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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Prime Time	)	MM Docket No. 94-123
Access Rule, Section 73.658(k) of the	)	
Commission's Rules	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1994 ; Released: October 25, 1994

Comment Date: January 6, 1995
Reply Comment Date: February 6, 1995

By the Commission: Commissioner Barrett issuing a separate statement.

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I. Introduction

1. We initiate this rulemaking proceeding to assess, in light of current economic and technological conditions, the legal and policy justifications for the Prime Time Access Rule ("PTAR"), 47 C.F.R. §73.658(k), and to consider the continued need for the rule in its current form. PTAR was promulgated in 1970 in response to the concern that the three major television networks -- ABC, CBS and NBC -- dominated the program production market, controlled much of the video fare presented to the public, and inhibited the development of competing program sources. The Commission believed that PTAR would increase the level of competition in the independent production of programs, reduce the networks' control over their affiliates' programming decisions, and increase the diversity of programs available to the public. The rule generally prohibits network-affiliated television stations in the top 50 television markets ("Top 50 Market Affiliates") from broadcasting more than three hours of network or former network ("off-network") programs during the four prime time viewing hours (*i.e.*, 7 to 11 p.m. Eastern and Pacific times; 6 to 10 p.m. Central and Mountain times).[1]

2. As the video marketplace has developed and the major television networks' power has declined, PTAR has come under increasing criticism. A number of formal requests for Commission action have been filed challenging the rule in whole or in part. On April 12, 1994, we issued a *Public Notice* soliciting public comment on the following filings: (1) a Petition for Declaratory Ruling (MMB File No. 900418A) filed by First Media Corporation ("First Media")[2] seeking a ruling that the Commission will no longer enforce PTAR because the entire rule can no longer be reconciled with the First Amendment; (2) an Application for

[1] Section 73.658(k) of the Commission's Rules, 47 C.F.R. §73.658(k), provides, in pertinent part, that commercial television stations owned by or affiliated with a national television network in the 50 largest television markets shall devote, during the four hours of prime time, no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films. PTAR contains exemptions for certain types of programming (*e.g.*, runovers of live sporting events, special news, documentary and children's programming, and certain sports and network programming of a special nature) which are not counted toward the three hours of network programming. 47 C.F.R. § 73.658(k)(1)-(6). *See* discussion at ¶¶ 56-57, *infra*.

[2] First Media, L.P., which filed comments in response to the April 12, 1994 *Public Notice*, is the successor-in-interest to First Media Corporation, which filed the Petition for Declaratory Ruling. As used herein, "First Media" refers to both parties.

Review (MMB File No. 870622A) filed by Channel 41, Inc. ("Channel 41")[3] challenging the "off-network" restrictions of PTAR and claiming that, under an analysis of the marketplace, the off-network restriction is no longer warranted; and (3) a Petition for Rule Making (MMB File No. 920117A) filed by Hubbard Broadcasting, Inc. ("Hubbard") raising both marketplace and constitutional challenges to the off-network restrictions of PTAR. Those parties filing comments in response to the *Public Notice* are set forth in Appendix A.

3. Inherent in our regulatory mandate is the continuing responsibility to review our rules and policies to determine whether, in light of prevailing market conditions, such rules and policies continue to serve the public interest. Based on the record already before us and the substantial changes that have occurred in the intervening 20 years since the rule was adopted and will likely occur in the near term in the video marketplace, we are convinced that an overall review of the need for the rule is now appropriate. Parties filing comments thus far, however, have failed to present a rigorous economic framework for analysis, supported by adequate data, that will enable us to assess the competitive effects of the rule and its efficacy in achieving both competition and non-competition-based public interest goals. Accordingly, this *Notice* proposes a framework to evaluate the continued efficacy of the rule. We particularly seek economic and other data and analysis that would assist our analysis within the framework we outline below. Parties who favor retention of all or part of the rule should also comment on whether the more incidental aspects of the rule, such as the specific exemptions to the rule, should be modified and in what manner.

II. Structure of the Industry

4. Critical to assessing whether PTAR has achieved its goals and whether the rule is necessary in today's television marketplace is an understanding of how the market for the purchase and sale of programs operates. Television stations obtain programming for delivery to their viewers in a variety of ways. First, stations that affiliate with a television network obtain an entire package or schedule of programming directly from their network (the network "feed"). The network, in this regard, acts as a broker between the program supplier and its affiliated stations. Each of the three major networks (ABC, CBS, and NBC) distributes its programs to over two hundred television stations nationwide that are connected with the network by cable or satellite. For clearing their airtime for network programming, the affiliates are compensated according to the time of the day they clear time for network programming and the size of their potential audience.

5. The networking of programs intended for the early evening hours that are the

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[3] Channel 41's Application for Review addresses the staff's May 22, 1987 decision denying Channel 41's Petition for Rulemaking to delete the off-network restriction of PTAR. In order to address the matters raised in Channel 41's original petition, as well as the matters raised by Hubbard and First Media, we will consolidate the Application for Review and the rulemaking petitions into this proceeding.

"prime time" for adult television viewing gives advertisers access to a substantial number of American households simultaneously. This, in turn, enables the networks to charge high prices for advertising time that are necessary to defray the cost of obtaining the programming most desired by television viewers. Networks encourage their affiliates to carry the entire network "feed" so as to maximize the national audience they can sell to advertisers.

6. Network affiliates also program part of the broadcast day independently of their network. They air locally originated programming, primarily local news and sports programming. They also obtain programming from suppliers called "syndicators," entities that sell programming to television stations on an individual basis. *Wheel of Fortune* is an example of a program supplied by a syndicator, in this case King World. Having no fixed set of affiliated stations, syndicators traditionally distributed their programming by sending film or tapes of their programs to each television station, a relatively expensive form of program distribution. The advent of satellite technology, however, has made it possible for them to distribute their programming simultaneously to their television station customers, just as the networks provide programming to their affiliates.

7. Stations that do not affiliate with a network are called "independent" stations. There are over 450 independent stations nationwide.[4] The owner of an independent station is responsible for obtaining programming for the entire broadcast day on a program-by-program basis from a number of sources (including, in some cases, a network). While independent stations air some locally originated programming, most of their programming is obtained from program producers or syndicators. Programs such as movies that have been previously shown in theaters, television series that were previously aired on network affiliates (*i.e.*, off-network programs like *The Cosby Show*), and series that have been produced originally for the independent stations (*i.e.*, first-run syndication like *Star Trek: The Next Generation*) make up the bulk of an independent station's program schedule. The independent station owner usually pays the syndicator directly for the programming and then earns revenue by selling the advertising time for such programming. Some syndicated programming, however, is sold on a "barter" basis, by which the television station pays a reduced amount of money (sometimes none) for the programming, but instead allows the syndicator to sell some of the program's advertising time directly to advertisers. Barter allows independent stations to acquire programming with smaller cash outlays. It also allows sale of national advertising on independent stations. Lastly, it allows a cash-strapped independent producer/syndicator to obtain funding from national advertisers directly.

8. Programs aired on broadcast television are produced by program production companies. The major broadcast television networks historically have produced a small

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[4] Over 150 of these stations are now affiliated with the Fox Broadcasting Company, which is considered an "emerging network" under Commission rules. *See* 47 C.F.R. §73.662(g).

number of programs through their in-house production companies.[5] Unlike those networks, however, Fox Broadcasting Company ("Fox") produces a large amount of programming; it is affiliated with a major movie studio, 20th Century Fox. Most television programs that are produced for the networks or independent stations are produced by either the major movie studios (*e.g.*, Fox, Time Warner, Sony, Disney), other independent program producers who often affiliate with a movie studio in order to produce the program, or syndicators (*e.g.*, King World). Programs intended for network distribution are supplied directly to the networks for airing on their affiliated stations. Programs intended for viewing on a non-network or syndicated basis are sold through the syndication "arm" of a production company, or the production company will sell the "syndication" rights to an independent syndicator who is then responsible for negotiating with the individual stations.

