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

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

# REPORT AND ORDER

Adopted: August 29, 1995 Released: September 6, 1995

By the Commission:

Table of Contents


| | | Paragraph |
|---|---|---|
| I. | Introduction | 1 |
| II. | Review of the Remaining Fin/syn Rules | 3 |
| | A. Background | 3 |
| | B. Analysis of Comments | 9 |
| | C. Conclusions | 28 |
| III. | Acceleration of the Rules' Expiration Date | 31 |
| IV. | Administrative Matters and Ordering Clauses | 32 |
| Appendices | | |


## I. INTRODUCTION

1. In its *Second Report and Order ("Second R&O")* in MM Docket No. 90-162, adopted in 1993, the Commission repealed significant portions of its financial interest and syndication ("fin/syn") rules, scheduled the remaining rules for expiration, and committed itself to conducting a proceeding six months prior to the scheduled expiration date to give interested parties an opportunity to demonstrate that we should not allow these rules to expire

as scheduled.[1] The remaining rules are now due to expire on November 10, 1995.[2] On April 5, 1995, we adopted a *Notice of Proposed Rule Making ("Notice")*[3] initiating the instant review of these rules. We also sought comment in the *Notice* on whether to accelerate the expiration date for the remaining rules in the event we determined that no basis had been shown for retaining them.

2. As both the *Second R&O* and the *Notice* make clear, and as we discuss more fully below, the burden of proof in this proceeding is placed on those parties seeking retention of the rules. Having considered the record before us, we find that those parties favoring retention of the remaining fin/syn rules have failed to meet their burden of proof, and that continuation of the rules therefore is not justified. We further find that elimination of the rules should be effective upon publication of this Order in the Federal Register.

## II. REVIEW OF THE REMAINING FIN/SYN RULES

### A. Background

3. The fin/syn rules, which were adopted in 1970 to limit network control over television programming and thereby foster diversity of programming through the development of diverse and antagonistic programming sources, restricted the ability of the three established networks (ABC, CBS, and NBC) to own and syndicate television

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[1] *Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, *recon. granted in part, Memorandum Opinion and Order ("MO&O")* 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).

[2] The Commission scheduled the complete expiration of the fin/syn rules for the date two years after the entry of a court order removing provisions from antitrust consent decrees that imposed prohibitions on ABC, CBS, and NBC that were similar to the restrictions imposed by the Commission's fin/syn rules as originally adopted in 1970. *See* 47 C.F.R. § 73.663 and *Second R&O*, 8 FCC Rcd 3282, *recon. granted in part, MO&O*, 8 FCC Rcd 8270. On November 10, 1993, in response to a joint motion filed by the three networks, the United States District Court for the Central District of California entered an order lifting these prohibitions. *United States v. National Broadcasting Company*, 842 F.Supp. 402 (C.D. Cal. 1993).

[3] *Notice of Proposed Rule Making* in MM Docket No. 95-39, 10 FCC Rcd 5672 (1995). In response to the *Notice*, six parties filed timely comments and seven filed timely replies. A list of commenting parties is contained in Appendix A

programming.[4] As stated above, we initiated the instant proceeding pursuant to our *Second R&O* in MM Docket No. 90-162, in which we determined that, given competitive conditions in the television programming marketplace,[5] the fin/syn rules should be repealed in their entirety. While we concluded in the *Second R&O* that market conditions did not justify retention of the fin/syn restrictions, we also determined that several critical non-market factors warranted a gradual repeal rather than immediate elimination of all of the rules. First, we developed a scheme to allow us to observe the operation of a partially deregulated market for a period of time to see whether our assessment that the networks would not act in ways detrimental to diversity and competition following deregulation was valid. Second, a gradual phase-out of our restrictions on active syndication in particular appeared warranted because we considered that lifting the restraints on such syndication posed a more significant risk of damage to outlet diversity than that posed by lifting the other restraints, in the event our conclusions about the reactions of the marketplace proved wrong.[6] Finally, we recognized that immediate elimination of all the rules could be disruptive and have unintended and unforeseen negative effects.[7]

4. The rules which we retained, and which we consider here, relate to active syndication on the part of the networks, their involvement in the first-run non-network market, warehousing of programs, and reporting requirements. Under these rules, the networks are prohibited from actively syndicating prime time entertainment network programming or first-run non-network programs to television stations within the United States. Any such program for which a network holds a passive syndication right must be syndicated domestically through an independent syndicator. Further, networks are prohibited from holding or acquiring a continuing financial interest or syndication right in any first-run, non-network program distributed in the United States unless the network has solely produced

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[4] For a history of the fin/syn rules, see *Second R&O,* 8 FCC Rcd at 3284-88; *Notice* at paras. 2-4.

[5] These conditions included the decline in network audience share since the fin/syn rules were adopted, the increasing demand for television programming created by the emergence of the Fox network and cable networks and the growth of independent television stations, the intense competition among the three established networks for programming, the increasing ability of first-run distribution to be a fully comparable alternative to network distribution, and the increased concentration in the programming production industry. *See Second R&O*, 8 FCC Rcd at 3303-10.

