UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications and Information
Washington, D.C. 20230

July 20, 1995

RECEIVED
JUL 20 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

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

Dear Chairman Hundt:

I am writing to present the views of the National Telecommunications and Information Administration (NTIA) on the Commission's review of the Prime Time Access Rule (PTAR).[1/] NTIA, which is part of the Department of Commerce, serves as the President's principal advisor on telecommunications and information policy issues.

Based on its review of the record and the marketplace, NTIA urges the Commission to conclude tentatively to repeal PTAR, but for the reasons set forth herein recommends that it proceed cautiously in doing so. On the one hand, the market appears to be far more competitive than when the rule was adopted. Independent program producers enjoy greater economic health. And, there are far more independent stations now than when PTAR was adopted in 1970.

1/ Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No. 94-123, Notice of Proposed Rulemaking (Notice), 9 FCC Rcd 6328 (1994). PTAR generally prohibits stations affiliated with any of the three oldest networks in the top 50 television markets from broadcasting more than three hours of network or former network (off-network) programs during the four "prime time" viewing hours.

On the other hand, NTIA is still concerned about the viability of independent television stations. In addition, other structural changes in the industry are imminent, and NTIA believes their effects on the video marketplace need to be absorbed and evaluated by the Commission before it takes final action on PTAR. Finally, the impact on the video marketplace of repealing PTAR is not clear. NTIA therefore concludes that, on balance, the Commission should issue a tentative decision repealing PTAR, but should delay the effective date of repeal for five years. Before finalizing repeal, the Commission should undertake a further review of PTAR once the impending structural changes in the broadcasting industry have become effective.

While the record before the Commission fails to provide sufficient guidance for taking final action at this time, there does appear to be clear evidence that the video programming marketplace has improved dramatically since PTAR was adopted in 1970.[2/] The Commission's Notice documented substantial improvements in the first-run syndication industry, increases in the number of independent stations, and a decline in network dominance.[3/] The record does not reveal the extent to which PTAR may have played a role in bringing about these changes, however.[4/]

Also, while the broadcast marketplace has become increasingly competitive over the past twenty-five years, the record is inconclusive on whether PTAR has actually enhanced viewer welfare.[5/] The record fails to demonstrate whether

---

2/ Notice, 9 FCC Rcd 6328, 6336-6342, paras. 16-21.

3/ Id.

4/ Industry observers disagree over whether PTAR or other factors have caused these changes. Other factors that are cited include the growth of cable and the All Channel Receiver Act, 47 U.S.C. § 303(s) (1962), which fostered the growth of UHF stations.

5/ In examining the economic effects of PTAR, the Commission may find helpful a staff paper prepared by a NTIA Senior Economist, Mark Bykowsky, Ph.D., Viewer Welfare Effects of the Prime Time Access Rule (1995) (copy attached). Bykowsky's analysis of PTAR suggests that viewer welfare -- as measured by the valuations viewers' place on programs -- would be enhanced by PTAR's elimination.

PTAR has improved the diversity and quality of programming available to viewers. In fact, a small group of firms continues to supply most of the programming in the prime time access period.[6/] Additionally, PTAR does not appear to affect the market's failure to meet fully viewers' programming preferences. That failure stems in part from basic industry structure: broadcasters seek audience share to enhance advertising revenues, but audience share merely approximates the extent to which viewers value programs; it does not measure the intensity of programming preferences.[7/] Thus, the record does not demonstrate that the continuation of PTAR -- which may distort the marketplace by, for example, handicapping the competitiveness of affiliates -- is a mechanism for enhancing viewer welfare.

Despite the record evidence showing a dramatic increase in the number of independent television stations since PTAR was adopted in 1970, however, NTIA is particularly concerned about the potential impact of PTAR's repeal on independent station.[8/] Independent stations provide important benefits to American broadcast

---

6/ King World, Paramount, Fox, and Warner Brothers provide most of the programming shown during the access period. See, e.g., Comments of the U.S. Federal Trade Commission Bureau of Economics at 23-28 (filed March 7, 1995); Comments of NBC, Inc. at 15-16 (filed March 7, 1995).