9. PTAR affects the programming activities of the participants in the television marketplace in several ways. PTAR explicitly limits the programming choices of network affiliates in the top 50 markets for a portion of their prime time schedule to non-network material. Consequently, it affects the programming they provide their viewers and their advertising revenues associated with this programming. These PTAR limits thus also create a demand for syndicated first-run programming by affiliates of the three major broadcast networks in the top 50 markets. By precluding network affiliates from showing network programs in the access period, PTAR also effectively creates a supply of popular off-network programming (typically "reruns") for purchase by independent stations; these programs typically generate high revenues for those stations. Finally, affiliates of evolving networks such as Fox will not be subject to PTAR until their networks pass certain thresholds. *See* 47 C.F.R. § 73.662 (defining television network subject to PTAR as an entity that provides more than 15 hours of prime time programming per week on a regular basis to at least 75 percent of television households nationwide). Thus, new networks that fall short of this threshold are free to sell programming to all stations, both network affiliates and independents. New network affiliates likewise are free to air all programming regardless of its source -- the major and evolving networks or syndication.

10. The "structure" of the television broadcast industry, in terms of the types of entities that comprise it (program producers, networks, affiliates, independent stations, etc.) and the customer-supplier relationships among them has not changed appreciably in the last quarter century. However, the number of participants in many of these categories and the competitive environment in which broadcast television operates -- the broader video marketplace -- have changed dramatically. It is this change and its impact on the effectiveness and continued advisability of PTAR that are at the heart of our inquiry. We turn

[5] Under a consent decree, ABC, CBS and NBC were until 1990 prohibited from producing, through a wholly owned program production company, more than a very limited number of prime time programs. That prohibition lapsed in 1991, and since 1993, when corresponding limitations in the FCC rules were repealed, the networks have been free to produce an unlimited amount of programs themselves. *See Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, 3339-3342, *recon. granted on other grounds*, 8 FCC Rcd 8270 (1993).

first, therefore, to an examination of the origins of the rule and the nature of the industry at the time the rule was adopted.

III. History of the Rule

11. PTAR was originally adopted in 1970, in conjunction with the Commission's financial interest and syndication ("fin/syn") rules, following extensive preliminary studies and Commission hearings.[6] The Commission determined that "[t]he public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming."[7] To promote these objectives, the Commission created a one-hour prime time "access" period during which affiliates in the largest markets were prohibited from exhibiting network programs or off-network programs.[8] The principal purpose of the rule, the Commission said, was to "make available an hour of top-rated evening time for competition among present and potential non-network program sources . . . so that the public interest in diverse broadcast service may be served."[9] The Commission reasoned that a prime time access period in the top 50 markets -- which then reached 75 percent of the television households nationally -- would stimulate a healthy independent syndication industry capable of producing quality programs by providing independent producers with a realistic opportunity to market programs to an adequate base of

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[6] *Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970) (*"PTAR I"*). As originally adopted, the fin/syn rules imposed broad constraints upon the financing, ownership, and broadcast syndication of television programs by television networks. Like PTAR, these rules were intended to promote diversity of program sources, and the fin/syn limitations imposed on the networks were a response to their perceived insurmountable advantage over independent producers in providing programs to their affiliates. *Id.*, 23 FCC 2d at 386. In 1991, the Commission modified the fin/syn rules, *see Report & Order* in MM Docket No. 90-162, 6 FCC Rcd 3094, *as modified, Memorandum Opinion and Order*, 7 FCC Rcd 345 (1991), but that decision was overturned and remanded to the FCC on appeal to the United States Court of Appeals for the Seventh Circuit. *See Shurz Communications v. FCC,* 982 F.2d 1043 (7th Cir. 1992). In response to the Court's remand, and after further proceedings, the Commission relaxed the fin/syn rules further and scheduled their expiration for November 1995. *See Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, *recon granted in part, Memorandum Opinion and Order*, 8 FCC Rcd 8270 (1993) (*"Fin/Syn MO&O"*). The United States Court of Appeals affirmed these actions in *Capital Cities/ABC, Inc. v. FCC,* 29 F.3d 309 (7th Cir. 1994).

[7] *PTAR I,* 23 FCC 2d at 394.

[8] As a result of general industry practice, broadcasters generally schedule the access period for the first hour of prime time, but a number of affiliates in markets affected by the rule broadcast exempt network news programming for half an hour of the access period, effectively reducing the access period to a half hour.

[9] *PTAR I,* 23 FCC 2d at 397.

television stations during a lucrative time slot.[10]

12. In adopting PTAR, the Commission believed that this "modest action [would] provide healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and indeed affiliated) stations."[11] The Commission also expressed its hope that diversity of program ideas would be encouraged by limiting the networks' ability to influence programming during the access period of prime time. However, the Commission cautioned that it was not its intention to "carve out a competition-free haven for syndicators" or to "smooth the path for existing syndicators."[12] Rather, the objective of the rule was to provide "opportunity -- now lacking in television -- for competitive development of alternate sources of television programs so that television licensees [would be able to] exercise more than a nominal choice" in selecting programming to present to their local audiences.[13]

13. The Commission relied on a number of facts to support its conclusion that the

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[10] *Id.* at 385-86. The top 50 markets to which this rule applies are the 50 largest markets in terms of average prime time audience for all stations in the market. Before 1980, the 50 markets were the largest 50 as listed in the Arbitron publication "Television Markets and Rankings Guide," generally applicable for the broadcast year starting the following fall. For broadcast years starting in the fall of 1980 and thereafter, the 50 largest markets to which PTAR applies is determined at 3-year intervals, on the basis of the average of two Arbitron February-March audience surveys occurring roughly 2 1/2 years and roughly 3 1/2 years before the start of the 3-year period. Shortly after the results of the 1978 survey were available, the Commission began issuing a list of the 50 largest markets for the 3-year period to which PTAR would apply. 47 C.F.R. §73.658(k), note 1. At present, the last three-year list was issued on May 11, 1993. *See Public Notice* No. 33069. We note that Arbitron no longer conducts these surveys. Accordingly, to the extent that PTAR is retained in some form, we seek comment on how we should proceed in the future to keep the market list current.

[11] *Id.* at 395.

[12] *Id.* at 397.

