stations are owned by group owners capable of using their bargaining advantages due to size to obtain programming on improved terms.[207] Further, 52 of these stations have affiliated with UPN and WB, a number likely to increase as those networks continue to develop. We also note the development of programming consortia, groups of allied stations joining together to produce and syndicate television programs. This trend is likely to continue as the marketplace adjusts to changes in the supply and demand for programming.[208] In short, PTAR now applies to no more than 56 independent stations that have no affiliation or other similar bargaining advantages in obtaining programming. This number is approximately 20 percent of the 278 independents in the PTAR Top 50 Markets.[209]

3. *Repeal of PTAR and New Broadcast Networks*

99. According to proponents of PTAR, one of the major reasons why PTAR has been and continues to be important is that by promoting the health of independent stations, it has helped create an important and necessary condition for the development of the new networks -- Fox, UPN and WB. These parties argue that PTAR improves the ratings and revenues and thus makes them attractive as potential affiliates for the newly developing networks. Viacom also argues that the popular off-network shows that independent stations air during the access period have carryover effects, through audience viewing patterns and in promotions during the access period, that can attract audiences to the Fox, UPN, or WB programming to be shown in the adjacent prime time period.[210] Proponents of the rule argue that repeal will severely harm independent stations and, in turn, harm the growth of UPN and WB.

100. These parties, however, have not demonstrated the link between the asserted harm to independent stations as a result of the repeal of PTAR and the decreased likelihood of the development of new networks. In their analysis concerning PTAR and the improving position of those stations and new networks, PTAR proponents seem to suggest that the profitability of independent stations has been responsible for the growth of newly emerging

---

[207] We define "group owners" as an owner of more than one television station. Group owners may enjoy programming cost advantages compared to an owner of a single television station. *See* Stanley Besen and Leland Johnson, "Regulation of Broadcast Station Ownership: Evidence and Theory," in *Video Media Competition* at 375 (ed. Eli M. Noam, Columbia University Press 1985).

[208] *See, e.g.,* "Partner Stations Network calls on 'Lifeguard'," *Broadcasting & Cable,* July 3, 1995, at 14 (reporting that 44 stations have joined together to produce and air a half-hour "reality strip," *Lifeguard*, beginning Dec. 25, and to syndicate the show nationally a month later).

[209] We also note that the arguments advanced by PTAR proponents cannot apply to the 20 UHF network affiliates in the Top-50 PTAR Markets. According to the EI Supplementary Study, at 23, "cash flow and pre-tax profits of the average ABC, CBS and NBC affiliate UHF station are lower than those of the average independent UHF station." This conclusion rests on 1992 and 1993 profitability data. *See* EI Supplementary Study, 27-28, EI Study at 76, Table A-16.

[210] Viacom Comments at 24-25.

networks, especially the Fox network.[211] However, it is equally plausible that many affiliates of the Fox network owe their improved profit position to their affiliation with Fox. Regardless of the possible importance of both parts of this interaction, parties favoring continuation of PTAR have not demonstrated in any convincing way that PTAR itself is ultimately responsible for the development of newly emerging networks.

101. The Commission does not believe that repeal of PTAR will create the grounds for failure of newly-launched television networks nor for significant slowing in their development. Some independent stations may find their profits reduced as the industry adjusts to this change and other regulatory and technological changes. However, the Commission concludes that the prospects for independent stations and new networks overall are good. First, the Commission believes that the UHF signal disparity has been reduced, albeit not entirely. This permits competition for programming on more even terms between similarly situated UHF and VHF stations, most of which are now network affiliates. Second, the video programming production market appears to be open to entry by large and small firms with many producers actively seeking outlets for their programs.[212] Third, the numbers of independent stations remain large enough to make it possible for new networks to add affiliates and expand audience reach. Finally, at the present time, virtually all categories of television broadcast stations are, on average, profitable. The repeal of PTAR will reduce costs imposed by the rule's restrictions on affiliates, network program producers, and viewers who prefer high-cost programming, and will not create significant problems for independent stations and new networks.

102. On July 7, 1995, LECG submitted a "Surrebuttal and Further Econometric Evidence" in this proceeding. We have also received a number of written submissions from INTV under our *ex parte* rules.[213] These filings reply to a number of criticisms of the LECG Study made by a number of commenters, and seek to provide further support for the argument that PTAR continues to be necessary to ensure the growth of independent stations and new networks. We have carefully reviewed these submissions. As set forth more fully in Appendix E, they do not provide sufficient evidence to alter our conclusion that PTAR is not necessary to provide independent stations or new networks a competitive advantage relative to the Top 50 Market Affiliates.

---

[211] *See* INTV Reply Comments at 17-20.

[212] *See supra* Section IV.B.

[213] *See, e.g.*, Letter of David L. Donovan, Vice President, Legal and Legislative Affairs, INTV, July 14, 1995.

C. Reducing Network Ability to Dictate Affiliate Programming Choices

103. PTAR prohibits the Top 50 Market Affiliates from obtaining network-provided programs or off-network programs during the access period. In 1970, when it adopted PTAR, the Commission concluded that this was a reasonable method of protecting affiliates against the power of the networks. Under this reasoning, the affiliates did not have sufficient bargaining power to refuse to run network programs, even when doing so was not in their economic self-interest. Thus, although the rule limited the programming options available to affiliates during one hour and consequently limited to the same extent the viewing options available to viewers, nonetheless the affiliates may have believed they were better off with the rule than without the rule, given the dominant position of the three networks. The view was that while a network would dictate one program shown nationally for the access period, the rule would permit the affiliate to choose instead from a range of choices (*i.e.*, in-house or independently produced programs).

104. The network affiliates, along with the Coalition, argue that only the off-network provision of the rule should be repealed. They assert that the off-network provision unnecessarily restricts affiliate program choice and has discouraged investment in network program production. They believe, however, that the network restriction continues to be warranted. According to these parties, the networks, despite such safeguards as the "right to reject" rule, still have the power to dictate affiliate program choices in prime time, enabling them to require clearance of network programming during the access period. The network affiliates and the Coalition argue that this in turn frustrates the "independence of affiliates to make programming decisions in response to local demand."[214] The networks dispute that they have this bargaining power. They also point to the efficiencies and consumer benefits that derive from network programming.

