

affiliates may have felt that even if it was not in their economic self interest to accept all the programs offered them by the networks, they did not have sufficient bargaining power to refuse to run the programs. Thus, even though the rule limited the options available to affiliates during one hour and consequently limited to the same extent the viewing options available to consumers, nonetheless the affiliates may have believed they were better off with the rule than without the rule, given the dominant position of the three networks. In practical effect, the rule was intended to increase the chances that the programming appearing on an affiliated station would reflect true viewer preferences. The view was that while the network would dictate one program for the access period, the rule would permit the affiliate to choose from a range of choices (*i.e.*, any independently or affiliate produced program).

41. In 1994, however, as we have discussed above, the relative position of the affiliates *vis-a-vis* the networks has changed. First, there are options available to network affiliates that were not available in 1970, especially the possibility of changing their affiliation. The press has recently reported that a number of affiliates have switched from one of the three major networks to Fox, an event that would appear to indicate that the major networks are not as dominant as they were 24 years ago. Clearly, to the extent an affiliate has the option of leaving a network to associate with another entity, that affiliate's bargaining position has improved. Second, there are today many more options for obtaining programming even without having a network affiliation, as indicated by the growth in the number of independent, unaffiliated stations. Hence, while network affiliates would likely prefer not to give up their affiliations, they appear to have a greater range of alternatives than they did two decades ago.

42. Thus, it is not clear that at this time regulatory protection for the affiliates against their networks is necessary to ensure that programming choices are made competitively and in a manner that more accurately reflects viewer preferences. Indeed, in an increasingly competitive video marketplace where the affiliates and networks must compete not only against more over-the-air outlets but also against cable networks and other multichannel media providers, it seems increasingly unlikely that the networks would attempt to force their affiliates to take unpopular programs or programs necessarily different from those the affiliates themselves would choose. For at least some affiliates, even if not for all of them, it may be that this rule now limits their choices and thus the choices of their viewers in ways that harm both the stations themselves and their viewers. We recognize that data submitted thus far in this proceeding indicate that current independently produced programs aired during the access period tend to garner very high ratings compared to competing programs in that timeslot. Accordingly, elimination of PTAR may not immediately result in significant changes in affiliate programming choices. However, elimination of the rule could offer the affiliates greater opportunity to respond to changes in ratings, and thus to serve their audiences more effectively, assuming that the networks lack the power to force their affiliates to make uneconomical programming decisions.

43. On the other hand, the Commission has historically recognized that the nature of networking generally places the network in a more powerful position than any one of its

affiliates. Thus, while the relative power of affiliates and networks may vary from market to market, individual stations appear to have a greater inherent need for the benefits of network affiliation (*i.e.*, a ready supply of proven programming) than a network does for an individual affiliation.⁷⁹ Moreover, the rise in number of independent stations may have increased the demand and competition for the most lucrative network affiliations, thus reducing, at least to some degree, the increased leverage the network affiliates appear to have gained as a result of the potential emergence of new networks. Finally, some have called into question the conclusion that the networks lack the power to force their affiliates to make uneconomical programming decisions.⁸⁰

44. Accordingly, we ask commenters to provide evidence regarding the bargaining position of affiliates *vis-a-vis* their networks. For example, during hours other than the PTAR access period, do affiliates in the top 50 markets carry programs other than network programs? To what extent does the market dynamic in the top 50 markets dictate performance in the less populated markets?⁸¹ Are the recent affiliation switches indicative of a change in the relative bargaining power of the networks and their affiliates, or are these switches due to other factors? How will the possible emergence of two new networks affect this bargaining power? Do these facts or other relevant information indicate whether affiliates would change their behavior in terms of the programs they showed during the access hour if PTAR were modified or repealed? To the extent that the behavior of affiliates might change in some way if PTAR were modified or repealed, how would that affect the programs ultimately available to viewers? Similarly, to the extent that we decide to modify or repeal the rule despite concern about the power of the networks over their affiliates, should we consider increasing our oversight of other aspects of the network-affiliate relationship? For example, there are a number of rules that circumscribe permissible terms of network-affiliate

⁷⁹ See, e.g., *Report & Order* in Docket No. 12746, 27 FCC 697, 713 (1959), *aff'd sub nom. Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961). We recognize, however, that affiliates have formed groups that counterbalance, to some degree, the power of their networks.