[13] *Id.* The Commission denied several petitions for reconsideration that challenged *PTAR I* on the grounds that it violated the First Amendment and exceeded the Commission's authority. Shortly thereafter, however, the Commission instituted a new inquiry and rulemaking proceeding, which considered modifying or repealing PTAR. Ultimately, the Commission issued a decision, *Report and Order* in Docket No. 19622, 44 FCC 2d 1081 (1974) ("*PTAR II*"), which retained PTAR in a substantially revised version. *PTAR II* never became effective when disputes over its effective date led to an injunction by the Court of Appeals for the Second Circuit staying implementation of the rule and urging the Commission to undertake additional analysis. In reviewing PTAR in the wake of the Court's injunction, the Commission decided in 1975 to abandon *PTAR II* and reinstate a slightly revised version of *PTAR I*. *See Report and Order* in Docket No. 19622, 50 FCC 2d 829 (1975) ("*PTAR III*"). *PTAR III* was generally upheld on judicial review and the *PTAR III* provisions are essentially the same as the rule in effect today.

networks were dominant in prime-time program production and distribution. For example, with regard to program distribution, the Commission observed that in 1969, only three national networks existed, and in the top 50 markets, 153 out of 224 commercial television stations were network affiliates. Nationally, there were 621 commercial television stations, of which 499 were network affiliates. Moreover, of the top 50 markets, only fourteen had at least one independent VHF television station.[14] Thus, independent programmers seeking to broadcast their products had no effective distribution alternative to the network affiliates. During prime time, control over programming and access to licensed television stations were heavily concentrated in the hands of the three networks -- affiliates only carried, on average, between 3.3 and 4.7 hours per week of non-network prime time programming, out of a total of 28 available hours. High cost, first-run syndicated programs,[15] which the Commission observed "must be most relied upon as competition for network supplied entertainment programming," had virtually disappeared from prime time.[16] Thus, the Commission noted that between 1957 and 1968, the share of all network evening programs produced or directly controlled by networks rose from 67.2 to 96.7 percent. Independent producers, who provided approximately one-third of the evening network schedules in 1957, provided less than 4 percent in 1968.[17]

14. In the years since PTAR was adopted, the emergence of new independent TV stations and the viability of new and developing broadcast networks based on these stations have led to a third rationale supporting PTAR. By restricting the program purchases available to top 50 affiliates during one of the prime time hours, PTAR created an advantage for independent stations and affiliates of new networks who were not subject to the same restrictions by decreasing the price of off-network programming for those stations. As we discuss below, parties representing those independent stations as well as new or emerging networks and affiliates of those new networks argue that they are advantaged by PTAR, and

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[14] At that time, television stations on the Ultra High Frequency (UHF) frequency band -- typically the struggling independent stations -- operated at a handicap to VHF stations due to technical limitations on their coverage area and the relative dearth of all-channel television receivers owned by consumers. This "UHF handicap" was considered an impeding factor in the early development of UHF stations, impairing their potential to contribute to diversity and competition in the marketplace of that time. *See, e.g.,* Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (1980), Volume I at 69-77.

[15] First-run syndicated programs are original programs sold directly to stations on a market-by-market basis.

[16] *PTAR I*, 23 FCC 2d at 385.

[17] *See id.* at 385-91. In addition, the Commission indicated that between 1958 and 1968, television stations in the top 50 markets decreased their prime time airing of first-run syndicated entertainment series from 1065 half hours to 833 half hours, and the number of first-run syndicated titles decreased from 154 to 103. In contrast, off-network entertainment series increased from 136 to 916 half hours, and from 26 to 90 first-run syndicated titles during this period. *Id.* at 385.

some of those parties also contend that without PTAR those new networks would never have developed. Hence, they maintain, PTAR adds to program diversity and the level of competition in program production by encouraging new networks, which, in essence, is an "infant industry" protection argument.[18]

15. In 1980, the Network Inquiry staff, an internal group convened by the Commission to examine network practices and the FCC's rules governing them, was unable to conclude that PTAR had either achieved or failed to achieve its intended objectives. According to the staff, while PTAR increased the number of first-run syndicated suppliers and distributors, it did not increase the extent of competition in the syndicated program supply or distribution markets, which the staff viewed as competitively structured prior to imposition of the rule. Since at the time of that study there were still only three major purchasers of network programming, the staff was unable to conclude that PTAR reduced "network dominance" in the sense of increasing the number of outlets or viewing options available to the public. It did, however, find that the rule by its very promulgation curbed "network dominance" by mandating a reduction in the networks' prime time schedules and requiring affiliates to obtain a portion of their prime time programming from non-network sources. Nevertheless, the staff concluded that PTAR should be repealed because, among other things, the rule did not appear to further any Commission policy to regulate in the public interest.[19] The Commission did not, however, formally adopt the staff's recommendation, and PTAR remains in force today.

IV. Recent Developments and Trends

16. Although in 1980 the Network Inquiry staff found that the structure of the TV industry had not changed in certain important ways since PTAR was adopted in 1970, particularly because there were still only three major TV networks at that time, the industry has changed quite substantially in the ensuing years. Indeed, if we compare 1994 with 1970, it is clear that the television industry has changed very significantly in the 24 years since

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[18] "Infant industry" protection theory allows the protection or insulation of an industry or industry segment from free marketplace competition for a limited period of time in order to allow for the development of viable competitors. *See* discussion *infra* at ¶ 48.

[19] Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (1980), Volume I at 510-513. In this regard, the Network Inquiry staff chiefly questioned the burden placed by PTAR on the promotion of localism and affiliates' programming choices. In response to this staff work, the Commission issued a *Notice of Proposed Rule Making* in Docket 82-345, 47 Fed. Reg. 32959 (1982), and in 1983, the Commission issued a *Tentative Conclusion and Request for Further Comments* in Docket 82-345, 94 FCC 2d 1019 (1983). Seven years later, that long-suspended docket was terminated, *Order* in Docket 82-345, and the Commission's fin/syn proceeding was commenced. *See Report and Order* in MM Docket No. 90-162, 6 FCC Rcd 3094, 3097 n.10 (1991).

PTAR was adopted. The total number of commercial and non-commercial television stations has increased 76 percent, from 862 stations in 1970 to 1,520 stations as of September 30, 1994.[20] The number of commercial independent stations (which rely mostly on syndicated programming) has grown by almost 450 percent, from 82 in 1970, to over 450 today.[21] Moreover, in 1970, the top 50 markets had 67 independent stations, or, on average, 1.3 per market. Today the top 50 markets have 289 independent stations, or, on average, 5.8 per market.[22] Despite the increase in the number of commercial television stations in virtually all respects, the number of network affiliates has remained largely unchanged.[23] By December 31, 1969, in the top 50 markets, there were 224 commercial television stations, 153 of which were network affiliates.[24] In 1994, the top 50 markets contained 480 commercial television stations, of which 167 are affiliates of the three traditional networks.[25] Finally, 65 percent of television households had access to six or more broadcast channels in 1970[26]; in 1993, 70 percent of all television households received 11 or more over-the-air channels.[27] Hence, even without considering other potentially competitive media outlets, the number of competing stations in the markets subject to PTAR has increased very substantially. Thus both the number of outlets able to purchase TV programs and the number of TV programs being shown to the average household or consumer has increased very substantially since 1970.

17. As we noted above, in 1970 there were three national television networks. Today, Fox is emerging as a fourth network, and plans for at least two additional networks -- United

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[20] FCC News Release, *Broadcast Station Totals as of September 30, 1994* (released Oct. 12, 1994).

[21] INTV Census, February 24, 1994. The number of independent stations in 1994 includes independent stations affiliated with Fox.

[22] *Id.*

[23] The reason that there has been relatively little increase in the number of stations affiliating with a national network despite the substantial increase in commercial television stations generally is that ABC, CBS and NBC already had affiliated stations in most television markets during this explosion of new television stations. In addition, the "dual network" rule, 47 C.F.R. §73.658(l), governs and limits the extent to which network-affiliated commercial television stations may affiliate with or carry the programming of more than one network.

[24] *PTAR I*, 23 FCC 2d at 385.

[25] *The Broadcasting Yearbook 1994*, C-123 - C-200.

[26] Nielsen Media Research, *Nielsen Television 1977,* at 5.

[27] Nielsen Media Research, *Television Audience 1993*, at 9.

