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FCC 95-97

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

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 91-221
Regulations Governing Television)	
Broadcasting)	

REPORT AND ORDER

Adopted: March 7, 1995

Released: March 7, 1995

By the Commission:

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I. INTRODUCTION

1. By this Report and Order, the Commission eliminates two of its network rules, 47 CFR Section 73.658(f) and 47 CFR Section 73.658(l). Section 73.658(f), the "network station ownership" rule, prohibits network ownership of television broadcast stations in markets that have so few stations, or stations of such unequal desirability (in terms of coverage, power, frequency, or other related matters), that "competition would be

substantially restrained" by permitting network ownership.¹ Section 73.658(l), the "secondary affiliation" rule, limits secondary affiliations in markets where two stations have affiliated with two of the three "traditional" networks, and there is at least one independent station with comparable facilities.² In these circumstances, Section 73.658(l) requires a third network seeking an affiliate in the market to offer its programming first to the independent station. The Commission concludes that changes in the marketplace have made both rules obsolete.

II. BACKGROUND

2. The genesis for this proceeding was a 1991 report by FCC Office of Plans and Policy (OPP report) on broadcast television and the evolving market for video programming.³ The OPP report concluded that the video market had undergone enormous changes since 1975. Among the changes were increasing competition in the video marketplace and rapid growth in the availability of national sources of programming resulting in a plethora of new services and choices for video consumers. In addition, the OPP report suggested that these competitive forces were affecting the ability of over-the-air-television to contribute to a diverse and competitive video programming marketplace.

¹ The rule states that "[n]o license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control of a network organization for a television broadcast station in any locality where the existing television broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. (The word 'control' as used in this section, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.)" 47 CFR Section 73.658(f).

² The rule begins by stating that "[t]he provisions of this paragraph govern and limit the extent to which, after October 1, 1971, commercial television stations in the 50 States of the United States, which are regular affiliates of one of the three national television networks, may broadcast programs of another network, in markets where there are two such affiliated stations and one or more operational VHF or UHF stations having reasonably comparable facilities which are not regular affiliates of any network." 47 CFR Section 73.658(l). The rule continues for 20 additional paragraphs and two notes defining and explaining the precise circumstances under which a network may not obtain a secondary affiliation in a television market (e.g., the rule defines station, network, television market, comparable facilities, types of programming, and offer and acceptance).

³ F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991).

3. The OPP report prompted the Commission to release a Notice of Inquiry (NOI)⁴ in 1991 to seek comment on the implications of the growth of competition in the video marketplace for our regulatory policies. As part of this inquiry, we asked which Commission regulations, if any, hamper the ability of the networks, their affiliates, or independents to compete with multichannel delivery systems. After reviewing the comments filed in response to the NOI,⁵ we adopted a Notice of Proposed Rulemaking (NPRM)⁶ in 1992 to consider changes to several long-standing structural rules that have governed the television industry. The NPRM proposed alternative means of lessening the regulatory burden on the television broadcasting industry as it seeks to adapt to the multichannel video marketplace. The NPRM specifically proposed repeal of the dual network rule (Section 73.658(g)), the network station ownership rule, and the secondary affiliation rule. After reviewing the comments filed in response to the NPRM,⁷ we have decided in this Report and Order to eliminate the network station ownership rule (Section 73.658(f)) and the secondary affiliation rule (73.658(l)).⁸

III. DISCUSSION

A. The Network Station Ownership Rule.

4. Rule. As explained above, the network station ownership rule prohibits a network organization from owning a TV broadcast station in any locality where the existing TV broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained. The definition of network for purposes of this rule derives from the Chain Broadcasting report⁹ and applies to any broadcast television network that distributes programming to two or more interconnected facilities.

5. History. The network station ownership rule derives from a similar rule applicable to AM radio networks, which originally was promulgated as part of the 1941 Chain Broadcasting rules. While recognizing that the ownership of broadcast stations by

⁴ Notice of Inquiry in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991).

