52] Further, Channel 51 cited recent San Diego floods, fires, and earthquakes that XETV failed to report in their broadcasting schedule as examples of the lack of issues-oriented programs provided by XETV.[53]

Fox anticipated a lengthy FCC decision process on its permit application, so it sought Special Temporary Authority to transmit the NFL games to XETV through the end of the 1994 season or until their application permits were granted, whichever came first.[54] This Special Temporary Authority request was granted on August 11, 1994.[55]

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1190. Channel 51's petition to deny was filed under 47 U.S.C. § 325(c) and (d). Section (c) provides, in relevant part, that "[n]o person shall be permitted to locate, use, or maintain a radio broadcast studio ... transmitted or delivered to a radio station in a foreign country ... without first obtaining a permit from the Commission upon proper application therefor." 47 U.S.C. § 325(c) (1994). Section (d) provides, also in relevant part, "the granting or refusal ... shall be subject to the requirements of section 309." *Id.*§ 325(d).

51. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1190.

52. *Id.* (citing *In re* Fox Television Stations, Inc., 10 F.C.C.R. 4055, 4060 (1994)).

53. *Id.*

54. *Id.*

55. *Id.* *But see In re* Fox Television Stations, Inc., 10 F.C.C.R. 4055 (1994).

## V. THE 1994 FEDERAL COMMUNICATIONS COMMISSION OPINION

On October 28, 1994, the FCC granted Fox a permit for a period of five years.[56] In considering NAFTA's effect on Section 325 cases, the FCC consulted with the Office of the United States Trade Representative (USTR), which is responsible for international trade policy and was one of the agencies which negotiated NAFTA.[57] The USTR responded that NAFTA affects the FCC's administration of Section 325 proceedings, and that the language contained in Annex VI was drafted to address the Mexican government's concern about the possible discriminatory application of Section 325 requirements.[58] The USTR concluded that the FCC's primary public interest consideration in post-NAFTA cases should be "the avoidance of electrical interference to U.S. broadcast stations."[59] Channel 51 argued that the FCC should still require American broadcasters to determine which issues and problems are of concern to the local community and to air informational programming that the broadcaster believes to be responsive to those issues.[60] XETV conceded that it does not present any news programming but argued that this was due in part to the remote location of the station's Tijuana studios.[61] The FCC concluded that the Mexican government does not have such a requirement for Mexican stations, and imposing this mandate on XETV, or any other Mexican station, would be tantamount to an "unnecessary restriction on trade."[62] Thus, the FCC opined that the primary criterion that NAFTA requires for assessing the public interest, convenience, and necessity in Section 325 proceedings should be "avoiding the creation or maintenance of electrical interference to U.S. broadcast stations."[63] Moreover, the FCC concluded that a Mexican station's programming is relevant to Section 309 public interest analysis if the programming poses a substantial risk of "public harm."[64] Consequently, XETV was

56. *In re* Fox Television Stations, Inc., 10 F.C.C.R. 4055 (1994).
57. *Id.* at 4058.
58. *Id.*
59. *Id.*
60. *Id.* at 4060.
61. *Id.*
62. *Id.*
63. *Id.* at 4068.
64. *Id.* at 4066. The FCC stated that "[p]rogramming raising public interest concerns under our post-NAFTA standard might include, for example, programming that is

granted its permit to broadcast live to the San Diego market despite not meeting the issue-responsive programming requirement.[65] Channel 51 appealed the FCC decision to the U.S. Court of Appeals for the District of Columbia Circuit.

## VI. THE U.S. COURT OF APPEALS OPINION

### A. *Procedural Background*

In January of 1995, the FCC granted, pursuant to 47 U.S.C. § 325(c), Fox's application for a permit to transmit live program material to XETV, a Mexican television station.[66] This permit allowed Fox to broadcast live television programming to XETV to be rebroadcast back into the United States.[67] However, prior to this grant, the FCC had to consider Channel 51 of San Diego's petition to deny Fox's application. Under 47 U.S.C. § 309(d) any party in interest may file a petition with the FCC to deny any application for a broadcast license.[68] A person seeking to intervene in FCC proceedings as a party in interest must show that he will somehow be adversely affected, either actually or potentially.[69] Moreover, to qualify as a party in interest, an individual can point to an economic injury as a means to achieve the requisite standing.[70] Channel 51 was considered a party in interest under Section 309 because it attempted to affiliate with Fox several years prior in its efforts to service the same area as XETV, but was unsuccessful.[71] Therefor, Channel 51 of San Diego, as a party in interest, filed a petition with the FCC to deny Fox's

obscene, indecent, illegal, encourages use of harmful products or activities, or is otherwise inimical to public health and safety." *Id.* The FCC further noted that "[t]he types of programming allegations raised in the present proceeding, while potentially important with respect to a domestic station, would not generally create a substantial risk of public harm in the case of a foreign station." *Id.*