Paramount and Warner Brothers -- have been announced.[28] Fox, launched in 1987, now has over 150 full-time broadcast affiliates, including one in each of the top 50 markets. (Fox also has over 40 part-time broadcast affiliates.) At the same time, the number of stations affiliated with ABC, CBS or NBC has remained relatively constant, with each network having, generally, one affiliate in each of the 200+ television markets.[29] The recent increases in the number of broadcast stations now provides more outlets for programming and the station base that may support the development of additional networks beyond Fox. Hence, it is clear that the three major TV networks face more competition in today's marketplace than they did in 1970 or even in 1980.

18. Accompanying these significant developments in the over-the-air television industry, new video distribution services have expanded greatly. Since the 1970s, cable TV has evolved from an embryonic retransmission medium to become a major competitor of broadcast television. In 1975, only 13.2 percent of television households subscribed to cable, compared to 62.5 percent today.[30] Moreover, cable systems now pass over 96 percent of TV households, which means that cable service is potentially available to nearly all U.S. households.[31] Wireless cable has also made significant progress from 50 systems serving 300,000 subscribers in 1990, to 143 systems serving 550,000 subscribers by June 1994.[32] Satellite Master Antenna Systems (SMATV) now serve about one million subscribers.[33] Low power television, which was first authorized in 1982, is today a viable service with 1540 stations nationally.[34] Home satellite dishes and video cassette recorders ("VCRs") were unavailable in 1970; by 1994, over 4 percent of television households owned satellite dishes

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[28] *See, e.g., Broadcasting & Cable*, August 15, 1994, at 13.

[29] In this regard, we note the recent phenomenon, reported in the trade press, of numerous switches of affiliation by local stations, many in the top 50 markets. Because of these dynamics, precise affiliate counts are not available.

[30] *Broadcasting & Cable,* October 3, 1994, at 60. In addition, cable subscribers nationally receive, on average, 39 channels (including broadcast stations and cable services), with most subscribers receiving at least 20 channels. Nielsen Media Research, *Television Audience 1993, supra*, note 26, at 9.

[31] *First Report* in CS Docket No. 94-48, FCC 94-235 (released September 28, 1994) (*"Cable Competition Report"*), at ¶ 18.

[32] *Id.* at ¶ 79.

[33] *Id.* at ¶ 92.

[34] *Broadcast Station Totals as of July 31, 1994*, FCC News Release (August 12, 1994).

and 77 percent owned VCRs.[35] Moreover, other technologies are beginning to emerge. Direct broadcast satellite ("DBS") service, which provides video programming to the home via satellite transmission to a dish receiver, is currently operational, and two DBS providers, DirecTV and United States Satellite Broadcasting (USSB), currently have capacity to transmit 216 and 20 channels, respectively.[36] DBS providers are reportedly marketing their equipment in 41 states, and they expect to offer service throughout the rest of the country in the near future.[37] Moreover, DBS home receiving equipment (consisting of an 18-inch dish, digital receiver and remote control) has reportedly sold out in the 41 states where it has been marketed.[38] DirecTV and USSB predict that by the end of 1994, the equipment will be available in approximately 10,000 locations, and that 600,000 units will be sold in 1994 and 1,000,000 units by next summer.[39] In addition, Primestar, a medium-power Ku-band service owned by six cable operators, has been operational since 1991. As of October 10, 1994, it claims 100,000 subscribers.[40] Again, the salient fact about home satellite dish signal reception, use of VCRs and now DBS, is that those technologies are potentially available to all or nearly all U.S. households.

19. The growth in the number of both broadcast and non-broadcast video outlets has greatly increased the demand for video programming. As a result, the first-run syndication market has grown substantially. Moreover, the distribution of syndicated programming has become easier and less expensive because of the availability of satellite delivery systems. The growth of cable networks has also increased demand for original programming and provided additional outlets for new first-run programs. In this regard, the number of basic cable programming networks, unavailable prior to 1976, grew from 34 in 1982 to more than 99 today.[41] In addition, syndicated programming is highly competitive with off-network

[35] "Satellite System Sales," *Satellite Business News,* August 10, 1994, at 1; Nielsen Media Research, *1992-1993 Report on Television,* at 15.

[36] *Cable Competition Report* at ¶¶ 63-64.

[37] "Cable Gets Dished," *Time,* October 31, 1994, at 46; "DSS Reaches 100K Subs, Goes National," *Multichannel News,* October 10, 1994, at 1.

[38] "Cable Gets Dished," *Time, supra* at 46; *see also* "Stores Can't Keep Dishes on Shelves," *Multichannel News,* July 25, 1994, at 1.

[39] *Cable Competition Report,* at ¶ 66; "DSS Reaches 100K Subs, Goes National," *Multichannel News, supra* at 1; *see also* "Cable Gets Dished," *Time, supra* at 46 (stating that media analysts forecast that the DBS industry will pick up 8 million to 10 million customers by the year 2000).

[40] "DSS Reaches 100K Subs, Goes National," *Multichannel News, supra* at 1.

[41] NCTA, *Cable Television Developments,* April, 1994, at 7-A. Data prior to 1982 are not available.

programming in markets where PTAR is inapplicable. In these markets, when given the choice of how to program the one-hour "access period," the majority of broadcasters select first-run syndicated programs instead of off-network shows.[42] Indeed, seven of the top-10 ranked syndicated programs are first-run programs, two are rerun packages of first-run non-network programs (the *Star Trek*-based series), and one (*Married... With Children*) is a Fox product.[43] Moreover, the first-run syndicated programs broadcast by affiliates in the top fifty markets during the access period generally receive the highest ratings in their market, exceeding the ratings received by off-network programs aired by independent stations.[44] The syndication market has produced an increasing number of new first run programs, growing from 45 first-run syndicated programs sold in 1970 to 250 in 1990.[45] In 1990, 18 of the top 25 most popular syndicated programs were first-run.[46] Hence, by almost any measure, it is reasonable to conclude that the level of competition in the sale and purchase of video programs has increased significantly since 1970, as has the level of diversity of program producers (in terms of number of separate producers) and of programs.

20. All of the factors mentioned above suggest that the degree of competition in the purchase of programs by television outlets, in the production and sale of video programs, and

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[42] "First-Run Tops Off-Net In Prime Access," *Broadcasting*, June 15, 1992 at 33. Stations in markets 51-75, which are not subject to PTAR restrictions, selected first-run syndicated programming to fill approximately 44 (59 percent) of 75 access hour time slots. In markets 77-100, 53 (65 percent) of the 81 available time slots are filled with first-run syndicated shows. *Id.* An analysis conducted by the staff in 1992 shows that stations in markets 51-75 choose first-run programs (including local news) to fill 88 percent of the available slots during the first half hour of the access period, when affiliated stations in the top 50 markets (*i.e.*, those subject to PTAR) often run a half hour of network news during the first half hour of the access period, pursuant to the exemption that applies to such programs if preceded by one full hour of local news. In the second half hour of the access period in markets 51-75, affiliates choose first-run programming over off-network programming 65 percent of the time.

[43] The top-10 syndicated programs for the 1992-93 season were, in order: *Wheel of Fortune; Jeopardy; Star Trek: The Next Generation; Star Trek: Deep Space Nine; Oprah Winfrey Show; Entertainment Tonight; Magic II; Married. . . With Children; Wheel of Fortune* (Weekend)*; A Current Affair*. Source: Nielsen Media Research, *1992-1993 Report on Television,* at 19.

[44] Arbitron Television, *Television Daypart Audience Estimates Summary*, February 1992. In markets 51-75, according to Nielsen's February 1992 ratings, the first-run syndicated shows usually receive the highest ratings. Of the 18 markets where off-network competes head to head with first-run, the first run shows finished first in ratings in every market. Flint, *First-Run Tops Off-Net In Prime Access, supra,* at 33.