⁵ Thirty-nine parties filed initial comments, and 19 filed reply comments.

⁶ Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

⁷ Thirty-four parties filed initial comments, and 17 filed reply comments. A list of commenters is attached as Appendix B.

⁸ The Commission will address the dual network rule in a later document.

⁹ Report on Chain Broadcasting, Federal Communications Commission, Commission Order No. 37, Docket No. 5060 at 92 (May 1941).

networks may result in a more efficient network broadcast system,¹⁰ the Chain Broadcasting report expressed concern over the potential for network ownership of radio stations to reduce competition among networks for affiliates and impede the growth of new networks. The rule sought to increase the availability of programming to viewers, prevent domination of smaller markets by networks, and encourage the creation and growth of new networks by preventing existing networks from "bottling up" the best facilities.¹¹ A parallel rule was applied to television in 1946.¹² When the rule was applied to television in 1946, there were only six television stations in the United States. In 1977, the application of Section 73.658(f), together with most of the other Chain Broadcasting rules, was eliminated for AM and FM radio stations.¹³ The Commission cited "tremendously changed circumstances [in the radio industry]" as the reason for the elimination of the rule. The Commission noted the great increase in the numbers of radio stations and networks and the decreased economic importance of networks and concluded that "the abuses and practices dealt with [in the Chain Broadcasting rules] are unlikely to develop [in the current radio industry] to any substantial extent."¹⁴

6. Comments. All commenters addressing our proposal to eliminate this rule supported our proposal. Several commenters argue that the growth in broadcast and non-broadcast outlets in markets of all sizes has rendered the rule obsolete. They agree with our statement in the NPRM that the average television market has approximately seven licensed commercial television stations (in contrast to the six on-air television stations in the entire country at the time of the rule's adoption), and over half of all households receive more than ten over-the-air stations.¹⁵ ABC points out that sufficient channels have been available so that the Fox Broadcasting Company was able to establish a national network, that other regional, occasional and special interest broadcast networks have developed and that there is

¹⁰ Id. at 67-68.

¹¹ Id. at 67-69.

¹² The rule was applied as part of a general Rule Making Order which established the first television table of allotments and transposed relevant regulations governing standard and FM radio broadcasting stations to the new medium. 47 CFR §§3.631-3.638 (1946); Amendment of Part 3 of the Commission's Rules, 11 Fed. Reg. (January 1, 1946).

¹³ Report, Statement of Policy, and Order in Docket No. 20721, 63 FCC 2d 674 (1977).

¹⁴ Report, Statement of Policy, and Order in Docket No. 20721, 63 FCC 2d 674, 678 (1977).

¹⁵ See, e.g., Capital Cities/ABC, Inc. (ABC) Comments at 27-28; National Association of Broadcasters (NAB) Comments at 36-37; National Telecommunications and Information Administration (NTIA) Comments at 31-32.

little, if any, danger of network domination of communications outlets in small markets.¹⁶ Furthermore, commenters note, cable television and home satellite dishes help make network programming available even in the smallest of markets.¹⁷

7. NBC argues that the network station ownership rule is unnecessary because networks have typically sought to own television stations in larger markets.¹⁸ NBC also argues that the failure of the network station ownership rule to have ever been successfully invoked to deny network acquisition of any television stations is a testament to its obsolescence.¹⁹ Moreover, commenters assert that, although raised infrequently (only six times since 1946), the rule might be contrary to the public interest because it could deter network companies from investing in smaller market stations.²⁰ Such stations, they indicate, lost on the average \$880,000 each in 1991.²¹ Network ownership of small market stations could, they continue, preserve such stations and provide viewers with better service in such markets because of the economic resources the networks represent.²² NTIA maintains that network ownership of stations in small markets might also permit improvements in program quality, including locally-produced news and information programming.²³ Yet, to the extent the rule is intended to preserve a competitive balance in small markets, commenters contend it discriminates against the networks because it does not place any similar limitation on other group owners or well-financed non-network owners whose acquisitions of small market stations could have similar competitive effects.²⁴

8. Decision. The network station ownership rule has rarely been invoked. It has only been raised in a total of six cases and has never prevented a network purchase of a

¹⁶ ABC Comments at 27 and 29.