⁸⁰ See, e.g., NASA Comments in MM Docket No. 91-221 (Review of the Policy Implications of the Changing Video Marketplace), at 17. In addition, recent press accounts report that certain network-affiliated stations have accused their networks of intimidation or retaliation in response to those stations considering the broadcast of football games carried by Fox. See *Broadcasting & Cable*, April 11, 1994, at 18.

⁸¹ Parties like The Walt Disney Studios have submitted data indicating that in markets not subject to PTAR (those below the top 50), stations choose programming similarly to those in the top 50. See, e.g., The Walt Disney Studios, *PTAR Top 50 Market Access Position Paper* (dated April 1994). In response, proponents of PTAR have argued that ratings performance in markets below the top 50 cannot be used to predict performance in a world without the rule. These proponents point out that the advantage given by PTAR in the top 50 markets provides the independently produced program with a chance to garner a national audience, which is assertedly critical for then marketing that program successfully in the rest of the country. Commenters submitting data on markets currently not subject to PTAR should address this criticism.

business relations, which could be strengthened or broadened if the public interest required.⁸² Finally, those arguing that the networks do retain significant bargaining power should present evidence that, absent PTAR, this power would be exercised in ways that disserve the public interest. Similarly, those arguing that the networks do not retain significant bargaining power should likewise present evidence that PTAR is impairing their ability to serve the public interest.

C. Providing Independent Stations with the Competitive Advantage of Greater Programming Choices

45. The third method we have identified by which PTAR alters competitive opportunities is that it provides independent stations with a competitive advantage over competing network affiliates. Specifically, since the Top 50 Market Affiliates have a more limited range of choices in placing programming on their stations, the independent stations receive two competitive advantages: (a) less competition for viewers, and (b) less expensive programming. The rationale for giving these advantages has been explained as a correction for inherent competitive disadvantages shouldered by independent stations, such as the technological impediments they face by virtue of the fact that most of them have been relegated to the UHF band.

46. In addition to placing independent stations on a more competitive par with the affiliated stations, PTAR has also been defended as a means to increase the diversity of programming outlets. Traditionally, the Commission has evaluated such diversity in terms of the broadcasting industry. If one takes this perspective and assumes that PTAR has played this role in the past, is PTAR still necessary to ensure such diversity? To what degree do independent stations continue to suffer appreciable fixed competitive disadvantages, particularly in view of the leveling effect that cable carriage has on broadcast signals? In this regard, we note that while cable carriage reduces the UHF disadvantage (at least for the 62.5 percent of television households that subscribe to cable), there may be problems that carry over to the cable medium (*e.g.*, channel positioning disadvantages). Even if fixed disadvantages on cable were eliminated altogether, how should the Commission weigh the fact that over 30 percent of viewers currently rely on over-the-air signals exclusively? Does the disadvantage that the UHF-based independent stations still have over-the-air continue to support an argument for PTAR? Commenters should factor all these elements into their analyses.

47. On the one hand, the array of broadcast options can be characterized as varied and competitive now. There are over 450 independent stations; a strong new direct competitor to the established networks (*i.e.*, Fox); and several incipient networks poised for development.⁸³

⁸² See, *e.g.*, 47 C.F.R. §§ 73.658 (a) - (i).

⁸³ See *supra* ¶¶ 16-21 for a detailed discussion of the range of competitors in the broadcasting industry.

The question then becomes whether, given this level of diversity, the competitive alteration that PTAR causes with respect to a segment of the market (*i.e.*, the affiliates and the major networks) is warranted. Commenters are asked to address the degree to which, from economic and public interest perspectives, PTAR leads to misallocated resources, limits viewers' programming choices, and alters the optimal prices paid.