7/ See Owen and Wildman, Video Economics, Chapter 4, at 101-150 (1992), cited in Mark Bykowsky, Ph.D., supra n. 5 at 19-20.

8/ Despite gains in the number of independent stations in the last two decades, the financial situation of independent stations appears more precarious in a number of respects than that of network affiliates. See, e.g., Setzer and Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, 6 FCC Rcd 3996, 4025-4028 (1991); Reply Comments of Association of Independent Television Stations, Inc. (INTV) at 13-15 (filed May 26, 1995). Moreover, most independent stations operate at a technological disadvantage, since most are UHF-based. See Comments of INTV at 23 (filed March 7, 1995); Reply Comments of INTV at 8-12 (filed May 26, 1995). Although parties in this proceeding have debated that point, NTIA finds most persuasive the argument that a technological disadvantage persists. Although cable may diminish the disadvantage to an extent, it does not fully alleviate it; 37.5 percent of American television households do not subscribe to cable.

television viewers. They serve as an important source of additional programming selections for the nearly 40 percent of Americans that do not subscribe to cable television. These stations also provide a foundation upon which nascent broadcast networks can be built, further benefitting viewers. While we lack evidence that elimination of PTAR would necessarily cause a nascent network to fail,[9/] PTAR's impact on such network development is a public policy matter warranting further Commission consideration.[10/]

Furthermore, the rationale for PTAR must be examined in the context of the imminent sweeping structural changes in the broadcasting industry. The Congress and the Commission are considering liberalizing, in the near future, broadcasting crossownership and multiple ownership rules to permit increased concentration in broadcast markets.[11/] The Commission also proposes to modify the rules regulating the broadcast network/affiliate relationship, which may affect the degree of control that networks exercise over their affiliates.[12/] In addition, the

---

9/ Mark Bykowsky, Ph.D. supra n. 5 at 9-10.

10/ INTV argues that repealing PTAR would result in a 9.3% drop in local station revenue, which could wipe out the profit margin and cash flow of many stations. INTV submits that this revenue loss will have significant public interest ramifications. See Letter from David L. Donovan, VP, Legal and Legislative Affairs, INTV, to Roy Stewart, Chief, Mass Media Bureau, FCC (July 14, 1995). See also Comments of Viacom, Inc. at 15-18 (filed March 7, 1995).

11/ See S. 652, 104th Cong. 1st Sess., §202 (1995); H.R.1555, 104th Cong., 1st Sess., §302 (1995); see also Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, Further Notice of Proposed Rulemaking, FCC 94-322, Rad. Reg. (P&F) Current Service 53:399 (released Jan. 17, 1995).

12/ Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, 47 C.F.R. § 73.658(a),(b),(d),(e), and (g), MM Docket No. 95-92, Notice of Proposed Rulemaking, FCC 95-254 (released June 15, 1995).

scheduled expiration of the financial interest and syndication (fin-syn) rules later this year could affect the amount of network programming that will be available in the marketplace, as well as the networks' incentives to require that affiliates clear off-network programs.[13/] Any increased vertical integration, horizontal concentration, or network market power that results from these marketplace changes could have unintended consequences on the video marketplace.

For these reasons, NTIA believes, the Commission should proceed with caution before taking final action to repeal PTAR. The Commission should, however, reject a phase-out approach to the rule that dispenses with the off-network rule. Parties advocating repeal of only the off-network restriction have failed to explain why network leverage exists with regard to network programs but would not exist with respect to off-network programs when the fin-syn rules are eliminated later this year.[14/]

We thus urge the Commission to issue a tentative timetable for the repeal of PTAR in five years. This will give the Commission the opportunity to re-examine this matter thoroughly, based on public notice and comment, once the impending

---

13/ See Review of the Syndication and Financial Interest Rules, Sections 73.659 - 73.663 of the Commission's Rules, MM Docket No. 95-39, Notice of Proposed Rulemaking, FCC 95-144, , Rad. Reg. (P&F) Current Service 53:35, para. 4, n. 7 (released and adopted April 5, 1995); Second Report and Order in MM Docket No. 90-162, 8 FCC Rcd 3282, 3303-10, recon. granted in part, Memorandum Opinion and Order in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994).