[6] Syndication is the industry term used to refer to the licensing of programs for exhibition to individual stations. We use the term "active" syndication to refer to the direct negotiation with individual stations for the exhibition of programs, and the term "passive" syndication to refer to the holding of syndication rights that do not bestow the right to negotiate directly with individual stations.

[7] *See MO&O*, 8 FCC Rcd at 8279.

that program. The anti-warehousing safeguards we have kept in place are designed to prevent a network from withholding prime time programs from the syndication market.[8] Finally, semi-annual reporting requirements are imposed on the networks.[9]

5. Both the *Second R&O* and the *Notice* were explicit that parties who oppose the scheduled expiration of the remaining fin/syn restrictions would bear the burden of proof in this proceeding. Thus, we stated in the *Second R&O* in 1993:

> Based on the evidence available to us, we are prepared to presume that complete removal of all remaining restrictions will be appropriate, and we are therefore placing the burden of proof on those that urge retaining fin/syn restrictions.[10]

In the *Notice,* we further explained that commenters opposing the expiration of the rules would "need to convince us that, based on the current status of the program production and distribution markets and the activities of the networks since 1993, the Commission should continue regulation in this area. Parties arguing for retention of fin/syn restrictions should support their positions with empirical data and economic analysis."[11] Thus, because we determined that, as of 1993, market conditions did not justify retention of the fin/syn rules, we made clear that those favoring retention of the rules would have to present evidence of the networks' behavior and the status of program production and distribution markets since that time.

6. In both the *Second R&O* and the *Notice,* we also set forth a list of 14 factors that we deemed relevant to our review of the remaining rules. These factors

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[8] Under these safeguards, a network is required to release into syndication a program for which it held syndication rights four years after the program's debut or within 180 days following the end of the network run, whichever is sooner. 47 C.F.R. § 73.660(b).

[9] Under these requirements, the networks must file semi-annual reports identifying all network prime time entertainment programs and first-run non-network programs in which they hold or acquire financial interests or syndication rights. In addition, the networks must provide various related information, such as details concerning the independent syndicators that market such programming, and lists of the domestic stations to which the networks themselves syndicate. These reports must be filed with the Commission and placed in the public file of each network-owned and -operated station before the first regular business day of September and March of each year. *See* 47 C.F.R. § 73.661.

[10] *Second R&O*, 8 FCC Rcd at 3340 (codified in 47 C.F.R. § 73.663). *See also MO&O*, 8 FCC Rcd at 8281 n.30 ("We intend to treat and address pleadings submitted by [proponents of the continuation of the fin/syn rules] similarly to a petition for rule making.").

[11] *Notice* at para. 12.

are:

(1) The extent to which a network-owned program is syndicated primarily to that network's affiliates.
(2) Patterns that reveal delay in the introduction of network programs (in which the networks had financial interests or syndication rights) into the syndication market.
(3) The percentage of network programming in which a network has obtained a financial interest or syndication right.
(4) The relative change in the number of independent producers creating and selling television shows to the networks.
(5) Each network's share of the first-run syndicated programming domestic market.
(6) Concentration of ownership in the program production industry.
(7) Audience shares of first-run syndicated programming carried by non-network affiliated stations during prime time.
(8) The overall business practices of emerging networks, such as Fox, in the network television and syndication business.
(9) Network negotiating patterns, particularly the manner in which networks obtain financial interests and syndication rights and the extent to which successful negotiations over back-end rights influence network buying decisions.
(10) Network syndication practices, to the extent they are permitted.
(11) The relationship and business arrangements between networks and third-party syndicators of off-network programming.
(12) Mergers or acquisitions involving networks, studios, cable systems and other program providers since our 1993 fin/syn decision took effect.
(13) The growth of additional networks, including the development of Fox and its position vis-a-vis the three major networks.
(14) The growth in the number and types of alternative outlets for sale of programming (*e.g.*, the development of the Direct Broadcast Satellite service; cable penetration; wireless cable development).

7. We also stated in the *Notice* that we would, in addition to examining information submitted regarding the above factors, take notice of the record developed in our proceeding to review the Prime Time Access Rule ("PTAR") to the extent that record is relevant here.[12]

8. The U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit" or "Court") affirmed the *Second R&O*, including both our conclusion that market

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[12] *Notice of Proposed Rule Making* in MM Docket No. 94-123, 9 FCC Rcd 6328 (1994); Report and Order, FCC 95-314 (released July 31, 1995).

conditions do not justify retention of the fin/syn rules and our decision to implement a phased approach to their repeal.[13] Although the Court stated that it would have supported the immediate repeal of all of the rules, it found that our phased approach was reasonable.[14] Nonetheless, the Court warned the Commission that it must have "an excellent, a compelling reason" to continue the remaining restrictions beyond their scheduled expiration.[15]

**B. Analysis of Comments**

9. We find that commenters favoring retention of the remaining fin/syn rules have failed to carry their burden of demonstrating that, based on empirical data and economic analysis of the television program production and distribution markets and network activities since 1993, the rules are necessary to ensure competitive market conditions or source and outlet diversity.