48. On the other hand, it can be argued that over the long run competitiveness within the broadcasting industry is enhanced by the strengthening of the independent station base. Specifically, it can be argued that PTAR provides "infant industry" type protections and thus competition enhancing benefits. By restricting the choices of network affiliates in the top 50 markets, PTAR has the effect of both enhancing the market for new first-run programming not under the control of the networks and also helps independent stations in those markets obtain off-network programming at somewhat reduced prices.⁸⁴ This, in turn, is said to increase the economic viability of "near" networks such as Fox,⁸⁵ as well as other potential networks such as United Paramount and Warner Brothers, all of which depend on the availability of numbers and economic strength of affiliated stations to form a base for the launch of new networks.⁸⁶ Indeed, proponents of PTAR have argued that if affiliates of potential new networks have to bid against existing major network affiliates for the best programs, they will lose out in such a bidding war, will not obtain the desired programs, and ultimately, their networks will not be successful.⁸⁷ Finally, it is argued that while, in the short

⁸⁴ Indeed, we have recognized the financial importance to independent stations of obtaining popular off-network programming. See *Fin/Syn Evaluation (Memorandum Opinion and Order)*, 8 FCC Rcd at 8294 n.64. Moreover, the value to independent stations of popular off-network programming is not limited to the immediate effects during the time the particular program is aired. Rather, the proponents of PTAR have observed that success during the access period -- which is enhanced by airing popular off-network fare -- enables the station to carry over audience viewership into adjacent prime time hours.

⁸⁵ Indeed, the benefits of PTAR appear to have contributed significantly to Fox's success. Fox's base of affiliates have relied heavily on off-network fare to compete effectively with the major network affiliates. Moreover, Fox product that enters the syndication market (*i.e.*, programs that have completed their first run on Fox) are not classified as off-network programs and are consequently marketed without any PTAR-based restrictions, thus increasing their value. Again, this appears to have contributed to Fox's success. We request more specific comment on the degree to which Fox's success is directly linked to PTAR.

⁸⁶ In other words, for any new broadcast networks to develop, there must be a base of successful independent stations, whose success could be jeopardized by the elimination of PTAR.

⁸⁷ The affiliates of would-be networks will generally come from the ranks of the independent stations, which are generally less financially successful than the network affiliates. Indeed, there is evidence, now somewhat dated, that supports the proposition that independent stations will tend to lose bidding wars against affiliates of established networks. See, *e.g.*, *OPP Report*, 6 FCC Rcd at 3999 ("Although broadcasting will remain an important component of the video mix, small market stations,

run, television viewers' choices might be reduced because of the limits on the Top 50 Market Affiliates, in the longer run, consumers will gain because of the development of stronger independent sources of programs, stronger independent stations and additional television networks that can compete with the major three networks.

49. We ask for comment on the above analyses. Parties should also address whether regulatory measures designed to encourage the introduction into the broadcast industry of increased competition in the form of new networks remain necessary when the established networks and their affiliates are also competing against non-broadcast video services. In other words, by limiting the programming prerogatives of the strongest players in the broadcast industry, over time how will PTAR affect the ability of this industry as a whole to survive against its non-broadcast, multichannel competitors? Moreover, we ask whether any inefficiencies of encouraging entry of new networks by placing limits on incumbents are outweighed by real benefits. Parties should identify and quantify these inefficiencies and benefits.

D. The Overarching Issues

50. The above discussion constitutes an analytic framework that should permit us to determine whether PTAR, as it operates in today's marketplace, in fact creates the appropriate market incentives to achieve certain results. Assuming these results, we now turn to questions regarding the current public interest value of these results, given their costs.

51. We observe that some proponents of PTAR suggest that the role of the non-broadcast media should be largely irrelevant in assessing the need for the rule.⁸⁸ Is it appropriate to analyze the issue in this manner? When PTAR was promulgated, reliance on the goal of fostering diversity in the broadcast medium exclusively made a good deal of sense because broadcast television was the only widely available outlet through which the public could receive video programming at home; if that form of programming were not diverse, the public would have nowhere else to turn. That is no longer the case today.⁸⁹ Accordingly, a diversity-based defense of PTAR would appear to depend on the principle that the Commission should continue to utilize regulatory means to ensure diversity for the remaining 30 percent of the population that relies exclusively on broadcast television for their

weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark.").