[45] A.C. Nielsen *Report on Syndicated Programs*, November 1990.

[46] Setzer and Levy, *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd 3996, 4087 (1991) (*"OPP Report"*), *citing* Nielsen Station Index, *Report on Syndicated Programs,* November 1990.

in the numbers of outlets showing programs to consumers, has greatly increased. Indeed, as a result of the rapidly changing video marketplace, the overall dominance of the three broadcast television networks in the video marketplace appears to have declined significantly. In 1975, the networks collectively attained 93 percent of the prime-time viewing audience; they now obtain about 61 percent.[47] Similarly, ABC, CBS, and NBC's collective all-day viewing share has dropped 13 percentage points in the last eight years, from 66 percent in 1985-86 to 53 percent in 1992-93.[48] Both drops are mainly due to the growth of independent television stations (including those affiliated with Fox), as well as the emergence of cable networks as a significant viewer alternative.[49] The decline in network prime time viewing has had a particularly negative effect on the broadcast networks because their advantage to advertisers historically resided in their ability to deliver the mass audiences that watch television in prime time.[50] Consequently, these networks' advertising revenues peaked, in real terms, in 1984 and generally declined through 1993.[51] The drop in both audience share and advertising revenue share through 1993 indicates that the networks no longer dominate the video marketplace to the extent they once did.

21. While we are aware that in 1994 the networks realized an increase in audience share and an improvement in their revenue and profit picture in the long term, competition can only be expected to increase. The competing video delivery systems described above are predicted to increase in number, enhance or add services, and add subscribers in the near future. Cable television penetration (subscribers divided by homes passed) is expected to reach 65 percent by 1998, thus adding about seven million new subscribers over the next several years.[52] The number of subscribers to wireless cable is also predicted to grow through the end of the decade and a 10 percent increase in the number of SMATV subscribers is predicted for 1995.[53] Further, there are 24 applications from local telephone companies to provide "video dialtone" service, the provision of independently supplied video programming

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[47] *Broadcasting & Cable*, March 21, 1994, at 46.

[48] NCTA, *Cable Television Developments*, April 1994, at 5-A.

[49] In the last twenty years, cable networks' share of the national television audience has risen from virtually zero to 22 percent in prime time and 25 percent all day. Nielsen Media Research, *1992-1993 Report on Television,* at 14; NCTA, *Cable Television Developments*, April 1994, at 5-A.

[50] *OPP Report,* 6 FCC Rcd at 4019-20.

[51] The combined three network share of total television advertising expenditures nationally decreased from 44 percent in 1975 to 31 percent in 1993. Source: McCann-Erickson, Inc., *Estimated Annual U.S. Advertising Expenditures*, May 1994; *TV Factbook*, Vol. 49, at 76-a.

[52] Veronis, Suhler & Associates, *Communications Industry Forecast,* July 1994, at 119.

[53] *Cable Competition Report* at ¶¶ 79, 92.

to consumers via telephone lines, to a potential 8.5 million homes.[54] DirecTV plans to increase its DBS channel capacity and has filed an application to operate a third satellite, scheduled to be launched in early 1995.[55] In addition, five other ventures hold DBS licenses and plan to launch satellites in the next few years.[56] USSB predicts that 1-2 million DBS units will be sold within a year and 5-10 million within three years. DirecTV plans to have 3 million subscribers in three years. USSB estimates that in seven years, almost 40 percent of all television households may receive programming via DBS.[57] Primestar has begun a $55 million advertising campaign and switched to digital technology on July 31, 1994. Targeting areas unserved by cable, Primestar plans to eventually offer 150 channels and have over 200,000 subscribers by the end of 1994 and 2-5 million by the end of the decade.[58] These forecasts suggest that the number of viewing choices available to the public, as well as the number of entities buying programs, will continue to expand, thus further intensifying the level of competition and the level of diversity in the video marketplace.

V. Positions of the Parties

22. While the preceding discussion highlights the dramatic growth in the level of competition and diversity in terms of program sources and program choices, parties responding to the *Public Notice* tend to espouse different interpretations of the facts described above. Some argue that in today's highly competitive, diverse video marketplace, PTAR is no longer necessary or desirable because it may adversely affect the efficient operation of the programming marketplace and, at a minimum, should be modified. In contrast, others contend that PTAR is at least partially responsible for the diversity and the level of competition in the modern broadcasting marketplace and must be retained to assure further increases in diversity and competition. The "off-network" restriction in particular drew a particularly high volume of comments by parties on both sides of the issue. We summarize those views below.

A. Repeal or Modification of PTAR

23. In the submissions referenced in the April 12, 1994, *Public Notice*, Channel 41, Inc. and Hubbard Broadcasting, Inc. seek repeal of the off-network restriction, arguing generally that such a restriction can no longer be justified in light of the technological and

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[54] *Id.* at ¶ 104.

[55] *Cable Competition Report* at ¶ 64.

[56] *Cable Competition Report* at ¶ 67.

[57] *Cable Competition Report* at ¶ 70.

[58] *Cable Competition Report* at ¶¶ 68, 70.

marketplace changes that have occurred since the adoption of PTAR. They maintain that the objectives of the off-network restriction -- to curb network dominance and promote a healthy first-run syndication market -- have largely been accomplished by technological advances and the growth of first-run program buyers, including cable and independent stations. Additionally, a wide array of commenters including CBS and NBC, network-affiliated station owner Bonneville International Corp. ("Bonneville"), the Network Affiliated Station Alliance ("Affiliate Alliance"), the Office of Communications of the United Church of Christ, *et al.* ("UCC"), and Westinghouse Broadcasting Co., Inc. ("Group W"), the original proponent of PTAR, agree generally that the substantial changes in the video marketplace since the adoption of PTAR have reduced the ability of the networks to dominate program production and distribution. They assert that the off-network ban has run its course and now operates to place the traditional networks, their affiliates and those that supply programming to the networks at a competitive disadvantage.

24. These parties also argue that the off-network restriction unfairly favors emerging networks and non-network program suppliers. By way of example, NBC asserts that Fox, which is not now subject to PTAR, reaches 97 percent of all television households and successfully competes against the original three networks for audience, advertising, programming and affiliates. NBC and others argue that so long as an "emerging network" programs no more than 15 hours of prime-time, such networks can develop programming and bid for first-run syndicated programming with the knowledge that, unlike ABC, CBS, or NBC, such programming can be resold in syndication to all stations, network and independent alike. The Coalition to Enhance Diversity ("the Coalition")[59] further maintains that regardless of Fox's legal status as a network, Fox programming product competes with traditional off-network programming in the syndication market, giving it an unfair advantage over ABC, CBS, NBC and producers of programming for them. In this regard, the Coalition and others such as CBS and the Affiliate Alliance assert that the off-network ban is protectionist and anti-competitive, because network affiliates in the top 50 markets are foreclosed from competing on an equal basis with independent and Fox-affiliated television stations and cable channels available in their markets.[60]

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[59] The Coalition states that it represents various public interest and consumer groups, independent program producers, production companies, broadcasters and trade unions.

[60] Group W states that the off-network ban treats similarly situated networks in a patently unfair manner, a situation it believes will be exacerbated by shifting network affiliations, particularly as network-affiliated stations subject to PTAR suddenly become exempt by switching affiliation to, for example, Fox, which is not now an entity subject to PTAR. Group W states that the safeguards incorporated into the off-network ban are not designed to deal with this phenomenon in a manner equitable to all stations, suggesting that Fox could continue to function as a fully competitive network without ever meeting the definition of a network for purposes of PTAR. Group W therefore urges that in this environment, Fox should be subject to the same PTAR limitations, or lack of them, applicable to the traditional networks.