105. Proponents of the network restriction argue that there are some indications that the networks continue to have significant bargaining leverage over their affiliates. Prime time clearance levels are very high. Affiliates of the three networks cleared 98 percent of network programming during the 1993-94 season.[215] The record also shows that affiliates rarely preempt prime time network programming, and that affiliate agreements are often structured to discourage preemption.[216] In addition, the increase in the number of independent stations may have increased the demand and competition for the most lucrative network affiliations. This may therefore reduce, at least to some degree, the increased leverage the network affiliates appear to have gained as a result of the emergence of the Fox network. Moreover, the WB and UPN networks, only recently launched and presently offering a minimal program schedule, may not yet provide a competitive alternative to affiliation with one of the other

---

[214] *See* NASA Comments at 10.

[215] Coalition Comments at 32.

[216] *Id.*

four networks.

106. On balance, however, we do not believe PTAR's network restriction is the appropriate mechanism under current market conditions to address the issue of the relative bargaining power between networks and affiliates. As an initial matter, high clearance rates do not necessarily indicate undue network leverage; they may simply reflect the popularity and efficiencies of network programming.[217] There is also evidence in the record indicating greater affiliate bargaining power today. The emergence of the Fox network certainly can be said to have improved affiliate bargaining power by creating a viable affiliation alternative to ABC, CBS, and NBC. This is demonstrated by the flurry of recent affiliation switches. Since May 1994, 68 stations have changed network affiliation. Of these, 21 switched from one of the three original networks to the Fox network.[218] This competition for affiliates has apparently resulted in greater affiliate compensation. The EI Study cites estimates that the three original networks will pay $200 million or more in additional compensation due to the more competitive market.[219] The networks also point to the fact that the total amount of network programming during non-prime time dayparts has declined over the years as evidence of the inability of networks to dictate to affiliates.[220] Finally, there are today many more options for obtaining programming even without having a network affiliation.

107. We note that we are not concerned with the relative bargaining position of networks and their affiliates to the extent it merely affects the distribution of profits between the parties. Rather, the public interest is implicated where network leverage prevents an affiliate from fulfilling its public interest obligations, such as broadcasting programming responsive to local interests, or distorts the normal market incentive to air programming according to viewer preferences.

108. We think these issues are best addressed in the context of our rules governing a station's right to reject network programming, the filing of affiliation agreements, and our

---

[217] *See Network Inquiry Study*, Vol. II at 288 ("[E]conomic factors are the dominant explanation of the decision to carry network programs. Nor is there anything sinister about this. A station's decision to carry a popular program undoubtedly provides substantial benefits to viewers in its community."); FTC Staff Comments at 19-20 n.38 (describing mutual incentive of a network and its affiliate to air programming that is attractive to audiences, and therefore valuable to advertisers).

[218] NBC Comments at 28.

[219] EI Study at 15.

[220] Since 1977, the total number of non-prime time daypart network programming hours offered to affiliates by the three networks has declined by 25 hours per week. NBC Comments at 28-29. NBC also points to the relatively lower clearance rates the networks enjoy during non-prime time dayparts, and notes that live clearance rates are even lower. For example, NBC's more popular afternoon soap operas have live clearance levels of approximately 70 percent. *Id.*

other rules regarding the network-affiliate relationship.[221] The Commission has initiated a comprehensive review of these rules. In doing so, it will address the issues the parties have raised here, including "whether networks . . . have the capability and the incentive to exercise undue market or bargaining power in the absence of these rules and [the] public interest concerns any such capability and incentive would raise."[222] These rules, and their corollary rulemaking proceedings, are better tailored to weigh the public interest issues and strike the appropriate balance regarding regulation of the network-affiliate relationship. PTAR, in contrast, is an imprecise, indiscriminate response to these concerns. Network leverage will vary from market to market, indeed from station to station. The network-affiliate bargaining table may look far different to a small, individually owned station in Louisville compared to an established, group-owned station in Chicago.[223] Yet PTAR treats both stations the same. In doing so, the rule denies networks and stations the option of taking advantage of network efficiencies during the access period that can lead to the financing of popular, higher cost programs. It does this in all markets, for it is not economical for the networks to run a network feed in non-PTAR markets when they cannot do so in the top 50 markets.[224]

109. The Coalition and the WW Study argue that the process by which the networks develop the programming for their affiliates involves a more hierarchical process that imposes bureaucratic costs and restrains program innovation and diversity. Yet they provide no empirical evidence to substantiate this claim. They also do not explain why these same problems would not exist with contracts between broadcast stations and suppliers of non-network programming, many of which are large Hollywood studios. In any event, we conclude that the competition the networks face would appear to give the networks a substantial incentive to ensure that their program production and selection process is innovative and not bogged down by bureaucratic inefficiencies.

110. These parties also argue that the network restriction solves a collective action problem. According to this theory, it is more profitable for both affiliates and the networks *not* to run network programming during the access hour, but only provided they are each assured that no other affiliates or networks airs network programming.[225] Such an

---

[221] *See* 47 C.F.R. §§ 73.658(a), (b), (d), (e), (g), (h), (i), 73.3613(a).

[222] *Notice of Proposed Rule Making* in MM Docket No. 95-90, FCC 95-226, released June 14, 1995, at ¶ 2. *See also Notice of Proposed Rule Making* in MM Docket No. 95-92, FCC 95-254, released June 15, 1995; *Notice of Proposed Rule Making* in MM Docket No. 95-40, FCC 95-145, released April 5, 1995.

[223] Both Louisville and Chicago are included in the top 50 PTAR markets.

[224] EI Study at 43.

[225] As stated in the *Network Inquiry Study*, under this theory "a network might have to offer a full lineup if other networks did and if audiences for later programs are determined in part by the audiences of the programs which precede them. While each network might prefer a situation whereby

arrangement, while contrary to the antitrust laws if established by individual parties, is made possible by PTAR's network restriction.[226]

111. We do not believe this theory justifies continuation of PTAR. To begin with, it is speculative. The Network Inquiry Staff stated that this collective action theory was only one of several possible scenarios: "[w]hile it is possible for both networks and affiliates to benefit from [PTAR], other outcomes in which network and station profits are reduced are also possible."[227] It is also inconsistent with the networks' position in this proceeding. They advocate repeal of the network restriction. And, while proponents of the network restriction claim that PTAR, by solving this collective action problem, has led to greater local programming and news, they provide no evidence in the record to support such a causal link. We also note that, according to these parties' own comments, 83 percent of affiliate access period programming in the top-50 markets is neither local programming nor local news.[228]

112. In sum, the record before us establishes sufficient improvement in affiliate bargaining power *vis-a-vis* the networks that any remaining issues concerning the network-affiliate relationship are best addressed in our network rules.

