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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Amendment of Part 73 of the	)	MM Docket No. 95-40
Commission's Rules concerning	)	
the Filing of Television	)	
Network Affiliation Contracts	)	

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COMMENTS OF CBS INC.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, respectfully submits these comments in response to a Notice of Proposed Rule Making released on April 5, 1995 ("Notice") in which the Commission has proposed to eliminate the rule requiring the filing of affiliation contracts, as part of its "continue[d] . . . examination of rules regulating broadcast television network/affiliate relations in light of changes in the video marketplace." (Notice at ¶1)[1] CBS fully supports the proposal to eliminate this rule, and instead require broadcast television stations to produce affiliation agreements upon the Commission's request. We concur in the Commission's tentative conclusions that such a change would relieve licensees of a paperwork burden whose costs markedly exceed its potential benefits, and more importantly, reduce the substantial anticompetitive effects of

[1] In pertinent part, 47 C.F.R. §73.3613(a) requires television broadcast stations to file with the FCC copies of network affiliation contracts, agreements and understandings, together with amendments, supplements and cancellations or terminations, within 30 days of the execution thereof. In addition, the Commission requires that these agreements be made available for public inspection at the station, 47 C.F.R. §73.3526(a)(3), and also routinely makes them available at the Commission. 47 C.F.R. §0.455(a)(3).

general public disclosure of the terms of affiliation agreements. (Notice at ¶17)

As the Notice observes, the principal purpose of requiring television stations to file their network affiliation contracts has been to enhance the Commission's ability to monitor network/affiliate relationships and ensure that the rules restricting these relationships are not violated in affiliation agreements. (Id. at ¶9) Historically, such close scrutiny of network/affiliate relationships was deemed necessary in order to restrain the potential exercise of "market power" by the three original networks over their respective affiliates. (Id. at ¶10) At present, however, the explosive growth in the video marketplace, and the sea change in the relationship between networks and affiliates, have rendered the underlying premise of "network dominance" of affiliates an anachronism,[2] and undercut the Commission's stated justification for the rule.

Since 1985, when the Commission last examined and reaffirmed the continued application of the affiliation contract filing requirement to broadcast television stations,[3] the balance of bargaining power between networks and their affiliates has shifted dramatically. The emergence of the Fox Network has produced intense competition among networks for affiliations in many markets. This competition has in turn yielded numerous network/affiliate realignments; difficult and protracted negotiations by all networks to retain existing affiliates or replace those that have

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[2] The obsolescence of the concept of "network dominance" in general, and in the network/affiliate relationship in particular, is examined at length in a comprehensive study submitted on behalf of ABC, CBS and NBC in the pending Prime Time Access Rule proceeding. See "Is ABC, CBS or NBC Dominant Today?", An Economic Analysis of the Prime Time Access Rule, Part II, Economists Incorporated, submitted in MM Docket No. 94-123 (March 7, 1995). ("PTAR Joint Economic Study").

[3] Report and Order In the Matter of Radio Network Affiliation Agreements, 101 FCC 2d 516 (1985) ("Radio Network Affiliation Agreements").

been lost; and significant increases in affiliate compensation.[4] This transformation in the bargaining relationship between networks and their affiliates is clearly destined to be a permanent fixture of network/affiliate relations in the future. Indeed, competition among networks has further intensified with the debut in 1995 of the new United Paramount and WB Networks, both of which are owned in part by powerful and deep-pocketed Hollywood studios with abundant bargaining power.

In a competitive environment marked by close negotiation of affiliation agreements, substantially increased compensation payments, and a significant reduction in the number of hours programmed by each of the original networks,[5] perpetuation of rules premised on the supposed market power of broadcast networks with respect to their affiliates makes little sense. There can certainly be no need for the Commission closely to monitor network/affiliate relationships by

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[4] As part of the agreement between Fox Television Stations and New World Communications Group announced in May 1994, New World agreed to change the affiliations of 12 stations it owned or was to acquire from one of the three original networks to Fox. By CBS's count, the Fox/New World deal has generated to date, directly or indirectly, 80 changes of network affiliations in 40 markets. As a result of this series of realignments, the three original networks reportedly will now pay at least $200 million in additional compensation to their affiliate bodies. Broadcasting & Cable, "CBS's Tony Malara: In the Storm of the Eye," December 19, 1994 at 34. The Fox/New World transaction and its aftermath are discussed, inter alia, in the Comments of CBS Inc., In Re Review of the Prime Time Access Rule, MM Docket No. 94-123 (March 7, 1995) ("CBS PTAR Comments") at 18-20; and in the Comments of CBS Inc., In Re Review of the Syndication and Financial Interest Rules, MM Docket No. 95-39 at 10-12.