10. Certain arguments made by these commenters suggest that the Commission must prove that repeal of the rules is justified. The Association of Independent Television Stations, Inc. ("INTV"), for example, argues that there is no rational basis for sunsetting the rules, that the FCC has found that the networks have the incentive and ability to deprive independent stations of access to syndicated programming, and that the Commission must make contrary findings based on substantial evidence in order to sunset the rules.[16] We disagree. Based on a thorough review of extensive record evidence, the Commission concluded in the *Second R&O* that the development of competitive conditions in program production and distribution markets and the decline of network dominance warranted the total repeal of the rules. This decision was affirmed by the Seventh Circuit. Moreover, the Court warned the FCC that only a compelling reason could justify retention of the rules after their scheduled expiration.[17] Thus, absent such a compelling showing on the part of those seeking to retain the rules, there are no grounds for suggesting, as INTV does, that the Commission must reexamine its conclusions regarding the lack of need for fin/syn regulation.

11. The Coalition to Preserve the Financial Interest and Syndication Rule ("Coalition") acknowledges in its reply comments that it must carry the burden of

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[13] *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

[14] *Id.*

[15] *Id.*

[16] INTV Comments at 11.

[17] *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

proof. Nonetheless, its discussion at times suggests that the burden of proof has shifted to those favoring expiration of the rules, *i.e.*, the networks. Thus, the Coalition asserts that the networks have failed to show that certain arguments submitted and findings made in proceedings conducted prior to 1993 are no longer valid.[18] However, absent a showing based on post-1993 evidence that such earlier arguments and findings are valid now, the networks are not required to disprove them.

12. Proponents of retention of the rules also argue that repeal of the rules will yield no benefits. The Coalition, for example, states that the purpose of the instant proceeding is to test the Commission's 1993 predictions regarding the beneficial effects of repealing the rules,[19] and argues that, since 1993, our relaxation of the rules has not resulted in predicted public welfare benefits.[20] Similarly, King World Productions, Inc. ("King World"), which focuses its comments on first-run syndicated programming, argues that allowing the networks to syndicate first-run programming would produce no public benefit and a probability of harm to source diversity.[21]

13. The purpose of this proceeding, however, is not to determine whether any particular benefits have been realized as a result of the partial elimination of our fin/syn rules. Rather, we provided for the instant review of our remaining rules because we wanted to be certain that their removal would not cause harm. Among our concerns was the possibility that we may have erred in predicting that the networks would not be able to abuse their position if we removed all restrictions on syndication. However, we have already concluded, and the Seventh Circuit has agreed, that the syndication rules are no longer justified by the conditions of the program distribution market, and we are concerned here only with preventing any harm that could result if we were wrong. We anticipate that the repeal of our fin/syn rules will have benefits over time, but our focus here is on whether or not there is evidence that repeal will threaten diversity in the program production and distribution markets.

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[18] The Coalition asserts, for example, that Department of Justice comments and FCC findings in 1983 regarding the networks' ability to warehouse programming are still valid and that "ABC makes no showing in its comments why warehousing should be any less of a concern today than it has been in the past." Coalition Reply Comments at 7-14.

[19] Coalition Comments at 3.

[20] *Id.* at 6. The Coalition asserts, for example, that the established networks have not financed small, unproven producers or "risky" programming since the relaxation of our financial interest restrictions. *Id.* at 7, 9-10, 12.

[21] King World Comments at 5.

14. Generally speaking, many of the pro-fin/syn arguments presented in this proceeding are unconvincing because they rely on conclusions reached by the Commission or others prior to 1993, or on analyses of network behavior before that time. Proponents of retaining the rules also rely in part on arguments that were rejected in the *Second R&O*. Our *Notice* stated that commenters opposing the scheduled expiration of our rules would need to present information about and analysis of network activities and the operation of program markets *since 1993*. Thus, arguments based on earlier analyses or data are irrelevant to the instant review (unless the data are used as a comparative benchmark), as are arguments rejected in our *Second R&O*.[22]

15. We turn now to an examination of the arguments made in this proceeding that provide data and/or economic analysis relevant to the period from 1993 to the present. In the discussion set forth below, we consider these arguments as they relate to the 14 factors set forth in the *Second R&O* and the *Notice*.

16. The extent to which a network-owned program is syndicated primarily to that network's affiliates. The only relevant data on this issue were submitted by those favoring elimination of the remaining fin/syn rules. Thus, for example, the National Broadcasting Company, Inc. ("NBC") provides figures for its single in-house production that has been in active first-run syndication by a third-party syndicator since 1993, a series entitled "News 4 Kids." As of May 1995, this program was being carried on 210 stations, of which only 49 -- or 23% -- are either owned by or affiliated with NBC.[23] In contrast, the proponents of retention of the rules did not provide evidence showing that network-owned programs are syndicated primarily to network-owned or -affiliated stations. King World states in its comments that NBC launched a weekly series entitled "Memories Then and Now" which, in its initial season, was carried on 44 stations, 31 of which were either owned by or affiliated with NBC.[24] According to King World, this program illustrates how the networks exploit their affiliates to exercise power over the distribution system. However, the figures King World cites are for February 1992, a period of time that is not relevant to this proceeding except insofar as it is used to place post-1993 network behavior into context. Moreover, even if we consider these figures as relevant here, we note that NBC points out that "Memories Then and Now" was syndicated by an independent distributor, and that King World does not claim that NBC had any influence over the syndicator's sales practices. According to NBC, the fact that the program was a failure in syndication shows that NBC does not have the power over

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[22] These include the argument that we have failed to define the television production and distribution markets correctly. *See, e.g.*, Coalition Reply Comments at 27-31.

