Source of flooding and location	# Depth in feet above ground. *Elevation in feet (NGVD)
At confluence with Horse Creek	*1,348
50 feet downstream of State Highway 16	*1,360
200 feet downstream of confluence with Tributary 2	*1,370
200 feet downstream of confluence with South Fork of Indian Creek	*1,375
100 feet downstream of Indian Creek Drive	*1,390
At corporate limits	*1,393
South Fork of Indian Creek:	
At confluence with Indian Creek	*1,376
50 feet upstream of Indian Creek Drive	*1,391
At western corporate limits	*1,416
Horse Creek:	
At confluence with Indian Creek	*1,348
At upstream face of Summit Avenue	*1,360
At southern corporate limits	*1,374
Tributary 1:	
At confluence with Indian Creek	*1,342
50 feet upstream of Central Avenue (U.S. Highway 67)	*1,361
100 feet upstream of Walcott Avenue	*1,374
At downstream face of Austin Street	*1,394
Tributary 2:	
At confluence with Indian Creek	*1,371
50 feet upstream of Central Avenue (U.S. Highway 67)	*1,381
100 feet upstream of State Highway 36	*1,395
1,000 feet upstream of FM 1689	*1,420
Tributary 3:	
At confluence with Indian Creek	*1,372
100 feet upstream of Indian Creek Drive	*1,390
At southern corporate limits	*1,428
Tributary 4:	
At confluence with Tributary 3	*1,420
At limit of study	*1,435
Tributary 5:	
At downstream face of State Highway 16	*1,351
100 feet upstream of airport runway	*1,373
At limit of study	*1,401
Maps are available for inspection at City Hall, City of Comanche, 114 West Central, Comanche, Texas.	

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: August 22, 1995.

Richard T. Moore,

Associate Director for Mitigation.

[FR Doc. 95–21397 Filed 8–28–95; 8:45 am]

BILLING CODE 6718–03–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 94–123; FCC 95–314]

Radio Broadcast Services; Television Program Practices

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This *Report and Order* repeals the Commission's Rules regarding the Prime Time Access Rule. The Commission had invited comments in a rulemaking proceeding to assess the legal and policy justifications, in light of current economic and technological conditions, for the Prime Time Access Rule and to consider the continued need for the rule in its current form. Based on the comments received from interested parties, including economic and empirical analyses of the effects of repealing or retaining the rule, the Commission concludes that the public interest warrants the repeal of PTAR. In repealing the rule, the Commission believes a one-year transition period is appropriate to provide parties time to adjust their programming strategies and business arrangements.

EFFECTIVE DATE: August 30, 1996.

FOR FURTHER INFORMATION CONTACT: Charles W. Logan or Alan E. Aronowitz, Mass Media Bureau, Policy and Rules Division, Legal Branch, (202) 776–1663, or Alan Baughcum, Mass Media Bureau, Policy and Rules Division, Policy Analysis Branch, (202) 739–0770.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* in MM Docket No. 94–123, adopted July 28, 1995, and released July 31, 1995. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street NW., Washington, D.C. 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street NW., Washington, D.C. 20037.

Synopsis of the Report and Order

1. The Commission's Prime Time Access Rule (''PTAR'') generally prohibits network-affiliated television stations in the top 50 prime-time television markets (''Top 50 Market Affiliates'') from broadcasting more than three hours of network programs (the ''network restriction'') or former network programs (the ''off-network restriction'') during the four prime time viewing hours (*i.e.*, 7 to 11 p.m. Eastern and Pacific times; 6 to 10 p.m. Central and Mountain times). The rule exempts certain types of programming (*e.g.*, runovers of live sports events, special news, documentary and children's programming, and certain sports and network programming of a special nature) which are not counted toward the three hours of network programming.[1] PTAR was promulgated in 1970 in response to a concern that the three major television networks—ABC, CBS and NBC—dominated the program production market, controlled much of the video fare presented to the public, and inhibited the development of competing program sources. The Commission believed that PTAR would increase the level of competition in program production, reduce the networks' control over their affiliates' programming decisions, and thereby increase the diversity of programs available to the public. PTAR also came to be viewed as a means of promoting the growth of independent stations in that they did not have to compete with Top 50 Market Affiliates in acquiring off-network programs to air during the access period.