[5] Historically, a principal rationale of the Commission's network/affiliate rules has been the concern that a network's pressure for clearance of its programs could overwhelm an affiliate's preference to present locally-originated programming instead. It is particularly noteworthy, therefore, that in the aggregate, the total programming offered by ABC, CBS and NBC has declined by 25 hours per week, from a total of 278.5 hours in 1977 to 253.5 hours in 1994. See PTAR Joint Economic Study at 91. This decrease reflects the abandonment of time periods by the networks because of low affiliate clearance rates, which demonstrates both affiliates' willingness and their ability to reject network programming in favor of alternative local or syndicated programming. CBS PTAR Comments at 15-17.

routinely requiring the filing of affiliation agreements. With network competitors for affiliates lurking at every turn -- and with the sharp increase in non-network programming now available to television stations -- the Commission may safely rely on its complaint process for any oversight of network/affiliate relationships which may arguably still be necessary. In addition, the dramatic change in the competitive framework within which network/affiliate relationships now exist also supports elimination of the requirement that affiliation contracts be made publicly available. There can no longer be any need for a rule whose basic purpose is to "aid stations in their bargaining with the networks."[6] Nor is CBS aware of any evidence to suggest that the general public makes any significant use of these filings, or that such review of affiliation agreements as has been undertaken has uncovered any issues of interest.

The Commission has correctly noted that a system of complaint-initiated requests for affiliation contract information would eliminate costs associated with the present rule -- costs which clearly exceed the rule's now illusory benefits. Adoption of the current proposal would relieve licensees of the additional expenses they incur to prepare and submit their affiliation contracts to the Commission. While perhaps not a significant burden on any one licensee, this burden is sizeable when viewed from the perspective of the industry as a whole, and in terms of

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[6] Report and Order In the Matter of Public Inspection of Affiliation Agreements, Docket No. 14710, 16 FCC 2d 973, 977 (1969). In the aftermath of the Fox-New World agreement, it is now apparent that the bargaining positions of broadcast television stations vis-a-vis the networks differ market by market, depending on unique market circumstances, and that, contrary to the Commission's past assertions, group owners are not necessarily favored over smaller, independent entities in affiliation negotiations.

the expense to the Commission associated with the retention of these records.[7]

Adoption of the Commission's proposal would also reduce the more substantial costs associated with the anticompetitive effects of general public disclosure of the business information contained in affiliation contracts. The Commission accurately suggests that by requiring affiliate compensation data to be made publicly available, it may be facilitating the ability of parties either seeking or offering affiliation to avoid competition, because the public availability of this information encourages joint monitoring to ensure similar behavior. (Notice at ¶15) For example, in markets where there are more networks seeking affiliates than there are commercial stations available, the compelled public disclosure of this information may allow commercial stations to ensure that the compensation each of them receives is greater than the compensation any one of them alone would be willing to accept. Payment of artificially high rates of affiliate compensation saps the networks' competitive viability by reducing funds available for program development and production.

Finally, CBS agrees with the Commission's view that the public availiability of affiliation agreements "alters the dynamic of the contracting process." (Id. at ¶16) In a climate in which each market presents unique competitive challenges, a network may be willing to enter into contractual arrangements which recognize an affiliate's particular market circumstances -- for example, a need for network financial support for the improvement of an affiliate's news

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[7] In 1985, the Commission indicated that over 3800 licensees then filed copies of their affiliation contracts with the Commission each year, resulting in a paperwork burden of over 2500 workhours on the industry. Radio Network Affiliation Agreements, supra, 101 FCC 2d at 517. While the filing requirement was repealed as to radio, approximately 900 television stations still remain subject to the rule.

operation. It cannot do so, however, if the network believes that such "specialized" contract terms may be demanded by its other affiliates.[8] Confidentiality of the financial and other terms of these agreements would, as the Commission predicts, "break the linkage between concessions offered to one affiliate and negotiations with other affiliates." (Notice at ¶16) In CBS's view, the public would be well served by a rule change that makes it more likely that affiliation contract terms can be tailored to meet specific local needs of an affiliate.

In sum, CBS supports the Commission's proposal to eliminate the rules requiring that network affiliation contracts be filed with the Commission and that they be made publicly available. Given the extraordinary changes in the video marketplace since the filing rule was last examined in 1985, including particularly the increased competition for affiliates among broadcast networks, there is no longer a need, if there ever was one, for the Commission to monitor the network's presumed "dominance" of network/affiliate relationships through mandatory filings of affiliation agreements. Rather, the Commission can comfortably rely on its ability to enforce its rules through a system of complaint-initiated requests for affiliation contract information.

CBS accordingly urges the Commission to adopt the proposal set forth in the Notice, and

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[8] See Radio Network Affiliation Agreements, supra, 101 FCC 2d at 517, where the Commission noted the uniformity of affiliation contracts.

to continue its ongoing review of its network/affiliate rules in light of the competitive realities which prevail in today's video marketplace.

Respectfully submitted,

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June 12, 1995