⁸⁸ See, e.g., MAP Comments at 18-23.

⁸⁹ We note that Judge Posner observed in *Schurz Communications, Inc. v. FCC*, *supra* at 1055, that the Commission could have reasonably concluded that its diversity goals do not dictate regulatory action in light of the breadth of available media (broadcast and non-broadcast) today.

programming fare,⁹⁰ either out of choice or because of financial limitations.⁹¹

52. Is PTAR the appropriate mechanism to ensure diversity for this group? As a threshold matter, we seek to gain the appropriate perspective on the fact that a proportion of the public is limited to over-the-air television. At present, 62.5 percent of television households in the United States subscribe to cable, and the percentage of homes passed by cable exceeds 96 percent. An additional 6 percent subscribe to other forms of distribution media. Moreover, our assessment of the trends indicate that by the year 2000, the percentage of the population able to receive non-broadcast video service will reach 100 percent. Given these facts and predictions,⁹² it appears that most of the country receives or will soon receive a wide diversity of programming. We ask commenters to address whether the percentage of viewers who are limited to broadcast television has or will become so small that the advantages of eliminating PTAR outweigh its benefits. To assist our review of this issue, we seek commenters' views on how we should treat households to which alternative video delivery systems are available, but which choose not to subscribe. Similarly, we ask commenters to address the impact of existing regulatory measures, such as cable rate regulation, on the availability of subscription video services to those portions of the viewing public that could not otherwise afford to pay.

53. Proponents of PTAR also argue that the broadcasting industry must fulfill unique public service obligations (imposed by the government), which would be more difficult absent a vibrant base of independent stations and a strong supply of diverse programming from non-network sources.⁹³ Commenters typically cite the broadcasters' obligation to serve their communities of license, and their resulting provision of such programming as public affairs, local news and other locally oriented material. Other video distribution services do not labor under the same regulatory obligations to provide such fare. In order to assess the cogency of these assertions, we seek evidence of the actual levels of such programming on independent stations, network affiliates, and non-broadcast outlets. In other words, the argument appears to assume that broadcasters in fact provide more public interest programming than other services. We ask that parties who rely on this assertion provide data supporting it. If non-

⁹⁰ As set forth in Section IV of this *Notice*, 62.5 percent of TV households in the United States receive cable service, and approximately 6 percent receive other multichannel video service, leaving about 30 percent of the population that relies exclusively on over-the-air broadcast service.

⁹¹ In increasingly smaller numbers, viewers are limited to over-the-air service because of the lack of availability of alternative delivery services.

⁹² See Section IV, *supra*, for a detailed description of the current and predicted levels of video service in the United States.

⁹³ As detailed above, PTAR's proponents have asserted that the competitive benefits received by independent stations, for example, result in greater profits that permit such stations to (a) survive more effectively, and (b) provide more or better "public interest" programming.

broadcast outlets are in fact providing the same or more of this type of service, is PTAR necessary to achieve the goals described in this paragraph? Commenters should also supply data to demonstrate the historical trends. Has the amount of public interest programming carried on broadcast television increased since the passage of PTAR, and how do these trends compare with those for the non-broadcast video media? Has an increase, if any, in the amount of public interest programming by independent stations been offset by a decrease in such programming by the network affiliates? To the extent PTAR harms network affiliates, one might expect a corresponding decrease in such programming. Does the rule, therefore, really create a net increase of such programming presented through the broadcast medium? In addition, commenters who attempt to trace a connection between the competitive benefits of PTAR and an increased output of public interest programming should, at the least, be able to document an industry-wide correspondence between such output and increased profit.