VII. SUMMARY OF FINDINGS AND TRANSITION

113. *Summary of Findings*. The Commission adopted PTAR in 1970 as a structural rule to promote its competition and diversity goals. It did so at a time when the three major networks were said to dominate the television marketplace. The record shows that this is not the case under today's market conditions. The three networks now face greater competition than they did in 1970. There has been dramatic growth in the number of independent stations, and broadcasters now must compete for audiences with the increasing numbers of non-broadcast outlets, especially cable service. The networks can no longer be viewed as a funnel through which all television programming must pass. PTAR is thus not necessary to promote independent program sources, PTAR's primary goal. The record shows that the large number of video programming outlets today creates a healthy demand for non-network programs.

114. We also conclude that there is no public interest reason for continuing PTAR as a means of providing independent stations or new broadcast networks a competitive advantage

---

all networks agreed not to offer a full line-up during prime time, each will find it profitable to offer a full line-up in the absence of such an agreement." *Network Inquiry Study*, Vol. II at 254.

226 *Id.*

227 *Id.* at 255.

228 Coalition Comments, Exh. 8.

relative to network affiliates in programming the access hour. Independent stations have grown dramatically since 1970 largely due to a number of factors unrelated to PTAR. While they will face greater competition in the absence of the rule, there is no reliable evidence in the record to support their claims that repeal will so affect their ratings and profits as to implicate their overall viability, the amount of public interest programming they air, or the development of new networks. Finally, we conclude that PTAR is not an appropriate mechanism for safeguarding affiliate autonomy. Affiliates have gained greater bargaining power since adoption of the rule, and any remaining concerns regarding the network-affiliate relationship are best addressed in the context of our other network rules which are presently under review.

115. We thus find that the public interest does not warrant the continuation of PTAR. This is especially the case given the costs the rule imposes. It deprives the three networks and their affiliates of the opportunity of taking advantage of network efficiencies which can provide important consumer benefits in terms of popular, high-cost programming. The record also indicates that the rule discourages investment in network programming by lowering the prices of off-network programs. Because we find no public interest benefits that outweigh these costs, we conclude that PTAR should be repealed.

116. *Transition.* The *Notice* sought comment on whether, in the event we conclude that PTAR should be eliminated, we should repeal the rule immediately or adopt a transition mechanism that would sunset the rule after a certain period of time.[229] As noted above, the record before us provides strong support for repeal of the rule. A transition consequently is not necessary to take a "wait and see" approach in order to test, and possibly revisit, the conclusion we reach today. We do, however, believe a short transition period is appropriate to allow "industry participants to adjust to the changing economic conditions that might result" from repeal of PTAR.[230] The PTAR regulatory scheme has been in place for over two decades, during which time members of the industry have come to rely on the structure imposed by that scheme. Eliminating that structure precipitously may have disruptive effects as the marketplace adjusts to the deregulated environment. A one-year transition will give parties time to adjust their business plans and contractual arrangements prior to repeal of the rule and moderate an unnecessarily abrupt impact on affected stations.

117. Independent stations in particular will need to adjust to these new marketplace dynamics. With repeal of the rule, independent stations may have to pay higher prices for popular off-network hits, and may be outbid for some of these shows by network affiliates. Independent stations may also face the prospect of competing against network programming during the access hour if the networks and their affiliates opt to run a network feed during this time period.

---

[229] *Notice*, 9 FCC Rcd at 6363.

[230] *Id.*

118. A one-year transition will provide independent stations time to adjust their business plans and programming strategies in response to these changes in the market. During the transition, independents may develop new programming strategies, budget additional funds to buy off-network programs that may become more expensive with repeal of the rule, or establish relationships with new program suppliers. The transition may also assist those stations in adapting to possible post-repeal programming changes that are announced by network affiliates.

119. We recognize that existing contractual arrangements may already provide some transition period for independent stations who have obtained licensing rights to air off-network programs during the access period for the 1995-96 season and even for subsequent years.[231] Similarly, the need for the Commission to fashion a transition period is also lessened by the fact that the programming schedules for the networks and their affiliates have, as a practical matter, been established. Network affiliates that have shown first-run syndicated programs during the access hour have most likely already made contractual commitments to run this programming for the upcoming season.[232] The effect of a transitionary delay of PTAR repeal is also slight in connection with the network programming restriction. As a general matter, the networks and their affiliates would need some lead time before they could air network-provided programming during the access hour in the event they choose to do so.[233] Thus, we would not expect our repeal of PTAR generally to create a situation whereby independent stations are faced with immediate price increases for programming to be aired in the coming year, or with immediate widespread programming changes on the part of the Top 50 PTAR Market Affiliates.

120. Some changes, however, could and would be expected to occur. Network affiliates often contract for off-network programs to air in other dayparts, such as early fringe and late fringe.[234] Absent the transition period, these contracts could be renegotiated and

---

[231] Contracts for off-network programming generally have 5-7 year terms. *See* LECG Study at 76; Coalition Reply Comments at 12. The contracts for popular off-network shows are often negotiated several years in advance of the airing of the program. *See Network Inquiry Study* Vol. II, at 429. For example, the licensing rights for *Seinfeld* and *Home Improvement* reruns, which will begin their off-network runs this fall, were negotiated well over a year ago for most stations. *See* Steve McClellan, "The Selling of 'Seinfeld,'" *Broadcasting & Cable* at 14, March 7, 1994; Thomas Tyrer, "'Simpsons,' 'Home' Pick Up Top Clearances," *Electronic Media* at 40, Oct. 4, 1993.

[232] Contracts for first-run syndicated programming generally run for one year, and in some cases two years. Coalition Reply Comments at 12.

[233] *See National Ass'n of Indep. Television Producers and Distrib.*, 502 F.2d at 254 (stating that network program planning begins twelve to eighteen months in advance). CBS has stated that it has no present plans to run a network feed during the access hour in the event PTAR is repealed. CBS Comments at 16.

