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

In re )  
 )  
Review of the Syndication and ) MM Docket No. 95-39  
Financial Interest Rules, Sections )  
73.659 - 73.663 of the Commission's Rules )

**NOTICE OF PROPOSED RULE MAKING**

Adopted: April 5, 1995

Released: April 5, 1995

Comment Date: May 30, 1995

Reply Comment Date: June 14, 1995

By the Commission:

**I. INTRODUCTION**

1. In 1993, after an extensive rulemaking proceeding, the Commission substantially relaxed its financial interest and syndication ("fin/syn") rules and established a timetable for their complete expiration.<sup>1</sup> Under that timetable, the rules presently are scheduled to expire in November 1995. As contemplated by our 1993 decision, we initiate this proceeding to provide an opportunity for comment before the remaining fin/syn restrictions expire, with the burden of proof placed on those parties seeking continued restrictions. We also seek comment on whether to amend the timetable we established in 1993 so as to accelerate the expiration date for the remaining fin/syn rules in the event parties arguing for their continuation fail to carry their burden of proof.

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<sup>1</sup> *Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, recon. granted in part, *Memorandum Opinion and Order* in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993), *aff'd sub nom. Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994).

## II. BACKGROUND

2. The fin/syn rules, originally adopted in 1970, placed significant restrictions on the ability of the established networks (ABC, CBS, and NBC) to own television programming and engage in the practice of syndication. The Commission imposed these constraints to limit network control over television programming and thereby encourage the development of a diversity of programs through diverse and antagonistic sources of program services.<sup>2</sup>

3. Recognizing the increased competition facing the networks, the Commission initiated a rulemaking proceeding in 1990 to assess the continuing efficacy of the fin/syn rules.<sup>3</sup> After receiving extensive comment and conducting an *en banc* hearing, the Commission in 1991 relaxed certain aspects of the rules but retained a modified fin/syn regime.<sup>4</sup> On appeal, however, this decision was overturned by the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") for failing to explain adequately how the revised rules satisfied the Commission's diversity goals, or why the Commission had rejected certain arguments advanced by the networks during the course of the proceeding.<sup>5</sup>

4. In response to the Seventh Circuit's decision, and after an additional opportunity for comment, the Commission in its *Second Report and Order* in MM Docket No. 90-162 ("*Second R&O*") further relaxed the fin/syn rules and established a timetable for their complete expiration.<sup>6</sup> The Commission found that repeal of the fin/syn rules was warranted given the increased competition facing the networks and the conditions in the television

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<sup>2</sup> See *Network Television Broadcasting*, 23 FCC 2d 382, 400 (1970), *aff'd sub nom. Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971).

<sup>3</sup> *Notice of Proposed Rule Making* in MM Docket No. 90-162, 5 FCC Rcd 1815 (1990). In 1983, the Commission had tentatively concluded that it should repeal the financial interest rules and retain modified syndication restrictions, and to sunset any remaining constraints by 1990. *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345, 94 FCC 2d 1019 (1983). Seven years later, this docket was terminated with no further action being taken on the Commission's tentative conclusions; instead, a new proceeding -- MM Docket No. 90-162 -- was commenced to examine whether the fin/syn rules continued to be necessary.

<sup>4</sup> *Report and Order* in MM Docket No. 90-162, 6 FCC Rcd 3094, *as modified, Memorandum Opinion and Order*, 7 FCC Rcd 345 (1991).

<sup>5</sup> *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

<sup>6</sup> The Commission's *Second R&O*, 8 FCC Rcd 3282 (1993), modified in a few minor respects on reconsideration, *Memorandum Opinion and Order* in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993) ("*MO&O*"), was upheld on appeal by the Seventh Circuit. *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994).