¹⁷ See, e.g., NAB Comments at 36-37; National Broadcasting Company, Inc. (NBC) Comments at 36.

¹⁸ NBC Comments at 36.

¹⁹ NBC Comments at 35-36.

²⁰ See ABC Comments at 30; NTIA Comments at 33-34. The commenters did not provide a definition of "smaller market stations."

²¹ See NAB Comments at 37; NTIA Comments at 33.

²² NBC Comments at 36.

²³ NTIA Comments at 33-34.

²⁴ NAB Comments at 37.

television station.²⁵ Moreover, the television market has undergone enormous change. Chief among these changes has been the growth in the number of television broadcast stations since adoption of this rule. When the Section 73.658(f) was applied to television in 1946 there were six television stations in the United States. As of December 1994, there were 1,523 full-power commercial and non-commercial television stations (682 VHF and 841 UHF). As a result of these changes, it is unlikely that the potential problems that led to adoption of the rule could occur. The rule only applies when there are "so few" television stations or where they are of such "unequal desirability" that competition would be substantially restrained. Such conditions are rare today. There are currently 13 markets that have only one commercial television station and there are 25 markets that have only two commercial stations. The 38 markets represent 2.7% of all television households. If we include both commercial and noncommercial stations, there are five markets with one television station and 21 markets with two television stations.

Since there are now so few small television markets of the type affected by the rule, it is not likely that network ownership of a station in these small markets can effectively be used to block the emergence of competing new networks. Fox, for example, has developed successfully without reaching 100 percent of television households. In addition, United Paramount Network (UPN) and Warner Brothers TV Network (WB) have entered the market and received advertiser support with less than full coverage of the United States. Both UPN and WB networks now reach approximately 80 percent of U.S. television households. These examples suggest that the 2.7 percent of television households represented by the 38 markets affected by the rule are not likely to be critical to the

²⁵ See General Times Television Corp., 13 RR 499 (1956) (without a written opinion, network purchase of one of Hartford's two commercial stations (a UHF station) approved); New Britain Broadcasting Co., 21 FCC 958 (1956) (network purchase of New Britain's only television station (UHF) approved, with the Commission taking cognizance of two other stations in the Hartford market); St. Louis Telecast, Inc., 22 FCC 625 (1956) (Section 73.658 deemed not to apply where there were three commercial and one noncommercial stations in the market (St. Louis)); Hyman Rosenblum, 22 FCC 1432 (1957) (acquisition permitted in market (Albany) with three stations, assuring station availability for all three networks); Biscayne Television Corp., 22 FCC 1464 (1957) (acquisition permitted in market (Miami) with three stations and two additional allocations, assuring availability of three national networks' programs over approximately equal facilities); and National Broadcasting Co., Inc., 44 FCC 2098 (1960) (renewal of network's license approved in city (Philadelphia) with three television stations). For a discussion of these cases, see L.A. Powe, Jr., "FCC Determinations on Networking Issues in Multiple Ownership Proceedings" at 51-59 (August 1979) in Network Inquiry Special Staff, Preliminary Report on Prospects for Additional Networks (Feb. 1980).

