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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

In re)
)
Review of the Prime Time)
Access Rule, Section 73.658(k))
of the Commission's Rules)

MM Docket No. 94-123

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

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May 26, 1995

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Capital Cities/ABC, Inc. ("Capital Cities/ABC"), owner and operator of the ABC Television Network ("ABC"), as well as eight television broadcast stations, files these reply comments in response to the parties that urge retention of the prime time access rule ("PTAR"), in whole or part:

Introduction and Summary

We have shown in our opening comments that PTAR inflicts injuries on the competitive process, as well as on viewers, networks, stations and program producers, that are not justified by any contribution to "diversity" that the rule may reasonably be thought to make. In consequence, as we have also shown, retention of PTAR not only would be arbitrary and capricious but would violate the First Amendment.

PTAR nonetheless has its defenders. A quarter-century of the protection against competitive forces that PTAR provides has given first-run syndicators and "independent" stations (including Fox, UPN and Warner affiliates, as well as wholly unaffiliated stations) a vested interest in the

continuation of that protection.^{1/} They cannot, to be sure, deny that PTAR restrains competition or hope to persuade the Commission that competition is not a good thing. They therefore mix their pleas for continued protection with assertions, based on a report prepared by the Law and Economics Consulting Group ("LECG"), that various market failures make PTAR's restraints affirmative aids to competition. And they make a last-ditch plea for delay in PTAR repeal to provide continued protection against competition in the wake of the scheduled sunset of fin-syn restraints on ABC, CBS and NBC ("the original networks").

We show in point I of our argument that LECG and its sponsors are wholly unable either to obscure PTAR's anti-competitive thrust or to reconcile the rule's restrictions with proconsumer and procompetitive principles. We show further that the Commission's diversity objectives do not warrant a departure from competition principles. And we show that the scheduled fin-syn sunset provides no excuse for delay in the repeal of PTAR.

There are also parties -- principally Disney and certain affiliates of the original networks -- who seek only selective refuge under the rule's protectionist scheme: they seek a repeal of the off-network restriction, but a

^{1/} See, e.g., Noll and Owen, The Political Economy of Deregulation (American Enterprise Institute, 1983) (providing case studies of regulatory schemes that have created intense constituencies among favored groups for the retention of regulation).

continuation of the restraint on network origination of programming during the access hour. To achieve this result, they point to dramatic changes in the video marketplace but claim, at the same time, that network/affiliate relationships have somehow been immune to the consequences of those changes. Thus, when opposing the rule's off-network provision, these parties point out that today's video marketplace is much more competitive and diverse than the marketplace in which the Commission adopted PTAR. They also urge that independent UHF stations and first-run syndicators no longer need "infant industry" protection. But they simultaneously claim that, despite the proliferation since 1970 of program sources available to stations of all kinds, the original networks dominate the program choices of their affiliates. PTAR's restraint on network competition is therefore still needed, they say, to protect affiliate "autonomy" and the diversity of program sources.

We show in point II of our argument that this effort to preserve the status quo in part suffers from more than internal inconsistency. The argument is predicated on the claim that the original networks today have the power to dictate the program choices of their affiliates. Any such claim is refuted by the record and is contradicted by its own exponents' assertion that PTAR enables affiliates collectively to act in ways that would otherwise violate the

antitrust laws. Once the claim of network market power is laid aside, the remaining arguments for retention of PTAR's network restriction fall apart.

Finally, we address in point III the attempts by various parties to defend the constitutionality of PTAR under the First Amendment. The Commission does not need to reach any question concerning the present vitality of the "frequency scarcity" justification for restraints on broadcaster free speech rights. It is in any event clear that restraints such as PTAR must pass muster under a standard more demanding than the one applied in Mt. Mansfield by the Second Circuit. PTAR cannot meet any such test.

ARGUMENT

I. LECG and Its Sponsors Fail to Justify the Rule

We show in this point that the arguments of LECG and its sponsors cannot mask PTAR's fundamentally anticompetitive nature or show that the rule comports with procompetitive principles. We show also that there is no "diversity" rationale for a departure from procompetitive principles and no ground for the delay in PTAR's repeal that these parties urge.

