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

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

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REPLY COMMENTS OF CBS INC.

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May 26, 1995

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REPLY COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits these Reply Comments in the above proceeding, which the Commission has initiated in order "to assess, in light of current economic and technological conditions, the legal and policy justifications for the Prime Time Access Rule..., and to consider the continued need for the [R]ule in its current form."[1]

[1] Notice of Proposed Rulemaking ("Notice") at ¶1. The Prime Time Access Rule ("PTAR" or the "Rule"), 47 C.F.R. §73.658 (k), generally prohibits television stations in the top 50 television markets which are affiliated with CBS, Capital Cities/ABC, Inc. ("ABC") or the National Broadcasting Company, Inc. ("NBC") from broadcasting, during the four prime time viewing hours, more than three hours of programs currently or previously supplied by one of those three networks. Id. Although the Rule does not so prescribe, the first hour of prime time, known as the "access" period, is generally the period in which the three affected networks do not supply network programming to their affiliates.

I. Introduction and Summary.

The parties who have thus far submitted comments in this proceeding fall into three principal categories -- those urging retention of the Prime Time Access Rule in its entirety, those urging its complete repeal, and those urging repeal only of the "off-network" provision of the Rule.

Predictably, those who have been the primary beneficiaries of the competitive advantages conferred by the Rule ardently believe that the Commission should retain it, or at least delay its inevitable demise. Viacom is the corporate parent of Paramount, one of the major first-run syndicators benefiting from the captive market of top-50 market affiliates created by PTAR, and one of the proprietors of a new network that enjoys exemption from its operation. It is thus not surprising that Viacom finds it "difficult to conceive of a less propitious time ... to repeal PTAR."[2] King World, the hugely successful distributor of game and reality shows for the access period, similarly has every reason to try to preserve its captive "seller's market" of major market network affiliates.[3] INTV's members are

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[2] Comments of Viacom Inc. ("Viacom Comments") at 35. The organization of affiliates of the United Paramount Television Network have also urged a "wait and see" attitude on the Commission. Comments of the UPN Affiliates Association at 10. A similar position is advanced by a small group of first-run program producers and distributors who "aspire to place a show in Access time." Comments of Friends of Prime Time Access at 2.

[3] Comments of King World Productions, Inc. ("King World Comments"). INTV suggests, with disarming candor and customary hyperbole, that the Rule should be kept in place so that King World, Paramount and Fox can "enjoy the fruits of their successes without shaking the republic to its core." Comments of the Association of Independent Television Stations, Inc. ("INTV Comments") at 34.

predominantly group-owned affiliates of the Fox, UPN and Warner Brothers networks; these companies understandably enjoy the access-period programming subsidy provided to them by the government at the expense of network program producers and the affiliates of the three original networks in their markets. In addition, proceeding from its time-honored belief in "network dominance" in every conceivable market -- the premise that it attempted to defend for years in the fin/syn proceeding -- Media Access Project contends that it is at best "premature" to repeal the Rule.[4]

A few other parties urge repeal of the "off-network" provision of the rule, but retention of PTAR's basic prohibition on agreements among the three original networks and their respective affiliates for network distribution of more than three hours of prime time programming per evening.[5] Again invoking the thesis of network "dominance" of their affiliate bodies, these parties assume that a network could unilaterally decide to program the

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[4] Comments of Media Access Project and People For The American Way at iii. Media Access Project believes that it is apt to compare "the networks" (which it would, of course, have the Commission consider as a single undifferentiated unit) to "the pre-MFJ Ma Bell" (Id.at 2), and urges that the repeal of PTAR would allow "[t]he networks to own and control the fate of every minute of programming on their own stations and affiliates." (Id. at 4) One other party, the staff of the Small Business Administration, objects to the analytical framework proposed in the Notice, at least insofar as the Commission proposes to consider the concept of "consumer welfare maximization" in determining whether the Rule should be repealed. Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Notice of Proposed Rulemaking at 11-12.

