Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

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REPLY COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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SUMMARY

No rational doubt could exist that sunset of the remaining network financial interest and syndication rules portends dramatic changes in the competitive strength of the ABC, CBS, and NBC television networks. What must not escape the Commission's concern in this upheaval is the effect on the three entrenched networks' *broadcast* competitors. As much as the three entrenched networks would find themselves in a stronger position to compete with cable, DBS, telephone companies, and other non-broadcast video entertainment media, they just as surely will be in an even stronger position to compete with their weaker broadcast competitors -- independent stations, emerging networks, and the affiliates of emerging networks.

On any basis of comparison, none of three emerging networks begins to compare with their entrenched brethren in the network business. In terms of coverage, program expenditures, audience ratings, amount of programming, number of affiliates, and VHF affiliate penetration, the three entrenched networks continue to hold the upper hand. This is, perhaps, most critical with respect to VHF affiliate penetration, a structural bias bred of the laws of physics and policy choices. None of the emerging networks can hope to compare coverage-wise with the entrenched networks as long as the entrenched networks retain their predominantly VHF affiliate bases and the emerging networks are relegated to their predominantly UHF affiliate bases or unless and until the UHF-VHF coverage disparity is eliminated.

INTV's members, whether full independents or affiliates of emerging networks, harbor reasonable fears that permitting the tentacles of the three entrenched networks to extend farther into the syndication market would impose new costs on their businesses, hindering and stifling their efforts to become truly, or at least nearly, equal competitors of the entrenched networks. Those fears derive from predictions of entrenched network behavior which would be driven by structurally-based incentives and capabilities which exist today and will exist tomorrow in no less degree than they existed in 1970, 1983, 1991, and 1993. Thus, INTV's position is anchored in the reality of the ongoing network affiliate relationship, an undeniable fact which no one expects to change.

In their comments, the networks urging advance of the sunset date offer something old, nothing new, baseless speculation, and facts askew. They continue to mask their intentions with rhetoric and self-serving theory and speculation. What is real and worthy of note, however, is the continuing structural characteristics of the video marketplace which place the networks in the strongest position and provide powerful built-in incentives to act in a manner detrimental to the well-being of their competitors. INTV, therefore, urges the Commission to postpone the sunset of the rules and tidy up its reporting requirements so as to develop a full and accurate record of network conduct. No evidence or rational basis exists to defuse the Commission's longstanding concerns about predictable network behavior designed to thwart and stifle competition from independent stations, the emerging networks, and their affiliates.

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INTRODUCTION

No rational doubt could exist that sunset of the remaining network financial interest and syndication rules portends dramatic changes in the competitive strength of the ABC, CBS, and NBC television networks. These three long-entrenched networks will enjoy enhanced capabilities in their efforts to compete effectively and efficiently with non-broadcast media.

What must not escape the Commission's concern, however, is the effect on the three entrenched networks' *broadcast* competitors. As much as the three entrenched networks would find themselves in a stronger position to compete with cable, DBS, telephone companies, and other non-broadcast video entertainment media, they just as surely would be in an even stronger position to compete with their weaker broadcast competitors -- independent stations, emerging networks, and the affiliates of emerging networks.[1]

Already, they are increasingly involved in program production for their own networks and occasionally other networks.[2] Already, at least one of them, CBS, is poised to enter the first-run syndication market at first opportunity via a joint venture with Group W Productions.[3] Already, they are expanding their station holdings via joint ventures and acquisitions.[4] Already, the networks show no hesitation to suggest that more extensive temporal exclusivity in their network license agreements would serve their interests. Already, renewed rumors persist that network-studio mergers will follow repeal of the rules. Such an ongoing competitive rearmament of the three entrenched networks only can enhance their competitive prowess *vis-a-vis* their broadcast competitors.

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[1]INTV membership is open to any television station which is not affiliated with the ABC, CBS, and NBC television networks. Therefore, many of INTV's members are affiliates of the Fox, UPN, and WB networks.

