Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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REPLY COMMENTS OF KING WORLD PRODUCTIONS, INC.

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SUMMARY OF ARGUMENT

The Commission quite properly called for rigorous analysis of the extent to which the Prime Time Access Rule continues to serve the public interest by increasing opportunities for independent programmers, reducing network ability to dictate programming choices and providing independent stations with the competitive advantage of greater programming choices. The filings by those in favor of repealing the rule (in whole or in part) are not responsive to this clear-headed call for a review of the continued necessity for PTAR.

The economic study submitted by ABC, CBS and NBC largely reiterates conclusory arguments that have been presented to the Commissions many time before. The one new position articulated in the Network Analysis, that there was a sharp drop in Households Using Television as a consequence of the implementation of PTAR, is misdirected. Even if the decrease in HUTs in the years immediately following implementation of PTAR can be attributed to the rule, the phenomenon was relatively short-lived; HUT levels during the access interval subsequently rebounded to equal (or exceed) pre-PTAR levels.

The Network Analysis and the Disney Paper are wrong in asserting that PTAR must be repealed because it has been in existence for 25 years. The rule was instrumental in creating the economic climate that permitted a proliferation of independent television stations. PTAR remains imperative to the existence of those independent outlets. A strong base of independent television stations is, in turn a necessary precondition to the development of new networks, a perhaps anticipated but certainly beneficial consequence of PTAR.

PTAR must not be repealed.

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King World Productions, Inc. ("King World") submits these comments in reply to the comments filed by certain other parties to the proceeding.

Not surprisingly, ABC, CBS and NBC have sponsored a submission that purports to justify elimination of the Prime Time Access Rule (PTAR) on economic grounds. Economists Inc., An Economic Analysis of the Prime Time Access Rule (the "Network Analysis"). The presentation made for the networks is both predictable and repetitive of previous filings. Because the Commission has heard before virtually all of what is contained in the Network Analysis, that document does little to advance the debate that the Commission properly called for in the Notice of Proposed Rulemaking inaugurating this cycle of pleadings. 9 F.C.C.R. 6328 (the "NPRM").

The Network Analysis sounds again the now somewhat tired refrain that PTAR has been unjustified from its inception because none of the networks, individually, has ever enjoyed monopoly power--as a court adjudicating antitrust claims would apply that term. This position is utterly unresponsive to the wise focus of the NPRM, which seeks to examine not the historical justification for PTAR but the continued necessity of the measure in light of industry developments of the past 25 years. More fundamentally, the approach of the Network Analysis is misguided because it assumes that PTAR must be evaluated by the standards that would be applied in antitrust litigation. This is conceptually just wrong. It is the Communications Act, and not the Sherman Act, that gave rise to PTAR and it is with reference to the former statute, not the latter, that the continuing appropriateness of this regulation must be evaluated. Because the Network Analysis has made a fundamental mistake in articulating the standards for evaluating PTAR, none of the conclusions based on that analysis is entitled to any weight.

Even on its own terms, the Network Analysis is significantly deficient. The first step for antitrust analysis is to define the relevant market. The Network Analysis does not even purport to do this in any rigorous way. Instead, it proceeds at a level of reckless generality to make unfocused observations such as the fact that 60 percent of the population has access to a broad variety of cable television programming. That fact is unarguable, but it does not lead to any necessary conclusion. What does the fact mean to the evaluation of PTAR? That is the hard question and one that finds literally no development in the Network Analysis.

It is right enough, as the Network Analysis accurately exclaims, that "[i]ncluding households that are passed by cable but do not currently subscribe, over 91 million households, or 97 percent of television households, have *access* to video programming through cable television." Network Analysis at 8 (footnote omitted)(emphasis in the original). But how that fact relates to the analysis of PTAR is the real issue, an issue that is passed without comment in the Network Analysis.