²⁶ Broadcasting and Cable (January 16, 1995) at 10; Communications Daily (December 23, 1994) at 5.

development of new networks. Moreover, networks are not as dependent on broadcast markets for coverage as was the case before the advent of cable. For example, Fox has filled in gaps in its reach through cable affiliations, and 18 percent of WB's coverage is attributable to cable carriage of WGN (Chicago) in markets without WB affiliates.²⁷

10. We also believe that elimination of our rule prohibiting network ownership of a station in a small market is unlikely to have an adverse effect on the availability of video programming to the public. When the Commission first adopted the rule in 1946, it intended to preserve a television station's access to alternative program sources. In this way, viewers in those markets would be able to see programs from more than just one network. An affiliate could choose to air another network's programming while an owned and operated station of a network could not. Today, small television markets still have only one or two broadcast outlets but network programming not available by over-the-air television in these small markets can be made available by cable and/or satellite home dish importation of distant network signals. The average cable penetration in the 38 markets with one and two broadcast stations is 68 percent (cable penetration in these markets ranges from 50 percent to 89 percent).²⁸ While cable and DBS are subscription services and are, therefore, not a complete substitute for broadcast television, their existence exerts competitive pressure on the television station(s) to show the best available programs. Moreover, we will continue to scrutinize potential adverse effects on competition and other public interest implications of network ownership of a station in a small market during the license transfer process.

11. Accordingly, we conclude that the network station ownership rule is no longer necessary to increase the availability of video programming to viewers or further the creation of new networks, and thus we find no basis to retain this rule. In addition, it is possible that the rule may well preclude potential benefits to the public. We note that the commenters agreed, without refutation by any party, that network ownership could produce efficiencies in managerial, technical, and other operations that would improve the financial viability and competitiveness of television broadcast stations in small markets, which could then better provide greater service to the public. Therefore, we are eliminating the network station ownership rule.

B. Secondary Affiliation Rule

12. Rule. The secondary affiliation rule specifically requires that in TV markets where two of the three traditional networks already have an affiliate, a network with no affiliate in the market must offer prime-time programs and weekend sports events to independent stations with facilities comparable to the other network affiliates (UHF or VHF) before offering the programs to either of the two affiliated stations. The term "network" in

²⁷ Broadcasting and Cable (January 2, 1995) at 36.

²⁸ Broadcasting and Cable Yearbook 1994 at D-68.

the rule is defined in two ways. A station is considered a network affiliate only if it has a regular affiliation with "one of the three national television networks" -- i.e., ABC, NBC, or CBS. 47 CFR Section 73.658(1)(1)(iii). However, networks whose programming is affected by the rule -- that is, the networks that are seeking an affiliation in a market that only has two "affiliates" within the meaning of the rule -- include any "national organization[s]" that distribute programs "for a substantial part of each broadcast day to television stations in all parts of the United States, generally via interconnection facilities." 47 CFR Section 73.658(1)(1)(v). At the present time, only ABC, CBS and NBC are covered by this definition because no other national networks as yet distribute programming "for a substantial part of each broadcast day." The rule as adopted is, in effect, a very narrowly drawn exception to the Commission's exclusive affiliation rule, which prohibits an affiliate from entering into any agreement with a network under which the station is prevented, hindered or penalized for broadcasting the programs of any other network. See Section 73.658(a) of the Commission's Rules.

13. History. The secondary affiliation rule was adopted by the Commission in 1971 in order to promote development of UHF television stations. The proceeding in which the rule was adopted was initiated by a petition that indicated that in certain markets with two VHF network affiliates and one UHF independent television station, the UHF stations had not been able to obtain regular affiliations with one of the three major networks. Instead, in such markets, the third national network, which had no affiliate in the market, frequently would place its programs on a secondary basis on one or both of the VHF stations, rather than offer them to the UHF independent. This practice created a self-perpetuating predicament: because UHF stations allegedly could not deliver the audience, a network with no affiliate in the market would first offer its programs to VHF stations affiliated with another network rather than to an independent UHF station. Because independent UHF stations had only tenuous secondary access to the popular program fare, they could not develop the audience necessary to interest the networks or to generate the income necessary to improve their facilities. This self-perpetuating situation was thwarting the development of the UHF television service and was therefore contrary to the expressed Commission goal of fostering the development of UHF television stations as "viable, truly competitive outlets capable of contributing to the full development of television in the United States."²⁹

14. Accordingly, the Commission adopted the secondary affiliation rule. Even at the time of adoption, the Commission indicated that the rule applied to only "a very limited number of situations" and expressed the hope that the need for it would expire as a result of "voluntary affiliation by the network with the UHF station."³⁰ "Thus benefitted, it is hoped that they [UHF stations] will become viable operations, making a permanent contribution to

²⁹ First Report and Order in Docket No. 18927, 28 FCC 2d 169, 185 (1971), recon. denied, 22 RR 2d 1732 (1971).