2. On October 20, 1994, the Commission adopted a *Notice of Proposed Rule Making* (''*Notice*''), 59 FR 55402 (November 7, 1994), in this docket to conduct an overall review of the continuing need for PTAR given the profound changes that have occurred in the television industry since 1970. In response to the *Notice*, we received a substantial number of comments from interested parties, including economic and empirical analyses of the effects of repealing or retaining the rule.

3. Based on this record, the Commission concludes that PTAR should be extinguished. The three major networks do not dominate the markets relevant to PTAR. There are large numbers of sellers and buyers of video programming. Entry, even by small business, is relatively easy. There are a substantially greater number of broadcast programming outlets today than when PTAR was adopted in 1970 due to the growth in numbers of independent stations. In addition, nonbroadcast media have proliferated. We also find, given these market conditions, and the record before us,

[1] 47 CFR 73.658(k)(1)–(6).

that the rule is not warranted as a means of promoting the growth of independent stations and new networks, or of safeguards affiliate autonomy. Indeed, the rule generates costs and inefficiencies that are not now offset by substantial, if any, benefits.

4. The Commission thus finds that the public interest warrants the repeal of PTAR. In scheduling repeal of the rule, a one-year transition period is appropriate to provide parties time to adjust their programming strategies and business arrangements prior to the elimination of a regulatory regime that has been in place for 25 years. Consequently PTAR will be repealed effective August 30, 1996.

5. This conclusion is consistent with the Commission's 1993 decision to schedule the repeal of the financial interest and syndication rules ((''fin/syn''), which was upheld on appeal by the U.S. Court of Appeals for the Seventh Circuit. *See Capital Cities/ABC, Inc. V. FCC*, 29 F.3d 309 (7th Cir. 1994). We determined that repeal of the fin/syn rules was warranted given the increased competition facing the networks and the conditions in the television programming marketplace. Based upon these findings we eliminated a number of the fin/syn rules immediately and set a timetable for repeal of the remainder.

6. The Commission reaches its conclusion to PTAR by analyzing the following factors: First, it evaluates whether the networks dominate the markets relevant to the rule, or would be likely to dominate them in the absence of PTAR. Second, it assesses the costs imposed by the rule. Third, taking into account its findings regarding whether the networks dominate and the costs of the rule, it analyzes whether the rule is necessary as a means of pursuing the benefits of fostering independent programming, promoting the growth of independent stations and new networks, and safeguarding affiliate autonomy.

I. The Networks and Their Affiliates Do Not Dominate Markets Relevant to PTAR

7. The Commission's adoption of PTAR in 1970 was premised on a view that the three networks dominated television programming. The Commission's analysis of the record leads it to conclude that neither the networks nor their affiliates dominate video programming distribution or the video programming production market. The Commission reaches this conclusion by employing a two-step market power analysis which involves defining the relevant market and examining evidence of undue market power.

A. Video Programming Distribution

8. PTAR applies to ABC, CBS, and NBC affiliates in the Top 50 PTAR Markets. These networks and their affiliates display or ''distribute'' television programming to viewers and sell air time to customers seeking to advertise. In program distribution, networks and their affiliates compete with programs broadcast by independent stations. The list of economic substitutes for network broadcasts may also include cable programs, programs over satellite television systems, videocassette rentals, and other alternatives. For purposes of its review of PTAR, the Commission will focus on program distribution comprising only broadcast television station operators and their networks. This is a conservative, perhaps overly narrow, approach given that a good case can be made that, from the viewers' perspectives, cable system operators inter alia are economically relevant alternative distributors of video programming. Since PTAR constrains the market activities of affiliates of the three major networks in the Top 50 PTAR Markets, the Commission's primary focus in this section is whether these network affiliates would be able to exercise undue market power in the delivery of video programming in their respective local markets.