14/ See Mark Bykowsky, Ph.D. supra, n.5 at 10-13.

structural changes in the broadcast industry have occurred.[15/] Delayed repeal will also permit industry participants to begin making necessary business adjustments in response to anticipated changes in the regulatory environment. We understand from industry sources that program negotiations and contracts are often concluded as much as two years before programs are aired. Therefore, immediate elimination of PTAR could cause undue disruption by failing to provide the industry with sufficient time to anticipate and adjust to changes in programming availability and cost.

Finally, a delayed timetable for repealing PTAR would provide the Commission with an opportunity to study the potential impact of repeal on the marketplace. The Commission could, for example, conduct a trial under which it eliminates PTAR only on weekends and measures the impact on various industry segments.[16/] This approach would allow for some change while continuing to provide stability in a marketplace that is about to undergo a major restructuring.

Accordingly, despite shortcomings in the record that make it difficult to predict with certainty the impact of continuing or repealing PTAR, a case can be made, on balance, for repealing PTAR in five years. Moreover, based on the absence of data to support PTAR's retention, we believe that the issuance of a tentative decision repealing PTAR is consistent with the Administration's efforts to

---

15/ The Commission should adopt an approach similar to the process the Commission established with respect to elimination of the fin-syn rules. In the fin-syn proceeding, the Commission decided to retain certain restrictions until two years after the district court in the consent decree litigation issued its decision modifying the relevant restrictions. At the same time, it indicated that eighteen months after that ruling it would launch an inquiry to provide an opportunity to comment for those who believed the restriction was still warranted, with the burden of proof on the parties seeking retention. See Second Report and Order in MM Docket No. 90-162, 8 FCC Rcd 3282, recon. granted in part, Memorandum Opinion and Order in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994). We believe that a similar process is warranted with respect to elimination of PTAR.

16/ We note that the PTAR requirements are not fully applicable Saturday night. See 47 C.F.R. § 73.658(k) (1994).

streamline regulations and eliminate unnecessary ones,[17] while allowing for further review and public comment before taking final action.

Sincerely,

Larry Irving

Larry Irving

cc: Commissioner James Quello
Commissioner Andrew Barrett
Commissioner Susan Ness
Commission Rachelle Chong
Roy J. Stewart, Chief, Mass Media Bureau
Douglas Webbink, Chief, Policy and Rules Division, Mass Media Bureau

---

17/ Remarks on Regulatory Reform, 31 Weekly Comp. Pres. Doc. 278 (Feb. 27, 1995); Remarks on Regulatory Reform in Arlington, Virginia, 31 Weekly Comp. Pres. Doc. 426 (Mar. 16, 1995).

CERTIFICATE OF SERVICE

I, Cheryl A. Kinsey, do hereby certify that I have this 20th day of July, 1995, mailed by first class United States mail, postage prepaid, copies of the foregoing letter to the parties of record in this proceeding, as identified on the attached list.

Cheryl A. Kinsey

Cheryl A. Kinsey

* The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

* The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

* The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

* Douglas Webbink, Chief
Policy & Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 536
Washington, D.C. 20554

James D. Schlichting, Chief
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

James A. Clifton
Raymond S. Hartman
Steven S. Wildman
The Law & Economics Consulting Group
1775 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20006

* The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

* The Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

* Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Carol Mattey
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

James J. Popham, Esq.
Vice President, General Counsel
Association of Independent
Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036

Ellen Oran Kaden, Esq.
CBS
51 West 52 Street
New York, New York, 10019

Oliver E. Williamson
Glen A. Woroch
Department of Economics
University of California
Berkeley, CA 94720