One could (although the Network Analysis does not) take the position that the potential for alternate program sources represented by the near ubiquity of access to cable justifies the abandonment of PTAR because the diversity of sources and outlets for broadcast television is no longer important. However, to take that position, one would have to explain why the approximately 3,500,000 homes (3.63 percent of all television households)[1/] without access to cable should be ignored and why the 40 percent of television households that do have access to cable but do not subscribe to it should not be the objects of concern. Those are hard questions and the Network Analysis provides literally no help in securing answers to them.

Perhaps recognizing that its invocation of the growth of cable as a justification for abandoning PTAR is, at best, incomplete, the Network Analysis proceeds to enumerate the very considerable expansion of independent television stations since 1970. There is a different, but equally profound, failure of analysis here as well. The expansion of independent television outlets might be cited to support the conclusion that PTAR's safeguards of diversity are no longer necessary, but, to make the argument properly, one needs to establish that the independent outlets will continue to survive in a market without PTAR.[2/] The Network Analysis is deficient because it makes no pretense of

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1/ See First Report, CS Docket No. 94-48, 9 F.C.C.R. 7442, 7566, Appendix C, Table 1 (1994).

2/ We do not believe this argument to be a sound one even if the continued existence of independent outlets without PTAR could be established. Successful first run syndicated programming is vital to the diversity benefits accomplished through PTAR and a full proof that PTAR is unnecessary would require a demonstration that such programming would be viable without PTAR. In King World's experience, clearance on network affiliates in major markets is a precondition to the viability of high quality first-run syndicated programs; clearance on independent television outlets would not secure the same level of benefits afforded by PTAR.

establishing this necessary condition; the economic report sponsored by King World (the "Economic Report"), in contrast, establishes that the much heralded growth of independent television stations was directly related to PTAR and, not surprisingly, that abandonment of the rule would have dramatic and immediate adverse consequences for the viability of independent stations.[3/]

The Network Analysis seeks to argue against the continuation of PTAR by outlining (at page 20) and displaying (at table A-10) what is characterized as a serious erosion of network share in advertising revenues. This presentation neglects a fact much more important than any that it discloses. As the Economic Report shows (at pages 21-31), the networks continue to have the power to raise their advertising rates in the face of decreasing audience delivered to their advertisers. This is a very strong signal that there is some fundamental dysfunction in this market. As the Economic Report concludes, only the emergence of the Fox network appears to have curbed this unnatural market power. Id. at 30. This constraint is, in turn, "critically dependent on the PTAR." Id. Thus, the networks' performance in advertising markets actually supports the maintenance of PTAR's protections.

There is one element to the Network Analysis that is new. At pages 34-40, the Network Analysis purports to demonstrate that PTAR had an immediate and enduring (through 1976) negative effect on the number of Households Using Television ("HUTs")

3/ The Economic Report demonstrates, for example, that had PTAR been repealed in 1994, independent stations would have immediately lost 60 percent of their access period audience, falling from average ratings of 4.01 to 1.67. Economic Report at 53, Table IV.2.

during the time periods when network affiliates ceased to air network programming in order to come into compliance with PTAR. In addition to some formal deficiencies with this demonstration,[4/] there is a more pronounced reason that this element of the Network Analysis is not helpful to the review of PTAR's continued importance. The appropriate question is not, as the Network Analysis persists in arguing that it should be, whether PTAR should have been adopted when it was. Rather, it is how PTAR performs today.

By the 1984/85 television season--the first full season for which King World has information concerning HUT data--HUT levels for the 7:30-8:00 p.m. period had returned to (and indeed exceeded) pre-PTAR levels. More importantly, the ratio of 7:30-8:00 p.m. to 8:00-8:30 p.m. HUT levels had resumed the proportions that prevailed before PTAR. The Network Analysis considers this relational measure a very strong one because "[s]ecular changes in viewing habits unrelated to PTAR should leave this ratio relatively unchanged." By the 1984-85 season, this ratio exceeded that found pre-PTAR; there were relatively higher audiences during the 7:30-8:00 p.m. access period than there had been for network programming in the same half-hour pre-PTAR. By the logic of the network's own analysis, but over a more meaningful time span than examined in the Network Analysis, PTAR resulted in welfare gains.