programming marketplace.<sup>7</sup> We eliminated certain aspects of the fin/syn rules immediately, but took a more cautious approach with respect to others to allow us to observe network conduct under the relaxed rules before the rules completely expired and to allow parties time to adjust to the new, deregulated business environment. We consequently retained a number of fin/syn restrictions, but scheduled their complete expiration for the date two years after the entry of a court order removing provisions from antitrust consent decrees that imposed prohibitions on ABC, CBS, and NBC which were similar to the restrictions imposed by the Commission's 1970 fin/syn rules.<sup>8</sup> On November 10, 1993, in response to a joint motion filed by the three networks, the United States District Court for the Central District of California entered an order lifting these prohibitions.<sup>9</sup> Thus, the remaining fin/syn rules are scheduled to expire on November 10, 1995. The Commission also determined in the *Second R&O* that, prior to the scheduled expiration of the rules, it would conduct a review of network activities in the financial interest and syndication areas, and initiate this review no later than 18 months after the lifting of the consent decree prohibitions, *i.e.*, no later than May 10, 1995.<sup>10</sup>

5. As noted, the *Second R&O* continued a number of constraints until the scheduled expiration of the rules. More specifically, during this interim period the networks are prohibited from actively syndicating prime time entertainment network programming or first-run non-network programs to television stations within the United States. Any such program for which a network holds a passive syndication right must be syndicated domestically through an independent syndicator.<sup>11</sup> Moreover, the Commission retained the prohibition

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<sup>7</sup> These conditions included the decline in network audience share since the fin/syn rules were adopted, the increasing demand for television programming created by the emergence of the Fox network and cable networks and the growth of independent television stations, the intense competition among the three established networks for programming, the increasing ability of first-run distribution to be a fully comparable alternative to network distribution, and the increased concentration in the programming production industry. See *Second R&O*, 8 FCC Rcd at 3303-10.

<sup>8</sup> See 47 C.F.R. § 73.663 and *Second R&O*, 8 FCC Rcd 3282, *recon. granted in part, MO&O*, 8 FCC Rcd 8270. Under these consent decrees, ABC, CBS, and NBC were prohibited from acquiring financial interests or proprietary (distribution) rights in non-network uses of television programs by others, from engaging in the domestic syndication business, and from conditioning or tying the purchase of the network right to a program upon the supplier's grant of any other right or interest to the network. *Second R&O*, 8 FCC Rcd at 3339.

<sup>9</sup> *United States v. National Broadcasting Company*, 842 F.Supp. 402 (C.D. Cal. 1993).

<sup>10</sup> 47 C.F.R. § 73.663. See also *Second R&O*, 8 FCC Rcd at 3337-42.

<sup>11</sup> Syndication is the industry term used to refer to the licensing of programs for exhibition to individual stations. We use the term "active" syndication to refer to the direct negotiation with individual stations for the exhibition of programs, and the term "passive" syndication to refer to the holding of syndication rights that do not bestow the right to negotiate directly with individual stations.

against a network holding or acquiring a continuing financial interest or syndication right in any first-run, non-network program distributed in the United States unless the network has solely produced that program. The Commission also imposed during this interim period reporting requirements on the networks,<sup>12</sup> as well as anti-warehousing safeguards designed to prevent a network from withholding prime time programs from the syndication market.<sup>13</sup>

6. While retaining for an interim period the above restrictions, the *Second R&O* eliminated other aspects of the fin/syn rules immediately. It eliminated restrictions on network acquisition of financial interests and passive syndication rights in network programming, except for certain reporting requirements, and all other ownership and syndication restrictions on non-prime time network programming. The *Second R&O* also eliminated restrictions on network ownership and syndication of all non-entertainment network programming (whether prime time or not), and it placed no limits on the amount of "in-house" programming a network can produce and distribute through its network distribution system.<sup>14</sup> The Commission also exempted emerging networks from all fin/syn constraints, except for reporting requirements that are triggered once the emerging network provides 16 hours of prime time programming per week to interconnected affiliates.<sup>15</sup>

7. With respect to foreign markets, the Commission ruled that networks may purchase, without restriction, foreign syndication rights in off-network programming distributed outside of the United States and first-run programming distributed solely outside the United States. Under these same conditions, the networks may engage in active syndication abroad. The networks may purchase foreign syndication rights in, including active syndication of, first-run programming in foreign markets even if the programs are also

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<sup>12</sup> Under these requirements, the networks must file semi-annual reports identifying all network prime time entertainment programs and first-run non-network programs in which they hold or acquire financial interests or syndication rights. In addition, the networks must provide various related information, such as details concerning the independent syndicators that market such programming, and lists of the domestic stations to which the networks themselves syndicate. These reports must be filed with the Commission and placed in the public file of each network owned and operated station before the first regular business day of September and March of each year. See 47 C.F.R. § 73.661.