[23] NBC Reply Comments at 19-20.

[24] King World Comments at 9

the distribution system that King World claims. If it had such power, NBC states, it would have been able to force sufficient clearances to make the show a success.[25] ABC also points out that the clearance of a program by only 31 NBC affiliates does not show that the networks have used their affiliates to exercise undue control over the distribution system.[26] Finally, we observe that no evidence was presented showing that Fox Broadcasting Company ("Fox"), which is permitted under our rules to engage in active syndication, has favored its affiliates in syndicating Fox programming. We find that evaluation of fin/syn repeal under this factor fails to support a conclusion that the networks favor affiliates in syndicating their programs.

17. The percentage of network programming in which a network has obtained a financial interest or syndication right. According to the Coalition, the established networks have taken financial interests, through either co-productions or in-house productions, "in approximately 40 percent of new shows picked up since the Commission eliminated the financial interest rule in 1993."[27] The Coalition asserts that this figure is evidence of the exercise of the established networks' market power in the purchase of programming. However, the Coalition does not explain how it arrived at this figure. Moreover, as both Capital Cities/ABC, Inc. ("ABC") and NBC point out, the Coalition's figure, even if valid, merely shows that the established networks have not had a financial interest in the majority of new shows picked up since the Commission eliminated the financial interest rule, a circumstance that is inconsistent with the contention that the networks have exercised undue market power.[28] In sum, no evidence has been presented that demonstrates that the established networks have exercised undue market power in acquiring a financial interest in prime time entertainment programming.

18. Further, no party has presented any evidence indicating that the established networks have allowed their financial interests in or syndication rights to programming aired during prime time to influence their decisions to either retain or cancel that programming. Under our current rules, the established networks may have both a financial interest in and syndication rights to programming produced in-house. NBC states that every network in-house program that premiered in the fall of 1994 was canceled by its respective network by the end of the broadcast season, and asserts that this fact refutes any suggestion that the networks accord favored treatment

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[25] NBC Reply Comments at 18-19.

[26] ABC Reply Comments at 13-14.

[27] Coalition Comments at 17.

[28] ABC Reply Comments at 4-5; NBC Reply Comments at 11.

to their in-house productions.[29] We find that proponents of retaining the remaining fin/syn restrictions have not demonstrated network favoritism toward programming in which they have a financial interest, or to which they have syndication rights, in any way that would adversely affect diversity within the program production market.

19. The relative change in the number of independent producers creating and selling television shows to the networks. In its reply comments, the Coalition suggests that data from a study submitted by Economists Incorporated in comments filed in the PTAR proceeding demonstrate that "source diversity has declined dramatically since the financial interest rule was repealed."[30] Specifically, the Coalition relies on Appendix E to show that there has been a reduction in the number of suppliers of prime time entertainment series since the 1993-94 season.[31] This appendix lists the packagers of programming included in the prime time schedules of ABC, CBS, and NBC from the 1969-70 season to the 1994-95 season and the percentage of prime time network programming supplied by these packagers. Figures for the 1995-96 season are projected based on one week of the announced fall line-up on the three networks. Economists Incorporated defines "packager" for purposes of this calculation as the entity that assumed contractual responsibility to a network for production or delivery of a series.

20. While we agree with the Coalition that the Economists Incorporated study indicates a decline in the number of packagers of programming included in the prime time schedules of ABC, NBC, and CBS from 29 in 1993-94 to 17 in the fall of 1995, we do not agree that these figures necessarily demonstrate a reduction in source diversity due to either the relaxation of our fin/syn rules or anticompetitive behavior on the part of the three networks. We note that Appendix E also shows that the number of packagers declined from 31 to 26 from 1990-91 to 1991-92, which was prior to the relaxation of our rules. We believe that this decline, which cannot be attributed to elimination of the financial interest rule, is instead attributable to the inherent riskiness of prime time programming, which may also explain the change in the number of packagers on which the Coalition comments. In addition, we observe that the identity of the packagers listed in Appendix E varies from year to year. This suggests that the list for any given year does not represent all program suppliers selling to the networks, nor can the variations in the lists be used to support a finding that suppliers are being excluded from the market. We also observe that Warner Brothers, which is developing a new broadcast television network to compete with

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[29] NBC Reply Comments at 11.

[30] Coalition Reply Comments at 25.

[31] Coalition Reply Comments at 25 and Appendix B (citing Economists Incorporated, An Economic Analysis of the Prime Time Access Rule (March 7, 1995, as amended and updated on June 12, 1995) (filed in MM Docket No. 94-123). Appendix E ("Economic Analysis")).