54. Finally, it appears worthwhile to consider whether different regulatory responses than PTAR would be more effective or efficient in achieving the stated goals of that rule. Therefore, in addition to seeking comment on whether we should retain, modify or repeal the rule, the Commission also seeks suggestions on alternatives to PTAR. For example, the rule is intended to promote independent program production. One alternative approach would be for the Commission to establish direct limits on the amount of in-house programming that the networks could distribute to other affiliates. We seek comment on whether this alternative or others could better achieve the goals of PTAR, either in terms of increased effectiveness or lowered costs.

VII. Incidental Elements of the Rule: Definitions and Exemptions

55. *Definition of a Network.* To the extent that the record might support retaining PTAR in whole or part, we believe that review of the current definitions and exemptions associated with the rule is appropriate. For example, under the Commission's current PTAR and fin/syn rules, Fox is not considered a network, and its affiliates are not considered to be network affiliates subject to those rules.⁹⁴ In their comments, the Fox Affiliates and others

⁹⁴ For purposes of PTAR, a "network" is any entity (or an entity under common control) regularly providing more than fifteen (15) hours of prime time programming per week (excluding live coverage of *bona fide* news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide. 47 C.F.R. §73.662 (f). That definition excludes any television network formed for the purpose of producing, distributing, or syndicating program material for educational, noncommercial, or public broadcasting exhibition, or for non-English language exhibition, or that predominately distributes programming involving the direct sale of products or services. Further, programming distributed by an entity prior to becoming a network, and subsequently produced episodes of a series first exhibited by that entity prior to becoming a network, are not network programming for purposes of PTAR. Moreover, for thirty-six (36) months after an entity becomes a network, stations owned by or affiliated with that network are exempt from compliance with the requirements of PTAR with respect to programming already under

repeatedly assert that one of the desirable features of PTAR is that while affiliates of the three largest networks in the top 50 markets are subject to PTAR, Fox affiliates are not, and thus are helped by the rule. In contrast, Group W raises questions of fairness, observing that it will become increasingly difficult to distinguish between network affiliates, who are barred from airing popular off-network and new network programming during the prime time access period, and affiliates of new "near" networks, who can secure such programming. Group W also argues that this disparate treatment will appear more and more arbitrary, as major network affiliates switch to "near" networks and are suddenly freed from the constraints of PTAR and allowed to compete more effectively against the remaining network affiliates in the market.⁹⁵ Group W, in this regard, 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.⁹⁶ With the above in mind, we ask commenters to address whether the current definition of a network continues to be appropriate to define which entities are networks and which stations are network affiliates subject to PTAR.⁹⁷

56. *Exempted Programming.* Although none of the petitioners has specifically raised this issue, we note that there are a number of exemptions to the general three-hour prime-time limit on network or off-network programs that may be aired by network affiliates in the top 50 markets. The specific types of programs include:

- (1) On nights other than Saturdays, network or off-network programs designed for children, public affairs programs or documentary

contract at the time the entity became a network. 47 C.F.R.. §73.658(k), Notes 3 and 4.

⁹⁵ We note that a former affiliate would reap a similar competitive advantage against independent stations and affiliates of new networks as well.

⁹⁶ Group W Comments at 3-4.

⁹⁷ We note that we recently redefined "network" under both the fin/syn and PTAR rules in the context of our review of the fin/syn rules. We felt that the previous definition would include entities that did not possess the degree of power that prompted us to place restraints on the networks in the first place, and that the definition was discouraging the development of new networks. See *Report and Order* in MM Docket No. 90-162, 6 FCC Rcd at 3149. For similar reasons, and because of the scheduled elimination of the fin/syn rules for the established networks, we decided to exempt emerging networks from virtually all fin/syn constraints no matter how they would ultimately compare with ABC, CBS or NBC. See, e.g., *Second Report and Order* in MM Docket No. 90-162, 8 FCC 2d 3282, 3331-35 (1993). Parties commenting here on the appropriate definition of "network" for PTAR purposes should address the applicability of our fin/syn approach to this definition.

programs;⁹⁸

- (2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office;
- (3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming;
- (4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control;
- (5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones; and
- (6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