³⁰ Id. at 185.

the full development of the nation's television system."³¹

15. Comments. Commenters were divided with respect to the continued merit of and need for the secondary affiliation rule. Commenters favoring repeal of the rule contend that in 1971, when the rule was adopted, the Commission was concerned that networks would "bypass" unaffiliated UHF stations in favor of stronger VHF facilities, stunting the growth of UHF television.³² However, these commenters note that there has been a large increase in UHF commercial and non-commercial stations on-the-air (from 292 in 1971 to 817 at the time the comments were filed), and they assert that both the all-channel capability of television receivers and the prevalence of cable carriage has reduced any UHF disadvantages and eliminated the need to protect and foster UHF development by this rule.³³ Commenters also point to "a multitude" of program sources from which independent stations may obtain programming -- including new sources for first-run syndicated programming -- which, they claim, further reduces the need for such a rule from that present in 1971 when there were only about 90 independent stations and the syndicated program supply market was weak.³⁴ Moreover, NBC further argues that, at present, networks generally prefer a full-time affiliation with a UHF station to part-time carriage by a VHF station.³⁵

16. Further, commenters favoring repeal argue that, in practice, the rule restricts only the three traditional networks by limiting the stations with which they can affiliate and allows other program distributors flexibility to choose their program outlets. These commenters do not believe that this is rational in the competitive video marketplace that the networks face today. Networks should, commenters favoring repeal continue, be free to choose their affiliates and distribute their programs in the method best serving their competitive interests. To retain the rule, these commenters conclude, would provide unaffiliated stations with a government subsidy that cannot be justified under existing market conditions.³⁶ Furthermore, Capitol asserts that the dominance of the three networks has been weakened as the number of media outlets has grown and the strength of independent stations

³¹ Id. at 191.

³² ABC Comments at 31.

³³ See, e.g., ABC Comments at 32; Capitol Broadcasting Co., Inc. (Capitol) Comments at 13-14; NBC Comments at 39.

³⁴ NBC Comments at 38-39; ABC Comments at 32.

³⁵ NBC Comments at 39.

³⁶ See ABC Comments at 33-34. ABC apparently believes that by "channeling" network programming to independent stations the Commission is subsidizing them, obtaining for independent stations a benefit that they may not be able to secure absent the rule.

has increased.³⁷ Thus, it concludes, a great number of stations have been constructed without any expectation of a network affiliation, demonstrating that their owners do not believe one is needed to survive. This, it continues, has led to a diminished bargaining power of the networks and a substantial alteration in the relationships between networks and their affiliates further rendering this rule unjustified and unnecessary.³⁸

17. Other commenters, including network affiliate groups, broadcast trade organizations and some broadcasters, urge retention of the rule. They maintain that circumstances have not changed to the degree necessary to justify changing the rule. ABC Television Affiliates argues that "the public interest considerations in assuring the availability in each market of full three-network service" warrant retention of the rule.³⁹ NAB asserts that, although there has been a considerable increase in the supply of programming since the rule's adoption, there has also been a large increase in the number of video outlets -- both broadcast and nonbroadcast -- all of which compete for programming. As a result, it argues, more than one half of all independent stations lost at least \$300,000 each in 1991, and UHF independent station profits dropped to an average loss of \$567,000, making elimination of the rule and the protections it affords "inadvisable."⁴⁰ NAB also points to the intense debate over the Commission's financial interest and syndication rules as evidence of the commercial value that continues to be ascribed to network programming and the importance that independent stations place on access to such programming. Other commenters believe that, without the rule, weaker independent stations are placed at an "extreme" competitive disadvantage; these commenters assert that without the rule the twice-affiliated station could "cherry-pick" its preferred network programming and prevent the public from seeing the network programs it chose not to air.⁴¹