9. Based on the record, it is clear that, in the Top 50 PTAR Markets, the three original networks and their affiliates face more competition for viewers than they did in 1970 or even in 1980. There are substantially greater numbers of television stations than there were in 1970. For example, the number of independent stations has grown by 450 percent during this time. The effects of this competition are readily apparent in examining the networks' audience shares over the years. Looking at prime time alone, the time period when the networks' viewing shares are the highest, each network's average share of the prime time audience declined from a 31.1 viewing share during the 1971/72 season to a 20.2 share during the 1993/94 season, a loss of almost one-third of each network's audience. ABC, CBS, NBC, and Fox had individual 1993/94 prime-time audience shares of 20.1 , 22.7, 17.8 and 11.4 percent, respectively. The Commission's calculation of affiliate audience shares in each of the Top 50 PTAR Markets is consistent with network audience shares nationally. No single network or network affiliate would seem to have the ability to dominate video programming distribution in any of these local markets.

10. Nor is it likely that affiliates in a local Top 50 PTAR Market would dominate as a group since video programming distribution is only moderately concentrated. In its 1993 decision setting a timetable for repeal of the fin/syn rules, the Commission stated that ''inter-network competition for programming is 'intense.' '' Nothing in the record before us calls this conclusion into doubt, as the networks continue to wage a ratings war that has only been heightened with the emergence of the Fox network.

11. The Commission thus concludes that, even focusing narrowly on local broadcast video programming distribution, the three networks and their affiliates cannot singly or jointly dominate video program distribution in the Top 50 PTAR Markets. This is a strong conclusion because the inclusion of additional television alternatives such as cable, satellite systems, video dialtone, etc., would serve to make domination by the networks and their affiliates even less likely.

B. The Video Programming Production Market

12. Defining the relevant video programming production market begins by focusing on the products produced by beneficiaries of PTAR. Entertainment series, news magazine shows, and game shows are examples of the programs sold by independent producers and syndicators of prime-time programs to network affiliates and independents. The list can be extended to include movies (whether for television, theatrical presentation, or cassette rental), sports programs, talk shows, news programming (local and national), musical variety, dramas, arts presentations, etc. Suppliers of these programs include not only those suppliers that actually are employed in a given year to produce programming for network prime time but also those producers willing and able to produce such programming in the event that market price increased above the competitive level. The list of suppliers will include television networks, independent syndicators, Hollywood movie studios, and international video producers. Buyers of such programming are not limited to television broadcasters but will include other purchasers of video programming such as cable networks and operators, direct broadcast satellite operators, videocassette distributers and, most recently, video programming affiliates of local telephone companies, which propose to offer video dialtone service. This market is clearly national and perhaps international in scope, because

television broadcasters obtain a large portion of their programs from national providers.

13. There is no evidence in the record that the networks exercise monopsony or oligopsony power in the video programming production market, i.e., that one (monopsony) or several firms (oligopsony) artificially restrict the consumption of programming and depress the market price paid for programming. Aside from the growth in the broadcast industry described above, there are nearly 150 national and regional cable networks, most of which transmit original, non-network programming. Also, other nonbroadcast video program distributors—such as cable, wireless cable, and satellite services—have grown. Finally, first-run syndicators are quite active as buyers (and sellers). According to the record, in 1994 the video entertainment programming purchased by each of the three networks accounted for approximately 9.4 percent of aggregate expenditures on video programming in the United States, after taking into account distribution fees associated with syndicated programming and home videos. These market shares indicate that demand for video programming is not concentrated, and that the networks clearly cannot be said to exercise undue market power in the video programming production market, either individually or together. The record also shows that the supply side of the video programming production market is no more concentrated than the demand side.

14. The Commission therefore concludes that no buyers or sellers, acting alone or together, are likely to be able to exercise undue market power in the video programming production market. In addition, entry barriers are low. In particular, it is unlikely that the three networks will be able to exercise market power in the video programming production market, either on the demand or supply side, if PTAR is repealed.

C. The National Television Advertising Market

15. Several proponents of PTAR argue that the three networks dominate the television advertising market. But these parties do not present sufficient evidence to support this argument. Moreover, PTAR was not adopted to address the structure or performance of the advertising industry. This is why the *Notice* did not explicitly seek information on television advertising markets. The Commission adopted PTAR due to concerns that the three networks dominated the production and delivery of television programming. Examination of video programming distribution and the video programming production market is thus directly relevant to whether PTAR is necessary under today's market conditions. The Commission cannot say the same for the television advertising market, nor are we persuaded that PTAR is the appropriate mechanism for addressing the networks' role in these markets.