ABC, CBS, and NBC, is providing 23.33% of the prime time entertainment schedule of the three major networks for the fall of 1995. This figure tends to discount any claim that ABC, CBS, and NBC are trying to restrict the supply of programming provided by competitors. In short, the information cited by the Coalition does not demonstrate that relaxation of our fin/syn rules has led to any reduction in the number of independent producers actively competing to create and sell television shows to the networks. Finally, to the extent that there has been any decline in the number of suppliers of prime time programming, it may be due at least in part, as CBS Inc. ("CBS") claims, to the major studios supplying an increased percentage of prime time programming.[32]

21. Concentration of ownership in the program production industry. In connection with this factor, commenters favoring retention of the fin/syn rules focused on levels of network ownership of prime time entertainment programming. The Coalition asserts that the networks' share of copyrights in such programming has increased from 29% to 35% since repeal of the financial interest rule but does not provide documentation for these figures.[33] INTV contends that the percentage of prime time entertainment series produced in-house by the networks increased from less than 1% in 1984-85 to 7.6% in the 1993-94 season.[34] However, neither party establishes a clear trend toward increased network ownership of such programming that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint. Moreover, looking at the percentages of hours of prime time entertainment series accounted for by in-house network production since 1993, we observe that these percentages have fluctuated from year to year. According to NBC, in-house productions accounted for 20.2% of the established networks' prime time entertainment series hours in 1992-93, 19.0% of these hours in 1993-94, 25.8% of these hours in 1994-95, and 22.2% of these hours in the Fall 1995 schedule.[35] Thus, we cannot say, based on the showings made in this

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[32] CBS Reply Comments at 13-14 (citing Brian Lowry, WB Packs Primetime Wallop, Variety, May 25, 1995, at 1, 9). *See also* Economic Analysis, Appendix E.

[33] Coalition Comments at 13.

[34] INTV Comments at 10 (citing Economic Analysis at 24). We note that Economists Incorporated, upon which INTV relies, has revised its figure of 7.6% for 1993-94 to 6.3%. *See* Economic Analysis, as amended and updated on June 12, 1995.

[35] The wide difference between the figures cited by INTV and those cited by NBC is due to the fact that INTV's figures refer to the percentage of the number of prime time entertainment series produced in-house, whereas NBC's figures document the number of hours of such programming. NBC Reply Comments at 9 (citing Economic Analysis, Appendix E. *See also* NBC Comments at 6-7; ABC Reply Comments at 9. The range of shares documented by NBC and ABC is within the networks' normal range of share

proceeding, that the networks have acted to preclude the prime time programs of other producers from reaching the market, or that program production has been concentrated in the hands of the networks as a result of the relaxation of the fin/syn rules to the detriment of the viewing public. Indeed, the fact that independently owned "packagers"[36] provided 80.97% of the prime time programming hours included in the schedules of ABC, CBS, and NBC during the 1993-94 season, provided 74.2% of these hours during the 1994-95 season, and are scheduled to provide 77.7% of these hours in the upcoming 1995-96 season[37] clearly demonstrates that the three established networks are not precluding independent product from their schedules and thereby concentrating ownership of prime time programming in their hands.

22. Audience shares of first-run syndicated programming carried by non-network affiliated stations during prime time. According to INTV, expiration of the fin/syn rules will limit the ability of independent stations to acquire first-run prime time syndicated programs. INTV states that first-run programming accounts for only 39% of the prime time programming of independent stations, and that this programming "rarely achieves" ratings comparable to the ratings of programming shown on the networks.[38] However, the Economists Incorporated data cited by INTV reflect only programming aired in the top 50 markets in November 1994, and do not include ratings information. Thus, the data cited do not support INTV's claims. ABC notes that first-run productions such as Star Trek/Deep Space Nine, Kung Fu, and The Legendary Journeys of Hercules have been syndicated successfully in prime time without reliance on the networks' affiliates.[39] In sum, it has not been shown that competitive first-run prime time programming is unavailable to independent stations, nor has it been demonstrated that the repeal of our remaining fin/syn restrictions would diminish the amount of first-run programming available to independent stations or otherwise be detrimental to the diversity of programs and program sources.

23. The overall business practices of emerging networks, such as Fox, in the network television and syndication business. Although it does not directly discuss its business practices, Fox provides information in its reply comments about its production of prime time programming. Fox states that it currently produces only 3-

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variation.

[36] *See supra* paras. 19-20.

[37] *See* Economic Analysis, as amended and updated on June 12, 1995.

[38] INTV Reply Comments at 7-8 (citing Economic Analysis at 134).

[39] ABC Comments at 6 (citing Economic Analysis at 17-18). *See also* David Tobenkin, Action Escalates for Syndicators, Broadcasting & Cable Magazine, Aug. 29, 1994, at 29 (discussing success of independent stations with first-run programs)

1/2 of its own 15 hours of prime time network programming, and that it produces a substantial amount of programming for other networks, including "Chicago Hope" and "Picket Fences" for CBS.[40] Fox offers itself as a "perfect laboratory model" of a broadcast network that has not been subject to regulatory constraints as a producer.[41] We believe that the fact that most of the prime time programming aired on the Fox network is produced by outside suppliers is evidence that permitting a network to own and syndicate programming does not result in foreclosing independent suppliers from the market.