[5] See, Comments of the Coalition to Enhance Diversity ("Coalition Comments"), Comments of the Network Affiliated Stations Alliance ("NASA Comments"), Comments of Group W. The Motion Picture Association of America (with Fox abstaining), urges retention of the three-hour rule without taking a position on the off-network restriction. Comments of the Motion Picture Association of America. One party asks the Commission in effect to expand the current exemptions to the three-hour rule to include all "network telecasts of live sports events." Comments of the Office of the Commissioner of Baseball.

fourth prime time hour, and then coerce its affiliates to clear it in the vast majority of the country needed to make the offering viable to national advertisers.[6]

In our initial comments in this proceeding,[7] CBS, like the other two original networks, urged that PTAR should be repealed in its entirety. Relying in part on a comprehensive economic study submitted by Economists Incorporated[8] on behalf of CBS, ABC and NBC in response to the Commission's request for relevant "economic data and other analysis," we demonstrated that the anachronistic premise of "network dominance" which supplies the underpinning of the Rule is simply false in today's video marketplace, where both broadcast and non-broadcast outlets for television programming and advertising -- local and national -- have proliferated to an extent unimaginable when PTAR was adopted. We also demonstrated that PTAR has outlived any plausible diversity-based justification which may originally have been claimed for it, in that the Rule has clearly failed to produce the intended increase in source or program diversity in the 7-8 PM ET prime time enclave on top-50 market network affiliates. Three out of the four large program producers/distributors which now enjoy the lion's share of the first-run television program distribution market in the access period are also major program suppliers to the three original networks, and are extraordinarily deep-pocketed new television network operators themselves. Nor is there any evidence that PTAR has contributed in any substantial or even measurable way to an increase in outlet diversity.

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[6] See, e.g.,Coalition Comments at 31.

[7] Comments of CBS Inc., March 7, 1995 ("CBS Comments")

[8] An Economic Analysis of the Prime Time Access Rule, Economists Incorporated (March 7, 1995) ("Joint Economic Study").

Finally, the CBS Comments and the Joint Economic Study demonstrated that PTAR is not just a harmless relic, but instead has blatantly protectionist, discriminatory and anticompetitive effects. It limits affiliates' program choices, while creating winners and losers in the program supply marketplace at the expense of economic efficiency, program quality and viewer welfare. And because its scope is limited to three entities deemed to be "dominant" in the 1960's video marketplace, the Rule flagrantly discriminates in favor of another full-fledged network (Fox) and its affiliates.[9]

The only parties currently arguing for retention of all or part of the Rule which have attempted to bolster their policy arguments with economic analysis are INTV, King World and Viacom (jointly), and the Coalition for Media Diversity.[10] The LECG Study jointly commissioned by INTV, King World and Viacom is said to provide the economic rationale for continuing the regulatory protections those parties or their constituents receive under the PTAR regime. The Williamson/Woroch study, submitted on behalf of the Coalition for

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[9] Several other parties support repeal on the basis that the Rule is constitutionally infirm. Comments of First Media Television, L.P., Comments of the Freedom Forum First Amendment Center at Vanderbilt University, Comments of the Freedom of Expression Foundation, Inc. The Media Institute takes the odd position that the Rule is objectionable on First Amendment grounds, but if the Commission disagrees, the Rule should be retained "on pragmatic grounds." Comments of the Media Institute at 2, 4ff.. The Federal Trade Trade Commission staff concludes that "justification for continuation of the rule is questionable," after an analysis of PTAR from a competition policy perspective. Comments of the Staff of the Bureau of Economics of the Federal Trade Commission at 33.

[10] The Economic Effects of Repealing the Prime Time Access Rule: Impact on Broadcasting Markets and the Syndicated Program Market, The Law and Economics Consulting Group, Inc. (March 7, 1995) ("LECG Study"). A Comparative Efficiency Analysis of the FCC's Prime Time Access Rule, Oliver E. Williamson, Glenn A. Woroch (March 7, 1995) ("Williamson/Woroch Study").

Media Diversity, persuasively demonstrates the economic basis for the repeal of the off-network provision of the Rule, but attempts to justify retaining the basic three-hour provision "for the time being." In light of the Commission's emphasis in this proceeding on its interest in close and careful economic analysis, CBS, ABC. and NBC have engaged Economists Incorporated to review and comment on various aspects of these two studies. A comprehensive analysis based on that review,[11] which is today being submitted to the Commission directly by EI on our behalf, reaffirms our conclusion that perpetuation of the Rule cannot be justified on economic grounds.

For the most part, the familiar arguments made by parties seeking retention of all or part of the Rule have been anticipated in the CBS Comments and in the Joint Economic Study and, we believe, need no further discussion. We therefore confine these Reply Comments to observations regarding a few arguments that are given special prominence in the initial comments of the sponsors of the LECG Study and the Williamson/Woroch Study, and that rely on those studies for support.