II. The Costs of PTAR

16. In assessing the continuing need for PTAR, the Commission must take into account the costs the rule imposes on the networks, their affiliates, producers of network programming, television viewers, and the efficient functioning of the market. One obvious cost of the rule is that it restricts the programming choices of Top 50 Market Affiliates. They cannot air either network or off-network programming during the access period. One set of comments describes how the off-network restriction interferes with the smooth functioning of the network-affiliate relationship by raising the overall costs of network broadcasting. With PTAR in place, the affiliate must either make investments to produce programs itself, or it must purchase first-run programs from syndicators. In the latter case, the affiliate bears the transaction costs of establishing relationships with syndicators and independent programmers. In either case, the affiliate bears the added risk of how first-run programming will perform relative to known-to-be popular network reruns. As a result of these higher costs, the total of net revenues to be shared among networks and affiliates is made smaller by PTAR.

17. PTAR harms not only networks and affiliates, but the producers of network programming. The off-network restrictions has had the unintended effect of discouraging investment in prime-time programming. Producers rely to a great extent on their ability to sell reruns of their programs—*i.e.*, off-network programs—to recoup their costs and to earn a profit. The license fee the networks pay for the right to air prime-time entertainment programs often does not cover the costs of producing these programs. The off-network restriction, however, diminishes producers' ability to recoup unrecovered costs by artificially restraining the prices of off-network programming. It does so by eliminating the Top 50 Market Affiliates from the range of potential purchasers of this programming. By reducing demand, the prices for off-network shows are reduced. The Commission believes that PTAR produces costs and inefficiencies to viewers that are larger than the benefits, if any, of PTAR to viewers.

18. In addition, PTAR as a whole prevents the networks and their affiliates from taking advantage of network efficiencies during the access hour. Networks can deliver large audiences to advertisers, which in turn allows the networks and their affiliates to provide higher cost programming that is quite popular among audiences during prime time. While the parties dispute the size of the economic cost due to the loss of network efficiencies, the Commission concludes that this cost far exceeds PTAR's economic benefits.

III. Analyzing the Public Interest Need for PTAR

A. Increasing Opportunities for Independent Programmers

19. PTAR's principal purpose was to promote source diversity by strengthening existing independent television program producers and encouraging entry of new producers. In adopting PTAR, the Commission predicted that the rule would increase the net amount of diverse programming available to the viewing public and induce the entry of new program suppliers into the market.

20. A number of parties argue that PTAR has failed to promote these goals. They point out that four companies—Paramount, Warner Brothers, Fox, and King World—distribute over 95 percent of the first-run syndicated programming aired during the PTAR access period. Putting aside the question of who distributes access period programming, opponents of the rule also argue that PTAR has failed to increase diversity in terms of who produces such programming. Moreover, the rule has been criticized for actually lowering program quality and diversity. Without judging the quality of particular programs, the Commission agrees that PTAR, by eliminating network programming during the access hour, may have resulted in the loss of efficiencies that the networks and their affiliates may have enjoyed in the absence of the rule. The Commission notes, however that there are many variables that affect the number of program producers and program types in the market, with or without PTAR. Nevertheless, we recognize the limits of regulatory efforts to promote program diversity, and realize that PTAR prevents the use of network efficiencies during the access hour.

21. Mindful of these issues, the Commission turns to the critical question of whether PTAR is necessary today as a means of promoting the

growth of independent programmers and source diversity. In answering this question, it is important to remember that in adopting PTAR, the Commission cautioned that it was not its intention to carve out a competition free haven for syndicators or to smooth the path for existing syndicators. Rather, the central objective of the rule was to provide opportunity for the competitive development of alternate sources of television programs. The Commission no longer believes PTAR is necessary to provide this opportunity under today's market conditions. The Commission reached a similar conclusion in eliminating the fin/syn rules' restriction on network acquisition of financial interest and syndication rights in network prime time entertainment programming. In reaching this conclusion, the Commission dealt with the same source diversity concerns and stated that if profits are competitive, then the only reason to employ regulatory devices to protect producer profits is if we determined that, for some reason, the public required a greater array of producers than the market would normally bear. As in the fin/syn proceeding, no party has provided any reasoned justification for such a result here.