57. In specifying the particular categories of exemptions to the three-hour PTAR limit, the Commission intended to safeguard, on policy grounds, existing levels of certain

⁹⁸ For purposes of PTAR, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are nonfictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself. The term "public affairs programs" means talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national, and international public affairs. 47 C.F.R. §73.658(k), Note 2.

types of programs by network affiliates and the networks themselves (e.g., children's programming) or to accommodate scheduling exigencies (e.g., coverage of fast-breaking news events). Therefore, we request that commenters provide any evidence that they may have on PTAR's effects in these regards. Has the existence of these exemptions led to the provision of the same amount of these types of programs than would have existed without the rule? If so, has consumer or viewer welfare been increased by allowing these exemptions, and has it been further increased by the fact that other classes of network and off-network programs are not similarly exempt from PTAR? In sum, we ask commenters to indicate whether these exemptions should be retained, modified or removed, and whether there are any other classes of programs which the public interest suggests should be similarly exempt from PTAR. For example, under the current rule, the Commission protects network and off-network children's programming in the existing access period. Should the Commission extend or modify PTAR to encourage the broadcast of additional children's programming?

VIII. Constitutional Issues

58. Finally, we note that, in light of the policy examinations we are undertaking to determine whether PTAR in its present form should be modified, it may not be necessary to address the specific constitutional questions raised herein. However, if PTAR is retained in part or in whole, it must be done in a manner consistent with constitutional principles. In this regard, we note that the rule has been unsuccessfully challenged as a restraint on free speech contrary to the First Amendment.⁹⁹ Regardless of whether its original objectives have been met, the issues now before us necessarily entail determining whether the government retains a justifiable interest in PTAR regulation as it now exists. Thus, parties urging retention of the rule, in part or in whole, should address whether the previous constitutional justifications for PTAR still apply, and should discuss the constitutional implications of any proposed alternative to the present rule. Parties may also wish to address whether and to what extent new and developing technologies have affected the constitutional analysis applicable to regulations of this nature, including whether, in fact, broadcast and non-broadcast program outlets are constitutionally indistinguishable as alleged by First Media and others.

IX. Conclusion

59. Based on the petitions and comments we have received, and in light of significant changes in the video marketplace, it is clear that the time has come to review the Prime Time Access Rule. We have proposed an analytical framework for evaluating the rule, and we anticipate that the data and studies that we have solicited will enable us to determine whether

⁹⁹ *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); cf. *Schurz Communications v. FCC*, 982 F.2d 1043, 1948 (7th Cir. 1992) (upholding constitutionality of fin/syn rules).

the rule should be retained, modified or repealed. However, we invite comment on whether there are alternative frameworks that better allow us to understand the public interest effects of retaining, modifying or repealing PTAR.

60. We invite commenters to tell us whether they believe that PTAR should be retained, modified, or repealed. Those who favor modification of the rule should be clear about the specific modifications that they favor and why they believe these changes would further the public interest.

61. If, as a result of the record developed in this proceeding, the Commission chooses to modify or eliminate the rule, we must then determine when to do so and whether we should adopt transition measures. With regard to when a change in the rule might be appropriate, one possibility is immediately after such a decision is made. Commenters may instead wish to propose a timetable that allows industry participants to adjust to the changing economic conditions that might result from modifications to PTAR. Supporters of this approach should suggest the time frame that they believe would be the most suitable. Alternatively, one might tie the timing of the modification or repeal of PTAR to marketplace developments. For example, such a measure might tie full elimination of the rule to the attainment of a commercial milestone such as having a specified percentage of television households receive broadcast television signals by subscribing to cable television or other multichannel delivery systems; or to the emergence of one or more additional networks. Alternatively, elimination could be tied to technological developments such as the general availability of advanced digital television. Lastly, the timing might be tied to regulatory developments, such as the scheduled expiration of the fin/syn rules or some time thereafter.