A. The Arguments of LECG and Its Sponsors Cannot Be Reconciled with Competition Principles

The syndicators and independent stations that sponsor the LECG report put forward three reasons to regard the

retention of PTAR as procompetitive. They say that the original networks enjoy market power in a "prime time advertising" market. They say that PTAR supplies a corrective for such market power by promoting the growth and viability of independent UHF stations and new television broadcast networks -- that repeal would undermine both. And they say that PTAR is needed to shelter first-run syndicators from the competition of off-network shows, which in their view enjoy an inherent, anti-viewer advantage over first-run shows. Each of these arguments fails.

1. LECG Fails to Show That Any Network Has Market Power in Any Relevant Market

LECG maintains that the three original networks have market power in "prime time advertising." This suggestion that PTAR should be evaluated in light of the structure of advertising markets is, to say the least, newly invented. PTAR was adopted, not to protect advertisers, but to promote competition and diversity in the sources of prime time television programs available to the public.^{2/} LECG is unwilling -- we suggest it is unable -- to claim that any network today has market power in the production, acquisition or distribution of video programming.

^{2/} Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382, 394-95 (1970). Justice Holmes once remarked that "when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base." Law in Science - Science in Law in Collected Legal Papers 225 (Peter Smith, 1952). The remark applies to consulting economists as well.

Moreover, the alleged prime-time "market" is plainly a contrivance for advocacy purposes. It excludes national spot and cable network advertising, and even broadcast network and barter syndication advertising for all but a few hours of each day.^{3/} None of these exclusions can withstand even the most cursory economic analysis.^{4/}

In any case, the market shares LECG attributes to ABC, CBS and NBC are far too small to warrant an inference that any network individually has market power.^{5/} Further, given the heterogeneous nature of the advertising product in

^{3/} See Law and Economics Consulting Group, Inc., The Economic Effects of Repealing the Prime Time Access Rule: Impact on Broadcasting Markets and the Syndicated Program Market ("LECG Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 9-11, 21-31. Cf. Comments of King World Productions, Inc. ("King World Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 16-17; Comments of Viacom, Inc. ("Viacom Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 30; Comments of The Association of Independent Television Stations, Inc. ("INTV Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 66-68.

^{4/} Economists Incorporated, Economic Analysis of Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, filed May 17, 1995, in MM Docket No. 91-221, Review of the Commission's Regulations Governing Television Broadcasting, vol. 1, at 42-44.

^{5/} LECG shows that ABC, CBS and NBC had November 1993 shares of viewing in prime time in the range of 21.2-22.1% (all week) or 17.4-22.1% (weekdays). LECG Comments, 12-15, Tables II.1 & II.2. Even if these viewing shares are equated with shares in a "prime time advertising" market, they fall far short of the size from which any antitrust court has been willing to infer the existence of market power. See, e.g., United Air Lines v. Austin Travel Corp., 867 F.2d 737, 742 (2d Cir. 1989) (31% market share insufficient to indicate monopoly power); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26-27 (1984) (in tying case, 30% market share insufficient as a matter of law to confer market power).

question, the nonpublic nature of most advertising transactions, and the existence of a wide range of significant alternate sellers, there is no reason to fear collusion among the sellers of network prime-time advertising.^{6/} Previous investigations have found no evidence of such collusion,^{7/} and LECG supplies none.^{8/} Thus, LECG fails to show that any network has market power of any kind.

2. PTAR Cannot Be Justified Under Competition Principles as a Protective Shield for Independent UHF Stations and Emerging Networks

LECG and its sponsors make two basic claims concerning independent UHF stations and the emerging networks. The first is that repeal of PTAR would lead to a massive drop in the ratings of independent UHF stations and to the virtual demise of the new networks for which those stations are the principal outlets. The second is that Commission interven-

^{6/} Economists Incorporated, Prime Time Access Rule: A Supplementary Economic Analysis ("EI Supp. Analysis"), filed May 26, 1995, in MM Docket No. 94-123, at 34-36.

^{7/} See Network Inquiry Special Staff, The Market for Television Advertising, Preliminary Report ("NISS Report") (June 1980), passim; Network Inquiry Special Staff, Responses to Comments on Preliminary Reports ("NISS Responses") (October 1980), at 87-99.

