

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules (Memorandum Opinion and Order) (MM Docket No. 94-123)

In this Report and Order, the Commission authorizes the repeal of the Prime Time Access Rule, §73.658(k) of the Commission's Rules. The Prime Time Access Rule (PTAR) was originally adopted in 1970 amidst a very different television broadcast landscape. At that time, the Commission felt that such a rule was necessary to promote diversity of programming sources and to increase the supply of programming to independent and network affiliated stations. Today, the television broadcast landscape is significantly different from that of 1970, due in large part to the emergence of cable television, wireless cable, direct broadcast satellite service, and multichannel multipoint distribution service as program distribution outlets. It is this altered television market place that has rendered PTAR no longer necessary in order to protect the public interest.

Because several parties have persuaded the Commission that PTAR is no longer needed to fulfill the objectives the Commission had envisioned for the rule at its inception, I join in today's decision to repeal Section 73.658(k) of the Commission's Rules. My concurrence is based on the Commission's decision to grant a one year "transition period", in which those businesses affected by the repeal are expected to adjust their plans and contractual arrangements. In as much as this one year period provides an opportunity for affected parties to adjust to a post-PTAR television broadcast environment, I am in support of the transition period. However, I question whether a one year transition period is truly enough time for those businesses most affected to plan and implement a transitional business strategy and for the Commission to ascertain the impact of the repeal of PTAR based on any transitional adjustments. For PTAR proponents and those who support a longer transition period in which to allow the market to adjust to the repeal of a 25 year-old Commission rule, this one year transition period is not only meaningless but borders on the offensive. In the end, it is likely that a one year transition period will effectively act as no transition period at all and therefore I must concur in the Commission's decision to retain PTAR for one more year.<sup>1</sup>

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<sup>1</sup> See INTV Reply Comments at 39. "Programming decisions are made and programming is acquired as much as three years in advance for exhibition in subsequent television seasons. Similarly, stations enter into multi-year contracts for syndicated programming, which commit them to use of specific programs often for several years into the future. Therefore, any transition mechanism must include a transition period which permits stations to exploit their existing program rights and plan sufficiently ahead for the future."

**Separate Statement of  
Commissioner Rachelle B. Chong**

*Re: Review of the Prime Time Access Rule, Section 73.638(k) of the Commission's Rules, MM Docket No. 94-123*

The prime time access rule is a rule whose time has come and gone.

When I evaluate an FCC rule, I first focus on the original purpose of the rule to see if the rule still serves the regulatory goal envisioned for it. In looking back to 1970 when the FCC first promulgated the prime time access rule ("PTAR"), the Commission was concerned with the dominance of the three television networks as to production and programming. The Commission believed that the networks' dominance was inhibiting the development of competing program sources. The Commission thought that the PTAR rule (and the financial interest and syndication rule implemented at the same time) would be a "modest action" providing a "healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations."<sup>1</sup> Diversity of programming and benefits to the development of UHF television stations were also expressed goals.<sup>2</sup>

Thus, the prime time access rule was put in place as a structural mechanism that indirectly promoted program diversity by trying to increase the variety of program sources. The rule did appear to forward its expressed goals during its tenure, by helping foster programming by independent producers. But the rule has also received a healthy share of criticism, including charges that the rule has lowered the quality and diversity of access-period programming.<sup>3</sup>

During the last 25 years, however, significant developments have taken place that have greatly altered the video marketplace. We have seen the number of independent commercial TV stations increase by almost 450% between 1970 and 1994, not to mention three new networks entering the fray. Cable, for example, has become much more than

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<sup>1</sup> *Report and Order* in Docket No. 12782, 23 FCC 2d 382, 395 (1970).

<sup>2</sup> Id.

<sup>3</sup> Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation Study*, Vol. II at 737 (1980).

just a method of retransmission to geographic areas who cannot receive over-the-area broadcast signals; it is now a rich new source of innovative programming. In addition, many other new program outlets are on the horizon, such as Direct Broadcast Satellite, wireless cable, and video dialtone systems.

In this proceeding, I have evaluated the prime time access rule in *today's* multichannel video world. In considering the arguments of the many parties who stand to economically benefit in this proceeding, I have made my primary concern the public interest. I have perused the evidence keeping in mind the original purpose of the rule.

I have been convinced by the evidence in the record that PTAR is placing artificial restrictions on the marketplace. While the parties disagree about whether the three networks still dominate television programming, our analysis leads me to conclude that the networks no longer control video programming distribution or the video programming production market. Thus, I have come to believe that a total repeal of PTAR is warranted. I believe that government ought to get rid of a rule that restrains what the top 50 market TV network affiliates can show during the access hour, based solely on who produced the program. It is time for the marketplace – in this case, the television viewers – to determine what programs should be seen in the access time period.

I do recognize the concerns of the independent stations and one of the new networks, who both express serious concerns about the effect of the repeal of PTAR on their profitability and viability. While I am sympathetic to their concerns, I agree with my colleagues that PTAR is not necessary to provide independent stations a competitive advantage relative to the network-affiliated television stations in the top 50 television markets. I do not believe that PTAR is the appropriate vehicle to balance any inherent inequities between the UHF and VHF stations, but would welcome discussion of more narrowly-tailored methods that would level the playing field. I cannot accept the argument that the repeal of PTAR will significantly slow the development of newly-launched television networks. I believe that the parties asserting this position have not demonstrated the nexus between the continuation of PTAR and the development of new networks.

While I would have preferred to discontinue the prime time access rule immediately, I have agreed to a very short transition period. This transition period does offer some benefits, namely, minimizing the disruption of the wholesale elimination of the rule. I would like to make it clear, however, that the adoption of the transition period in no way suggests any uncertainty on my part about our conclusion to repeal PTAR.