[2]Comments of the Coalition to Preserve the Financial Interest and Syndication Rule, MM Docket No. 95-39 (filed May 30, 1995) at 13 [hereinafter cited as "Coalition"] (In the two years since repeal of the financial interest rule, the networks' share of copyrights held in prime time entertainment programs increased from 29 percent to 35 percent."); *see also* Comments of the Association of Independent Television Stations, Inc., MM Docket No. 95-39 (filed May 30, 1995) at 10-11 [hereinafter cited as "INTV Comments"].

[3]"CBS, Group W form historic alliance," *Broadcasting & Cable* (July 18, 1994) at 14.

[4]*Id.*

One readily might observe, "So, what? After all, each of the three emerging networks -- Fox, UPN, and WB -- enjoys studio ownership or involvement." Such an observation, however, obscures enormous and very material differences between the three entrenched networks and their emerging network competitors. On any basis of comparison, none of the three emerging networks begins to compare with their entrenched brethren in the network business. In terms of coverage, program expenditures, audience ratings, amount of programming, number of affiliates, and VHF affiliate penetration, the three entrenched networks continue to hold the upper hand. This is, perhaps, most critical with respect to VHF affiliate penetration, a structural bias bred of the laws of physics and policy choices. None of the emerging networks can hope to compare coverage-wise with the entrenched networks as long as the entrenched networks retain their predominantly VHF affiliate bases and the emerging networks are relegated to their predominantly UHF affiliate bases or unless and until the UHF-VHF coverage disparity is eliminated in some fashion. Whereas cable has been touted as the cure for the UHF handicap, cable carriage offers only a limited boost to UHF stations because a substantial proportion of viewers (35-40%) are not cable subscribers, carriage of stations beyond their off-air coverage areas is not required, and the increased number of channels available for viewing draws more audience away from UHF stations than the UHF stations gain from carriage in the first place.

Some might point out that Fox is closing the UHF-VHF gap via its successful wooing of VHF affiliates of other networks. The other side of that coin, however, is the hundreds of millions, if not billions, of dollars that Fox has forked out to acquire highly attractive programming like NFL football and secure ownership or investment positions in stations in order to prompt their switch of affiliation to Fox from another network. Fox, in other words, has paid dearly to reduce its UHF handicap, something never required of the three entrenched networks. This hardly denies that the entrenched networks have responded by increasing compensation to some of their affiliates. That cost to the entrenched networks, however, has paid for more than temporary loyalty in the face of Fox's advances to their affiliates. It has secured for them long-term affiliate agreements and stronger provisions designed to discourage pre-emption of network programs. In short, holding and fortifying the high ground remains easier by many orders of magnitude than taking the high ground from entrenched competitors. As an agency charged with the obligation to assess the public interest consequences of its actions, the Commission must resist the temptation to sacrifice the interests of the weaker elements of the broadcast industry at the altar of competition-for-the-sake-of-competition.[5]

INTV, invoking the concerns of the weaker elements of the broadcast industry, filed comments in this proceeding urging postponement of the sunset of the remaining rules. INTV's members, whether full independents or affiliates of

[5]Furthermore, the sunset of the rules would occur in no vacuum. Other limitations that have reined in the entrenched networks also await the coup de grace from Congress or the Commission. For example, the three entrenched networks urge and anxiously await the lifting of current limits on the number of stations they might own nationally and locally. Already networks are expanding their station portfolios, either through outright acquisitions or joint ventures.