62. A transition mechanism could be based on a variety of different considerations. If the Commission adopts a transition, it must define the stages of that transition. Commenters in this proceeding have focused much of the debate thus far on PTAR's off-network restriction. One possible transition would entail initial repeal of the off-network restriction followed by later repeal of the remainder of the rule. We invite comment on whether such a staggered repeal of the rule would further the public interest by reducing marketplace disruption or would delay the realization of benefits that could otherwise be realized from immediate reform. Parties should focus comments in this regard on identifying portions of the rule for which immediate elimination appears least likely to be disruptive and most apt to create positive effects. Moreover, to the extent that a phasing-out of PTAR, in whole or part, is appropriate, we solicit comment on whether it would be wise to adopt here a review and expiration framework similar to that established for the fin/syn rules, or whether some other approach would provide a better safeguard in the transition to scheduled repeal of the rule.¹⁰⁰

¹⁰⁰ In the fin/syn proceeding, the Commission decided to phase out those rules in two stages to observe how the market would begin to react to the removal of those long standing constraints. This approach was designed to eliminate those restrictions that appeared least likely to negatively affect diversity and competition, while retaining, but phasing out, other restrictions whose premature elimination held the most risk of harm -- "including significant upheaval and disruption in the industry

63. Another possible transition mechanism would be to limit temporarily the application of PTAR or its components to affiliates in the top 10 or 25 markets. This approach would guarantee first-run syndicated programs access to, for example, the 10 or 25 largest television markets, which now account for 31 and 50 percent, respectively, of all television households (as opposed to the top 50 markets, which represent 67 percent).¹⁰¹ Under this approach, markets 11-50, or 26-50, would be opened to competition during the prime time access period, and affiliates in those markets would be able to exercise increased programming discretion during the access period. We seek comment generally on this type of interim proposal, and specifically on whether the top 10 or 25 markets are adequate in terms of audience share, advertising revenues and affiliate viewing share to preserve a base of protection for new first-run syndicated programming, should such a base be found necessary.

64. A final type of transition mechanism would be to lift for a specified period the off-network restriction for programming that meets certain conditions. For example, one might exempt from the restriction those programs that have been off-network for more than a certain number of years, allowing older off-network programs to compete with first-run syndicated programs for access to Top 50 Market Affiliates during prime time. This approach could increase competition and allow Top 50 Market Affiliates greater programming discretion, while preserving an access period for first-run syndicated programs in the top 50 markets, possibly increasing the after-market value of network programs and decreasing the risk to producers of high quality network programming.

65. Finally, we take this opportunity to remind parties that, as is the case with any rulemaking proceeding at this stage of the administrative process, the current rule remains in full force and effect.

X. Administrative Matters

66. Ex Parte Rules -- Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules.

and potentially harmful competitive abuses not unlike those that led to the original imposition of the rule." *See Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, 3337 (1983). Moreover, in order to assure as smooth a transition as possible, the Commission stated that it would conduct an inquiry prior to the scheduled expiration of the remaining fin/syn restrictions as an additional safeguard to ensure that the market is operating as anticipated, without unintended and adverse negative consequences. In this regard, the Commission stated that its inquiry would provide an opportunity for comment to those who believe that retention of restriction is warranted, but that the remaining fin/syn restrictions would automatically expire unless the Commission issued an order to the contrary. *Id.* at 3338-42.

¹⁰¹ 1994 *Broadcasting and Cable Yearbook*, p. c-203-4.

See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

67. **Comment Information.** Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 6, 1995**, and reply comments on or before **February 6, 1995**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

68. **Initial Regulatory Flexibility Analysis.** See Appendix B attached.