22. Repeal of PTAR will subject suppliers of first-run syndicated programming to greater competition during the access period. This competition in today's marketplace can provide incentives to provide more innovative, higher quality programming, all of which benefits the consumer. Repeal of PTAR will also eliminate the costs generated by the rule. Most importantly, prices for off-network programming will no longer be artificially constrained, which we expect will encourage investment in the production of network programming.

23. Proponents of the rule have not provided any evidence to support their claims that this competition will destroy the market for first-run non-network syndicated programming. The record indicates that first-run programming is often quite popular among audiences, and may very well be carried by network affiliates during the access hour in the Top 50 PTAR markets even after repeal of the rule. To the extent off-network or network programming would displace first-run syndicated programs from the Top 50 Market Affiliates, first-run programs should be able to find a place on independent stations, not to mention other outlets such as cable.

B. Fostering the Growth of Independent Stations and New Networks

24. PTAR provides independent stations greater access to off-network programming and prevents them from having to compete against network programming during the access hour. Proponents of PTAR argue that the rule is necessary to promote the Commission's outlet diversity goals by fostering the growth of independent stations and new networks. But the record does not conclusively show that repeal of either the off-network provision or the network restriction of PTAR will undo the growth of independent stations since the rule was adopted. Nor will repeal of the rule likely undermine the development of new broadcast networks, or otherwise harm the Commission's outlet diversity goals.

25. The number of independent television stations has grown by almost 450 percent since PTAR was adopted, from 82 stations in 1970 to over 450 today. The record indicates that advances in television design, the growth of cable penetration, and the growth in demand for television advertising all have strengthened independent television. Independents also have a robust supply of programming to turn to under today's market conditions. The repeal of PTAR is unlikely to threaten these advancements. Nor is there sufficient basis in the record to conclude that repeal will so undermine the ratings and profits of independent stations that our outlet diversity goals will be implicated. It is likely that repeal of the rule will subject these stations to greater competition in acquiring off-network programming and in attracting audiences during the access hour and prime time. But there is not sufficient evidence in the record to support the claims that this competition will result in dramatic ratings declines and revenue losses to an extent that threatens the overall viability of independent stations and their ability to satisfy their public interest obligations. Relatedly, there is no reliable evidence to indicate that repeal of PTAR will jeopardize the station base of the new networks or threaten their further development.

26. The Commission consequently concludes that PTAR is not warranted as a means of ensuring the growth of independent television stations or new networks. This is especially the case given the costs of the rule. The off-network provision discourages investment in network programming. Moreover, it is becoming increasingly inequitable to provide a competitive advantage to independent stations over network affiliates in today's marketplace. The networks and their affiliates, like independents, face growing competition from non-broadcast media.

27. The Commission reaches this conclusion by addressing three questions raised by the commenters: First, does the record show that the ''UHF handicap'' warrants affording independent stations a competitive advantage in the form of PTAR? Second, does the record demonstrate that PTAR is needed to support independent television stations' ratings and profitability and that repeal of PTAR would significantly harm outlet diversity? Third, does the record support the argument that the repeal of PTAR will frustrate the development of new networks?

1. The UHF Handicap

28. Proponents of the rule seek to justify PTAR by pointing to the signal reach disadvantage of UHF stations relative to VHF stations. They maintain that this ''UHF handicap'' places independent stations at a structural disadvantage since most of them are in the UHF band. Affiliates of the three major networks are predominantly VHF stations.

29. The Commission's review of the record, however, as well as Commission findings in other proceedings, leads it to conclude that the UHF handicap has been reduced to some extent. First, Congress and the Commission have taken a number of steps over the years to ameliorate this handicap by requiring television equipment improvements. Second, the growth of cable has resulted in a reduction in the UHF handicap with respect to those viewers that subscribe to cable. However, although cable has reduced the UHF handicap, the Commission understands that it may still affect some portion of viewers who are not cable subscribers.