[234] *See Network Inquiry Study* Vol. II, at 429.

modified to allow Top 50 PTAR Market Affiliates to air such programming during the access period. By establishing a one-year transition, the Commission will consequently provide a more stable adjustment period during which independent stations can be assured that they will not have to respond to possible immediate programming changes by Top 50 PTAR Market Affiliates. While the benefit of the transition is admittedly modest, given the stability inherent in the existing contractual process, the costs to affiliates and the networks that will continue to be restricted by the rule during the transition year are correspondingly low in light of the fact that the affiliates have disincentives to alter their programming schedules in the near-term even if repeal were immediate. On balance, we believe that the benefits of a short transition outweigh these costs. We also note that Top 50 PTAR Market Affiliates will be free to contract *during* the transition period for the right to air access-period network or off-network programming *after* the effective date of PTAR repeal.

121. We reject transition proposals that would continue PTAR for an indefinite or overly long period of time.[235] Such proposals, if adopted, would impose costs that outweigh any possible benefits of a longer transition. The record in this proceeding demonstrates that continuation of the rule is not in the public interest; prolonging PTAR simply as a means of continuing to confer competitive benefits on independent stations therefore cannot be justified.

122. Nor do we believe the scheduled repeal of the remaining fin/syn rules calls for a longer transition period for PTAR.[236] A number of the fin/syn rules, including restrictions on network acquisition of financial interests in prime time programming, were eliminated over two years ago; the marketplace thus should have had time to adjust to the elimination of these rules. No party has made a convincing case that the upcoming planned repeal of the remainder of these rules will lead to any anticompetitive activities by the networks or undue disruption of the marketplace so as to warrant postponing PTAR repeal beyond a year. We also do not believe it is necessary to take a staggered approach to repeal or schedule a final review of the rule prior to its scheduled expiration, as we did in the fin/syn proceeding.[237] The record in this proceeding clearly supports repeal of PTAR, and the three networks can be said to be facing even more competition today than they were when the Commission established its fin/syn transition in 1993.[238] Phased deregulation is less useful when the

---

[235] These proposals include repealing PTAR in 10 years, or tying repeal to (1) the new networks obtaining a certain nationwide coverage and programming levels comparable to the three original networks, (2) the elimination of the "UHF handicap", or (3) the general availability of digital television. *See* Viacom Reply Comments at 25-26; INTV Reply Comments at 37-38.

[236] The remaining fin/syn rules are scheduled to be eliminated on November 10, 1995. The Commission has sought comment on a proposal to accelerate this expiration date. *See supra* note 15.

[237] *See Fin/Syn Second R&O*, 8 FCC Rcd at 3340.

[238] Indeed, the 1994 Court of Appeals decision affirming the Commission's 1993 fin/syn decision stated that the "three original networks are even weaker today than they were in March of [1993]

transition period is as a means of minimizing disruption in repealing a regulation as opposed to taking several cautionary steps in order to confirm the planned elimination of an entire rule. The transition plan we adopt today is not motivated by any uncertainty over our conclusion to repeal PTAR, but rather by a concern that immediate repeal could be unnecessarily disruptive.

123. We believe that a one-year transition period strikes the appropriate balance between our conclusion to repeal PTAR and the need to avoid undue disruption from eliminating a 25-year old rule. The courts have noted the considerable discretion that the Commission has in establishing timetables to minimize disruption from regulatory changes.[239] Indeed, there is judicial precedent in the context of PTAR for the proposition that a transition period is permissible when necessary to allow parties time to adjust to deregulation.[240]

124. We will thus schedule repeal of the rule in its entirety for August 30, 1996. This will provide ample time for publication of this *Report and Order* in the Federal Register before the one-year transition period commences. It also allows this period to end prior to the start of the 1996-97 television season.

125. *Other Issues.* Given our conclusion that PTAR no longer serves the public interest and should be repealed, we need not address the argument advanced by a number of

---

when the decision to deregulate was made, and no doubt they will be weaker still [in 1994] when the [fin/syn review] proceeding is to commence." *See Capital Cities/ABC, Inc.*, 29 F.3d at 316.

[239] In upholding our fin/syn transition mechanism, the U.S. Court of Appeals stated that the "precise timetable on which the Commission executes a major turn in regulatory policy is a matter of judgment and prudence rather than of logic and measurement, and it is confided to the discretion of the Commission within broad limits." *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994).

[240] In particular, in *National Ass'n of Indep. Television Producers & Distrib. v. FCC*, 502 F.2d 249 (2d Cir. 1974), the U.S. Court of Appeals for the Second Circuit vacated a 1974 FCC decision on the grounds that it did not provide independent programmers and the three networks sufficient lead time to prepare for the FCC's decision to partially repeal PTAR by, among other things, reducing the access period to one-half hour. (These concerns were subsequently mooted given that the Commission, upon remand, generally reinstated the version of PTAR it had adopted in 1970. *See supra* note 17.) We note that while the court's decision provides general support for a transition, its specific findings are not controlling under today's circumstances and do not warrant a transition longer than the one-year period we adopt today. First, the networks have not argued in this proceeding that they need any lead time before repeal of the rule becomes effective. As for independent programmers, their existing contractual arrangements already provide them a built-in transition period of at least a year given that, as noted, many network affiliates would appear to have already committed to carry their programming at least through the 1995-96 televisions season. *See supra* note 228. In any event, the record shows that independent programmers, even without PTAR, will continue to have access to numerous outlets for their programs. *See supra* Section VI.A.

parties that the rule is contrary to the First Amendment.[241] We also do not believe it is appropriate to alter the definition of "network" to include the new networks as urged by some parties.[242] We are not persuaded that this definition is inequitable or that it causes new networks to curtail their prime time offerings in order to evade the application of PTAR.[243] In any event, the rule will expire in a year and would have little if any impact on an entity that became a "network" during that time period given the grandfathering provisions presently set forth in the rule.[244] Finally, given our decision to repeal the rule, we will not modify the current exemptions to PTAR as proposed by a number of commenters.[245] The proposed revisions to the definition of a "network" and the rule's exemptions are not appropriate for the one-year transition we have established. Indeed, modifying these provisions of the rule could run directly counter to the purposes of the transition by creating uncertainty and disruption during a period that is intended to provide parties time to adjust for repeal of the PTAR. We will consequently retain PTAR in its existing form during the one-year transition period.

---

[241] We note, however, that the constitutionality of PTAR was upheld in *Mt. Mansfield, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). *See also Schurz Communications, Inc. v. FCC*, 982 F.2d 103, 1048-49 (7th Cir. 1992) (stating, in review of FCC fin/syn decision, that Supreme Court has interpreted First Amendment as not prohibiting FCC from regulating activities of broadcast networks).