65. Issue-responsive programming is a requirement placed on television stations which directs them to dedicate an appropriate amount of time to broadcast local service which meets the needs and interests of the community. *In re American Broad. Cos.*, 35 F.C.C.2d at 11.

66. Application of Fox Television Stations, Inc., 11 F.C.C.R. 14870 (1996).

67. *Id.*

68. California Broad. Forum v. FCC, 752 F.2d 670, 674 (1985) (citing 47 U.S.C. § 309(d) (1982)).

69. *See In re* Doubleday Broad. Co., Inc., 56 F.C.C.2d 333, 333 (1975).

70. *In re* Evening Star Broad. Co., 67 F.C.C.2d 318 (1995).

71. *In re* Fox Television Stations, Inc., 10 F.C.C.R. 4055 (1994).

XETV application.[72] However, the FCC denied Channel 51's petition to deny and instead granted Fox's application under 47 U.S.C. § 325(c).[73]

Like any decision handed down by the FCC, the decision to grant Fox's Section 325 application was not final. FCC orders and decisions are subject to review under U.S.C. § 402. Under U.S.C. § 402(b) "[a]ppeals may be taken from decisions and orders of the FCC to the United States Court of Appeals for the District of Columbia."[74] Accordingly, Channel 51 had a right to exercise this option and have its petition to deny Fox's application reviewed by the U.S. Court of Appeals for the District of Columbia. In the present case, Channel 51 exercised its option to appeal the FCC's Order to the U.S. Court of Appeals for the District of Columbia.[75]

### B. *The Opinion*

The Court of Appeals began its analysis by focusing on NAFTA Annex VI.[76] The court stated that Annex VI directs the FCC not to consider a foreign station's nationality for purposes of favoring a domestic competitor.[77] The FCC established in its 1972 opinion certain criteria that must be met by a television station before a Section 325 permit could be granted.[78] Among these criteria, the FCC required television stations to dedicate a portion of their broadcast schedules to issue-responsive programming.[79] This type of programming was designed to meet the local interests and needs of the community.[80] After NAFTA's implementation, the FCC departed from this issue-responsive requirement, stating that imposing such a requirement would be an unnecessary restriction on trade.[81] This type of restriction, under the FCC's analysis, would be a clear contravention of

72. *In re* Fox Television Stations, Inc., 11 F.C.C.R. 14870 (1996).
73. *In re* Fox Television Stations, Inc., 10 F.C.C.R. 4055 (1994).
74. 47 U.S.C. § 402(b) (1994).
75. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1187.
76. *Id.* at 1191.
77. *Id.*
78. *In re American Broad. Cos.*, 35 F.C.C.2d at 11.
79. *Id.*
80. *Id.*
81. *In re* Fox Television Stations, Inc., 10 F.C.C.R. 4055 (1994).

NAFTA's mandate.[82] Specifically, the FCC stated that XETV did not have to meet the issue-responsive requirement in granting its Section 325 permit because it would be an unnecessary restriction on trade.[83] However, in the court's opinion, the FCC did not explain why subjecting XETV to the same issue-responsive programming requirement to which domestic stations are subject constitutes a type of discrimination against a foreign station on the basis of nationality.[84] Further, because the FCC departed from its issue-responsive requirement, the court held that the FCC must provide a reasoned explanation for such a departure.[85] According to the court, "[c]iting NAFTA will not fulfill this need without a reasoned explanation of how that agreement eliminates the relevance of this [issue-responsive] requirement, which presumably exists to assure that events of local interest and importance receive broadcast coverage."[86] Thus, the court held that the FCC's failure to show how the issue-responsive requirement has become irrelevant in a Section 325 proceeding precludes the court from considering such a requirement to be an "unnecessary restriction on trade."[87] Accordingly, the case was remanded to the FCC for treatment consistent with the court's opinion.[88]