18. Decision. We need not decide in this proceeding the broader issue of whether UHF independent stations remain at a disadvantage for any purpose as compared to VHF stations. Nor need we decide whether network power has been diminished to such an extent that elimination of every existing restraint on network activities is warranted. The record developed herein persuades us that the secondary affiliation rule is unnecessary to ensure the availability of competitive programming to unaffiliated stations. Two factors lead us to this result: 1) improvements to UHF reception; and 2) the increased availability of programming and heightened competition for affiliates.

³⁷ Capitol Comments at 14.

³⁸ Id. at 11 and 14.

³⁹ ABC Television Affiliates Association Reply Comments at 5.

⁴⁰ Although in its comments, NAB attributes these statistics to TV Digest, they are also reported in the 1993 NAB Television Financial Report, 1991 Data, pp. 181, 219.

⁴¹ Fisher Broadcasting, Inc. Comments at 9.

19. As stated above, the secondary affiliation rule sought to break the self-perpetuating cycle that made independent (primarily UHF) stations an unattractive delivery vehicle for the networks. While the rule was limited by its terms to providing a regulatory boost to independent stations that had "reasonably comparable facilities" vis-a-vis their affiliated counterparts, these independent stations nevertheless operated at a technologically-based disadvantage even though the facilities might be comparable. For example, in 1971, many television receivers could not receive UHF signals, and those that could did not provide equivalent tuning of UHF and VHF stations.

20. From a technical perspective, the ability of the UHF television service to compete against VHF service, however, has improved in the 24 years since the secondary affiliation rule was adopted. One major change occurred as a result of the Commission's invocation -- beginning in the 1970s -- of the authority it had been given under the All-Channel Receiver Act of 1962 to require not only that television receivers be capable of receiving UHF as well as VHF channels, but that such receivers provide a greater degree of tuning comparability for VHF and UHF channels.⁴² Pursuant to this authority, between 1970 and 1973, the Commission required television receivers to have more comparable tuning for UHF channels.⁴³ In 1976, the Commission provided that any television receiver equipped with a VHF antenna must also have a UHF antenna,⁴⁴ and in 1978 the Commission reduced the maximum allowable noise figure for television receivers.⁴⁵ In 1982, the Commission modified the television all-channel requirements and recommended that information on improving UHF reception be disseminated to the public.⁴⁶ Advances in television design and the role of cable carriage have decreased the gap between VHF and UHF stations. These developments substantially alleviated the technical disadvantages faced by UHF television receivers, and thus removed one of the obstacles to the development of UHF service for which the secondary affiliation rule was designed to compensate.

21. The second development that has minimized the need for the secondary affiliation

⁴² Pub. L. 87-529 (July 10, 1962) 76 Stat. 150, codified at 47 U.S.C. §303(s), 330; First Report and Order in Docket No. 14769.

⁴³ Report and Order in Docket No. 18433, 21 FCC 2d 245 (1970); Memorandum Opinion and Order in Docket No. 18433, 23 FCC 2d 793 (1970); Report and Order in Docket No. 19268, 32 FCC 2d 612 (1970); Report and Order in Docket No. 19722, 43 FCC 2d 395 (1973).

⁴⁴ Report and Order in Docket No. 20839, 62 FCC 2d 164 (1976).

⁴⁵ Report and Order in Docket No. 21010, 69 FCC 2d 1866 (1978), recon. denied, 70 FCC 2d 1176 (1978). "Noise" is a measure of the effectiveness of television receivers in displaying a weak television signal.