emerging networks, harbor reasonable fears that permitting the tentacles of the three entrenched networks to extend farther into the syndication market would impose new costs on their businesses, hindering and stifling their efforts to become truly, or at least nearly, equal competitors of the entrenched networks. Those fears derive from predictions of entrenched network behavior which would be driven by structurally-based incentives and capabilities which exist today and will exist tomorrow in no less degree than they existed in 1970, 1983, 1991, and 1993. The three entrenched networks by definition always will have a genuine and substantial interest in attracting the largest audiences with the most desirable demographic characteristics to their network programming and to the programming provided by their O&Os and affiliates. For network syndicators, the needs of their own networks, their O&Os, and their affiliates always will appear as bright blips on their radar screens.[6] For example, no network syndicator could ignore the potential impact of syndicating a popular network series during its network run. At the very least, it would provide ammunition to competing independent stations, which most likely would schedule the program in prime access, thereby maximizing its audience, but

[6]This critical underlying basis for concern has changed not at all. The networks continue to exhibit programming via nationwide webs of affiliates, which compete directly with independent stations (including the affiliates of the now three emerging networks). The inherent incentives to place competing stations at a disadvantage are even greater now than in 1993 because two additional infant networks have emerged. Evidence submitted by INTV in the Commission's proceeding concerning the Prime Time Access Rule suggests that additional broadcast networks are creating the first true competition to the three entrenched network in the advertising market. Therefore, the three entrenched networks now have an even greater incentive to take actions detrimental to the affiliates of emerging networks.*See* Comments of the Association of Independent Television Stations, Inc., MM Docket No. 94-123 (filed March 7, 1995) at 66-67 [hereinafter cited as "INTV PTAR Comments"]; *see also* 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,* MM Docket No. 94-123 (filed March 7, 1995) at 30.

also reducing the lead-in audience to network programming from the network's affiliate. Such showings also might dilute the audience potential for the original episodes of the show still appearing on the network.[7] A network syndicator would be foolish, even negligent, to ignore these factors in its profit maximizing decision for the network. Therefore, the only reasonable conclusion, as the Commission has recognized, is to acknowledge the risk that network syndicators will be governed by incentives foreign to unattached syndicators, which incentives will precipitate actions detrimental to the network's weaker competitors -- independent stations and emerging networks and their affiliates.

Therefore, in its comments, INTV posited that the incentives and abilities of the three entrenched networks to engage in anticompetitive behavior detrimental

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[7]No less than the present chairman of CBS, Inc., and the former president of Capital Cities/ABC, Inc., have acknowledged this incentive. In the words of Laurence Tisch, Chairman of CBS, Inc., appearing before the Commission on December 14, 1990:

> Well, I think we're only questioning when a program should go into syndication. It shouldn't be warehoused after it's off-the-air. I mean what if we have *Murphy Brown* on the air? Why should we be competing with episodes of *Murphy Brown* on other channels which are buying it at much lower cost than we're paying for it?

Similarly and also before the Commission on December 14, 1990, Capital Cities/ABC, Inc. President Daniel Burke observed:

> What we need is the opportunity to harvest some of the results of programming which is primarily financed by the networks and turned over to secondary markets to compete with us. It's a little like shipping scrap metal overseas and then having them come back as grenades and artillery.

Indeed, the networks have acknowledged that withholding product would serve their interests.

to independent stations were as real today as ever.[8] INTV's position is anchored in the reality of the ongoing network affiliate relationship, an undeniable fact which no one expects to change. In their comments, the networks urging advance of the sunset date offer something old, nothing new, baseless speculation, and facts askew. In reply thereto, INTV hereby submits the following reply comments:

REPLY TO COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("ABC") continues to disclaim network market power, but overstates its case, noting, for example, that "first-run syndicators continue successfully to distribute prime time programs without relying on access to affiliates of ABC, CBS, or NBC."[9] However, only 39% of independent station prime time programming is first-run, which programming rarely achieves ratings

[8] INTV further pointed out that even in 1993, "The Commission found that independent stations (then including affiliates of the Fox network and now including, as well, affiliates of the two other emerging networks, UPN and Warner Bros.) placed great reliance on the ability to acquire highly popular syndicated programming in order to sustain and improve their financial vitality and that of their programming service to the public. The Commission at the same time found that the three entrenched broadcast television networks had the incentive and ability to deprive independent stations (and now emerging network affiliates) of access to such popular genres of syndicated programming. Thus, in 1993, the Commission made findings soundly based on substantial evidence, much of which was provided by INTV and other parties favoring retention of the rules." *See* Remand Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 1, 1995); Remand Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed February 16, 1995).