30. While the UHF disparity continues for some viewers, we do not think the public interest is served by tying PTAR to its complete elimination. The rule does not and cannot address the technical disparities that still exist between some stations. Moreover, the rule has never been tailored to the UHF/VHF distinction. Rather, PTAR provides a competitive advantage to independent stations by limiting the programming options available to Top 50 Market Affiliates, even in cases where the affected network affiliates are themselves UHF stations. The Commission does not believe this is appropriate given today's market

conditions and the costs imposed by the rule. The handicap has been reduced. Affiliates, like independents, are facing increased competition in the television marketplace from non-broadcast sources. The Commission thus concludes that the UHF handicap that remains does not warrant continuation of PTAR.

2. PTAR and the Ratings, Growth, and Profitability of Independent Television Stations

31. The Impact of PTAR on Ratings and Station Growth. Proponents of the rule rely on a regression analysis set forth in the comments submitted by the Law and Economics Consulting Group (''the LECG Study'') to support their claims regarding the importance of PTAR to independent stations. The LECG analysis attempts to demonstrate that the adoption of each of the two components of PTAR (the three-hour network restriction and the off-network restriction) increased the ratings of independent stations. The same analysis also seeks to show that repealing PTAR will result in a 58 percent drop in access period ratings and in a carry-over 67 percent drop in the ratings for the first (following) prime-time hour for independent television stations.

32. After an extensive review of the LECG Study, the Commission concludes that the LECG Study, and the arguments advanced by parties based on this study, do not provide sufficient evidence to demonstrate that repeal of PTAR will result in significant ratings declines for independent stations. For the same reasons, the study does not provide reliable evidence that PTAR has as a historical matter increased independent station ratings. There are numerous flaws in LECG's analysis that lead the Commission to this conclusion, including the following: (1) LECG does not link its econometric model to an underlying conceptual model of behavior in the television industry; (2) LECG ignores to problem of hysteresis (*i.e.*, even if PTAR caused certain changes in the past, there is no guarantee that its elimination will reverse those changes); (3) LECG's statistical methodology links changes in independent station's ratings PTAR solely to PTAR, and does not take into account other regulations that have benefited these stations; (4) There are errors and gaps in LECG's data sets; (5) There seem to be problems with LECG's specifications of its equations and their estimation; and (6) LECG's analysis reports point estimates for regression coefficients without confidence intervals, making it impossible to confirm that LECG's predicted ratings decline for independent stations are statistically distinguishable from zero.

33. The Commission further observes that while independent stations will be forced to pay competitive prices for off-network programming in the absence of PTAR, they will not necessarily be outbid for such programming. In market 51–100, 76 percent of syndicated programs aired by network affiliates is first-run rather than off-network. Moreover, in 1993, two of the top five off-network programs broadcast in markets 51–100 were aired more often on independent stations than on affiliates. It is also unlikely that all network affiliates in a market will flock to off-network shows, given the incentive to counter-program with different program formats. In addition, in the event the networks and their affiliates opt to run network programming during the access hour, off-network fare will continue to be available to independents. Finally, in the event an off-network program is displaced from an independent station, the station can turn to first-run syndicated programming. First-run programming can generate higher ratings than off-network shows, with associated carryover ratings benefits.

34. The Commission also notes that the argument advanced in favor of giving a competitive advantage to independent stations, taken to its logical conclusion, would suggest that PTAR coverage be redefined so that it applies to smaller, and less financially secure, markets. Yet no party has proposed such a result. To the contrary, PTAR's benefits appear to flow mainly to the stronger independent stations in the country. In fact, these stations generally have affiliated with one of the new networks or are part of a jointly owned station group. According to comments submitted by NBC, there is not a single independent station in the top 50 markets showing a top-five rated off-network program that is (1) a UHF station that is (2) not affiliated with Fox, UPN, or WB, and/or (3) not owned by a company owning three or more stations. Thus, the impact of repeal of the rule may primarily be felt by the stronger independent stations. In addition, these stations participate in joint purchasing or production arrangements that may ameliorate some of the effects of PTAR's repeal on program prices.