II. The Post-PTAR Repeal "Doomsday" Scenario Is False.

A central theme of the sponsors of the LECG Study is that repeal of PTAR would result in precipitous and calamitous ratings declines for independent stations in the access period and in prime time in general. INTV predicts that "the repeal of the Prime Time Access

[11] Prime Time Access Rule: A Supplementary Economic Analysis, Economists Incorporated, May 12, 1995. ("EI Supplementary Analysis")

Rule or the off-network provision would undermine the current vitality of independent television stations."[12] Viacom (Paramount's parent company) suggests a post-PTAR doomsday scenario in which repeal would cause "many independent stations will go dark" and "stymie the growth of emerging networks like UPN."[13] These dire predictions are derived from LECG's estimates of short- and long-term post-1971 independent station ratings increases, on the theory that these increases would be reversed if PTAR were repealed.

CBS does not contend that repeal of PTAR would have no marketplace effects on independent stations and, by extension, on new network proprietors and the syndication industry. As we have previously emphasized, a central problem with the Rule is its patent regulatory bias in favor of classes of healthy competitors which need no government largesse. And since we believe the Rule operates to distort the marketplace by affording unjustifiable regulatory protection to these favored competitors, we of course also believe that competition on the merits would produce marketplace adjustments. On the other hand, the posited "domino effect" of PTAR repeal on the ratings of independent stations, with resulting adverse effects on new networks and syndicators, is at best a gross exaggeration.

The EI Supplementary Analysis demonstrates that the dramatic ratings declines predicted by the protected parties are vastly overstated because, among other things, they ignore the effect of Fox programming, which has been responsible for the bulk of the overall ratings increase,

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[12] INTV Comments at 64.

[13] Viacom Comments at 5.

and which is unlikely to suffer noticeably in popularity with the elimination of PTAR. In fact, EI concludes, "LECG has offered no credible evidence that repeal of the Rule is likely to have a significant impact on the ratings of independent stations or the growth of emerging networks."[14] But in light of the prophecies of doom advanced by proponents of retention of the Rule, we think it important to emphasize here who has actually benefited from its regulatory bias, and who will thus bear the "costs" of being subject at last to the ordinary, unfettered operation of the marketplace.

The first bias of the Rule is in favor of all top-50 market "independent" stations and against affiliates of the three older television networks. Even if it were assumed -- wrongly, we believe -- that PTAR has had any measurable effect on increasing outlet diversity through such favoritism,[15] it cannot be defended today as anything approaching sound, efficient, rationally targeted regulatory policy. According to INTV's own count, the vast majority of the 203 "independent" stations without foreign language or other specialized formats which enjoy the benefit of the PTAR subsidy in the top-50 markets are either VHF stations (45), or UHF stations affiliated with the Fox, Warner Brothers or UPN networks (102). Many of these stations are owned by proprietors of the exempted networks (Fox, Chris Craft, and

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[14] EI Supplementary Analysis at 21. Besides the economic issues specifically referenced in these Reply Comments, EI also deals in depth with all other facets of the LECG Study and the Williamson/Woroch Study, including the UHF handicap, independent station profitability, the "public good" theory, the supposed "handicap" of first-run syndicated programming as opposed to off-network programming, and various "network dominance" arguments.

[15] The economic model developed by LECG, far from showing a positive relationship between PTAR and the growth to date of independent stations, predicts that PTAR had a negative effect on the number of independent stations for the first 15 years of its existence! EI Supplementary Analysis at 8 et seq.

Paramount) or other large group owners (e.g. Tribune Broadcasting Co. and Clear Channel Television Inc., among others). In fact, according to INTV, there are only 46 UHF stations without specialized formats in the top-50 markets that are unaffiliated with the newer networks.[16] The Coalition to Enhance Diversity further refines this category by excluding all group-owned stations, which can plausibly be assumed to be generally healthier and better-financed that nongroup-owned stations. The Coalition's conclusion is that "[i]n the top 50 markets, there are only seven independent stations that are not either part of a larger group of stations or affiliated with a new network (or both)."[17] Even if the Commission continues to believe that it has a role to play in propping up marginal television stations, PTAR plainly is not an appropriate tool for doing so, and should be replaced by a policy targeted for the very few stations that appear to fall in that category.