## VII. THE 1996 FEDERAL COMMUNICATIONS COMMISSION OPINION

On remand, the FCC issued an order applicable to Fox and Channel 51 that requested each side to submit comments, within fifteen days of the release of the order, directed to the questions presented by the Circuit Court's opinion.[89] In response to the questions presented by the court, Channel 51 argued that "whatever issue-responsive programming requirements apply to

82. *Id.*
83. *Id.*
84. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1191.
85. *Id.*
86. *Id.* at 1191-92.
87. *Id.* at 1192.
88. *Id.* Section 402(h) provides, in pertinent part, that

> [i]n the event that the court shall render a decision and enter an order reversing the order of the Commission ... to carry out the judgment of the court and it shall be the duty of the Commission ... to review such judgment, to ... give effect thereto, and ... to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

47 U.S.C. § 402(h) (1994).

89. *In re Fox Television Stations, Inc.*, 11 F.C.C.R. 6702 (1996).

domestic stations must also apply to foreign stations, insofar as NAFTA applies to section 325(c)."[90] Channel 51 reasoned that if such requirement applies to both foreign and domestic stations, the requirement can only be changed for foreign stations if it is also changed for domestic stations.[91] Channel 51 argued that this type of fundamental change in the FCC's policy would be impermissible without a full hearing or rule-making.[92] To support its contention, Channel 51 stated that XETV "has in fact refused to air such [issue-responsive] programming preferring less costly entertainment programming. [Thus there is] a prima facie showing that XETV is virtually devoid of any issue-responsive programming."[93] Fox, on the other hand, argued that the imposition of an issue-responsive programming requirement in Section 325 cases would be an unnecessary restraint on trade, in violation of NAFTA.[94] Further, Fox argued that the issue-responsive requirement would inevitably favor U.S. stations over Mexican stations in the Section 325 process, and that this is a result that is specifically prohibited by NAFTA Annex VI.[95]

The FCC concluded that XETV and any other foreign-based television station wishing to transmit live broadcasting to the United States will be required to show in applications that they have met the issue-responsive requirement during the term of the initial authorization.[96] The FCC reasoned that, by conditioning its grant of the Section 325 authorization upon XETV's meeting the issue-responsive programming requirement applicable to domestic stations, the FCC will not discriminate or impose an unnecessary restriction on trade in violation of NAFTA.

## VIII. ANALYSIS

Several years prior to the current proceedings, Channel 51 petitioned the FCC to expand the restrictions of Section 325(c) to require prior FCC approval of every foreign station's affiliation with a U.S. network unless the network first offered the affiliation to a domestic station that could provide comparable serv-

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90. *In re Fox Television Stations, Inc.*, 11 F.C.C.R. at 14874.
91. *Id.*
92. *Id.*
93. *Id.* at 14874.
94. *Id.* at 14873.
95. *Id.*
96. *Id.* at 14878.

ice.[97] Although this petition was denied, it demonstrates the protectionist practices that NAFTA now prohibits. Further, it was this type of protectionist attitude that concerned the Mexican government when it negotiated Annex VI.[98] Mexico's goal was to remove artificial barriers to the cross-border delivery of programming and eliminate the potential for the FCC to favor U.S. broadcasters as network affiliates over their Mexican counterparts.[99] Therefore, NAFTA Annex VI, as it applied to Section 325 proceedings, "was negotiated at the request of the Government of Mexico [to address that government's concerns about] the possible discriminatory application of Section 325(c) licensing requirements."[100] However, through its earlier decisions—namely, *American Broadcasting Cos.*—the FCC added an issue-responsive requirement to its public interest analysis which is in conflict with NAFTA. Consequently, the FCC concluded that its public interest analysis, after the implementation of NAFTA, should focus on two factors: (1) whether a foreign station caused electrical interference to U.S. stations in violation of applicable treaties and (2) whether the foreign station's programming created a substantial risk of harm to U.S. viewers.[101] However, the Circuit Court for the District of Columbia required a reasoned explanation from the FCC if it wished to depart from this standard and stated that "citing NAFTA will not fulfill this need."[102]

### A. *Federal Communications Commission's Reasoned Explanation for its Departure from the Issue-Responsiveness Requirement*

The Circuit Court for the District of Columbia's decision relied on the FCC's interpretation of Section 325 in a prior FCC action denying a similar application submitted by ABC television Network.[103] The FCC explained that the 1972 decision had been "based largely on the availability of an American broadcaster

97. *In re McKinnon Broad. Co.*, 7 F.C.C.R. 7554 (1992).