^{8/} That network prime-time rates rose more than inflation during the eighties (see LECG Comments, 21-25) is not evidence of market power. As EI points out (see EI Supp. Analysis, 44) the eighties were an expansionary period in which demand for advertising generally outstripped supply. Further, if networks ever had market power, it was during the sixties, but their rates declined during the recession of that era. EI Supp. Analysis, 45.

tion is justified by the technological handicap from which UHF stations suffer in relation to VHF stations.^{9/}

As we show in this section, each of these claims is the product of faulty analysis and the selective use of data. And, even if it could be shown that a repeal of PTAR would result in harm to individual competitors, retention of PTAR would not be justified absent a showing that overall competition, and hence consumers, would suffer.

a. LECG's Predictions of Damage to Independent UHF Stations and Emerging Networks Are Unfounded

LECG's dramatic predictions rest on a claim that PTAR has had a substantial positive effect on the number of independent stations and their ratings, in both the "short run" (the years 1971-79) and the "long run" (1980-present). That claim is deeply flawed. Indeed, LECG's own data show, if anything, that PTAR has failed to have any such effect.

LECG concedes that, in the short run, PTAR had no statistically significant impact on the number of independent stations.^{10/} And LECG's claim that PTAR caused a long run increase in the number of independents is not supported

^{9/} This is once again not a rationale that inspired PTAR's adoption, but rather one invented subsequently. When the rule was adopted, it was not even clear that independent stations in the top fifty markets were exempt from the off-network restriction. The Commission clarified the point two years later. See Interpretations of Rule Restricting Presentation of Off-Network Programs and Feature Film Shown in the Market Within the Past 2 Years, 34 F.C.C.2d 1099 (1972).

^{10/} Appendix to LECG Comments ("LECG Appendix"), 41.

by its own model. First, the model is incapable of determining whether the growth in the number of independent stations was due to PTAR or other equally or more plausible factors -- such as increases in the number of homes passed by and receiving cable, increases in the demand for broadcast advertising, and the availability of new communications satellite technologies. Second, the model includes no data for 1980-86, a crucial period in the increase in the number of independents. Third, in stating that PTAR had a positive effect on the number of independents beginning in 1985 (fifteen years after the promulgation of PTAR),^{11/} LECG misinterprets its own data. In fact, according to LECG's figures, 1985 was simply the end of the period (1971-84) during which PTAR had a negative effect on the number of independent stations. Indeed, according to the data presented by LECG, if PTAR is not repealed, a net post-PTAR positive effect on the number of independent stations would not occur until 2002 (or 32 years after the rule's promulgation).^{12/}

The flaws in LECG's analysis of independent stations' ratings are even more striking. It is not surprising that PTAR's restraints on network-affiliated stations resulted in short-run gains for independents in the access period (7:30-8:00 p.m.). However, LECG's data indicate that, for non-Fox

^{11/} Id., Table D.1, p. 38.

^{12/} See EI Supp. Analysis, 9-10.

independents, long run average ratings during that same time period were actually lower than in the pre-PTAR era.^{13/}

Given the very different performance of Fox affiliates and non-Fox independents in the access time period, it seems evident that whatever ratings increases have been enjoyed by independent stations in the aggregate are almost wholly attributable to the characteristics of Fox and its affiliates.

The existence of Fox, moreover, cannot be attributed to PTAR. LECG asserts that PTAR had a beneficial "carry-over" effect on independent station ratings in periods following the access period and thereby promoted the growth of new networks. It maintains that, although PTAR had no such effect in the first "carry-over" period (8:00-8:30 p.m.), it caused independent stations' ratings to increase in the second carry-over period (8:30-9:00 p.m.).^{14/} This asserted phenomenon is unexplained and, indeed, inexplicable. It requires one to believe that, although the roughly one million additional households that tuned in to independent stations during the access period as a result of PTAR tuned out during the next half hour, the access-period gains caused a quarter of those viewers to tune back to independents during the subsequent half hour period.

^{13/} See LECG Appendix, Tables D.1 and D.2.

^{14/} See LECG Comments, 89-90 & n.51.

Even if LECG's dire predictions had more substance, they are based entirely on the assumption that the audience share gains by independent stations shortly after PTAR was adopted would be reversed if PTAR were repealed. But conditions have changed since the seventies, making share gains in that period an unreliable basis for predicting 1995 share losses. As LECG concedes, syndicators have developed more effective first-run programs than those available in the seventies.^{15/} Further, many independent stations are now well established in the marketplace; viewer loyalties would militate against any sharp drop-off in audience. Finally, cable television networks now garner about half of prime time viewership in cable households. Any increase in network affiliate ratings arising out of the repeal of PTAR is as likely to come at the expense of the cable networks, which did not exist in the seventies, as of independent stations.