PTAR's second bias is in favor of Fox and other new networks and against the three older networks. At this juncture, we think it beyond dispute that Fox, which benefits from the Rule in its multiple roles as an exempt network, an "independent" station owner and a syndicator, is a full-fledged competitor hardly in need of special favors. Fox itself does not contend otherwise.[18] The proprietors of the Warner Brothers and UPN networks of favored

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[16] EI Supplementary Analysis at 84.

[17] Coalition Comments at 25.

[18] While Fox did not file initial comments in response to the Notice, the record in this proceeding includes its June 13, 1994 letter to Chairman Hundt, in which, to its credit, it supported "repeal or modification of the Prime Time Access Rule" because of its belief "that the public interest in competition and innovation would be well-served by the broad deregulation of broadcast stations and broadcast networks."

"independent" stations include two of the largest communications companies in the world,[19] whose goal is to ensure distribution of the television program product of their major motion picture studios. Assuming that repeal of PTAR would have some adverse effect on overall ratings and revenues of the large protected class of television stations -- and might even require Warner Brothers and Viacom to make new financial accommodations to some of their less affluent affiliates -- it surely does not follow that the Commission should intervene in a competitive market to prevent this result.[20]

The third bias implicit in the Rule is in favor of the few distributors of the game and reality shows that populate the access period reserve created by PTAR, and against other producers and distributors of network and off-network programming (including the three older networks themselves) whose product is barred from that period in the top-50 markets. As noted above and in the CBS Comments, King World is a major distributor of such access period programming, and the only significant supplier that could be argued to owe its success to PTAR -- a debt to the government that King World acknowledges.[21] Whatever one thinks about the nature and extent of the contribution to program diversity supplied by King World's "stripped" access period program offerings, it is surely insufficient to justify that company's governmentally protected niche in the program supply marketplace.

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[19] CBS Comments at 5.

[20] The Fox/New World affiliation realignments reportedly cost the three older networks more than $200,000,000 in additional affiliate compensation. Id. At 19-20.

[21] King World Comments at 1. The other major access period distributors are Fox and Paramount, both of which have long been producers of prime time programming for the affected three networks.

A central myth that PTAR's proponents have attempted to perpetuate in this proceeding is that the beneficiaries of the Rule are vulnerable small business operators that could not be expected to adjust to, or thrive in, a free marketplace, to the ultimate detriment of outlet, source and program diversity. In truth, the "winners" under PTAR are predominantly substantial, sometime huge, entities whose contributions to diversity, if any, are simply not dependent on the Prime Time Access Rule.

III. The Assertions of Network Dominance In Advertising Markets Are Unavailing And Irrelevant.

A second prominent argument of the Rule's defenders that purports to originate from the LECG Study is that "repeal of the Prime Time Access Rule or the off-network provision would permit the three established networks to retrench and reassert dominance in the national prime time advertising market."[22] In the same vein, Viacom asserts that, when it comes to advertising, "the major broadcast networks still retain an extraordinary amount of market power in prime time television."[23] Although the Commission's Notice sought comments on issues related to historical fears of "network dominance" in the program supply marketplace -- issues which have also been thoroughly explored and decided in the fin/syn proceeding -- the behavior of the national advertising market has never been at issue in the PTAR context, for the simple reason that it is wholly unrelated to the diversity concerns

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[22] INTV Comments at 68.

[23] Viacom Comments at 31.

which motivated PTAR regulation in the first place.[24] To the extent that promotion of new networks was belatedly added to the rationales for PTAR, the EI Supplementary Analysis demonstrates that "PTAR was never needed to facilitate the entry of new networks and has not materially affected the emergence of new networks."[25]

In any case, this attempt by INTV and Viacom to defend PTAR on the basis of "network dominance" in the national advertising market is based on LECG's indefensibly narrow market definition, together with faulty conclusions drawn from advertising pricing trends that are fully susceptible of conventional economic explanations ignored by LECG. LECG concludes that increases in national advertising rates in the 1980's demonstrate network market power. In fact, "[t]"he increase in advertising rates that [LECG] attributes to dominance of the networks can more plausibly be explained by increased demand for advertising, a position consistent with LECG's own statements and with economic theory."[26] In sum, this effort to revive discredited "network dominance" theories in the context of advertising markets is unavailing and, in any case, irrelevant to the PTAR proceeding.

IV. No Persuasive Economic Or Policy Basis Has Been Offered To Justify Retention Of The Three-Hour Network Programming Restriction.