Diane S. Killory, Esq.
W. Stephen Smith, Esq.
Susan H. Crandall, Esq.
Bradley S. Lui, Esq.
Morrison & Forrester
Attorneys for Coalition to Enhance Diversity
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Nathaniel F. Emmons, Esq.
Andrew H. Weissman, Esq.
Mullin, Rhyne, Emmons and
Topel, P.C.
Attorneys for First Media Television, L.P.
1225 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20036

Jerry Udwin
The Udwin Group
Friends of Prime Time Access
1828 L Street, N.W.
Washington, D.C. 20036

Ian D. Volner, Esq.
N. Frank Wiggins, Esq.
Venable, Baetjer, Howard &
Civiletti, L.L.P.
Attorneys for King World Productions
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005

James Denvir, Esq.
Margaret L. Tobey P.C.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
Attorneys for the Motion Picture Assoction of
America
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Mark W. Johnson, Esq.
CBS
Suite 1000
1634 I Street, N.W.
Washington, D.C. 20006

Michael Vita
Federal Trade Commission
Bureau of Economics
6th Street & Pennsylvania Ave., N.W.
Washington, D.C. 20580

David M. Hunsaker, Esq.
Denise B. Moline, Esq.
Putbrese & Hunsker
6800 Fleetwood Rd.
Suite 100
P.O. Box 539
McLean, VA 22101

Jonathan Birkhahn, Esq.
Senior Vice President of
Business Affairs and
General Counsel
King World Productions
1700 Broadway, 35th Floor
New York, New York 10019

Sol Schildhause, Esq.
Andrew Auerbach, Esq.
The Media Institute
1000 Potomac Street, N.W.
Suite 301
Washington, D.C. 20007

Fritz E. Attaway
Motion Picture Association of
America
1600 Eye Street, N.W.
Washington, D.C. 20006

Richard Cotton
Ellen Shaw Agress
National Broadcasting Company
30 Rockefeller Plaza
New York, New York 10115

John K. Hane
Howard Monderer
National Broadcasting Company
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Benjamin W. Tucker, Jr.
Chairman, Steering Committee
President
Retlaw Broadcasting Company
4880 North First Street
P.O. Box 5455
Fresno, CA 93755

Robert Allen Garrett, Esq.
Carl A. Fornaris, Esq.
Arnold & Porter
Counsel for the Office
of the Commissioner of Baseball
555 12th Street, N.W.
Washington, D.C. 20004-1212

Jere W. Glover, Esq.
Chief Counsel for Advocacy
Barry Pineles, Esq.
Assistant Chief Counsel
Office of Advocacy
United States Small Business Admin.
409 3rd Street, S.W.
Washington, D.C. 20416

Al DeVaney
UPN Affiliates Association
c/o Station WPWR-TV, Channel 50
2151 N. Elston
Chicago, Illinois 60614

George H. Shapiro, Esq.
Marilyn D. Sonn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
Attorneys for Viacom, Inc.
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Martin P. Messinger, Esq.
Vice President &
General Counsel
Westinghouse Broadcasting
Company
200 Park Avenue, 37th Floor
New York, New York 10166

Stephen A. Hildebrandt, Esq.
Chief Counsel
Westinghouse Broadcasting
Company
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Ramsey L. Woodworth, Esq.
Wilkes, Artis, Hedrick & Lane, Chartered
Attorneys for Westinghouse Broadcasting Co.
1666 K Street, N.W.
Washington, D.C. 20006

Joel Rosenbloom
A. Douglas Melamed
Stuart P. Green
Wilmer, Cutler & Pickering
Counsel for Capital Cities/ABC, Inc.
2445 M Street, N.W.
Washington, D.C. 20037-1420

William Reyner and Mace Rosenstein
HOGAN & HARTSON L.L.P.
Attorneys for Fox Broadcasting Co.
and Fox Television Stations, Inc.
Columbia Square
555 Thirteenth St., N.W.
Washington, D.C. 20004

Jill A. Lesser
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036

Joseph L. Paykel
Gigi B. Sohn
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036

Richard B. Quinn
The Freedom Forum First Amendment Center
At Vanderbilt University
1207 18th Avenue, South
Nashville, TN 37212

VIEWER WELFARE EFFECTS OF THE PRIME TIME ACCESS RULE

Office of Policy Analysis and Development

Staff Paper

by

Mark M. Bykowsky, Ph.D.