<sup>13</sup> Under these safeguards, a network is required to release into syndication a program for which it held syndication rights four years after the program's debut or within 180 days following the end of the network run, whichever is sooner. 47 C.F.R. § 73.660(b).

<sup>14</sup> "In house" productions refer to co-production arrangements between a network and an outside domestic or foreign producer, as well as programming produced solely by a network.

<sup>15</sup> An "emerging network" is defined as an entity not meeting the definition of a "television network" as of June 5, 1993, but which subsequently meets this definition. 47 C.F.R. § 73.662(g). See also 47 C.F.R. § 73.662(f) (in general, defining "television network" as any entity providing on a regular basis more than fifteen hours of prime time programming per week to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide).

distributed domestically if the network is the sole producer of the programming.

### III. REVIEW PRIOR TO EXPIRATION OF RULES

8. As provided by the Commission's rules, we are issuing this *Notice* to afford an opportunity for opponents of fin/syn repeal to demonstrate that retention of restrictions is warranted,<sup>16</sup> with the burden of proof on those who would retain the restrictions. The remaining rules will expire on November 10, 1995, unless we take affirmative action to the contrary.<sup>17</sup>

9. The bases for the scheduled elimination of all the fin/syn rules are set forth in the *Second R&O*, which concluded that the market conditions present at that time did not justify continuation of the fin/syn regime.<sup>18</sup> Indeed, on review of the *Second R&O*, the Seventh Circuit stated that it would not have "forbidden an immediate rescission of restrictions whose mismatch with the current situation in the broadcast industry becomes more evident by the day."<sup>19</sup>

10. Out of an abundance of caution, however, the Commission took a phased approach toward deregulating in this area due to several non-market factors. First, our assessment that the networks would not act in ways detrimental to diversity and competition was necessarily predictive in nature, and, as the Seventh Circuit stated, a phased deregulatory scheme would allow us to "observe the operation of a partially deregulated market before allowing deregulation to become complete."<sup>20</sup> Second, a more cautious approach appeared to be warranted with respect to active syndication because of the more significant risk of damage to outlet diversity in the event that we prematurely removed these last restrictions. Third, we recognized that immediate elimination of all the rules could be disruptive and have unintended and unforeseen negative effects, given the fact that the fin/syn regulatory scheme has been in place for over two decades; we judged that a phased elimination of the rules would minimize the disruption of the television industry's business practices.<sup>21</sup>

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<sup>16</sup> 47 C.F.R. § 73.663. See *Second R&O*, 8 FCC Rcd at 3337-42.

<sup>17</sup> *Id.*

<sup>18</sup> See *Second R&O*, 8 FCC Rcd at 3303-08, 3337-40; see also *MO&O*, 8 FCC Rcd at 8279-80.

<sup>19</sup> *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

<sup>20</sup> *Id.*

<sup>21</sup> See *MO&O*, 8 FCC Rcd at 8279. As the Seventh Circuit observed, the interim period has given "the independent producers an opportunity to form their own networks if they want to have

11. Given these factors, we staggered elimination of the rules, retaining for an interim period constraints on active network syndication and substantial involvement in the first-run market as well as the anti-warehousing safeguards. We also scheduled the review we initiate today as "an additional safeguard to gauge as responsibly as possible whether our conclusion regarding the state of the 1993 market -- that it can operate effectively without fin/syn restrictions -- and of developing market trends was accurate."<sup>22</sup>