25. Commenters opposed to the off-network ban also contend that it has not worked as originally envisioned to stimulate diversity of program production. Rather, they maintain that the prime time access period is dominated by three program suppliers (King World, Paramount and Fox) and four shows (*Wheel of Fortune, Jeopardy, Entertainment Tonight* and *A Current Affair*). According to NBC, these three program suppliers account for 93 percent of the programs acquired for and broadcast during the access period in the top 50 markets, dominating the first hour of prime time to the same extent as the national networks dominated that time period in 1970 when PTAR was established.[61] The Coalition maintains that if the Commission properly considers all options available to video consumers in the modern video marketplace, including the plethora of new services, it will find that the magnitude of profound industry changes compels revocation or modification of PTAR as has been done with other longstanding network and ownership restrictions found to be no longer warranted.[62]

26. In addition to these arguments for repeal of just the off-network part of PTAR, First Media, Channel 41 and Hubbard contend that the entire rule is constitutionally impermissible. They assert that the rule: (1) can no longer be justified under a "scarcity" rationale; (2) impermissibly creates two classes of speakers -- "favored" speakers (*i.e.*, independent program producers) and "disfavored" speakers (*i.e.*, national networks and their affiliated stations) -- and treats them differently; and (3) cannot be sustained under the stricter constitutional scrutiny standard, which assertedly must be used because PTAR is a content-based restriction on speech (*i.e.*, news, public affairs, documentary, sports and children's programming are exempt from PTAR while entertainment programs are not). Those parties filing comments favoring repeal of the rule on economic or policy, as opposed to constitutional, grounds generally frame their arguments in terms of the off-network restriction. Their arguments appear to be equally applicable to the entire rule, however. In sum, the proponents of elimination of the rule believe it no longer serves the public interest and, instead, upsets the competitive balance between network affiliates and independents (or affiliates of emerging networks).

B. Retention of the Status Quo

27. A number of commenting parties urge retention of PTAR as it currently exists. These parties -- including the Fox Broadcasting Company Television Affiliates ("Fox

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[61] *See* NBC Comments at 14. In addition, it claims that for the 1992-1993 television season, the top-six first-run syndicators (King World, Paramount, Disney, Multimedia, Warner and Fox) controlled over 72 percent of the total first-run syndication market, with three of these companies (Disney, Warner and Fox) also providing 49 percent of the outside-supplied entertainment series premiered on the three traditional networks that season. *Id.* at 22-23. Similarly, the Coalition contends that ten first-run programs are broadcast in 71 percent of the affiliate access periods in the top 50 markets, with 49 percent of those access time periods filled with just four shows. The Coalition Comments at 5-6.

[62] The Coalition Reply Comments at 6-7.

Affiliates"), the Association of Independent Television Stations, Inc. ("INTV"), King World Productions, Inc. ("King World"), Media Access Project ("MAP"), and Viacom, Inc. ("Viacom") -- support the existing rule for a variety of reasons. For instance, Fox Affiliates point to the rule as responsible for their achieving viability and, in turn, facilitating the development of Fox.[63] They therefore urge the retention of PTAR in the belief that no legal or policy grounds exist that support repeal or modification. Others, such as MAP, King World and Viacom, believe that any exploration of the continuing need for PTAR must be preceded by a Notice of Inquiry exploring a host of issues, including but not limited to the current and future status of independent stations and the first-run syndication industry. INTV has also argued that the mere adoption of a notice of proposed rule making concerning PTAR will adversely affect independent stations by inducing network affiliates to purchase the rights to broadcast off-network shows in the access period in the event the rule is modified. INTV maintains that these purchasing efforts will irreparably harm independent stations by bidding up the prices of off-network shows they purchase or by outbidding them altogether and depriving them of their most valuable programming. They argue that any action on the rule should await a settling of the new regulatory landscape produced by the scheduled expiration of the current financial interest and syndication rules. Additionally, some proponents of PTAR, such as MAP, contend that the rule has stimulated diversity and should be retained.

28. MAP, which favors retention of the off-network ban, states that, irrespective of market changes that have taken place, over-the-air broadcasting remains the primary source of news and entertainment programming, especially for the 40 percent of Americans who cannot afford or choose not to subscribe to cable. It asserts that the perceived explosion of new communications technologies, and the diversity expected to follow, has not occurred. MAP states that the combined audience share of *all* the national cable networks does not even remotely approach any one of the three major broadcast networks. MAP therefore maintains that while there are now more program outlets generally, they are not genuinely and equally competitive, and that the original networks have retained inordinate dominance over the marketplace. This power, it believes, is likely to be enhanced significantly by the imminent demise of the fin/syn rules. In this regard, MAP states that the traditional networks have the most established resources and viewership, the strongest and most established local stations as affiliates, and still broadcast the vast majority of the news, public affairs, entertainment and sports programming, although Fox is making substantial inroads in these regards.[64] MAP also points to the fact that, unlike some of the newer video distribution services, the traditional broadcast networks reach virtually all television households, a fact reflected in their higher advertising rates.

29. Fox Affiliates and INTV contend that no showing has been made that the Top 50

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[63] Fox itself, however, favors repeal of the rule.

[64] MAP Reply Comments at 9-12. In addition, it states that even if the off-network ban favors Fox over the traditional networks, the rule should not be eliminated simply because it has worked in Fox's case.

Market Affiliates are significantly harmed by their inability to air off-network syndicated programming during prime-time access. Rather than causing a competitive imbalance, Fox Affiliates claim that the off-network restriction has enabled them to survive as independent stations, and ultimately to grow as affiliates of Fox and achieve a more competitive position *vis-a-vis* established network affiliates in their markets, precisely because the restrictions on the affiliates of the three largest networks increase the Fox affiliates' ability to acquire attractive programming, particularly highly popular off-network programs. They further believe that any perceived competitive harm to stations subject to the off-network ban is overstated because the first-run syndicated shows aired by Top 50 Market Affiliates during the access period attract larger audiences than the off-network shows broadcast by independents. Moreover, they note that independent stations generally operate at a competitive disadvantage in that the Top 50 Market Affiliates are, for the most part, larger and more established VHF stations, contributing to their dominant market share and superior bargaining power over predominately UHF independent stations. Thus, they contend that any decrease in the ability of independent stations to air popular off-network programming in the access hour will jeopardize their economic ability to realize their overall programming plans, including expansion into local news and other high-quality programming. They therefore state that elimination of the off-network restriction will seriously curtail the full potential of these independent stations to maximize program diversity and achieve competitive parity with the affiliates of the established networks or to offer a viable core of stations for the development of alternative television networks.[65]

30. Other supporters of the off-network ban, particularly first-run syndicators, claim that without the present rule, off-network programs will be aired by Top 50 Market Affiliates during the access period because of their proven audience appeal, diminishing the ability of new and untested first-run syndicated shows to garner sufficient audience share to sustain and develop the diversity it provides.[66] In this regard, King World claims that the fundamental difference between first-run and off-network syndicated programming is that first-run programming is generally untested and does not have the built-in audience demand of former network programming. It states that the production of first-run programming is a risky financial venture because the program producer must create a wholly new audience on a market-by-market basis, making access to viewers during the peak viewing hours of prime time essential to the first-run syndicator. King World asserts that the audiences needed to successfully launch a new first-run program cannot be reached unless there is potential access to a market's dominant stations -- the network owned and affiliated stations in all of the Top 50 markets. King World believes that without PTAR, first-run syndicators will be chiefly dependent on independent stations for access to audience, and that most independent stations

[65] Fox Affiliates Comments at 2-3.