24. Network negotiating patterns, particularly the manner in which networks obtain financial interests and syndication rights and the extent to which successful negotiations over back-end rights influence network buying decisions. While not directly addressing this issue, the Coalition does assert that the established networks have uniformly lowered the license fees they pay for prime time entertainment programming.[42] However, the Coalition cites figures without providing any documentation. Moreover, as NBC points out, the Coalition does not indicate in citing its figures what type of programming is involved or the track record of the producer.[43] As a result, we cannot assess the significance of the Coalition's numbers. We note, too, that CBS cites independent industry analysts as reporting that the average license fees paid by the three major networks, as estimated on a per-hour basis, remained virtually unchanged from the 1992-93 season through the 1994-95 season.[44] Thus, we find that proponents of retaining the fin/syn rules have provided no probative evidence that the established networks have exercised undue market power since 1993 in their negotiations for financial interests and syndication rights in television programming.

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[40] Fox Reply Comments at 4.

[41] *Id.*

[42] Coalition Comments at 11.

[43] NBC Reply Comments at 8.

[44] CBS Reply Comments at 10 n.25 (citing Paul Kagan Associates, Inc., TV Program Stats, Sept. 30, 1994, at 1). One of the articles cited by the Coalition in support of its argument that the networks have pushed license fees down -- J. Max Robins, Nets, Producers Face Off as Fee Fight Foes, Weekly Variety, May 8-14, 1995, at 29 -- also characterizes such fees as "stagnant" but does not state that they have declined. Further, other recent published reports indicate that the networks are spending an increased amount of money on license fees for new series, *see* J. Max Robins, Top-drawer Talent Taps Web Wallets, Weekly Variety, May 22-28, 1995, at 1, and that the networks are spending increased amounts for pilots, *see* J. Max Robins, Networks Chase Demos with Pricey Pilots, Weekly Variety, March 27-April 2, 1995, at 1.

25. Mergers or acquisitions involving networks, studios, cable systems and other program providers since our 1993 fin/syn decision took place. CBS cites a number of mergers that have occurred since 1993 that have resulted in the formation of large new competitors in the video production and distribution markets. Among these are the merger of Viacom Inc., Blockbuster Entertainment Corp., and Paramount Communications, Inc., which has resulted in a company with both production and distribution capabilities.[45] To the extent that such mergers have strengthened the production and distribution capabilities of the merging parties, the three original networks are facing more effective competitors in the video production and distribution markets. We note as well the recent announcements that the Walt Disney Company plans to acquire ABC and that Westinghouse Electric Corp. plans to purchase CBS. The Commission will, of course, be reviewing these acquisitions in the normal course of its regulatory business to ensure that they do not undermine the competitiveness of the production and distribution markets.

26. The growth of additional networks, including the development of Fox and its position vis-a-vis the three major networks. In their comments, NBC, CBS, and ABC point to the growing audience share of Fox, and to their own declining audience share, as evidence of the competition Fox provides to the established broadcast networks.[46] CBS notes that the aggregate prime time viewing share of the three original networks, which had already fallen to 59% in 1992, dropped further to 57% in the 1993-94 season.[47] NBC, CBS, and ABC also point to the emergence of the United Paramount and Warner Brothers networks as evidence of both the forward integration of existing television programming producers into the distribution of programming through broadcast television outlets and the increased number of potential purchasers of television programming.[48] INTV argues that these new networks cannot compete effectively with the established networks because of the structural advantages enjoyed by the latter -- primarily the number of VHF stations owned by or affiliated with the established networks.[49] INTV also suggests that the two newest networks have not had a significant competitive impact because they supply only 2 to 4 hours of weeknight prime time programming.[50] We have, however, already decided in our *Second R&O* that any structural advantages of the

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[45] CBS Comments at 7-10.

[46] NBC Comments at 4; CBS Comments at 10-11; Capital Cities/ABC Comments at 6.

[47] CBS Comments at 10 (citing Wall Street Journal, April 14, 1995, at B-5).

[48] NBC Comments at 4; CBS Comments at 11-12; ABC Comments at 6.

[49] INTV Reply Comments at 3.

[50] *Id.* at 14.

established networks are no longer sufficient to allow them to dominate the program production and distribution markets.[51] Moreover, Fox has competed effectively for a number of VHF affiliates and initiated a series of affiliate switches, which have resulted in some of the established networks having fewer, rather than more, VHF affiliates than they did in 1993. Thus, any structural advantage that the established networks may have had based on ownership of and affiliation with VHF stations has been diminished rather than increased since our *Second R&O*. Even if the impact of the United Paramount and Warner Brothers networks is currently relatively small, they nonetheless appear to be viable new competitors for the established networks and may increase their market share as Fox has done.[52] Given Fox's growth in audience share, as documented by Economists Incorporated in our PTAR proceeding,[53] and the emergence of two additional broadcast networks, we find that the established broadcast television networks have faced more, rather than less, competition from broadcast television purchasers and distributors since 1993. In keeping with this finding, we disagree with King World's claim that the established networks have bottleneck power over the broadcast television distribution system.[54]

27. The growth in the number and types of alternative outlets for sale of programming (*e.g.*, the development of the Direct Broadcast Satellite ("DBS") service; cable penetration; wireless cable development). We determined in our *Second R&O* that cable networks were competitors to the established broadcast television networks in the purchase of television programming.[55] CBS and ABC point out in this proceeding that there has been continued growth in the number and audience share of not only cable networks but also other networks using alternative distribution technologies (*e.g.*, DBS, wireless cable), and they cite data provided in Economists Incorporated's PTAR comments that demonstrate the increased market

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[51] *See Second R&O*, 8 FCC Rcd at 3303-08.