In short, whether and to what extent the independents and emerging networks survive and thrive will not depend on whether PTAR remains law. It will depend rather on the level of advertising demand and the overall strength of over-the-air broadcasting (in an era of competition for

^{15/} If and to the extent that network affiliates in the top markets should outbid independents for attractive off-network shows after repeal, those higher quality first-run shows would be available to the independents.

viewer attention unimagined in 1970), as well as on the acumen and efficiency of those parties themselves.

b. The Remaining UHF Handicap Is Not a Market Failure Justifying Commission Intervention Under Competition Principles

In their effort to minimize the ability of independent UHF stations to compete without the benefit of protectionist regulation, LECG and the other defenders of PTAR greatly exaggerate the extent of the handicap that UHF stations arguably continue to face in comparison to VHF stations. The Economists Incorporated Economic Analysis submitted with our opening comments shows that this handicap has been greatly reduced since 1970 and, indeed, since 1980.^{16/} Neither LECG's study of the relative profitability of VHF and UHF stations nor its comparison of the ratings of Fox VHF and UHF affiliates successfully rebuts that showing.^{17/}

The question before the Commission does not in any case turn on the degree to which UHF stations are still disadvantaged by their frequency assignments. It is demonstrable that, whatever technological advantage VHF still has over UHF, that advantage does not confer market power. Despite

^{16/} EI Economic Analysis, Appendix C.

^{17/} EI Supp. Analysis, 24-28. The EI Supplementary Analysis also shows (at 23-24) that PTAR is an awkward, ill-fitting response to the remaining UHF handicap. It subsidizes VHF independents, does not aid UHF independents that specialize in religious programming, foreign-language programming or home shopping and injures UHF affiliates of the original networks.

their heavy dependence on UHF outlets,^{18/} Fox, United Paramount, Warner and the first-run syndicators of prime-time action dramas are effective constraints on the behavior of the original networks in acquiring programs,^{19/} in delivering them to stations and viewers and in selling advertising.^{20/} Similarly, the explosion of UHF stations in the decade of the eighties demonstrates that the UHF handicap is not a significant barrier to entry.

Thus, the most that might be claimed is that the remaining UHF handicap results in an unequal distribution of market shares among the stations and networks that now exist and that protective measures may promote greater entry than would otherwise occur. Such a claim cannot justify PTAR under competition principles. It is always possible to enhance market share for weaker competitors and encourage greater entry by imposing regulatory restrictions on stronger, more established or more highly valued market

^{18/} See Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, MM Docket No. 91-221, FCC 95-97 at ¶ 22 (released March 7, 1995) (from 79% to 86% of the outlets of Fox, United Paramount and Warner are UHF stations).

^{19/} The Commission so found, with respect to first-run syndicators, in Evaluation of the Syndication and Financial Interest Rule, Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd 3282, 3306-7, recon., 8 FCC Rcd 8270 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994).

^{20/} LECG concedes this much by including these parties in its "prime time advertising" market, along with the original networks.

participants. But such manipulation of the market does not serve the procompetitive policies underlying the antitrust laws.

As Judge Posner has said: "Competition is the allocation of resources in which economic welfare (consumer welfare, to oversimplify slightly) is maximized; it is not rivalry per se, or a particular form of rivalry, or some minimum number of competitors." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 395 (7th Cir. 1984). "The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality." Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 664 (7th Cir. 1982). Indeed, as the FTC Staff points out, competition policy is disserved by the artificial stimulation of entry by uneconomic entities and the resulting attenuation of the efficiencies of incumbent competitors.^{21/}

This is particularly the case where (as here) the stimulation is achieved by restraining the ability of incumbents to compete. In 1988, the Commission decided on this ground to abandon a previous policy of denying the public the benefits of new or expanded VHF service in order to protect

^{21/} See Comments of the Staff of the Bureau of Economics of the Federal Trade Commission ("FTC Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 30-31.

existing or potential UHF stations against competitive harm.^{22/} Quite recently, it repealed as unnecessary and harmful to the public a rule that had the effect, in markets with two VHF stations and one UHF station, of compelling ABC, CBS or NBC to give the UHF station noncompetitive access to its programming.^{23/} The same conclusion, we submit, should be reached here.