35. Growth in Numbers of Independents. One of the reasons that the LECG Study and INTV claim as support for the proposition that repeal of PTAR will substantially hurt UHF independent stations is that the adoption of PTAR allegedly was responsible for significant growth in the number of independent stations, albeit not until 5–15 years later. However, a study submitted by Economics, Inc. (''EI''), shows that LECG's model can be used to demonstrate that PTAR is *not* responsible for the increase in the number of independent stations. Thus, the Commission cannot conclude that PTAR's adoption caused a significant increase in the number of independent stations. Nor can the Commission therefore conclude that PTAR's repeal will cause the large reduction in the number of independent stations claimed by the rule's proponents.

36. The impact of PTAR on Profits and Programming. Even if the Commission assumes that PTAR proponents are correct in their prediction of a ratings decline for independent stations in the event PTAR is repealed, they have not demonstrated how that would affect independent stations and the future development of new networks. In particular, LECG has not provided any convincing estimate of how a decline in audience share during 1 or 2 hours of prime time, would lead to a large decline in station revenues and a resulting decline in station profits. Proponents of the rule have thus not provided any reliable basis to find that the profits of independent stations would decline significantly. More importantly, there is no reliable evidence in the record to support these parties' claims that repeal of the rule will so affect the financial health of independent stations as to force stations off the air or undermine their ability to provide public interest programming, including news and other public affairs programming.

37. What the record does show is a generally healthy financial picture for independent stations. Profit data published by the National Associate of Broadcasters (''NAB'') indicate that the average independent station has generally been profitable, at least since the mid-1980s. The average UHF station has been profitable since 1992 after a number of unprofitable years through the 1980s. This strong financial picture extends to the independent stations not affiliated with the largest of the new networks, Fox. These stations reported, on average, 1993 profits of four million dollars per station. UHF non-Fox affiliated independents reported average annual profits of $1.5 million per station in 1993. Also, these average profits understate profitability in the largest markets, those to which PTAR applies.

38. Conclusions. The Commission thus concludes that PTAR, which has become overly broad and inequitable, is not necessary to provide independent

stations a competitive advantage relative to the Top 50 Market Affiliates. Independent stations may face greater competition in programming the access hour without PTAR. But there is no reliable evidence that this will so jeopardize the financial health of independent stations as to implicate public interest concerns, particularly those relating to outlet diversity.

3. Repeal of PTAR and New Broadcast Networks

39. 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. Proponents of the rule argue that repeal will severely harm independent stations and, in turn, harm the growth of UPN and WB. 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 networks, especially the Fox network. 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.

40. 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. 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.

C. Reducing Network Ability to Dictate Affiliate Programming Choices

41. 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).

42. While advocating repeal of the off-network provision of PTAR, 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. The record also shows that affiliates rarely preempt prime time network programming, and that affiliate agreements are often structured to discourage preemption. 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 four networks.

43. On balance, however, the Commission does 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. 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. 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. Finally, there are today many more options for obtaining programming even without having a network affiliation.

44. The Commission notes that it is 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.

45. The Commission thinks 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 its other rules regarding the network-affiliate relationship. 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. These rules, and their corollary rulemaking proceedings, are better tailored to weigh these 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.

IV. Summary of Findings and Transition

46. The record shows that 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. The record further shows that there is no public interest reason for continuing PTAR as a means of providing independent stations or new broadcast networks a competitive advantage relative to network affiliates in programming the access hour. Finally, the Commission finds that PTAR is not an appropriate mechanism for safeguarding affiliate autonomy. The Commission thus finds that the public interest does not warrant the continuation of PTAR, especially given the costs the rule imposes.

47. The *Notice* sought comment on whether, in the event the Commission concluded that PTAR should be eliminated, it should repeal the rule immediately or adopt a transition mechanism that would sunset the rule after a certain period of time. As noted above, the record 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 Commission's conclusion to repeal the rule. The Commission does, 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. 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.

48. The Commission rejects transition proposals that would continue PTAR for an indefinite or overly long period of time. 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 in the public interest; prolonging PTAR simply as a means of continuing to confer competitive benefits on independent stations therefore cannot be justified.