4/ Table I-5 of Appendix I to the Network Analysis shows statistically significant declines in the ratio of HUTs from 7:30-8:00/8:00-8:30 p.m. between the 1969-71 (averaged) seasons and the 1972/73 and 1976/1977 seasons. Table 2 of Attachment 1 to this pleading illustrates that the increase in the same ratio between the 1968/69 and 1970/71 seasons (all pre-PTAR) was statistically significant, as was the increase between the 1976/77 and 1984/85 seasons. The decrease in the ratios between the 1988/89 and 1989/90 season was likewise statistically significant. These facts strongly suggest that statistically significant ratio shifts occur quite commonly in periods that are extraordinarily unlikely to have had anything to do with PTAR. The attribution of causation in the Network Analysis is thus suspect.

If the consumer welfare loss measured by the Network Analysis vanished in later years, the strained effort (presented in its Appendix J and summarized at its pages 40-41) to put a total dollar value on that loss is unalterably wrong. The presentation is internally deficient as well: It is implausible that the valuation of network signals (or independent signals) based upon data from the 1960's has any relation to the video marketplace today. Extrapolating HUT data from only half of the year to represent annual values is also conceptually indefensible.[5/] It is also incorrect to assume, as the Network Analysis does, that all half hours of prime time programming are of equal value to viewers.

The Network Analysis purports to provide a demonstration that PTAR has muted competition in ways that are detrimental to consumers. Unlike the Economic Report, which relies on an econometric review of historical facts to determine the effect of PTAR on independent stations, the Network Analysis fails to substantiate recited "facts" and leaps from them to logically unrelated conclusions. The following passage illustrates both of these shortcomings:

> Further, nowadays audiences lost to ABC, CBS and NBC affiliates on account of the Rule go in large measure to benefit cable networks rather than independent broadcast stations. Finally, even if PTAR continues to benefit Fox affiliates and independent stations, surely continued sheltering is unwarranted.

Network Analysis at 44-45.

5/ As table 3 of Attachment 1 to this pleadings demonstrates, HUT levels during weeks immediately before and immediately after the 28 weeks on which the Network Analysis valuation is based shows an increase in viewing following the implementation of PTAR.

The Network Analysis, in common with the filing sponsored by the Coalition to Enhance Diversity (the "Disney Paper")[6/], characterizes PTAR as a species of "infant industry" regulation. Both presentations argue that the passage of time, alone, warrants repeal (in the view of the networks) or dismemberment (from the Disney vantage) of the rule. "Independent television licensees now have had 25 years to grow in number . . . and the independent industry is no longer an infant." Network Analysis at 51. "Moreover, whatever the justification for an infant industry argument at the early stages of an industry's development, there is one verity: infant industry arguments can not justify perpetual protection." Disney Paper at 19. This is not an analytically helpful approach.[7/] PTAR was put in place not as a designedly short-lived measure to permit independent television stations to take economic root but instead as a structural remedy for the market failures that led to an unhealthy level of network control over the programming available to television viewers. It is fair enough to inquire, 25 years later, into the continuing efficacy of and necessity for PTAR. It is, however, analytically disingenuous to assert that the rule has outlived its utility simply because 25 years have passed.

It is, in any event, neither necessary nor appropriate to analyze PTAR through standardized molds. The Commission was entirely right when it concluded " . . . a rigorous economic policy analysis . . ." is necessary ". . . to assess the extent to which the rule serves the Commission's 'public interest' mandate to maximize consumer

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6/ Williamson, Woroch, A Comparative Efficiency Analysis of the FCC Primetime Access Rule.

7/ The NPRM, in passing, referred to PTAR as arguably providing "'infant industry' *type* protections . . ..." 9 F.C.C.R. at 6356 (emphasis supplied).

welfare . . . ." NPRM, 9 F.C.C.R. at 6348. The Network Analysis and Disney Paper's attempted application of "infant industry" theory provides no such analysis.