98. Brief for Intervenors Televimex, S.A. de C.V. and RadioTelevisora de México Norte, S.A. de C.V. at 8, *Channel 51 of San Diego, Inc.*, 79 F.3d at 1187 (No. 95-1128).

99. *Id.*

100. *Id.* (quoting comments of the General Counsel to the Office of the United States Trade Representative made to the FCC).

101. Brief for Appellee at 13, *Channel 51 of San Diego, Inc.*, 79 F.3d at 1187 (No. 95-1128).

102. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1191.

103. *In re* American Broad. Cos., 35 F.C.C.2d 1 (1972).

willing to take the place of a foreign station for purposes of network affiliation."[104] However, following the implementation of NAFTA, the FCC concluded that it could "not use Section 325 as a means of favoring a domestic station that is competing with a foreign station for affiliation with a U.S. programmer."[105] In its opinion, the FCC explicitly stated that:

> the commission may not in the present case properly consider Channel 51'[s] ... willingness to affiliate with Fox as a factor bearing on the public interest. Without that network affiliation factor, to which the 1972 Commission accorded substantial weight ... the alleged deficiencies in the Mexican stations' programming, *even if true*, would not be sufficient to outweigh the public interest of making additional programming choices available to American audiences.[106]

The U.S. Court of Appeals for the District of Columbia Circuit did not hold that the FCC's 1994 decision to grant XETV a Section 325 permit was erroneous. The court merely held that if the FCC wished to depart from its issue-responsive requirement established in 1972 through its *American Broadcasting* decision, it must give a reasoned explanation for its departure.[107] The court added that merely citing NAFTA will not be sufficient to justify such a departure.[108] However, in its 1994 order granting XETV a broadcast permit, the FCC did more than merely cite NAFTA as the reason for departing from the issue-responsive requirement. Indeed, a close look at the FCC's 1994 decision reveals a "reasoned explanation" describing why the FCC decided to modify the issue-responsive requirement in granting broadcast applications to foreign television stations.

The FCC began by looking to congressional intent in enacting Section 325.[109] In enacting Section 325 Congress' original concern was to "protect American audiences from substantial domestic harm that could be caused by certain activities of foreign stations."[110] In light of this intent, the FCC reasonably

104. *In re Fox Television Stations, Inc.*, 10 F.C.C.R. at 4067.
105. *Id.*
106. *Id.* (emphasis added).
107. *Channel 51 of San Diego, Inc.*, 79 F.3d at 1191.
108. *Id.*
109. Brief for Appellee at 25, *Channel 51 of San Diego, Inc.*, 79 F.3d at 1187 (No. 95-1128).
110. *Id.* (quoting *In re Fox Television Stations, Inc.*, 10 F.C.C.R. at 4065).

concluded that consideration of programming that is "obscene, indecent, illegal, encourages use of harmful products or activities, or is otherwise inimical to public health and safety ... continues to be a permissible restraint in post-NAFTA Section 325 cases because otherwise there could be a substantial risk of serious harm to American audiences."[111] The FCC then consulted with NAFTA's principal negotiators, the USTR.[112] The USTR clearly stated that NAFTA affects the FCC's administration of Section 325 proceedings, and that the language contained in Annex VI was negotiated at the request of the Mexican government.[113] Apparently, the Mexican government was concerned about precisely the same problem that occurred in *Channel 51*—namely, the discriminatory application of the requirements of Section 325.[114] Thus, NAFTA's principal negotiator, the USTR, concluded that the FCC's primary public interest consideration in post-NAFTA cases should be limited to "the avoidance of electrical interference to U.S. broadcast stations."[115] The FCC did not conclude its analysis here, however, but continued its reasoned explanation for its departure. Additionally, the FCC cited authority which stated that the FCC "cannot altogether exclude from consideration such serious defects of [a] foreign station's programming as would affect the public interest."[116] The FCC then concluded with a reasoned explanation of what NAFTA stood for in the context of U.S. broadcasting laws. The FCC stated:

> NAFTA was not intended as a means by which the United States would export all of its broadcast laws to foreign sovereign nations. Rather, it was intended to open our borders to free competition and trade, in part by eliminating any Section 325 practices that this commission deems no longer necessary to serve the public interest in the context of foreign programming applications. To further this goal, NAFTA established one primary and objective criterion (interference) to be applied to all section 325 cases, without closing off the potential for the Commission also to consider similarly serious pub-

111. *Id.* at 26 (quoting *In re Fox Television Stations, Inc.*, 10 F.C.C.R. at 4066).
112. *In re Fox Television Stations, Inc.*, 10 F.C.C.R. at 4055.
113. *Id.*
114. *Id.*
115. *Id.* at 4058.
116. *Id.* at 4059 (citing Wrather-Alvarez Broad., Inc. v. FCC, 248 F.2d 646 (D.C. Cir. 1957)).

lic interest issues that might arise on a case by case basis.[117]

Thus, the order provided by the FCC was supported by several authorities. As discussed above, the FCC relied on the USTR's analysis of NAFTA's impact on post-NAFTA cases. This agency's analysis should be respected and given a great amount of weight because it was one of the principal agencies that negotiated NAFTA. Finally, the FCC relied on case law[118] and NAFTA Annex VI in guiding its "reasoned departure" from the issue-responsive programming requirement.

### B. *The Issue-Responsive Requirement as a Restriction on Trade*

By forcing foreign-based television stations to conform with U.S.-defined issue-responsive programming criteria, the FCC would, in effect, create an unnecessary restriction on trade. Specifically, compelling foreign television stations to follow the needs and interests of a remote community through an issue-responsive requirement could lead to a higher economic burden placed on these foreign stations. For example, a television station located in Mexico that broadcasts into San Diego would have to spend more time, money, and other resources to cover a flood or earthquake in San Diego than a San Diego television station would have to spend. This result would drive many foreign television stations out of the American market because they would not be competing on a level playing field with their American counterparts. Taken to its logical conclusion, this practice would lead to an American telecommunications industry that is dominated by American stations rather than having an industry that comports with NAFTA's goal and is comprised of all three participating nations. This outcome is at odds with NAFTA's objective. In light of NAFTA, it appears that the issue-responsive requirement needs to be more flexible as it applies to foreign stations. Specifically, the FCC should, upon a showing of greater economic cost and burden incurred by a foreign station,

117. *Id.* at 4065.

118. *See, e.g., Wrather-Alvarez Broad. Inc.*, 248 F.2d at 651; Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); *In re* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1075 (1984).

be allowed to review the applicability of the issue-responsive requirement to a license application. Then, if the foreign station meets this initial burden and there are sufficient stations that currently engage in issue-responsive programming in that market, the FCC should be given authority to waive this requirement for such foreign station. By allowing the FCC to waive the issue-responsive requirement in appropriate situations, the FCC's programming goals and NAFTA's mandates will be met.

As we turn our focus to the twenty-first century, it is imperative that NAFTA members focus upon long-term goals and embrace the exchange of information as a bona fide form of trade. Viewed in this respect, and with the implementation of NAFTA, it is apparent that the FCC can no longer impose its regional community standards on a foreign television station. Specifically, the FCC, under the mandates of NAFTA, needs to foster the free flow of information among participating countries rather than obstruct this flow by setting up unnecessary regulations such as the issue-responsive requirement.

## IX. CONCLUSION

After NAFTA's implementation, the FCC should look to a more economically feasible method to meet the needs and interests of the community. With NAFTA implemented, the word "community" by definition became expansive. In determining whether a regulation such as an issue-responsive requirement is necessary, we need to begin by determining what constitutes "the needs and interests of the community." To answer such questions we need to define "community." It appears that with the implementation of NAFTA it will be counterproductive to define "community" in the conventional geographically local sense. Moreover, if we define "community" as NAFTA implicitly requires, then there will no longer be a need to impose an issue-responsive requirement on foreign-based television stations. Specifically, if our new community is the United States, Canada, and Mexico, then an issue-responsive requirement, in a regional sense, becomes meaningless. Moreover, such requirement will, in the long run, hinder the economic growth of the most important market of the twenty-first century—the market for the exchange of information. Therefore, it is clear that if we continue to erect walls such as an issue-responsive requirement, then the trade situation will not improve but deteriorate. If such walls

are allowed to remain, then the original intent of NAFTA (not to create any unnecessary restrictions on trade) will never come to fruition.

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