[242] *See, e.g.*, Comments of NBC at 42-44. For purposes of PTAR, a "network" generally is any entity (or an entity under common control) regularly providing more than 15 hours of prime time programming per week (excluding live coverage of *bona fide* news events of national importance) to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide. 47 C.F.R. § 73.662 (f).

[243] *See, e.g.*, Fox Comments at 2, 4 (stating that Fox offers only two hours of daily prime time programming so that its affiliates can counter-program with locally produced news during the last hour of prime time).

[244] Programming distributed by an entity prior to becoming a network, and subsequently produced episodes of a series first exhibited by that entity prior to becoming a network, are not network programming for purposes of PTAR. Moreover, for 36 months after an entity becomes a network, stations owned by or affiliated with that network are exempt from compliance with the requirements of PTAR with respect to programming already under contract at the time the entity became a network. 47 C.F.R.. § 73.658(k), Notes 3 and 4.

[245] *See* 47 C.F.R. § 73.658(k)(1-6) (listing exemptions). *See* Comments of NBC at 44-46 (arguing that Commission should extend certain exemptions to Saturday night access period); Comments of the Office of the Commissioner of Baseball (arguing that the FCC should remove the prohibition on network telecasts of live sports events during the prime time access period).

VIII. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

126. *Need for and purpose of this Action:* This action is taken to repeal the prime time access rule, 47 C.F.R. §73.658(k), in response to changes in the communications marketplace, and to better adjust to the needs of the public. The Commission believes that this action will remove barriers to competition in the markets for video programming and enhance program diversity for television viewers. The Commission stated that the rule will be repealed on August 30, 1996, which will give affected parties time to adjust their business plans and contractual arrangements in order to avoid an unnecessarily abrupt impact associated with repeal to viewer and industry structures that have developed in the 25 years that the subject rule has been in place.

127. *Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:* None.

128. *Significant Alternatives Considered and Rejected:* The Commission determined that, based on the record developed in this proceeding and existing marketplace conditions, the public interest will be served by repeal of PTAR. Proponents of retaining the rule failed to establish that it remains necessary to ensure the diversity of programming sources and outlets contemplated by adoption of PTAR. Moreover, these parties have not demonstrated convincingly that PTAR itself is ultimately responsible for the development of newly emerging networks or that repeal of the rule will threaten the station base of the new networks. Those favoring repeal of the rule established that the rule unnecessarily limits the programming choices of network-affiliated stations in the Top 50 television markets and discourages investment in network programming, without off-setting public interest benefits.

129. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 4 U.S.C. § 601, *et seq.*

B. Additional Information

130. For additional information regarding this proceeding, contact Charles W. Logan or Alan E. Aronowitz, Mass Media Bureau, Policy and Rules Division, Legal Branch, (202) 776-1653, or Alan Baughcum, Mass Media Bureau, Policy and Rules Division, Policy Analysis Branch, (202) 739-0770.

IX. ORDERING CLAUSES

131. IT IS THEREFORE ORDERED that, pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 303(r), Section 73.658(k) of the Commission's Rules, 47 C.F.R. § 73.658(k), IS HEREBY REPEALED EFFECTIVE August 30, 1996, and that Part 73 of the Commission's Rules IS AMENDED as set forth in the attached Appendix F effective August 30, 1996.

132. IT IS FURTHER ORDERED that MM Docket No. 94-123 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

Appendix A

The following parties filed formal comments in response to the FCC's *Notice of Proposed Rule Making:*

1. The Association of Independent Television Stations, Inc.

2. Bureau of Economics, Federal Trade Commission

3. Capital Cities/ABC, Inc.

4. CBS Inc.

5. Chief Counsel for Advocacy, United States Small Business Administration

6. The Coalition to Enhance Diversity

7. The Commissioner of Baseball

8. Economists Incorporated (Economic Analysis prepared for ABC, CBS and NBC)

9. Freedom of Expression Foundation, Inc.

10. The Freedom Forum First Amendment Center at Vanderbilt University

11. First Media Television, L.P.

12. Friends of Prime Time Access

13. King World Productions, Inc.

14. The Law and Economics Consulting Group Inc. (Economic Report prepared for INTV, King World & Viacom)

15. Media Access Project/People for the American Way

16. The Media Institute

17. The Motion Picture Association of America, Inc.

18. National Broadcasting Company, Inc. (NBC)

19. Network Affiliated Stations Alliance

20. UPN Affiliates Association

21. Viacom Inc.

22. Westinghouse Broadcasting Company (Group W)

23. Oliver E. Williamson & Glenn A. Woroch (A Comparative Efficiency Analysis prepared for the Coalition to Enhance Diversity)

The following parties filed formal reply comments in response to the FCC's *Notice of Proposed Rule Making:*

1. The Association of Independent Television Stations, Inc.

2. Capital Cities/ABC, Inc.

3. CBS Inc.

4. The Coalition to Enhance Diversity

5. Economists Incorporated (Economic Analysis prepared for ABC, CBS and NBC)

6. Friends of Prime Time Access

7. King World Productions, Inc.

8. The Law and Economics Consulting Group Inc. (Economic Report prepared for INTV, King World & Viacom)

9. Media Access Project/People for the American Way

10. National Broadcasting Company, Inc. (NBC)

11. Network Affiliated Stations Alliance

12. Viacom Inc.

13. Oliver E. Williamson & Glenn A. Woroch (A Comparative Efficiency Analysis prepared for the Coalition to Enhance Diversity)

Appendix B: Additional Discussion of the EI Study's of the UHF Handicap

1. INTV makes several criticisms of the EI update of Park's study. First, the data samples used by Park and the EI Study are allegedly flawed. Only counties within 35 miles of a television city were included; 41 fringe area counties were dropped. Thus, INTV argues, the studies only could reflect the potentially better reception of UHF signals on cable systems located well within their off-air coverage areas. The Commission notes however that, under "must carry," UHF stations can invest in equipment that will require the cable system to extend the area in which the station may be viewed. INTV has provided no evidence that viewing patterns in fringe areas will somehow differ from those near cities. In the absence of such argument or evidence, it is reasonable to rely upon the conclusions of the EI Study.