[9] Comments of Capital Cities/ABC, Inc., MM Docket 95-39 (filed May 30, 1995) at 3 [hereinafter cited as "ABC"].

comparable to programming on the three entrenched networks.[10] Moreover, ABC neglects the obvious question under the circumstances -- what effect would sunset of the rules have on such first-run syndication. INTV submits that sunset of the rules will have an adverse effect on the market for prime time syndicated programming.[11] By jeopardizing independent station access to highly popular off-network hits, sunset of the rules will lessen the ability of independent stations to acquire and/or underwrite production of first-run prime time syndicated programs. Such a result would redound to the entrenched networks' benefit by undermining the market for non-network prime time programming and weakening prime time competition from independent stations.

ABC likewise disclaims the ability to corner the market in off-network programming so as to allow it to injure non-affiliated stations via warehousing or favoritism.[12] This is myopic. First, focusing on what one network may be able to accomplish in the off-network syndication market misses the point. Each of the three entrenched networks has the same incentives to grant every advantage to its affiliates, while placing competing independent stations at a disadvantage. In the

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[10]*See* Economists, Inc., *An Economic Analysis of the Prime Time Access Rule,* MM Docket No. 94-123 (filed March 7, 1995) at 134 [hereinafter cited as *Economic Analysis*].

[11]For present purposes, prime time is defined to exclude "prime access." In the case of prime access, the Prime Time Access Rule will continue to assure a market for prime access first-run syndicated programming unless the Commission elects to permit further fortification of the networks' position at the expense of emerging networks by repealing or relaxing the Prime Time Access Rule. *See Notice of Proposed Rule Making,* MM Docket No. 94-123, 9 FCC Rcd 6328 (1994).

[12]ABC at 4, 11.

hardly unlikely event that the three entrenched networks respond in like fashion to these incentives, a substantial restriction on output is likely.[13] Second, as INTV has demonstrated previously, networks have considerably more ability than they would prefer to admit to skim the cream of the off-network syndication market.[14] Third, the ability of networks to prevent popular network programs from entering syndication in no way is tied to their securing syndication rights to a program. They may see that a program remains out of syndication by insisting on more extensive temporal exclusivity in their exhibition contracts. Indeed, they have shown no hesitation in trumpeting the benefits of greater periods of exclusivity.[15] Thus, ABC's argument offers no assurance whatsoever that the three entrenched networks could

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[13]Whether a network syndicator withheld programs or steered them to affiliates, the effect is still the same for independents and emerging network affiliates: They are deprived of programming critical to their economic vitality.

[14]*See* Remand Reply Comments of the Association of Independent Television Stations, Inc., *supra*, at 4; Further Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed November 21, 1990), Exhibit 7; Further Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162 (filed December 19, 1990) at 22.

[15]ABC (at 10) itself states that "[E]very program owner has an incentive to reap maximum value from the exploitation of his program in sequential 'windows' and to preserve exclusivity in each window when the objective of profit-maximizing would be served." ABC (at 14, n.36) similarly criticizes the anti-warehousing rule:

> The requirement that programs in which an original network holds the syndication rights be made available for syndication no later than four years after the commencement of the network run blocks strategies that might turn out (in a given case) to maximize the programs value.... [A] network ... cannot itself determine the syndication strategy or earn the syndicator's share of syndication revenue even where it might be best positioned to do both.

ABC at 14. ABC, thus, acknowledges its quest for control, while admitting that its only direct financial cost from the rule is the syndicator's share of revenue, not the bulk of syndication revenue which flows back to the program's owner.

not gain a sufficient share of the typically small supply of off-network hits which drive the bottom lines of independent stations.