[52] We note that at present there are 144 Designated Marketing Areas, encompassing 93.4% of U.S. television households, with four or more broadcast television stations. Broadcasting & Cable Yearbook (1995). Thus, there are enough stations to affiliate with more than three networks.

[53] *See* Economic Analysis, Appendices A and K.

[54] King World Comments at 6-8. Further, the programming offered by non-network distributors (or syndicators) is increasingly competitive with network fare for viewers and advertisers. As Bob Cesa, president of the Advertiser Syndicated Television Association and senior vice president of syndicator Twentieth Television, points out: "Syndication generates network-like ratings in so many dayparts, especially daytime and early prime, that advertisers can't afford to be locked out." Broadcasting & Cable Magazine, May 15, 1995, at 48.

[55] *Second R&O*, 8 FCC Rcd at 3306-07.

share of cable networks.[56] The Coalition argues that cable and other services are not effective competitors to broadcast television, and that cable and other non-broadcast networks therefore are not effective competitors to broadcast networks.[57] However, we have already decided in our *Second R&O* that these alternative video delivery systems provide sufficient competition with the broadcast networks to obviate the need for fin/syn restrictions and, absent evidence of new developments, this conclusion need not be revisited.[58] Moreover, based on the evidence in the record before us, we find that the established broadcast television networks have faced more, rather than less, competition for the acquisition of television programming from non-broadcast television purchasers since 1993.[59]

## C. Conclusions

28. Proponents of retaining our remaining fin/syn rules have failed to carry their burden of proof that earlier relaxation of these rules has threatened diversity in the television program production and distribution markets, or enabled the established networks to engage in anticompetitive activities to the detriment of the public interest; or that the current conditions of the production and distribution markets warrant retention of the rules. Proponents of retaining the rules have not provided persuasive evidence that the established networks engage in, or threaten to engage in, affiliate favoritism to the detriment of non-network stations; that the established networks place or retain programming in their schedules because of their financial interests in or syndication rights to that programming, or for other than legitimate competitive reasons; or that the established networks have reduced the pool of suppliers of television programming through anticompetitive practices.

29. In addition, proponents of retaining the remaining fin/syn rules have provided no evidence unrelated to our 14 factors that would cause us to question whether the conclusions we reached in 1993 remain valid today. Nor have they shown that the semi-annual reports submitted by the networks reveal ownership patterns that pose a threat to programming diversity. Moreover, there is persuasive evidence that the established broadcast television networks have faced increased

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[56] CBS Comments at 12-13; ABC Comments at 7

[57] Coalition Comments at 15.

[58] *Second R&O*, 8 FCC Rcd at 3304-08; *MO&O*, 8 FCC Rcd at 8285-86.

[59] Cable's competition for viewers has not been based solely on their provision of news, sports, movies, and off-network programming. Increasingly, cable channels are investing in original programming as well. *See* Rich Brown, *USA Commits $140 Million to Originals*, Broadcasting & Cable Magazine, June 5, 1995, at 24

competition for the acquisition of television programming from broadcast and non-broadcast television distributors since 1993, and there is evidence which suggests that the market power of the established networks, as determined by their prime time audience share, has decreased since 1993. We therefore decline to alter our 1993 decision to sunset the remaining fin/syn rules. In light of the fact that the commenters have not shown a need to retain these rules, we also conclude that there is no justification for strengthening any of the rules, as the Coalition urges.[60]

30. Finally, we note that both the Coalition and INTV urge us to retain, and indeed strengthen, our reporting requirements for the networks even if we allow the rest of the fin/syn rules to expire.[61] These parties argue that it is important for the Commission to monitor the networks' conduct following repeal of the remaining rules in order to assess the impact of such repeal. However, neither of these commenters has demonstrated the need to continue reporting requirements, and we decline to do so.

## III. ACCELERATION OF THE RULES' EXPIRATION DATE

31. In our *Notice,* we sought comment on whether, in the event proponents of retention of the fin/syn rules failed to meet their burden of proving that retaining the rules is warranted, we should amend our rules to allow for an expiration date earlier than November 10, 1995. Commenters in this proceeding have failed to demonstrate that market conditions and network behavior since 1993 justify retaining the rules. In addition, no evidence or argument has been submitted showing that repeal of the remaining rules before November 10, 1995, would disrupt the conduct of business by parties relying on the rules, although we sought comment on this point. We also note, as discussed above, that the networks now face more competition than in 1993 for the acquisition of television programming from broadcast and non-broadcast television distributors. Moreover, we have described at length the negative effects of the fin/syn rules on production and distribution markets in our earlier decisions.[62] Under these circumstances, we conclude that no public interest purpose would be served by allowing the rules to remain in effect until November 10, 1995. We thus conclude that all of the remaining fin/syn rules will be repealed immediately upon

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[60] Coalition Comments at 20-22.