The appropriate analysis lies in the empirical evidence and econometric analysis of the Economic Report, which make clear that PTAR was an instrumental factor in the improved economic viability (and consequent proliferation of) independent television stations. This base of independent television stations made it possible for the emerging Fox Network to come into existence; without the existence of unaffiliated stations with nation-wide coverage to serve as affiliates, the launch of a new broadcast network would not have been possible. It may well be, as some commenters have suggested, that other attributes of PTAR were also helpful to the development of the Fox Network. See, e.g., Comments of the Coalition to Enhance Diversity at 20-21. The continued existence of healthy independent outlets necessary to support the broadcast network activities recently undertaken by United Paramount and Warner Brothers is a necessary condition to the success of those undertakings, and the overall financial vitality of those outlets continues to be critically dependent upon PTAR.

The Commission has recognized that the number of first-run syndicated programs has increased dramatically in the PTAR years:

> The syndication market has produced an increasing number of new first run programs, growing from 45 first-run syndicated programs sold in 1970 to 250 in 1990. In 1990, 18 of the top 25 most popular syndicated programs were first-run.

NPRM, 9 F.C.C.R. at 6340 (footnotes omitted). Although no one can definitively measure how much of this growth can be attributed directly to PTAR, certainly a substantial measure of it is. This is true for two reasons.

First, by its design, PTAR made it significantly more likely that network affiliates would choose first-run syndicated programming in at least part of the prime time hour from which network and off-network programs were barred. Second, as the Commission has reflected in regard to King World's own experience, many first-run syndicated programs would not be commercially viable if access clearance on the dominant network-affiliated stations were not available. See NPRM, 9 F.C.C.R at 6346-47. Thus, the structure of PTAR, and King World's experience in operating under it, provide evidence of both the importance of PTAR to the growth of first-run syndication since the rule took effect and the rule's continued necessity.

The suggestion in the NPRM that these benefits might be counter-balanced by "at least two additional effects" seems to us wrong. The proposition is this:

> First, the loss of opportunity to program the access period would appear to create incentives for those program suppliers who are barred from this period to shift their sales efforts to the next best venue. Presumably, then, some of their product displaces independent product that would appear outside of prime time. While we do hot have sufficient data to quantify this effect, it may be that this loss of independently produced programming outside of prime time exceeds the gain within prime time

NPRM, 9 F.C.C.R. at 6350 (footnote omitted). It may be right that movement of product ineligible for clearance under PTAR would displace independent product outside of prime time. We do not, however, see how the loss could ever exceed the gain. The movements hypothesized would take place on a show-by-show basis, and, as a practical matter, would involve only off-network programming because the networks have not expanded their network feeds outside of prime time. Thus, the effect of PTAR may be to move a given off-network show that would otherwise be aired by a network affiliate during the access period to an independent during prime time or a network affiliate or independent outside of prime time. Assuming that the displaced off-network program replaces an independent product in one of these "second best" venues, independently produced shows (and the source diversity values associated with them) are necessarily still better off in gross. An independently produced show will have prime time audience on a network affiliate rather than non-prime time audience on an affiliate or the (probably) smaller prime time audience available on an independent station. By affording more people the opportunity of access to a first-run program, a source diversity gain is guaranteed.

The second of the "two additional effects" also seems wrong:

> Second, the loss of opportunity of the three major networks to provide programming to their affiliates during the access period reduces by three the number of entities that might otherwise purchase new programs from independent program producers.

Id. (footnote omitted). In any given market at any given moment in time there exists a finite number of prime time hours to be programmed.[8] As programming conventions have developed in this country, those hours will be filled with some mix of local, off-

[8] The condition is equally true for a nation as a whole, but the way in which programming is distributed makes it more sensible to look at individual markets.

network, first-run syndicated and network programming. The network affiliate that decides to run local programming in some or all of the access period has in a very meaningful sense created a new program from an independent producer (that is, the station itself). Displacing a network program with a first-run syndicated program in the access period does not reduce the demand for new programs from independent producers. Network affiliates may not use off-network programming during prime time so that this variety of programming has no effect at all.