3. PTAR Cannot Be Justified Under Competition Principles by the Supposed "Public Good" Disadvantage of First-Run Syndication

LECG and its sponsors sharply criticize the Notice in this proceeding for failing to take account of the fact that video programs are "public goods."^{24/} According to LECG, this fact justifies PTAR's protection of first-run syndicators against competition.^{25/} At the outset, however,

^{22/} Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), recon., 4 FCC Rcd 2276 (1989).

^{23/} Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, MM Docket No. 91-221, FCC 95-97 (released March 7, 1995), at ¶ 25.

^{24/} LECG Comments, 7-8. A "public good" has been defined as "one whose cost of production is independent of the number of people who consume it; more precisely, one person's consumption of such a good does not reduce the quantity available to other people." See Bruce M. Owen and Steven S. Wildman, Video Economics 23 (1992).

^{25/} LECG Comments at 57-69. INTV is evidently convinced it has found a general rationale for protectionist Commission regulation. See INTV Comments, 38-39. But the generalized proposition that government intervention may be appropriate to resolve problems associated with the provision of "public goods" proves nothing about the appropriateness of any particular regulation.

the bare fact that video programs are public goods does not distinguish first-run syndicated programs from others. The danger of undersupply normally associated with the private production of public goods is not unique to first-run programs and does not justify their protection against competition at the expense of other programs, all of which are public goods.^{26/}

LECG argues that, because the production costs of off-network programs are largely amortized during their network run, they can be sold at lower prices in syndication, and broadcast stations seeking maximum profit will choose off-network shows over first-run shows, even if the latter are more popular (as LECG maintains they are). PTAR, it says, combats this anti-viewer bias and promotes original production by ensuring that first-run shows need compete only with local programming for access to the prime time schedules of ABC, CBS and NBC affiliates.^{27/}

LECG's argument is badly flawed. In the first place, LECG has not shown that first-run shows are generally more popular than off-network broadcasts.^{28/} Further, the supposed disadvantage of first-run programs as a class is theoretical rather than real. The average off-network show

^{26/} See EI Supp. Analysis, 31.

^{27/} LECG Comments, 64-66.

^{28/} EI Supp. Analysis, 34. Ratings, moreover, do not automatically reflect viewer willingness to pay for particular shows. Id. at 34-36.

has unrecovered production costs as great or greater than the production costs of average first-run shows.^{29/} Moreover, off-network shows have the same alleged advantage over first-run programs in competing for carriage on independent stations in prime time that they have in the access hour.^{30/} Yet, as we have shown, first-run syndication accounts for almost four times as many prime time hours on non-Fox independents as off-network.^{31/}

The supposed advantage of off-network programs, moreover, is shared by other program types, such as motion pictures sold for broadcast television after theatrical, video, and pay TV "windows." Programs produced for the large U.S. market enjoy the same advantage in foreign markets when they are distributed abroad. Indeed, first-run series (e.g., Star Trek/The Next Generation) enjoy the same advantage if and when they have sufficient enduring attraction to be repeated over a period of years.

The game and talk shows that dominate the access period on original-network affiliates under the PTAR regime are less likely to have such enduring value, but they compete by

^{29/} Id. at 33.

^{30/} Affiliates of the original networks are overwhelmingly broadcasting network shows from 8-11 p.m., EST, and do not typically bid for off-network programs with a view to their broadcast during that period.

^{31/} See Comments of Capital Cities/ABC, Inc. ("Capital Cities/ABC Comments"), filed March 7, 1995, in MM Docket No. 94-123, at 15-16.

virtue of their relatively cheaper cost.^{32/} LECG's contention is that, even so and despite their greater popularity, they cannot compete with off-network programs on a cost-per-rating-point basis. It argues further that the displacement of these shows from the prime-time schedules of original-network affiliates in the top markets would jeopardize their distribution altogether, in light of the lower ratings they could expect when broadcast by top-market independents.^{33/}

This contention, even if valid,^{34/} would not justify the rule. To the extent they exist, the cost advantages derived from distributing a video program in sequential media "windows" reflect genuine efficiencies, i.e., the fact that more viewers want to watch the "windowed" programs in more ways, and the concomitant ability of the market to spread the costs of the program over a larger number of

^{32/} EI Supp. Analysis, 31-32. LECG attempts to obscure this fact by comparing the annual cost of five weekly episodes for a first-run game or talk show with the seasonal cost of one weekly episode for a network prime-time sitcom. See LECG Comments, 71.