⁴⁶ Report and Order in General Docket No. 78-391, 90 FCC 2d 1121 (1982).

rule is the significant increase of sources of programming since 1971 when the rule was adopted. In markets where the rule would apply today, we believe that independent stations, either UHF or VHF, should remain viable entities by looking to these alternative program sources -- including Fox, United Paramount and Warner Brothers -- even if they lose the benefit of a regulatory "right of first refusal" on some programming of the three traditional networks.⁴⁷ In addition, independent stations have access to a plethora of syndicated first-run and off-network programming.

22. An overview of the marketplace reveals that independent UHF stations have become more competitive despite their lack of affiliation with the traditional networks, and that they no longer appear to need regulatory assistance to attract affiliations of nascent networks. Thus, of Fox's 140 primary affiliates, 121 (86%) are UHF stations;⁴⁸ of United Paramount's 95 affiliates, 78 (82%) are UHF stations;⁴⁹ and of Warner Brothers 43 affiliates, 34 (79%) are UHF stations.⁵⁰ This was not a result of the "secondary affiliation" rule because none of the programmers involved, Fox, United Paramount and Warner Brothers, "distribut[e] programs for a substantial part of each broadcast day," so as to qualify as "networks" under the definition contained in Section 73.658(l)(l)(v) of the Commission's Rules. (Emphasis added.) Rather, these nascent networks chose UHF stations as their primary affiliates rather than opting for secondary affiliations with VHF stations.

23. To illustrate some of the factors influencing the viability of UHF stations, we note that in 1971, there were 179 commercial UHF television stations on the air.⁵¹ As of December 31, 1994, the number of commercial UHF stations had risen to 601, an increase of 235 percent.⁵² We also note that, contrary to the one-year financial snapshot offered by NAB for 1991, profits for UHF independents, on average, have risen dramatically since that year. In 1992, average profits were \$552,000, and in 1993, average profits tripled to \$1.5 million.⁵³ Indeed, recognizing that the UHF service has achieved some degree of

⁴⁷ Notice of Proposed Rule Making in MM Docket No. 94-123, 9 FCC Rcd 6328, 6355 (1994).

⁴⁸ Broadcasting & Cable Yearbook 1994, at G-65.

⁴⁹ Broadcasting and Cable (January 2, 1995) at 36.

⁵⁰ Id.

⁵¹ Cable and Television Factbook, Cable and Services Volume, 1985 Edition/No. 53 at 17.

⁵² FCC News Release 51785 (January 24, 1995).

⁵³ National Association of Broadcasters, 1993 Television Financial Report at 102; 1994 Television Financial Report at 173.

comparability with the VHF service, the Commission eliminated the UHF Impact Policy in 1987.⁵⁴ This degree of comparability may not be high enough to warrant the rescission of all rules designed to promote UHF stations. Indeed, we have asked for comment on the issue of VHF/UHF comparability in other, currently open, proceedings.⁵⁵ Nevertheless, we do not believe that they continue to require the regulatory assistance of this narrowly drawn rule.

24. The basic goal underlying the Commission's adoption of the secondary affiliation rule was to increase the likelihood that UHF television would develop into a viable and competitive service. It appears that the rule has influenced this objective to the extent to which it was capable of doing so. In light of the changes in the market noted above, we believe this narrowly drawn rule is not needed.

25. We also believe that the practice of forcing the networks to make certain offers (i.e., for primary affiliation with an independent station in lieu of a secondary affiliation with an existing network affiliate) may have negative consequences in markets where the rule is applicable by denying affiliated stations maximum programming choices. Such stations are precluded from competing for such secondary network affiliation. As a consequence, they are barred from access to such network programming irrespective of their independent business judgment as to the desirability of that programming. This interference with commerce and free choice should not be maintained where, as here, there remains little justification. Accordingly, it appears that whatever benefits this rule has brought will now continue without this type of regulatory assistance. In light of the foregoing, we are eliminating the secondary affiliation rule.