69. **Additional Information.** For additional information on this proceeding, contact David E. Horowitz or Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

XI. Ordering Clause

70. IT IS THEREFORE ORDERED that the Petition for Rulemakings filed by First Media Corporation and Hubbard Broadcasting, Inc., and the Application for Review filed by Channel 41, Inc. ARE CONSOLIDATED into this proceeding.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

Appendix A

The following parties filed comments in response to the FCC's April 12, 1994, *Public Notice*:

Association of Independent Television Stations, Inc. (Comments and Reply Comments)
Bonneville International Corporation
CBS Inc.
The Coalition to Enhance Diversity (Comments and Reply Comments)
First Media, L.P. (Comments and Reply Comments)
FBC Television Affiliates Association
Fox Broadcasting Company¹⁰²
King World Productions, Inc. (Comments and Reply Comments)
Media Access Project (Comments and Reply Comments)
MTM Television Distribution, Inc.
NATPE International
National Broadcasting Company, Inc.
Network Affiliated Stations Alliance
Office of Communications of the United Church of Christ; Black Citizens for a Fair Media;
Dr. Everett Parker, Adjunct Professor, Fordham University; Peggy Charren, Visiting
Scholar of the Harvard University Graduate School of Education and Founder of
Action for Children's Television; and Henry Geller, Communications Fellow, The
Markle Foundation
Viacom Inc. (Comments and Reply Comments)
Westinghouse Broadcasting Company, Inc.

The following parties filed *ex parte* submissions which have been associated with this proceeding:

ACI; All American Television, Inc; Central City Productions, Inc.; Claster Television
Incorporated; Crescent Entertainment, Inc.; Mark Goodson Productions LP; Kushner-
Locke Company; Lee Miller Productions; Loreen Arbus Productions, Inc.; Muller
Media, Inc.; Ralph Edwards/Stu Billett Productions; S.I. Communications, Inc.; and
Videoware Corporation
Association of Independent Television Stations, Inc.
Buck Owens Production Company, Inc.
Consumer Federation of America
KGW-TV
KHNL(TV)
KING(TV)

¹⁰² Letter to Chairman Hundt dated June 13, 1994.

KMSP(TV)
KOCB-TV
KOFY(TV)
KOKI-TV
KPLR-TV
KPTV(TV)
KREM-TV
KRLR-TV
KSMO-TV
KTLA(TV)
KTXH-TV
KTXL(TV)
KWGN-TV
LIN Television Corporation
Media Access Project
People for the American Way Action Fund
Post-Newsweek Stations, Inc.
Scripps Howard Broadcasting
The Udwin Group
WBFS-TV
WBSV(TV)
WCIU-TV
WCNC(TV)
WDJT-TV
WGNX(TV)
WGTW-TV
WHAS(TV)
WHNS-TV
WLVI-TV
WOAC(TV)
WPIX, Inc.
WPTY(TV)
WTMV(TV)
WTOG-TV
WTTA-TV
WUTV(TV)
The Walt Disney Studios

Appendix B

Initial Regulatory Flexibility Analysis.

Reason for the Action: This proceeding was initiated to review and update the provisions of PTAR.

Objective of the Action: The actions proposed in this *Notice* are intended to reexamine and perhaps modify or eliminate the prime time access rule, 47 C.F.R. §73.658(k), in response to changes in the communications marketplace, and to better adjust to the needs of the public.

Reporting, Record keeping, and Other Compliance Requirements Inherent in the Proposed Rule: None.

Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule: None.

Description of Potential Impact and Number of Small Entities Involved: Approximately 416 existing television broadcasters of all sizes may be affected by the proposals contained in this Notice.

Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The proposals contained in this Notice are meant to simplify and ease the regulatory burden currently placed on network affiliates in the top 50 markets.

As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981)).

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

**Re: Review of the Prime Time Access Rule, Section 73.658(k) of the
Commission's Rules**

This Notice of Proposed Rulemaking reflects a thorough approach to reviewing the merits of the Prime Time Access Rule [PTAR] from various perspectives in the industry. The broadcast and emerging networks, network affiliates, independent television stations, and program producers and syndicator will all have an opportunity to influence the outcome of this docket.

I believe this Notice will track the impact of concurrent industry developments, to include: (1) the potential sunset of our Financial Interest and Syndication Rules in 1995; (2) recent network affiliation changes; (3) recent television station ownership investments, both controlling and non-controlling, and the impact on network affiliation relationships; and (4) the impact of potential modifications to PTAR with respect to independent television station groups and emerging networks. I hope the record in this proceeding will present the Commission with an updated snapshot and projection of industry trends.