ABC similarly discounts concerns about networks' extracting rights from first-run producers, handicapping the launch of first-run shows, or injuring non-affiliated stations.[16] Again, however, ABC fails to mention, much less confront, the underlying basis for concern. ABC dismissively states only that "A network which lacks power over its network program suppliers *a fortiori* lacks power as a syndicator to injure station customers."[17] This ignores the enormous leverage the networks exercise through their O&O stations. Syndicated programs must succeed on VHF stations in the largest markets or not at all. In the top five markets, half of the VHF stations are network owned and operated.[18] This accords the networks a gatekeeper position. One need only consider the CBS-Group W station and syndication joint venture (as well as the distribution pattern for its first program, *Day and Date*) to realize just how important access to large market stations is to first-run syndicators.[19] That ABC was in no rush to confront its O&O-based power in the first run syndication market is understandable, but such reticence to address the real issue robs ABC's contentions of any credibility.

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[16]ABC at 4.

[17]*Id.*

[18]*See 1995 Television & Cable Factbook.*

[19]Furthermore, the CBS-Group W venture would provide access to Group W's VHF stations in San Francisco and Boston.

ABC contends that anticompetitive network strategies would have to "avoid intervention by antitrust authorities, if not by the Commission."[20] Such arguments blink reality. Long before any administrative or judicial redress could take place, the damage would have been done and irreversibly so. Add to which, detecting, much less proving, that anticompetitive acts had occurred, would be difficult and expensive.[21] Even the networks' favored forum has acknowledged the prohibitive expense of antitrust litigation.[22] Only prophylactic Commission rules can prevent damaging anticompetitive behavior by the networks.

ABC also argues that "The only effect of the restraints on off-network syndication is to depress the prices networks are willing to pay for off-network rights (thus injuring network program suppliers), as well as to bar new competitive entry into off-network syndication."[23] INTV simply notes that if network program suppliers were injured by the off-network syndication ban, they ought be linking arms with the networks and urging repeal of the ban. In fact, of course, they vigorously oppose sunset of the rule.[24] INTV also suggests that "new competitive

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[20]ABC at 13.

[21]*See* Reply Comments of the National Telecommunications and Information Administration, MM Docket No. 90-162 (filed August 1, 1990) at 4, n.7.

[22]*United Airlines v. CAB*, 766 F. 2d 1107 (7th. Cir. 1985).

[23]ABC at 13 - 14 [Footnotes omitted].

[24]*See* Comments of the Coalition to Preserve the Financial Interest and Syndication Rules, *supra.*

entry" in the context of ABC's assertion is a misnomer. It should be new, vertically-integrated competition -- a horse of a far different color.

Finally, ABC resists the notion that it could have undue influence in first-run syndication because "no network has the power to dictate its affiliates non-network program choices."[25] INTV would remind the Commission, first of all, that the networks' affiliates harbor an opposing view of network power.[26] Secondly, the networks would have to exert little control over their affiliates directly. They will be able to exert enormous control over the supply of first-run programming entering the market in the first place via their O&Os. Therefore, by restricting the supply largely to network-produced or syndicated shows, they will leave their affiliates little real choice.

REPLY TO COMMENTS OF CBS, INC.

CBS complains that the remaining rules prevent it from entering the syndication business, while Viacom, Inc., becomes a "behemoth."[27] CBS's failure to diversify, however, hardly may be placed at the feet of the remaining financial

[25]ABC at 16.

[26]*See* Comments of the Network Affiliated Stations Alliance, MM Docket No. 94-123 (filed March 7, 1995).

[27]Comments of CBS, Inc., MM Docket No. 95-39 (filed May 30, 1995) at 7-8 [hereinafter cited as "CBS"].

interest and syndication rules. NBC and ABC seem to have diversified in spite of them in ways which also were open to CBS.