[66] *See, e.g.,* Viacom Reply Comments at 4 (If the off-network restriction is repealed, "an unrestricted auction of off-network series would occur, and would be won . . . by the richer network affiliates.").

do not provide the audiences which the first-run syndication industry requires.[67] Further, King World claims that programs successfully launched during the access period provided by the off-network ban are the economic foundation for the development of all first-run syndicated programming. It therefore maintains that PTAR serves what King World believes was its intended purpose because the marketplace itself will not provide the kind of access to the audiences which first-run syndicated programming needs to be successful.[68]

VI. Proposed Analytical Framework for Evaluating the Efficacy of PTAR

31. As discussed above, the Commission created PTAR as a reaction to a marketplace that it believed was functioning without sufficient competition and had yielded inadequate levels of diverse programming. In order to correct the perceived lack of competition and diversity, the rule altered the competitive opportunities in the relevant markets in three basic ways. *First*, by carving out a portion of prime time to be used for non-network use, the rule made it easier for independent producers to sell their programming to the more successful stations in the top markets (*i.e.*, affiliates of the three major networks). Among the intended effects was the goal of strengthening existing independent producers and encouraging entry of new ones. From an economic perspective, the Commission anticipated that the decrease in supply of programming available to affiliates (caused by PTAR's ban on network and off-network programming) would increase prices paid for independently produced programming, thus acting as a spur for greater production and new entry.[69] Thus, the Commission predicted that the rule would increase the net amount of diverse programming available to the viewing public and create new competitors to the existing three networks. *Second*, the rule sought to reduce the networks' role in dictating their affiliates' programming choices, by forbidding the affiliates in the top 50 markets from running more than three hours of network or off-network

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[67] King World Comments at 8-10. Moreover, King World states that because of the importance of the top 50 markets to first-run syndication, the fact that first-run programming may compete successfully in markets below the top 50 is irrelevant. *Id.* at 10.

[68] King World maintains that even if the access period is currently dominated by only a few companies, such a result is a function of the marketplace in which PTAR allows them access to compete, and the rule has added at least three meaningful independent voices where none existed before. Moreover, although there are now a few successful first-run syndicators, King World maintains that they do not, individually or collectively, possess market power on the scale of the networks and do not have the access the networks have over their affiliates -- the dominant stations in the top 50 markets. *See* Reply Comments of King World at 3-5.

[69] This economic assessment does not appear to take into account the fact that the networks not only produced programs themselves, but they also could (and did) purchase programs from non-network sources for broadcast over their affiliates. Thus, the networks occupied positions as program purchaser, program supplier and program producer. To the extent the networks purchase non-network programming for distribution to their affiliates, the demand for such "independent" programming is unaffected by a restriction like PTAR.

programming during the four-hour prime time period. Thus, the rule was viewed as a way to increase affiliate autonomy and reduce network dominance.[70] The immediate effect was to ensure that not all of an affiliate's prime time programming came through the same network filter. *Third,* the rule has come to be viewed as a mechanism for strengthening independent stations, with the result of increasing the strength and number of the primary buyers of independently produced programming. The argument is that, with this increase, not only are the number of independent program producers increasing, but the opportunity for new networks to emerge and compete with the existing networks is enhanced (by the presence of a healthy pool of independent stations). Thus, by strengthening independent stations overall, the rule has been considered to further both diversity and competition goals. Moreover, the independent stations themselves produce some degree of original programming, which contributes to the overall levels of diverse programming available in the market.

32. In 1970, there was a strong case for taking government action to correct the effects of a competitively unbalanced market. However, with the development of alternative forms of video distribution, the growth of the broadcast industry (including increased competition among networks for affiliates), and the increase in the number and type of entities creating nationally distributed video programming, we must assess the continued efficacy of a rule like PTAR. We therefore undertake a rigorous economic and policy analysis in this proceeding to assess the extent to which the rule serves the Commission's "public interest" mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry.[71] Accordingly, we seek to evaluate the factual and economic assumptions underlying PTAR to ascertain whether the rule operates to achieve its intended effects, and what unintended effects it may also cause. In addition, our analysis will evaluate whether the intended and unintended effects further the attainment of legitimate goals in today's world. As in every analysis of this nature, the ultimate decision to retain, modify or eliminate the rule will turn on a weighing of its costs against its benefits. To permit us to perform this analysis, the following three sections ask a series of specific questions about the three above-described ways in which PTAR alters the competitive opportunities in the relevant markets, followed by a section that seeks comment on the overarching issues and ultimate cost/benefit calculation.

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[70] While the rule did not eliminate all constraints on affiliate programming choices, the Commission viewed the rule's constraints as less restrictive than those imposed by network practices. Before PTAR was promulgated, the networks affirmatively selected all programs during prime time for their affiliates, assertedly regardless of affiliate preferences. The rule, on the other hand, imposes a negative constraint, leaving affiliates free to select from the range of all non-network sources.

[71] *See, e.g., Memorandum Opinion and Order* in MM Docket No. 87-24, 4 FCC Rcd 2711, 2723 (1989) (stating that the Commission's "goal is, of course, to see that the *public* interest is served, not to maintain an inefficient distribution scheme that favors [certain competitors]") (emphasis in original).

A. Increasing Opportunities for Independent Programmers

33. With respect to the first method of altering competitive opportunities -- PTAR's creation of a window of opportunity for independent producers to supply programs to the Top 50 Market Affiliates for broadcast during prime time -- we raise three critical questions that go to the actual operation of the rule: (a) whether this enhanced opportunity increases the net amount of independently produced programs available to the public, (b) whether this opportunity increases the net number of independent program producers serving the market,[72] and (c) whether the limit placed by this opportunity on an affiliate's ability to carry network or off-network programming during the access period reduces the economic value of network programming aired during the other parts of prime time, by limiting the potential buyers for these programs after the network run is complete, thereby depressing the total return on these programs.

34. The carving out of a time slot for independently produced programs would appear to increase the demand for them, thus raising prices and encouraging entry of new firms producing such programs. Indeed, since PTAR was established, successful, independently produced programs like *Wheel of Fortune* have been added to the mix of programs available to the public, and at least several powerful independent suppliers of broadcast product have developed.[73] Proponents of PTAR have also argued that independent producers as a group cannot effectively survive unless they can launch their programming over network affiliates in the top markets, and that PTAR is the only assurance that they have that opportunity;

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[72] Both effects -- increasing the number of independent producers and increasing the number of independently produced programs -- have been viewed as important. In 1970, there was very little independently produced programming, so the rule created a virtual guarantee that the amount of it reaching the public would increase -- by reserving a portion of prime time for such programming. Diversity goals have also emphasized the link between a variety of program sources and the variety of programs themselves. Thus, a market has not been considered diverse if only a few sources supply all the programming, even if the range of programs is quite varied. Accordingly, we would discount to some degree the diversity value of a net increase of independently produced programming if the net number of producers did not appreciably increase. Opponents of the rule have made the argument that the number of producers developed by virtue of the rule is small. The argument against discounting the diversity value too much is that any increase in absolute number of producers is a benefit, and that a significant increase in the amount of programs themselves, even if emanating from the same source, is a significant improvement over a world where virtually all home-viewed video programs came from one of three sources.