2. Second, INTV argues that the EI Study fails to explain the anomalous result that UHF affiliates suffer a handicap compared to VHF affiliates while independents show no such differential. However, the Commission notes that the EI Study, at 84, offered two explanations:

> The continuing handicap of UHF network affiliates may reflect their status as small-market stations, perhaps unable economically to invest in the extra broadcast facilities necessary to overcome the handicap. Further, both Park's and the present results may be affected by the nature of the sample of markets, and this may explain the unexpected persistence of a UHF handicap for affiliated stations. A more representative sample doubtless would confirm the common-sense hypothesis that the UHF handicap has been greatly reduced for all classes of station.

3. Third, INTV argues that, unlike Park, the EI Study made no distinction between local and distant signals. Thus, for example, the presence of national superstation WTBS, a UHF independent, in the Southeast might greatly reduce the apparent UHF handicap of all independents and mask the continuation of the UHF handicap for all local stations. However, the EI study at 86, n.127, notes that "[o]nly those stations were examined that could likely be received off the air: those for which most of the county was within Grade B contour or those which had a non-cable household all-day share of 5 percent or greater." WTBS was counted as an independent in those counties that fell into the Grade B contour. Everywhere else, its contribution was counted as another cable network. Thus, the Commission believes that INTV's criticism is without merit.

Appendix C: Technical Problems with the LECG Study

1. LECG's assertion that independents' ratings will drop by 58 percent is based on an econometric model in which independent station performance (measured by growth in the number of independent stations per market, average independent station ratings in a market, and aggregate ratings of all independent stations in the market) depends on the period of time (T71) since the adoption of PTAR, TV households in the ADI (Area of Dominant Influence), the percentage of TV households in the ADI with cable, percentage of TV households in the ADI with UHF reception, average real per capita income in the ADI, and the number of independent stations in the market.

2. There are numerous econometric problems with the LECG Study's regression analysis that predicts a 58 percent drop in independent station ratings with the repeal of PTAR:

a. There is a serious econometric problem with the variable T71. In general, the use of time in this fashion as an explanatory variable is problematic.[1] First, it may mask something else happening in the market, *e.g.*, changes in the courts and at the Commission that foster ease of entry into broadcasting and cable television. There may be other variables that should be included that are not. Second, as time approaches infinity, the mean value of time may be nonexistent.[2] In such a case, the time trend variable is non-stationary. However, the regression theory used by LECG requires that each variable be stationary, *i.e.*, have a finite variance. As a result of nonstationarity, the basic assumptions underlying statistical tests used to evaluate the regressions and their results are not fulfilled. Therefore, the regression results in the LECG Study are not necessarily valid.

b. Another set of problems arises with Table D.3 (page 47 of Appendix D). That table presents the results of a logit regression, by definition non-linear, to estimate a version of Equation (D.1). There is no mention of the nonlinear regression algorithm. In such a nonlinear analysis, it is necessary to identify the starting point for the regression. These two

---

[1] *See* Charles R. Nelson and Heejoon Kang, "Pitfalls in the Use of Time as an Explanatory Variable in Regression," Journal of Business and Economic Statistics, Volume 2, Issue 1, 1984, pages 73-82.

[2] A flat trend line will have a mean value but not a finite standard deviation as time approaches infinity. However, an upward sloping trend line will not have a mean value or a finite standard deviation.

problems mean that we cannot evaluate the quality of the regression.

c. A continuing problem with LECG's regression analysis is illustrated by Tables D-3 and D-4 of their study. In those tables, various sample sizes are identified (e.g., N = 271; N = 1065; N = 355). Yet nowhere in their analysis is there a discussion of how these sample sizes arose.

d. Similarly, the R^2s reported in LECG's Table D-4 are .20 and .62. This suggests that there is a lot of random noise in the regression results. The standard error of the estimate is factored into the calculation of prediction intervals. Table D-5 predicts the ratings of an average independent station with and without PTAR. It is from these ratings that the LECG Study concludes that repeal of PTAR will lower independent stations' ratings by 58 percent. Some of those incremental effects are quite small, very close to zero. The authors present no prediction intervals for those estimated effects. The same is true for other tables, e.g., Table D-7, that report predicted effects of PTAR's repeal.

Appendix D: Video Programming Distribution Concentration in the Top 50 PTAR Markets

Data Notes

1. First, Commission staff relied on the list of the Top-50 PTAR Markets in 1994 as shown in the Commission's Public Notice, dated April 16, 1990. (These markets are ranked on the number of prime time households, instead of the more usual market rankings based on total television households.)

2. Second, CBS affiliates broadcast the Olympics during February, 1994. CBS affiliates' market shares are therefore unusually high during this month. This increases the calculated HHIs for February, 1994.

3. Third, the source for market shares was Investing in Television: 1995 Market Report, First Edition, BIA. The totals for market shares in each market did not always add up to 100 percent, ranging from a low of 59 percent to a high, in one instance only, of 103 percent. Staff makes the reasonable assumption that the "missing" shares belong to numerous stations with individual market shares so low that it is not worthwhile for BIA to print them. Given this assumption, the HHIs calculated by staff should be close approximations to the actual HHIs.