July 20, 1995

National Telecommunications and Information Administration

The views expressed herein are those of the author, and do not necessarily reflect the views of the National Telecommunications and Information Administration. The author would like to thank Natalie Rodriguez, Rafael Alvarez, and Mark Holiday for assistance in preparing this paper.

I. Introduction

The Prime Time Access Rule ("PTAR") restricts the number of hours of network and off-network programming network affiliates in the top 50 television markets can exhibit during the prime-time viewing period. PTAR's objective is to enhance program quality and diversity by increasing the competition offered to network programming by producers of first-run syndicated programming, and to reduce control networks exercise over their affiliates. In adopting PTAR in 1970, the Federal Communications Commission ("Commission") believed that the market structure of the broadcast television industry was inconsistent with the efficient allocation of resources and, moreover, that it would inhibit viewer welfare by artificially restricting a household's program viewing options (e.g., program diversity).

In its Notice of Proposed Rulemaking, the Commission recommended that petitioners develop an economic framework within which to analyze PTAR's desirability. A number of parties provided such a framework. In what follows, we construct a basic economic framework for evaluating PTAR's viewer welfare effects and, where appropriate, comment on elements of the framework developed by other parties. With regard to the latter objective, the analysis addresses whether PTAR's elimination would significantly harm the ability of entities to create additional networks. It also discusses whether a strong basis exists for eliminating only the off-network provision. In general, the study finds that rather

than improving the allocation of resources, PTAR contributes to their misallocation and, moreover, may be inconsistent with the Commission's objective of enhancing viewer welfare.

II. General Economic Framework

PTAR was adopted in 1970 because of viewer welfare concerns regarding the primary networks' (i.e., ABC, CBS, NBC) ability to dictate their affiliates' programming decisions. The Commission also believed that the program acquisition practices of the three major networks were inconsistent with the development of a healthy independent program production industry. According to the Commission, "[t]he public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming."[1/]

The Commission has instructed parties to evaluate PTAR in terms of its effect on television viewer welfare. The following analyzes PTAR's viewer welfare effects. Consistent with the Commission's desire to discover new approaches to analyzing such effects, part of this analysis employs game-theoretic principles. These principles appear to shed new light on PTAR's desirability.

1/ Network Television Broadcasting, Report and Order, 23 FCC 2d 382, 394 (1970).

III. Welfare Effects of PTAR

In its simplest terms, television networks "sell" access to television households to advertisers by acquiring the broadcast exhibition rights of television programs. This service evolved in response to the needs of local broadcast stations, suppliers of programming (i.e., "program suppliers"), and advertisers. Specifically, local broadcast stations require quality programming delivered at "reasonable" cost. Program suppliers desire outlets for their programming, while advertisers demand access to large numbers of television viewers.

The advantage a network has, relative to a non-network, in satisfying the needs of each of these market participants stems, in part, from the high fixed cost of developing a television program and the relatively low incremental cost of having an additional viewer view that program. Under such conditions, the per viewer cost of developing a program declines continuously with increases in the number of viewers. Consequently, program suppliers whose products are widely viewed can offer more expensively produced programs, for a given cost per viewer, than program suppliers whose products reach a smaller audience.[2/]

2/ This point regarding the networks is about as old as the PTAR rule itself. See, S. Besen, T. Krattenmaker, A. Metzger, and J. Woodbury, Misregulating Television: Network Dominance and the FCC 5 (1984). The Commission recognized this point when adopting PTAR. See Network Television Broadcasting, 23 F.C.C. 2d at 386-387. In addition, because the networks may be able to produce superior programs, in general, networks enable the affiliates to reduce the transactions costs associated with obtaining multiple programs.