[61] Coalition Reply Comments at 34-37; INTV Comments at 13 and Reply Comments at 16.

[62] *See, e.g., Second R&O*, 8 FCC Rcd at 3286-87, 3290, 3301, 3308-9; *MO&O*, 8 FCC Rcd at 8282.

publication of this Order in the Federal Register.[63]

## IV. ADMINISTRATIVE MATTERS AND ORDERING CLAUSES

32. Pursuant to the Regulatory Flexibility Act of 1980, the Commission has set forth a Final Regulatory Flexibility Analysis, which appears in Appendix B. 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 the Regulatory Flexibility Act, 4 U.S.C. § 601 *et seq.*

33. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314, Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in Appendix C, effective upon publication of this Order in the Federal Register.[64]

34. In keeping with our recent decision in our PTAR proceeding,[65] IT IS FURTHER ORDERED that Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in Appendix D, effective August 30, 1996.

35. IT IS FURTHER ORDERED that MM Docket No. 95-39 IS TERMINATED.

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[63] As noted above, the Seventh Circuit on review of the *Second R&O* indicated that it would have supported the immediate repeal of all of the fin/syn rules in 1993. Thus, the Court stated that it would not have "forbidden an immediate rescission of restrictions whose mismatch with the current situation in the broadcast industry becomes more evident by the day." The Court also observed: "The television industry is changing so rapidly that we cannot exclude the possibility that the interim restrictions will come to seem irrational before they are due to expire." *Capital Cities/ABC, Inc.*, 29 F.3d at 316.

[64] *See* 5 U.S.C. § 553(d) (rules that relieve a restriction may be effective less than 30 days after publication in the Federal Register).

[65] *See supra* note 12.

36. Further information on this proceeding may be obtained by contacting David Horowitz, Mass Media Bureau, at (202) 776-1653, or Robert Kieschnick, Mass Media Bureau, (202) 739-0770.

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:*

Association of Independent Television Stations, Inc.
Capital Cities/ABC, Inc.
CBS Inc.
Coalition to Preserve the Financial Interest and Syndication Rule
King World Productions, Inc.
National Broadcasting Company, Inc.

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

Association of Independent Television Stations, Inc.
Capital Cities/ABC, Inc.
CBS Inc.
Coalition to Preserve the Financial Interest and Syndication Rule
Fox Broadcasting Company
King World Productions, Inc.
National Broadcasting Company, Inc.

## APPENDIX B

### Final Regulatory Flexibility Analysis

**I. Need for and Purpose of this Action:**

This action is taken to accelerate the expiration of the Commission's remaining fin/syn rules -- previously scheduled for November 10, 1995 -- so that the rules will expire upon publication of this Order in the Federal Register.

**II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:**

None.

**III. Significant Alternatives Considered and Rejected:**

The Commission considered retaining the remaining fin/syn rules. However, after reviewing the comments submitted in this proceeding, the Commission concluded that the proponents of retaining the rules had not met their burden of proving that the rules are still needed to achieve the FCC's goals of source and outlet diversity in the television programming marketplace. One commenter in this proceeding argued that the fin/syn rules should be strengthened. The Commission considered this argument but concluded that it was without merit in light of the fact that no need for retaining the rules at all had been demonstrated. The Commission also considered leaving the remaining fin/syn rules in place until their previously scheduled expiration date of November 10, 1995, but concluded that no evidence had been presented showing that earlier repeal would disrupt the conduct of business by parties relying on the rules. Given the increased competition facing the networks and the negative effects of the fin/syn rules on production and distribution markets, the Commission concluded that no public interest purpose would be served by waiting until November 10, 1995, to sunset the rules.

## APPENDIX C

## Rule Changes

Effective upon publication of this Order in the Federal Register, 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 of Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. § 154, 303, 334.

2. 47 CFR 73.659, Television network financial interests and syndication rights in first-run programs, is removed in its entirety, and section 73.659 is reserved.

3. 47 CFR 73.660, Television network participation in program syndication, is removed in its entirety, and section 73.660 is reserved.

4. 47 CFR 73.661, Network television program ownership and syndication reports, is removed in its entirety, and section 73.661 is reserved.

5. 47 CFR 73.662, Definitions for television network financial interest, syndication, and prime time access rules, is amended by revising the title and introductory note to read as follows:

47 CFR 73.662, Definitions for television prime time access rules.

For purposes of § 73.658(k):

6. 47 CFR 73.663, Expiration of the financial interest and syndication rules, is removed in its entirety, and section 73.663 is reserved.

## APPENDIX D

### Further Rule Changes

Effective August 30, 1996, Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

Part 73 RADIO BROADCAST SERVICES

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

AUTHORITY: 47 U.S.C. § 154, 303, 334.

2. 47 CFR 73.662, Definitions for television prime time access rules, is removed in its entirety, and section 73.662 is reserved.