Table D-1: Market Structure in the PTAR Top-50 Local Broadcast Markets

	Prime Time HHIs					All Daypart HHIs				
Market and Rank	Nov-94	Jul-94	May-94	Feb-94	Average	Nov-94	Jul-94	May-94	Feb-94	Average
1. New York	1299	932	1297	1732	1,315	1057	850	1022	1123	1013
2. Los Angeles	1308	935	1269	1594	1,277	995	843	969	1041	962
3. Chicago	1467	1098	1564	1917	1,512	1198	1093	1276	1407	1244
4. Philadelphia	1399	1090	1437	1939	1,466	1197	1066	1195	1309	1192
5. Boston	1175	863	1227	1711	1,244	929	780	969	1111	947
6. San Francisco	1172	858	1201	1734	1,241	898	719	842	1124	896
7. Dallas-Ft. Worth	1531	1186	1610	1947	1,569	1279	1115	1300	1356	1263
8. Detroit	1574	1224	1590	2230	1,655	1318	1107	1534	1681	1410
9. Washington	1414	990	1346	1846	1,399	1099	924	1083	1325	1108
10. Cleveland	1554	1148	1493	2207	1,601	1256	1084	1222	1607	1292
11. Houston	1329	1139	1493	1753	1,429	1149	850	1022	1123	1036
12. Atlanta	1494	1209	1501	1928	1,533	1307	1169	1300	1441	1304
13. Miami	1076	868	1074	1221	1,060	920	789	860	887	864
14. Minneapolis	1615	1302	1640	2207	1,691	1361	1316	1478	1687	1461
15. Tampa	1239	919	1189	1665	1,253	1031	859	949	1201	1010
16. Pittsburgh	1478	1116	1400	1959	1,488	1382	1291	1452	1603	1432
17. St. Louis	1803	1424	1761	2249	1,809	1559	1272	1509	1628	1492
18. Seattle	1342	997	1359	1871	1,392	1110	911	1106	1272	1100
19. Denver	1398	1034	1418	2160	1,503	1168	1008	1207	1472	1214
20. Phoenix	1209	1037	1195	1872	1,328	941	932	1007	1255	1034
21. Baltimore	1512	1253	1550	1941	1,564	1328	1207	1362	1506	1351
22. Sacramento	1348	945	1261	1755	1,327	1047	852	999	1197	1024
23. Indianapolis	1206	979	1290	1560	1,259	1009	935	1109	1238	1073
24. Hartford	1120	760	1119	1581	1,145	942	750	944	1116	938
25. Orlando	1387	1070	1423	1923	1,451	1231	1018	1226	1422	1224
26. Kansas City	1486	1174	1452	2097	1,552	1187	1104	1211	1478	1245
27. Portland, OR	1460	1068	1489	2158	1,544	1122	998	1138	1383	1160
28. Nashville	1268	1003	1309	2135	1,429	1258	1044	1258	1676	1309
29. Cincinnati	1375	1158	1428	1959	1,480	1155	1030	1175	1430	1198
30. Milwaukee	1431	1104	1441	1920	1,474	1184	1039	1166	1405	1199
31. Columbus, OH	1692	1125	1699	2213	1,682	1563	1251	1593	1758	1541
32. San Diego	1158	774	1160	1713	1,201	895	726	868	1080	892
33. Memphis	1213	1044	1267	1769	1,323	1321	1192	1393	1580	1372
34. Greenville, SC	1411	1043	1433	2027	1,479	1446	1124	1366	1612	1387
35. Oklahoma City	1590	1130	1468	2127	1,579	1440	1206	1385	1630	1415
36. Charlotte	1149	974	1250	1551	1,231	1088	1030	1146	1326	1148
37. New Orleans	1357	1148	1479	1914	1,475	1420	1371	1603	1902	1574
38. Buffalo, NY	1533	948	1430	1657	1,392	1495	1179	1359	1349	1346
39. San Antonio	1272	918	1181	1619	1,248	1044	868	1045	1184	1035
40. Grand Rapids, MI	1288	963	1112	1902	1,316	1177	1038	1147	1349	1178
41. Raleigh-Durham	1079	914	1207	1832	1,258	1218	1214	1236	1615	1321
42. Norfolk, VA	1418	930	1255	2122	1,431	1307	1053	1311	1627	1325
43. Salt Lake City	1604	1145	1380	2115	1,561	1373	1166	1249	1558	1337
44. Greensboro, NC	1271	999	1270	2029	1,392	1357	1209	1410	1751	1432
45. Louisville, KY	1451	1147	1463	1973	1,509	1332	1213	1534	1642	1430
46. Birmingham	1198	1043	1198	1451	1,223	1511	1315	1409	1398	1408
47. Charleston, WV	1092	918	1224	1576	1,203	1078	933	1128	1170	1077
48. Providence, RI	1521	1173	1535	1934	1,541	1422	1391	1455	1603	1468
49. Harrisburg, PA	974	788	929	1130	955	1021	913	1026	1053	1003
50. Little Rock	1414	1188	1497	1967	1,517	1434	1274	1486	1662	1464

Source: Based upon data from Investing in Television: 1995 Market Report, BIA Publications, Inc.

Appendix E: Analysis of LECG's Surrebuttal and *Ex Parte* Materials

1. INTV and their consultant, LECG, filed extensive surrebuttal and *ex parte* materials toward the end of this proceeding.[3] We have carefully reviewed and analyzed these materials. Our conclusions on the essential issues raised by INTV and LECG are:

- LECG's responses to criticisms of their model were not sufficient to permit the Commission to rely upon LECG's predictions of a significant rating decline for independent stations if PTAR is repealed.

- INTV does not demonstrate that repeal of PTAR will lead to significant reductions in the revenues and profits of independents.

- LECG concludes erroneously that rising *nominal* network primetime advertising prices demonstrate network market power.

- LECG does not demonstrate that, after PTAR's repeal, viewer welfare will be reduced as the result of network affiliates' and independent stations' program purchases.

2. We here explain the basis for each of these conclusions in turn.

<u>The LECG Model</u>

3. LECG does not discuss the nonstationarity problems with their time trend variables as identified in Appendix C of the draft PTAR order. Nor is their filing sufficient to remedy the problems with their model as listed in Section VI.B.2 of this order.[4]

4. However, they do provide prediction intervals (confidence intervals for their predictions). The Commission has examined LECG's procedure for calculating these prediction intervals and finds it problematic. Indeed we conclude that their method for

---

[3] *See* LECG's "Surrebuttal and Further Econometric Evidence" and "Appendices to surrebuttal and Further Econometric Evidence," (both filed July 11, 1995), and INTV's "Written Ex-parte Communications" (filed July 14, 1995).

[4] The three major television networks (ABC, CBS, and NBC) filed "Comment on LECG Surrebuttal" by EI at 1-4 that reached a similar conclusion. *See* also "Review of the Prime Time Access Rule; MM Docket No. 94-123," a letter with attachments filed by Counsel for the Coalition in which Counsel's asserts that LECG's ". . . report does not provide any effective refutation of Professors Williamson and Woroch's critique of LECG's earlier work."

deriving these prediction intervals is incorrect.[5] The correct method will result in broader prediction intervals, intervals that may well include zero. In such a case, LECG's predicted ratings changes due to PTAR's repeal cannot be statistically distinguished from no decline in ratings at all.

Revenues and Profits of Independent Television Stations

5. INTV asserts that they have used three "separate" methods of calculating the revenue loss to independents due to PTAR's repeal.[6] However, INTV's three methods are not truly separate because all rely upon estimates of ratings declines in the access period predicted by LECG's model. We have already explained why we choose not to rely upon that model's predictions.[7]

6. Second, each of the first two estimation methods employed by INTV relies on the same "16%" statistic. INTV conducted an "informal" survey to determine that 16% of independents' revenues came from the access period. Because that survey is not necessarily representative, we can conclude little from the use of the 16% figure to derive estimates of lost revenues and profits.