Moreover, competition among television stations will induce them to acquire such expensively produced programs.[3/] Because such incentives exist in every broadcast market, national advertisers are able to reach a large audience, at a lower cost (including transactions costs), by purchasing advertising time from the networks.

Due to these and other efficiencies, the networks and their affiliates provide the most attractive television programming distributed over-the-air, as measured by viewing shares.[4/] It is generally believed that, by preventing the network affiliates' from providing such programming during the access period, PTAR skews competition between them and competing independent and non-commercial television stations. Indeed, one petitioner asserts that the increase in the number of independent stations since 1970 was the direct result of PTAR and, moreover,

---

3/ Some believe that affiliates are sometimes forced to carry network programming. See infra. Comments of the Coalition to Enhance Diversity, in MM Docket No. 94-123 at 31-34. [Hereinafter, unless otherwise stated, comments referred to were filed on March 7, 1995 in MM Docket No. 94-123].

4/ See Economists Incorporated, Prime Time Access Rule: A Supplementary Economic Analysis in MM Docket 94-123, Table A-4 at 62 (filed May 26, 1995).

that its repeal would impose substantial economic harm on independent stations.[5/]

INTV states that PTAR has increased the number of independent stations and, therefore, has enhanced viewer welfare.[6/] As the Federal Trade Commission has correctly observed however, "[f]rom a competition policy perspective, this entry would not necessarily be viewed as evidence of desirable market performance - the opposite may be true."[7/] The FTC adds:

5/ See Law & Economics Consulting Group, Economic Report: The Economic Effects of Repealing the Prime Time Access Rule: Impact on Broadcasting Markets and the Syndicated Program Market, in MM Docket No. 94-123, at 45-56; Association of Independent Television Stations, Inc., (INTV) at 45. This party estimates that the elimination of PTAR would cause a 2.34 ratings points decline in the independent station viewing shares during the access period.

6/ Comments of INTV, at 56.

7/ Comments of the Staff of the Bureau of Economics of the Federal Trade Commission (FTC), in MM Docket No. 92-123 at 30 (filed March 7, 1995).

As noted by Williamson and Woroch on behalf of the Coalition to Enhance Diversity (Coalition), INTV's position is an "infant industry" argument. See Oliver E. Williamson and Glenn A. Woroch, A Comparative Efficiency Analysis of the FCC's Prime Time Access Rule, in MM Docket No. 94-123, at 19-21. According to this argument, which is typically presented in the context of international trade, one country's industry (i.e., Country A) requires protection from another country's (i.e., Country B) exports because of certain advantages possessed by Country B's industry. This argument's justification is strongest when Country B's advantage is the product of strategic behavior, in which case global economic efficiency may not be promoted by a persistently weak industry in Country A.

It appears that the advantages possessed by network television lie primarily with the efficiencies it provides, rather than from the adoption of strategic behavior. Moreover, as Williamson and Woroch state on behalf of the Coalition, an infant industry argument can not be sustained indefinitely. See Williamson and Woroch, at 19.

> Competition policy views entry as a means to an end, rather than an end in itself. Whenever possible, competition policy seeks to create or preserve conditions that allow entrants to respond to profit opportunities arising from the entrants' better products or lower costs. The principles of competition policy would not be served were the PTAR's effects mainly to attenuate the efficiency of incumbent broadcasters (unless this somehow produced a more-than-offsetting benefit).[8/]

INTV argues that existing independent stations would be harmed by PTAR's repeal.[9/] It argues that PTAR ameliorates a market failure stemming from the "public good" nature of television programming.[10/] While the public good nature of television programming does raise concerns over the economically efficient supply of television programming, it is clear that PTAR does not lessen or eliminate this problem.[11/] One method of reducing a public good problem involves designing a mechanism that induces prospective users to reveal truthfully the value

---

8/ See Comments of the FTC, at 31.