^{33/} LECG Comments, 70.

^{34/} First-run syndicators are now demonstrably able to mount expensive "action hour" dramas (e.g., the various syndicated Star Trek series, Kung Fu or Babylon 5) without relying on affiliates of the original networks. Contrary to King World's contention (see King World Comments at 13-14), it is not evident that the same cannot be done with first-run game or talk shows, or that there is more at stake in this matter than the greater profits a first-run syndicator can earn by clearing such shows on the strongest stations in the top markets.

viewers. Consumer interests are served by allowing those efficiencies to have their effect, thus providing the public with the greatest viewing satisfaction, even if the result is that some programs that are desired by some viewers are not produced.^{35/}

PTAR interferes with these efficiencies by preventing the full exploitation of the "off-network" window. In so doing, it artificially increases the portion of the cost of network prime-time programs that the networks must bear, reduces the incentives of networks and producers to invest in those programs, and thus harms viewers in all "windows," who would benefit from the investments that are not made.^{36/}

B. Diversity Objectives Do Not Warrant a Departure from Competition Principles

It may be argued that the principles of competition policy that we have espoused do not give sufficient weight to the public interest in a diversity of video program sources -- that the Commission should for this reason

^{35/} It is commonplace in a market-based economy that some desired products are not produced because their costs cannot be covered. See EI Supp. Analysis, 33.

^{36/} See EI Supp. Analysis, 35-36. LECG claims that off-network prices have not declined since the adoption of PTAR and that the emergence of cable networks as purchasers of off-network rights compensates for the rule's impairment of the broadcast market for those rights. See LECG Comments, 85. That claim is contradicted by LECG's own contention that networks support the elimination of the off-network restriction because the result would be to reduce the license fees they pay for prime-time series (see id. at 67) -- a result that would follow only if off-network prices increased.

interfere with the competitive market to promote the fortunes of independent UHF stations, new networks and first-run syndicators. There is no basis, however, for any such argument.

At the outset, the original networks are not the only (or even the most formidable) sources of the competition that confronts independent UHF stations, new networks such as United Paramount and Warner and first-run syndicators. The Fox network and cable networks present at least as large a competitive threat to those parties.^{37/} If there were a valid "diversity" rationale for interference with the market to protect those parties from competition, there would be no adequate reason to single out the original networks and their affiliates for restraint.

There is in any event no such rationale. The Commission once expressed the view that its "diversity" objectives required it to strive for a virtually unlimited number of broadcast outlets and sources.^{38/} Subsequently, however, it has recognized that the pursuit of diversity in this fashion can produce so little enhanced diversity of

^{37/} See EI Economic Analysis, 7, 9. We trust that, at this point, no one will suggest that Fox is entitled to protection as an "emerging" network. Cf. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 315 (7th Cir. 1994) ("the exemption of Fox from these [fin-syn] restrictions increasingly seems arbitrary").

^{38/} See Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, 312 (1970) (arguing the desirability of the 51st station in any given market from a diversity perspective).

ideas and perspectives and so much harm to the public as to be unwarranted.^{39/}

That, we submit, is the situation here. Whatever the case may have been in 1970, no network today possesses "bottleneck" power arbitrarily to control the video program content available to the public, in prime time or any other part of the broadcast day. Moreover, the continued existence of subscription-based networks distributed by cable and other new media does not depend upon PTAR. Neither, as we have shown, does the continued existence of Fox, United Paramount, Warner or first-run syndication. Thus, the repeal of PTAR would not allow any network to achieve "bottleneck" power.

In these circumstances, there is no real reason to believe that any otherwise commercially viable program or program idea would fail to reach the public (in the event of PTAR's repeal) because of a paucity of commercial station outlets or distribution channels.^{40/} The selection of

^{39/} See, e.g., Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 100 F.C.C.2d 17 (1984), modified on recon., 100 F.C.C.2d 74 (1985) (relaxing the seven-station limit on multiple ownership at the national level). In particular, see 100 F.C.C.2d at [recon order] 80-87.

^{40/} This is not to say, of course, that the commercial video system, whether based on advertising or on some form of subscription or other payment, necessarily presents the public with all the arguably worthwhile programming services. A belief that the contrary is likely to be true is the raison d'etre for noncommercial, educational television.