CBS also reminds the Commission of Chief Judge Posner's prescience in observing that the networks "no doubt...will be weaker still" when the present proceeding was to commence.[28] Network financial reports suggest otherwise.[29]

The emerging networks also draw CBS's attention:

> Like Fox, the proprietors of these latter-day networks are also major program producers and syndicators that are explicitly exempt from the operation of the remaining fin/syn restrictions. These new networks also gained instant credibility because of their relationships with major station group owners....[30]

Again, however, the emerging networks continue to struggle against the UHF handicap.[31] That may mean inferior coverage or the bearing of enormous costs to entice VHF stations to switch affiliations. In either case, the "original" networks faced no such burden.

CBS touts the failure of the network-owned productions in the fall schedule. CBS says this proves the point that the networks will look to program quality rather

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[28]CBS at 10-11.

[29]*See, e.g.,* "Prime time upfront explodes," *Broadcasting & Cable* (June 5, 1995) at 9.

[30]CBS at 12.

[31]*See* Introduction, *supra,* at 2 *et seq.*

than ownership in determining which programs to acquire and schedule.[32] INTV also notes that another inference might be drawn, *i.e.*, that the networks scheduled network-produced programs with lesser regard for quality. In this context, one also must note the continuing decline in network license fees, possibly a function of the networks' headlong plunge into network program production.[33]

REPLY TO COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

NBC's efforts to portray an even more competitive marketplace for the three entrenched networks overshoot reality. For example, NBC says that the UPN and WB networks have "successfully" launched.[34] This may be true in the narrow sense of the word, but their ultimate success as the fifth and sixth networks is far from assured. NBC also grossly exaggerates the impact of the two newest networks, suggesting that they provide "a steady supply of high quality programming..."[35] Only by footnote does NBC acknowledge that UPN and WB currently furnish two to four hours of week night prime time programming.[36] NBC also touts the

[32]CBS at 15; *see also* Comments of the National Broadcasting Company, Inc., MM Docket No. 95-39 (filed May 30, 1995) at 7 [hereinafter cited as "NBC"].

[33]Coalition at 4, 11.

[34]NBC at 4.

[35]NBC at 9.

[36]*Id.* at 9, n.32.

"promise" of telephone company video services.[37] However, telco video apparently is destined to remain largely just that -- a promise -- for the foreseeable future. As the Commission is well aware, numerous video dialtone applications recently have been withdrawn.

NBC also continues to assert incorrectly that "[B]efore 1970, when the networks could acquire such rights and were actively engaged in the syndication business, there was no evidence of either 'affiliate favoritism' or 'warehousing.'"[38] NBC is wrong. INTV has submitted such evidence to the Commission.[39]

In sum, the networks continue to mask their intentions with rhetoric and self-serving theory and speculation. What is real and worthy of note, however, is the continuing structural characteristics of the video marketplace which place the networks in the strongest position and provide powerful built-in incentives to act in a manner detrimental to the well-being of their competitors.

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[37] *Id.* at 5.

[38] NBC at 9.

[39] Further Comments of the Association of Independent Television Stations, Inc., *supra*, Exhibit 5, a copy of which is attached hereto as Exhibit One.

REPORTING REQUIREMENTS

In its comments, INTV also urged the Commission to maintain its reporting requirements even in the event it lets the sunset proceed as planned. Continuation of reporting requirements then would be particularly necessary because the networks would be more heavily involved in syndication than under the remaining rules, posing additional risks to independent television and the emergence of new networks.