12. By this *Notice*, we are providing an opportunity for comment on the accuracy of our 1993 predictions and our conclusion that the remaining fin/syn restrictions should be eliminated. Comments submitted by parties who oppose the scheduled expiration of these restrictions will need to convince us that, based on the current status of the program production and distribution markets and the activities of the networks since 1993, the Commission should continue regulation in this area. Parties arguing for retention of fin/syn restrictions should support their positions with empirical data and economic analysis. In this regard, we list the following factors that the *Second R&O* set forth as being relevant to the review we initiate today.<sup>23</sup>

- The extent to which a network-owned program is syndicated primarily to that network's affiliates.
- Patterns that reveal delay in the introduction of network programs (in which the networks had financial interests or syndication rights) into the syndication market.
- The percentage of network programming in which a network has obtained a financial interest or syndication right.
- The relative change in the number of independent producers creating and selling television shows to the networks.
- Each network's share of the first-run syndicated programming domestic market.
- Concentration of ownership in the program production industry.

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distribution systems that are wholly independent of the existing networks, their competitors, which with the expiration of the remaining restrictions will no longer be handicapped in competing with the independent producers." *Capital Cities/ABC, Inc.*, 29 F.3d at 314. We note that two new networks have in fact recently been launched: the Warner Brothers Network ("WB"), owned by Warner Brothers, and the United Paramount Network ("UPN"), owned by Viacom-Paramount and Chris Craft/United. See David Tobenkin, "New Players Get Ready to Roll," *Broadcasting & Cable*, Jan. 2, 1995, at 30.

<sup>22</sup> *MO&O*, 8 FCC Rcd at 8279.

<sup>23</sup> *Second R&O*, 8 FCC Rcd at 3340-41.

- Audience shares of first-run syndicated programming carried by non-network affiliated stations during prime time.
- The overall business practices of emerging networks, such as Fox, in the network television and syndication business.
- Network negotiating patterns, particularly the manner in which networks obtain financial interests and syndication rights and the extent to which successful negotiations over back-end rights influence network buying decisions.
- Network syndication practices, to the extent they are permitted.
- The relationship and business arrangements between networks and third-party syndicators of off-network programming.
- Mergers or acquisitions involving networks, studios, cable systems and other program providers since our 1993 fin/syn decision took effect.
- The growth of additional networks, including the development of Fox and its position vis-a-vis the major three networks.
- The growth in the number and types of alternative outlets for sale of programming (e.g., the development of the Direct Broadcast Satellite service; cable penetration; wireless cable development).

In addition to examining information submitted regarding the above factors, we will also take notice of the record developed in our pending proceeding to review the Prime Time Access Rule ("PTAR") to the extent it is relevant here.<sup>24</sup>

13. The burden in this proceeding will be on fin/syn proponents to demonstrate "an excellent, a compelling reason" why the restrictions should be continued.<sup>25</sup> As we have stated previously,

[b]ased on the evidence available to us [in 1993], we are prepared to presume that complete removal of all remaining restrictions will be appropriate, and we are therefore placing the burden of proof on those that urge retaining fin/syn restrictions. If proponents of retaining the rules fail to demonstrate to the Commission that the rules should be left in place, or if the Commission fails to act within six months after the final review begins, then the rules shall

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<sup>24</sup> *Notice of Proposed Rule Making* in MM Docket No. 94-123, 9 FCC Rcd 6328 (1994).

<sup>25</sup> *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

automatically expire.<sup>26</sup>

In affirming the Commission's phased approach to fin/syn repeal, the Seventh Circuit supported our presumption that the rules should expire, observing that the "three original networks are even weaker today than they were in March of [1993] when the decision to deregulate was made, and no doubt they will be weaker still [in 1995] when the new proceeding is to commence."<sup>27</sup>

#### IV. ACCELERATING THE RULES' EXPIRATION DATE

14. As described above, under the timetable set forth in our rules the remaining fin/syn restrictions will expire on November 10, 1995 unless parties opposing their expiration persuade us that the restrictions should be continued beyond this date. We seek comment on whether, in the event these parties fail to carry this burden of persuasion, we should amend our rules to allow for an earlier expiration date. We will have received comment from interested parties as part of our final review of the rules, and will have had over eighteen months to observe the networks' business practices under our interim fin/syn regime after the consent decrees imposed on the networks were modified. Assuming the commenters fail to persuade us that continued fin/syn restrictions are necessary, we question whether it would serve any public interest purpose to require the networks to wait until November 10, 1995 before they are set free from the remaining restrictions.<sup>28</sup> We consequently seek comment on accelerating the expiration date of the rules in the event parties arguing for their continuation do not carry their burden of proof, and whether doing so would unduly disrupt any business arrangements or practices that have been established in reliance on the presently scheduled expiration date of November 10, 1995.<sup>29</sup>