As noted above, CBS believes that the record already compiled in this proceeding

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[24] Notice at para. 11, citing Report and Order in Docket No. 12782, 23 FCC 2d 382, 397 (1970).

[25] EI Supplementary Analysis at 46.

[26] Id.

conclusively demonstrates that the sea change in the relationship between networks and affiliates, recently dramatized by the series of affiliation changes precipitated by the Fox/New World transaction, has deeper roots in the changing marketplace and is permanent. Indeed, given the state of the marketplace, we find it ludicrous for the Network Affiliated Stations Alliance to suggest that "the relative balance of power between networks and affiliates has not changed appreciably since PTAR was adopted." [27]

The only attempt to cast an argument for retention of the three-hour network programming restriction specifically in economic terms is made by the Williamson/Woroch Study, which concludes that it should "be retained at this time" because it "is already in place, applies to only one hour per day, has potential collective action benefits, and serves the Commission's diversity purposes by encouraging non-hierarchical production ... ."[28] The contention that all or part of the Rule should be retained because it is already on the books and affects "only" an hour of prime time is, to be kind, unconvincing. And as for the theoretical economic justification for retaining only PTAR's network programming restriction -- no empirical data is presented on the issue -- we note that Williamson and Woroch posit that the restriction independently enhances diversity, but fail utterly to show any diversity increase under the Rule, and offer no plausible explanation of how diversity would decrease if the restriction were repealed.[29]

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[27] NASA Comments at 3.

[28] Williamson/Woroch Study at 38.

[29] EI Supplementary Analysis at 51.

Undeterred by the lukewarm endorsement of its economists for carving out and retaining the network programming restriction, the Coalition falls back on the "network dominance" theory, concluding that "[m]arketplace changes have not altered the fact that, absent the network restriction, affiliates will have little choice but to air network programming offered for broadcast during the access hour."[30] This perennial argument has been thoroughly discredited in the CBS Comments and in the Joint Economic Study; here, we emphasize only that the Coalition's suggestion fails to recognize that a substantial consensus of affiliates is necessary before a network can successfully launch programming for additional time periods.

In our initial comments, we supplied recent examples of CBS's abandonment of daytime network-programmed time periods when clearances diminished to the point where the offerings were not attractive to national advertisers.[31] In prime time, the affiliates organizations believe that their economic interest in limiting first-run network programming to three hours is very strong. In the face of that belief, we have no doubt that an expanded network offering would not be practicable. Indeed, in 1981 -- before many of the marketplace changes that have made PTAR obsolete at best -- CBS withdrew a series of proposals to expand its evening news broadcast to one hour in the face of affiliates' "deep

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[30] Coalition Comments at v. While NASA and the Coalition worry about networks forcing affiliates to clear programming they would prefer not to accept, it is ironic that Viacom acknowledges the transformation in network affiliation relations, and worries that "the networks might be willing to provide other favors [beyond increased compensation] to their affiliates to strengthen their schedules and keep them happy ." NASA Comments at pp. 2-11. Viacom Comments at 39.

[31] CBS Comments at 15-20.

and widespread disapproval of the plan, even with economic compensation."[32] In any case, as we emphasized in the CBS Comments, we have no expectation that repeal of the Rule could or would result in any near-term agreement among CBS and its affiliates to expand the present network prime time schedule. From the perspective of CBS's ability to compete effectively in the video marketplace in the short term, therefore, repeal of the network programming restriction is not as urgent a priority as the off-network portion of the rule. This does not, however, detract from our belief that the Rule as whole is an indefensible anachronism and should be eliminated.[33]

V. Conclusion.

The initial comments of parties supporting retention of all or part of PTAR have continued to rely on notions of "network dominance" that have no current foundation and have been thoroughly discredited. As demonstrated herein and in the EI Supplementary Analysis, the economic studies commissioned by the Rule's proponents are critically flawed and, in any event, do not support the exaggerated claims of their sponsors. The Commission

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[32] Wall Street Journal, April 7, 1982 at A-4.

[33] As emphasized in the CBS Comments, however, it is critically important that the Commission not perpetuate, even temporarily, its existing crabbed interpretation of the network programming restriction that would bar network companies from producing and syndicating first-run programming to top-50 market affiliates in the "access period" even after the fin/syn rules have been abolished. CBS Comments at 26-27.

should proceed promptly to repeal the Prime Time Access Rule as an important step toward reforming its regulatory mission to the realities of today's marketplace.

Respectfully submitted,

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May 26, 1995

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