In any event, the reporting requirements should be retained and strengthened. In this regard, INTV has reviewed a report form which will be offered in the reply comments of the Coalition to Preserve the Financial Interest and Syndication Rule. INTV urges the Commission to adopt a form as suggested by the Coalition. The reporting requirements now in place have proven inadequate.[40]

CONCLUSION

INTV reiterates its position that sunset of the rules would be premature. No evidence or rational basis exists to defuse the Commission's longstanding concerns about predictable network behavior designed to thwart and stifle competition from independent stations, the emerging networks, and their affiliates. This is

[40]For example, even CBS acknowledges that independent syndicators providing information to CBS have failed to provide information in requisite detail. CBS at 16, n.45.

particularly true in light of the three entrenched networks very entrenched positions on the high ground of the video marketplace. INTV, therefore, urges the Commission to postpone the sunset of the rules and tidy up its reporting requirements so as to develop a full and accurate record of network conduct.

Respectfully submitted,

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REPLY COMMENTS OF
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EXHIBIT ONE

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FURTHER COMMENTS OF INTV □ MM Docket No. 90-162 □ **EXHIBIT 5**

NETWORK SYNDICATORS: BACK TO THE FUTURE

The networks are fond of stating that times have changed since the enactment of the rules, in 1970. Curiously, when asked whether they will engage in future anti-competitive activity the answer is – we did not engage in such behavior when we were able to secure financial interests and syndication rights, therefore we will not do so in the future.[1] The contradiction is obvious.

If times have changed, then the economic incentives which existed prior to the rules no longer exist, making past behavior irrelevant to predictions of future actions. Indeed, it is because the networks are now losing audience share, and the value of the syndication business increased, that there is a greater incentive to manipulate program distribution to disadvantage the toughest competitor – independent television. Nevertheless, to the extent network behavior prior to 1970 is relevant, then it is worth rediscovering the marketplace as it existed.

The networks state that the Commission in 1970, did not find any measurable greater success by network syndicators in selling programs to affiliates or any discriminatory or otherwise abusive behavior.[2] This assertion is based on the networks reliance on statistical information contained in the two Arthur D. Little studies. However, the bare statistical results presented by the networks give little

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[1] Of course independent television was not a strong sector of the broadcasting industry and certainly not a competitive threat to network ratings. At the time there were only 70 independent stations. Today there are over 339, a testament to the effectiveness of the rules.

[2] Reply Comments of CBS Inc., In the matter of Evaluation of Financial Interest and Syndication Rules Docket No. 90-162 (August 1, 1990) at 99.

insight into the actual market dynamics of the period.[3] A more important source of information is the Commission's own conclusions throughout the 1960's and into the 1970's.

What the Commission found was an increasingly restrictive program supply market resulting directly from networks obtaining financial interests and controlling domestic syndication. The FCC found that manipulation of the market constrained the development of independent television. The fact that network syndicators sold product to independent stations is not the issue. The issue is whether the market structure prevented independent stations from having access to competitive programming. Even if network syndicators sold product to independent stations, what type of product was entering the market? How old was it? Were there restrictive terms on its broadcast? Did affiliated stations have an exclusive right of first refusal? During the 1960's and into the 1970's the Commission found the market to be unnecessarily restrictive.

One of the first examinations of network television program procurement occurred

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[3] It was reported by the Commission's staff that contrary to the networks conclusions, the first Arthur D. Little study supported imposition of the rules.

> In preparing their new comments on the basis of the second Little Report, the networks may feel obliged to take care to defend the objectivity of the first report. When it was issued, many in the industry felt it had demolished the basis of the commissions' rule.
>
> However, the commission staff was reported to have submitted a memorandum to the commission, contending that the report's conclusions are "forced and polemic", and designed to coincide with the position taken by the networks. The staff said the statistical material was correct -- but that it supported the contentions underlying the commission's proposal.

Broadcasting, April 28, 1969 at 67. Indeed, the second ADL report submitted to the FCC contained "numerous errors" that were apparently corrected later. Report and Order in Docket No. 12782, 23 FCC 2d 382, 385 n. 9. In fact, subsequent corrected data changed the conclusions that could be drawn from that analysis. Id. at 386 n. 13. Accordingly, it is important to determine whether data submitted in this proceeding contains the "corrected" information.