9/ Comments of INTV, at 9.

10/ Id. at 39.

11/ Williamson and Woroch on behalf of the Coalition to Enhance Diversity state that television programming is not a public good because television stations are capable of excluding non-payers. See Reply Comments of Oliver E. Williamson and Glenn A. Woroch, at 9-10 (filed May 26, 1995). However, while FCC regulations do not prevent broadcast stations from establishing subscription fees, economics as well Congressional backlash, may prevent stations from doing just that.

they place on the public good.[12] PTAR does not induce viewers to reveal such valuations and, therefore, is unlikely to reduce the public good problem.[13]

By handicapping competition, PTAR appears to distort the allocation of resources in the program supply market.[14] By preventing affiliates in the top-50 markets from obtaining network programming for exhibition during the access period, PTAR artificially reduces the demand for such programming and, therefore, the financial return of its suppliers. Moreover, by preventing network affiliates from obtaining off-network programming for exhibition during the access period, PTAR artificially reduces further the returns of such suppliers. These two effects cause a reduction in the quantity of network programming supplied.

Because the number of prime time viewing hours remains fixed however, some market participants clearly benefit from PTAR. Indeed, PTAR clearly assists the producers of first-run syndicated programs by reducing the number of programs with which they must compete. To the extent that their programs are less popular

---

12/ See J.O. Ledyard, California Institute of Technology, Social Science Working Paper #861, Public Goods: A Survey of Experimental Research 7 (Aug. 1993).

13/ PTAR subsidizes producers of first run syndicated programs at the expense of producers of network programming. It is difficult to imagine how such a subsidy mechanism could reduce the public good problem. See Economists Incorporated, An Economic Analysis of the Prime Time Access Rule in MM Docket No. 94-123, at 48-50.

14/ To the extent that the network is more efficient at distributing programming than syndicators, PTAR causes a waste of economic resources.

than network programs, PTAR artificially increases the demand for first-run syndicated programs, thereby diverting revenue from producers of network programs to producers of first run syndicated programs. It is tempting to argue that the economic gains of some suppliers off-set the losses of other suppliers and, therefore, economic welfare will not be adversely affected. This is not likely to be the case however. A subsidy creates an "dead weight" welfare loss in both the market in which the subsidy is generated, and the market in which the subsidy is conferred. Rather than having off-setting effects, the welfare effects of economic distortions are, in general, additive.

Finally, a number of parties assert that PTAR's elimination will make it significantly more difficult for Paramount/Viacom and Time Warner to develop their nascent broadcast networks. They assert that the ability of these parties to develop such networks depends upon the economic viability of independent television stations. PTAR, by enhancing such viability, significantly increases these parties' ability to develop their broadcast networks.

While economic welfare may be promoted if such networks were developed, it is unlikely, however, that their development depends on the economic viability of independent television stations. In deciding to develop a new network, the entity must evaluate the return it earns from creating such a network and compare it to returns from alternative investments. The return it earns from the former depends

not on the station's pre-network affiliation profitability, but on the station's profitability as a new network affiliate.

Even if an independent station was to go "dark," theory suggests that there is little to prevent such stations from reappearing as affiliates of a new network. Importantly, when a station goes out of business, its sunk capital -- including its broadcast license -- remain. Prospective station owners may be able to acquire such capital at a bargain rate, perhaps acquiring a cost advantage over incumbent stations. While existing owners of independent stations may be adversely affected by PTAR's elimination, its absence may not affect the ability of such entities to develop new broadcast networks.

A. Desirability of Eliminating Only the Off-Network Provision

The networks and their affiliates have different policy positions regarding PTAR. Networks advocate that PTAR be completely eliminated, while the network affiliates argue only for the elimination of PTAR's off-network provision. This position is somewhat paradoxical given the strong incentives each party has in maximizing their joint profits. The network affiliate position may be based on its belief that either its share of the economic pie would be greater with the off-network provision PTAR than without it or that imperfections in the bargaining process between it and the network make it difficult for both of them to reach the joint private welfare maximizing outcome.