There is one further element of this portion of the NPRM's discussion that warrants brief attention. We agree with the Commission's observation that ". . . economic incentives--rather than the source of the programming--may play the greater role in determining the diversity of program type the public sees". The Economic Report establishes, as an analytic matter, that off-network programming that is less popular than first-run syndicated programming will be carried by a network affiliate if the lower cost of that programming more than offsets the decrease in advertising revenue associated with smaller audience. Economic Report at 63-70. Thus, without the off-network provision of PTAR, off-network programming stands a good chance of vanquishing more popular first-run syndicated programs.

All told, the Commission's well-designed request for information appropriate to a rigorous reexamination of PTAR has not been addressed by the Network Analysis or the

Disney Paper. Only the Economic Report has produced helpful new information. That paper firmly supports the retention of PTAR--the result that the Commission must reach.

Respectfully submitted,

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King World Reply Comments
Attachment 1

TABLE 1
AVERAGE RATING LEVELS (TVHUTs) AND VIEWERSHIP RATIOS
FOR 28-WEEK INTERVAL USED IN THE ECONOMISTS INC. REPORT

	AVERAGE TVHUTs		Viewership Ratio
Season	7:30-8:00p	8:00-8:30p	7:30-8:00/ 8:00-8:30p
1968/69*	60.9	64.1	0.950
1969/70	61.3	64.5	0.951
1970/71	62.1	65.0	0.955
1971/72	59.2	63.1	0.938
1972/73	60.2	64.2	0.938
1976/77	60.3	64.3	0.938
1984/85	61.8	64.2	0.962
1985/86	61.7	64.7	0.953
1986/87	61.3	64.4	0.952
1987/88	60.6	62.8	0.965
1988/89	60.5	62.2	0.972
1989/90	58.1	61.3	0.948
1990/91	58.3	61.6	0.946
1991/92	58.1	61.4	0.947
1992/93	58.9	61.8	0.952
1993/94	58.7	61.8	0.949

* No ratings data are available for the 21st and 22nd weeks of the 1968/69 season. Weekly averages were imputed using ratings data from the same weeks of the 1969/70 and 1970/71 seasons.

TABLE 2
STATISTICAL SIGNIFICANCE OF SHIFTS IN VIEWERSHIP RATIOS
FOR 28-WEEK INTERVAL USED IN ECONOMISTS INC. REPORT

	Change in Viewership Ratio (7:30-8:00p/8:00-8:30p)		
Comparison	Mean	T-statstic	p-value
1968/69 vs. 1970/71	0.0054	3.08	0.003
1972/73 vs. Average of 1969/70 and 1970/71	-0.0148	-8.06	0.000
1976/77 vs. Average of 1969/70 and 1970/71	-0.0153	-10.62	0.000
1984/85 vs. 1976/77	0.0236	9.65	0.000
1989/90 vs. 1988/89	-0.0239	-5.49	0.000

Note: T-statistics and p-values do not incorporate the autocorrelation adjustment used in Table I-5 of the Economists Inc. report for the 1972/73 result.

TABLE 3
COMPARISON OF AVERAGE RATING LEVELS (TVHUTs) FOR
4-WEEK INTERVALS PRECEEDING/FOLLOWING 28-WEEK PERIOD
USED IN THE ECONOMISTS INC. REPORT

	AVERAGE TVHUTs	
Season	7:30-8:00p	8:00-8:30p
1968/69	47.3	52.4
1969/70	47.0	52.0
1970/71	47.7	52.1
1971/72	48.1	52.6
1972/73*	n/a	n/a
1976/77	47.8	52.6
1976/77 vs. average of 1969/70 and 1970/71	**0.43**	**0.54**
1976/77 vs. 1968/69	**0.50**	**0.12**

* No ratings data are available for September 1972.