7. Third, the same informal INTV survey was used to estimate that independents' costs would rise by 17% as programming prices rise following PTAR's repeal. Again, the

---

[5] In their Appendices to their Surrebuttal, LECG report calculated prediction intervals (confidence intervals for their predictions) for their forecasts (from the LECG Study) that PTAR would cause significant reductions in ratings for independent stations. These intervals are based on $t(p, x_0V(b)x_0')$ where p is a point estimate for the dependent variable and V(b) is the covariance matrix of the GLS estimator. Such a prediction interval is incorrect.

Derivation of the appropriate prediction interval parallels the traditional OLS prediction interval as given in econometrics texts, e.g. Henri Theil, Principles of Econometrics, John Wiley & Sons, Inc., New York, 1971 at 123. Let $y = XB+\epsilon$ where $E[\epsilon\epsilon'] = \Omega$ which has decomposition $PP' = \Omega^{-1}$. Multiplying both sides by P produces $Py = PXB + P\epsilon$, i.e. $y_* = X_*B+\epsilon_*$. Therefore, OLS on the transformed equation is efficient and $b=(X_*'X_*)^{-1}X_*'y_* = (X'\Omega^{-1}X)^{-1}X'\Omega^{-1}y$. It follows that $E[b]=B$ and $V(b)=\sigma^2(X'\Omega^{-1}X)^{-1}$.

Let y_0 be the value of the dependent variable in the future period. Thus, $y_0=Bx_0+\epsilon_0$ where x_0 is a vector of regressors in the future period and ϵ_0 is the error in the future period. The predictor of y in the future period is $\hat{y}_0=bx_0$ which is equal to $E[y_0]$. To derive a prediction interval for y_0, we consider the forecast error $e_0=y_0-\hat{y}_0 = (B-b)x_0+\epsilon_0$. Thus the forecast error variance $V(e_0) = V[(b-B)x_0]+\sigma^2 = x_0'V(b)x_0+\sigma^2$. This is the GLS analogue to the traditional OLS prediction intervals, and differs from the $x_0'V(b)x_0$ used by LECG. Since σ^2 is always positive, the correct prediction intervals are larger than those reported by LECG.

[6] *See* "Written Ex-parte Communications" at 6.

[7] The first two methods rely upon LECG's predicted 58% ratings decline in the access period for all markets. The third method uses LECG's predicted ratings declines for each market individually.

study cannot be assumed to be representative. Also, the study may be flawed because the independent station respondents had an incentive to bias upwards their estimates of cost increases (as well as revenue losses) in their responses to INTV's questions.

Nominal Network Advertising Prices and Market Power

8. In Section IV.C, we note that LECG failed to adjust the networks' nominal prices for inflation or to consider whether increased demand for network advertising might explain any (real) rise in prices. In their Surrebuttal at 65, LECG asserts: ". . .such an increase in demand [for advertising] does not lead to an increase in advertising rates if, as EI claims, the market at issue is competitive."

9. The Commission concludes that LECG has made two errors in their economic analysis: first, they focus on *nominal* rather than *real* prices, and second, they argue that the long-run supply curve in competitive markets must be flat.. Depending on whether the long-run market supply curve is upward-sloping, flat, or downward-sloping, real prices would go up, stay constant, or drop, respectively, as demand in competitive markets increases.

10. At page 66 of their Surrebuttal, LECG states: "An increase in demand that does lead to an increase in price in the long run is consistent with a market in which some degree of market power exists because of, for example, barriers to entry due to a scarcity of VHF spectrum allocations." A standard text (Managerial Economics, S. Charles Maurice, Christopher R. Thomas, and Charles W. Smithson (Irwin: Homewood, IL), 1992, at 452) explains that the long run supply in a competitive industry can exhibit increasing or constant costs.[8] An increasing-cost industry is simply one in which input prices rise as all firms in the industry expand output. This does not require the exercise of market power. It simply reflects the fact that expansion in the, say, wheat-growing industry may increase the demand for and price of, for example, mechanical harvesters. Therefore as the price of wheat rises and wheat growers expand production in the long-run, their costs rise because the price of mechanical harvesters *inter alia* rises. This does not require the exercise of market power by wheat growers or by manufacturers of mechanical harvesters.

Program Purchases and Viewer Welfare[9]

11. The model presented by LECG assumes that there are two possible program choices: an off-network program which has a cost of c that is sunk, and a first-run program which has a cost of c that is not sunk. The off-network program generates revenue r_s and the first-run program generates a revenue of $r_h > r_s$. The total surplus to be divided between the

---

[8] For a discussion of a downward-sloping supply curve for perfectly competitive markets, see James D. Gwartney and Richard L. Stroup, Economics: Private and Public Choice, 1987, Harcourt Brace Jovanovich, Orlando, Florida, at 440-441.

[9] *See* LECG's Surrebuttal at 85-95.

station and the producer of the off-network program is r_s - *0*; *0* because the cost is sunk. The surplus to be divided between the station and the producer of the first run program is $r_h - c$.

12. For the moment, assume that the program's revenue is a good measure of the consumer welfare generated by the program. Then, total welfare is maximized by picking the program associated with the largest surplus. In this case, the rule is to pick the off-network program if $r_s > r_h - c$ and to pick the first-run program otherwise. Clearly, because c is a positive number, the first-run program may not be chosen, even though it generates more consumer welfare.

13. The possibility that the program generating the most consumer welfare is not chosen is the welfare bias, according to LECG. However, their conclusion is misleading because they fail to account for the cost of the program. Although consumer welfare may be higher with the first-run program, the extra welfare comes at a cost of c, and the cost may outweigh the benefit. In fact, the above decision rule does not harbor a welfare bias; it is a good rule if revenue is a good measure of consumer welfare.

14. The revenues of independent stations are unlikely to be an appropriate measure of social welfare. Revenues are the product of the quantities purchased multiplied by the price charged. Welfare is measured by the consumer surplus, the dollar value of the willingness-to-pay of consumers (or viewers) in excess of the price actually charged. There is no reason to expect that revenues will equal the dollar value of consumers' surplus. LECG has therefore failed to document that social welfare is reduced by repeal of PTAR.

Appendix F: Rule Changes

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 73 RADIO BROADCAST SERVICES

1. The Authority Citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. § 154, 303, 334.

2. Section 73.658 is amended by removing and reserving paragraph (k).