Oliver Williamson and Glenn Woroch (Williamson and Woroch), on behalf of the Coalition to Enhance Diversity, advocate removing only the off-network provision. Williamson and Woroch believe that the network restriction may convey benefits to stations, if not to viewers. Specifically, they believe that the network restriction may solve what amounts to a "prisoners' dilemma" problem regarding station program choices.[15/] Specifically, there may exist a unique Nash equilibrium in program choices that yields lower payoffs to each competing station than some other, more cooperative outcome. By eliminating the Nash equilibrium, the network rule may permit such stations to arrive at the cooperative, and more profitable program choice outcome.[16/]

Competing stations may face a "prisoners' dilemma" problem. Moreover, it is conceivable that the network provision is the most efficient mechanism for solving this problem. However, it is unclear how solving this problem through PTAR's network program rule promotes viewer welfare. While there are certainly instances where solving a "coordination problem" promotes consumer welfare, there are many instances -- which Williamson and Woroch readily acknowledge --

---

15/ A "prisoners' dilemma" is one in which a Nash equilibrium is "Pareto dominated" (i.e., payoffs for each player are lower than their payoffs from some other outcome). See Roger B. Myerson, Game Theory: Analysis of Conflict 97 (1991).

16/ Williamson and Woroch suggest that PTAR may enable the networks to solve their own "prisoners' dilemma." See Williamson and Woroch, supra note 7, at 30. This position appears to be at odds with the networks' position that PTAR should be eliminated in its entirety.

in which such a solution does not enhance economic welfare. However, in this instance, they argue that viewers will benefit from a solution to the stations' coordination problem. Specifically, they believe that the exhibition of network programming during the access period will displace locally produced programming which, they assume, will better satisfy local viewer tastes.[17/]

While the elimination of the network provision will likely alter the programs shown by local stations, it will not alter them in the way Williamson and Woroch believe would reduce viewer welfare. As the Network Affiliated Stations Alliance -- an entity that argues for the elimination of the off-network provision -- states, affiliates typically exhibit syndicated programming, rather than locally produced programming, during the access period.[18/] Therefore, the displacement of local programming by network programming, and the assumed reduction in viewer welfare, will not occur.

Moreover, those that advocate the elimination of only the off-network provision must explain why stations would have, following the elimination of the Commission's Financial Interest and Syndication Rules ("FinSyn"), program choice autonomy regarding off-network programs. Neither the affiliates nor the Coalition to Enhance Diversity explain why such leverage exists with regards to network

---

17/ See Williamson and Woroch, supra note 7 at 31.

18/ Comments of the Network Affiliated Stations Alliance, at 9.

programming, but will not exist with off-network programming following FinSyn's elimination. Absent such an explanation, it is difficult to justify the selective elimination of PTAR's off-network provision.[19]

The analysis has focused primarily on PTAR's impact on competing television stations, program suppliers, and the networks. Because the Commission has stated that its analysis of PTAR will focus on whether it enhances television viewer welfare, the following analysis examines the extent to which PTAR enhances such welfare.

B. Game Theoretic Analysis of PTAR

1. Methodology

The following analysis examines whether PTAR is likely to enhance the welfare of television viewers. This analysis is based upon economic reasoning applied to sets of hypothetical data on viewer preferences regarding television programs. The analysis is straightforward. First, we construct a simple model of program choice based upon the profit incentives of television stations, a simple menu of available program choices, and the valuations a collection of hypothetical

---

19/ Williamson and Woroch also discuss how "hierarchical production" which, according to them is analogous to an environment where the network provision does not exist, would stifle program diversity. See Williamson and Woroch, supra note 7, at 31-37. The validity of this point notwithstanding, it is unclear why the elimination of the off-network restriction would not have the same diversity-reducing effects in an environment in which the financial interest and syndication rules no longer exist.