49. Nor does the Commission believe the scheduled repeal of the remaining fin/syn rules calls for a longer transition period for PTAR. 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. The Commission also does 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 it did in the fin/syn proceeding. 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. Phased deregulation is less useful when the transition period is used 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 the Commission has adopted is not motivated by any uncertainty over its conclusion to repeal PTAR, but rather by a concern that immediate repeal could be unnecessarily disruptive. The Commission will thus schedule repeal of the rule in its entirety for August 30, 1996.

50. Other Issues. Given the Commission's conclusion that PTAR no longer serves the public interest and should be repealed, the Commission need not address the argument advanced by a number of parties that the rule is contrary to the First Amendment. The Commission also does not believe it is appropriate to alter the definition of ''network'' to include the new networks as urged by some parties. The Commission is 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. 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. Finally, given the Commission's decision to repeal the rule, we will not modify the current exemptions to PTAR as proposed by a number of commenters. The proposed revisions to the definition of a ''network'' and the rule's exemptions are not appropriate for the one-year transition the Commission has 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 PTAR. The Commission will consequently retain PTAR in its existing form during the one-year transition period.

V. Administrative Matters

51. *Reason for the 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.

52. *Objective of this Action:* 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 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.

53. *Legal Basis:* Authority for the actions taken in this Report and Order may be found in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i) and 303(r).

54. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:* 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.

List of Subjects in 47 CFR Part 73

Radio broadcasting, Television broadcasting.

Rule Changes

Part 73 of Title 47 of the 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. Sections 154, 303, 334.

§ 73.658 [Amended]

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

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–21319 Filed 8–28–95; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 217 and 227

[Docket No.950427119–5214–06; I.D. 081495A]

RIN 0648–AH98

Sea Turtle Conservation; Restrictions Applicable to Shrimp Trawling Activities; Additional Turtle Excluder Device Requirements Within Certain Fishery Statistical Zones

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary additional restrictions on fishing by shrimp trawlers in the inshore and nearshore waters off Texas and a portion of Louisiana to protect sea turtles; request for comments.

SUMMARY: NMFS is imposing temporary additional restrictions on shrimp trawlers fishing in all inshore waters and offshore waters out to 12 nautical miles (nm) (22.2 km) from the COLREGS line, between the United States-Mexico border and 93° W. long. This area includes all of the Texas coast and the western portion of the Louisiana coast, and includes NMFS shrimp fishery statistical Zones 17 through 21. The restrictions include prohibitions on the use by shrimp trawlers of: Soft turtle excluder devices (TEDs); try nets with a headrope length greater than 15 ft (4.6 m), unless the try nets are equipped with approved TEDs other than soft TEDs; and a webbing flap that completely covers the escape opening in NMFS-approved top-opening TEDs. This action is based upon a ruling from U.S. District Judge, Southern District of Texas, Galveston Division, in *Center for Marine Conservation* v. *Brown*, No. G–94–660 (S.D. TX, Aug. 1, 1995) in order to facilitate administration and enforcement of the court order.

DATES: This action is effective August 24, 1995 until 30 minutes past sunset (local time) on September 10, 1995. Comments on this action must be submitted by September 26, 1995.

ADDRESSES: Comments on this action and requests for a copy of the supplemental biological opinion (BO) prepared for this action should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Charles A. Oravetz, 813–570–5312, or Phil Williams, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take and mortality of sea turtles as a result of shrimp trawling activities have been documented in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions set forth at 50 CFR 227.72. The incidental taking of turtles during shrimp trawling in the Gulf and Atlantic Areas (defined in 50 CFR 217.12) is excepted from the taking prohibition, if the sea turtle conservation measures specified in the sea turtle conservation regulations (50 CFR part 227, subpart D) are employed. The regulations require most shrimp trawlers operating in the Gulf and Atlantic Areas to have a NMFS-approved TED installed in each net rigged for fishing, year round.

The conservation regulations provide a mechanism to implement further restrictions of fishing activities, if necessary to avoid unauthorized takings of sea turtles that may be likely to jeopardize the continued existence of listed species or that would violate the terms and conditions of an incidental take statement (ITS) or incidental take permit. Upon a determination that incidental takings of sea turtles during fishing activities are not authorized, additional restrictions may be imposed to conserve listed species and to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species. Restrictions may be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each (50 CFR 227.72(e)(6)).