[73] It would appear that the number of independent suppliers that PTAR assertedly develops is limited by the amount of access time made available. Proponents of PTAR have argued that the success of an independently produced first-run program depends on a high percentage of clearances nationally; without this level of clearance, the funds for the program are insufficient to sustain it. Thus, one would expect to see only a handful of programs running on a given time slot at any one time. This effect would limit the number of new independent programmers fostered by the rule.

according to this argument, once the protection of PTAR is lifted, an entire segment of program supply could wither, leaving, over the long run, a significant reduction of total program suppliers. However, the opportunity for independently produced programs to occupy a portion of prime time without competition from network or off-network programs may create at least two additional effects. First, the loss of opportunity to program the access period[74] would appear to create incentives for those program suppliers who are barred from this period to shift their sales efforts to the next best venue. Presumably, then, some of their product displaces independent product that would appear outside of prime time. While we do not have sufficient data to quantify this effect, it may be that this loss of independently produced programming outside of prime time exceeds the gain within prime time.[75] We ask commenters to submit studies detailing such patterns of programming in all dayparts since PTAR was adopted. Second, the loss of opportunity of the three major networks to provide programming to their affiliates during the access period reduces by three the number of entities that might otherwise purchase new programs from independent program producers.[76] This reduction of demand by networks for new product may tend to reduce prices paid for such programs overall, along with the amount of programming produced and incentives for entry by new firms. To enable us to assess the weight of these arguments, we ask commenters to present data and economic studies to demonstrate PTAR's net effect on independent program production and producers, given all these considerations.

35. One conceptual criticism of the rule's current ability to encourage diverse programming through the creation of a window of opportunity for independent programmers is that economic incentives -- rather than the source of the programming -- may play the greater role in determining the diversity of program type the public sees. Presumably, the network affiliates will select the type of programming most likely to gain the largest audience, whether that is a game show or a comedy or drama series.[77] Thus, the presence or absence of

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[74] Entities suffering this loss of opportunity include syndicators of off-network product, as well as the networks themselves, who supply first run network product and, with the impending removal of fin/syn restraints, will be able to supply off-network product without limitation.

[75] We recognize that more viewers watch television during prime time than in other dayparts, but to the extent that the loss of independent programming outside of prime time is significant, diversity goals are nevertheless impaired, and the overall health of the programming industry may be impaired as well.

[76] We acknowledge that a program that passes through the network filter is not considered "independent" in the same sense as one that is placed directly by the independent producer in the hands of a station. However, in both cases, the station's position between producer and audience reduces the independent nature of the program. Moreover, in today's marketplace, many producers are regarded as "independent" despite the fact that they sell programming to the major networks.

[77] We acknowledge that affiliates may be influenced by a variety of factors other than a calculation of how much audience a particular program may garner. For example, parties have asserted that with the lifting of fin/syn constraints, the networks will have the incentive and

PTAR may have little effect on the diversity of program types available to the public. On the one hand, if network or off-network programming tends to garner the most audience, and the affiliates are precluded from airing such programming during the access period, rather than purchasing less established forms of the same type of programming, the affiliates may have the incentive to counterprogram with very different types of shows. This appears to reflect how the market, in fact, has developed; during the access period, network affiliates tend to air game shows and news magazine programs, while competing independent stations tend to air network reruns. On the other hand, if PTAR were eliminated and the network affiliates outbid the independent stations for the most popular off-network fare, presumably the independent stations would have the same incentive as the network stations do now to counterprogram with different types of shows than network or off-network programs.

36. Independent stations, however, have typically competed at a technological disadvantage (since most are UHF-based), and the argument has been made that the supply of independently produced programming would not have developed like it has if the independent programmers did not have access to the top market affiliates to launch and establish the platform for their programs' success. We ask whether in today's marketplace, particularly with cable leveling the technological differences between UHF and VHF stations for the 62.5 percent of television households that subscribe to cable, this dynamic still pertains. Would the level of diversity of programming diminish if we eliminated PTAR?

37. PTAR's limit on the ability of affiliated stations to air network programming may also reduce the overall return to producers of such programming (whether the networks or independent producers) by eliminating prospective bidders for the programs in the "after-market." Generally, network programs are produced and aired on the network at a deficit. This deficit, and any profit to be made by the producers, is recovered after the program leaves the network and is sold in syndication. By eliminating as bidders for these programs those stations that are commonly the strongest -- the top 50 market network affiliates -- the total return to producers would likely be reduced. The question posed by this analysis is whether the reduced return to producers is significant and whether it, in turn, would lead to reduced investment in first-run network shows and ultimately to lower quality network programming. We ask commenters to supply any data or analysis that would permit us to more fully evaluate this possibility.

38. In predicting the effects of PTAR on independent program supply and the programmers of such fare, we note that heretofore the three major networks have not competed directly with the independent programmers because of the constraints of the fin/syn rules. The old fin/syn regime generally prohibited the networks from syndicating

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opportunity to convince their affiliates to purchase network syndicated product even if such product may not perform as well in the market as some other independently produced syndicated program. Similarly, affiliates enter into long term affiliation contracts, which may prompt the affiliate to air a less lucrative program that it would not have chosen to air absent the contract. In providing their analyses, commenters should address these factors.

programming or holding continuing financial interests in programming once it entered the syndication market. These constraints, however, are being phased out. The networks' increasing opportunities to own programming and direct its flow through the market will have some effect on the performance of independent program producers and their ability to compete. However, it is not clear whether these new network opportunities are significant enough to warrant a regulatory constraint like PTAR. Accordingly, we ask commenters to address the relationship between the operation of PTAR and our findings in the fin/syn proceeding, where we determined that there did not appear to be any economic justification for continued restraints on the networks' ability to own financial interests in broadcast programming or to syndicate such programs.[78] Clearly, our recent conclusions in the fin/syn proceeding are relevant to our analysis of PTAR; both sets of rules were implemented at the same time in response to the same perceived market dysfunction. When we scheduled the expiration of the fin/syn rules, we concluded that the networks lacked sufficient power to control the programming market, including syndication and program production, despite the networks' influence over an extensive web of affiliated stations. We now ask for comment on whether there is any reason to assume that the networks possess sufficient power by virtue of their role in providing prime time programming to their affiliates to alter the performance of the marketplace in ways that negatively affect the public interest.

39. Similarly, we ask commenters to address the question of how the fin/syn changes will affect our assessment of network power in the PTAR context. Proponents of the rule maintain that with the projected demise of fin/syn, the protections of PTAR for independent producers are all the more critical. Moreover, these parties argue that PTAR now operates as a significant remaining safeguard for independent stations. According to this argument, fin/syn ensured that the independent stations would not have to negotiate with the networks for the most valuable syndicated fare, and PTAR ensured that the independent stations' primary competitors -- the network affiliates -- would have a reduced incentive to bid for such programs (because of limits PTAR places on when such programs can be aired). Opponents of PTAR dispute these views, maintaining that the Commission's findings in the fin/syn proceeding provide a basis for concluding that PTAR is likewise unnecessary to ensure programming source diversity.

B. Reducing Network Ability to Dictate Affiliate Programming Choices

40. With respect to the second method of altering competitive opportunities -- limiting the networks' power over their affiliates by reducing network ability to influence programming choices during the access period of prime time -- PTAR prohibits the affiliates from obtaining network provided programs or even off-network programs during that period. In 1970, when it adopted PTAR, the Commission concluded that this was a reasonable method of protecting affiliates against the power of the networks. At that time the affiliates were quite dependent upon the networks as the major source of programs, and thus the

[78] *See, e.g., Fin/Syn MO&O*, 8 FCC Rcd at 8278-82.