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<sup>26</sup> *Second R&O*, 8 FCC Rcd at 3340 (codified in 47 C.F.R. § 73.663). See also *MO&O*, 8 FCC Rcd at 8281 n.30 ("We intend to treat and address pleadings submitted by [proponents of the continuation of the fin/syn rules] similarly to a petition for rule making.").

<sup>27</sup> *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

<sup>28</sup> Indeed, we note that the Seventh Circuit observed: "[t]he television industry is changing so rapidly that we cannot exclude the possibility that the interim restrictions will come to seem irrational before they are due to expire. In that event, however, the parties would be free to ask the Commission to modify or abrogate the restrictions ahead of schedule." *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

<sup>29</sup> Until and unless we act on this acceleration proposal, our present timetable for the expiration of the fin/syn rules will remain in effect. Under that timetable, "[u]nless the Commission takes affirmative action to the contrary," the remaining fin/syn rules will expire on November 10, 1995. See 47 C.F.R. § 73.663.

## V. CONCLUSION

15. With this proceeding we initiate a final review of the fin/syn rules as part of the timetable we previously established for their elimination, and we also seek comment on whether to modify our rules so as to accelerate the scheduled expiration date of the rules in the event parties arguing for their continuation fail to carry their burden of proof. As in our previous fin/syn proceedings, our concern is not "the distribution of profits among private parties," but whether fin/syn restrictions are necessary to promote competition and diversity in television programming, program origination, and program delivery.<sup>30</sup> We will continue to be guided by these concerns in assessing arguments for continuing fin/syn restrictions.

## VI. ADMINISTRATIVE MATTERS

16. *Ex Parte Rules -- Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Accordingly, *ex parte* presentations will be permitted, except during the Sunshine Agenda period, provided they are disclosed as set forth in the Commission's Rules. See 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

17. *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 May 30, 1995, and reply comments on or before June 14, 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, parties must file an original and four copies of all comments, reply comments and supporting comments. If parties 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 FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

18. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") -- set forth in Appendix A attached hereto -- of the expected impact on small entities of the proposal suggested in the *Notice*. 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*, including the IRFA, to the Chief Counsel for Advocacy of Small Business Administration in accordance with paragraph 603(a) of the Regulatory

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<sup>30</sup> *Second R&O*, 8 FCC Rcd at 3302.

Flexibility Act, 5 U.S.C. § 601 *et seq.*

19. *Legal Authority.* Authority for this *Notice of Proposed Rule Making* is contained in Sections 4(i) and (j), and 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

20. *Additional Information.* For additional information on this proceeding, contact Charles W. Logan (202/776-1653), Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

## APPENDIX A

### Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

*Reason for Action and Objectives:* This *Notice of Proposed Rule Making* is initiated to conduct a review of the Commission's financial interest and syndication ("fin/syn") rules as part of the timetable the Commission has previously established in scheduling the elimination of the rules. It also seeks comment on whether to accelerate the scheduled expiration date of the fin/syn rules in the event parties opposed to their elimination fail to persuade the Commission that the rules should be continued.

*Legal Basis:* Action as proposed for this proceeding is contained in Section 4(i), 4(j), 301, 303(i), 303(r), 313, and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313, and 314.

*Reporting, Record Keeping, and Other Compliance Requirements:* None.

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

*Description, Potential Impact and Number of Small Entities Affected:* The entities that could potentially be affected by this proceeding include television program producers and syndicators, television networks and their affiliate stations, and non-network television stations. It is anticipated that any rule changes arising out of this proceeding would have a minimal impact on the small entities that could be affected.

*Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:* None.