IV. CONCLUSION

26. Based upon our review of the record in this proceeding, we conclude that neither the "network station ownership" nor the "secondary affiliation" rules are required any longer. While independent stations and, particularly, UHF independents may no longer need the protections these specific rules provide, we reiterate that each of our network related rules must stand or fall on its own merit in light of the protection it was designed to afford, the costs it imposes and benefits in which it results, and the harm that its elimination would cause. We find that in the instant matter, these particular rules are no longer required by the public interest and we are deleting them.

⁵⁴ Report and Order in MM Docket No. 87-68, 3 FCC Rcd 638, (1987).

⁵⁵ See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 94-322 (released Jan. 17, 1995) at ¶102; and Review of the Prime Time Access Rule, Notice of Proposed Rule Making in MM Docket No. 94-123, 9 FCC Rcd 6328 (1994).

Final Regulatory Flexibility Analysis

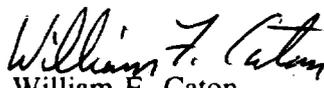
I. Need and Purpose of this Action: The Commission believes that this action will eliminate rules no longer required by the public interest in view of changes in the video marketplace since their adoption. Additionally, their elimination will make over-the-air television better able to compete in the current, and future, video environment.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

III. Significant Alternatives Considered and Rejected: The only alternative to the action being taken herein that was considered by the Commission was retention of the subject rules.

27. IT IS THEREFORE ORDERED that, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r), Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in the attached Appendix A.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

Rule Changes

Part 73 of Title 47 of the U.S. Code of Federal regulations is amended to read as follows:

Part 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334

2. Section 73.658 is amended by removing and reserving paragraphs (f) and (l).

APPENDIX B: LIST OF COMMENTING PARTIES

Comments

1. Abry Communications
2. Act III Broadcasting, Inc.
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Barnstable Broadcasting, Inc.
6. Buck Owens Production Company, Inc.
7. Capital Cities/ABC, Inc.
8. Capitol Broadcasting Company, Inc.
9. CBS Inc.
10. Clear Channel Communications
11. Commonwealth Communications Services, Inc.
12. Fisher Broadcasting Inc.
13. Fox Inc.
14. Home Shopping Network, Inc.
15. Jet Broadcasting Co., Inc.
16. KFVE Joint Venture
17. LIN Broadcasting Corporation, Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Company, and The Spartan Radiocasting Company
18. Malrite Communications Group, Inc.
19. Marion TV, Inc.
20. McKinnon Broadcasting Company
21. Morgan Murphy Stations
22. National Association of Broadcasters
23. National Broadcasting Company, Inc.
24. National Telecommunications and Information Administration
25. Network Affiliated Stations Alliance
26. Office of Communication of the United Church of Christ
27. Press Broadcasting Company, Inc.
28. Sinclair Broadcast Group, Inc.
29. Trinity Broadcasting Network
30. United States Catholic Conference
31. Vetter Communications Company, Inc.
32. Westinghouse Broadcasting Company, Inc.
33. WKRG-TV, Inc. and WEVV, Inc.
34. WNAL-TV, Inc.

Reply Comments

1. ABC Television Affiliates Association
2. American Federation of Television and Radio Artists
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Blackburn & Company, Inc.
6. Federal Trade Commission, Staff of the Bureau of Economics
7. Jet Broadcasting Co., Inc.
8. KMTR, Inc.
9. Morgan Murphy Stations
10. National Association of Black Owned Broadcasters
11. National Association of Broadcasters
12. National Broadcasting Company, Inc.
13. Office of Communications of the United Church of Christ
14. Paramount Stations Group, Inc.
15. Telecommunications Research and Action Center/Washington Area Citizens Coalition
Interested in Viewers' Constitutional Rights
16. WJAC, Inc.
17. WKRG, Inc. and WEVV, Inc.