TABLE 1.—GENERAL SUPERFUND SECTION—Continued

State	Site name	City/County	Notes (a)
* * * * * * *			
NY	Consolidated Iron and Metal	Newburgh.	
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NY	Shenandoah Road Ground Water Contamination	East Fishkill.	
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OR	Taylor Lumber and Treating	Sheridan.	
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PA	Lower Darby Creek Area	Delaware/Philadelphia Counties.	
* * * * * * *			
TX	Malone Service Company, Inc	Texas City.	
* * * * * * *			
VT	Elizabeth Mine	Strafford.	
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[FR Doc. 01–14616 Filed 6–13–01; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 00–108; FCC 01–133]

RIN 4211

Broadcast Services; Radio Stations, Television Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the Commission's ''dual network'' rule. That rule effectively prevented mergers among the four major television broadcast networks (ABC, CBS, Fox and NBC) or between one of the four major networks and the UPN and/or the WB television networks. The action taken eliminates that portion of the rule that effectively prevents mergers between a major television network and the UPN and/or WB television networks.

DATES: Effective August 13, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Roger Holberg or Danny Bring, Mass Media Bureau, Policy and Rules Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Report and Order* (*R&O*) in MM Docket No. 00–108, FCC 01–133, adopted April 19, 2001, and released May 15, 2001. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC and may also be purchased from the Commission's copy contractor, International Transcription Service (202) 857–3800, 445 12th Street, SW., Room CY–B402, Washington, DC. This *R&O* is also available on the Internet at the Commission's website: *http://www.fcc.gov.*

Synopsis of Report and Order

I. Introduction

1. In this *R&O* we amend § 73.658(g), the ''dual network'' rule, to permit one of the four major television networks—ABC, CBS, Fox and NBC—to own, operate, maintain or control the UPN and/or the WB television network. The rule already permits any of the four major television networks to own any television network created subsequent to the date that the Telecommunications Act of 1996 was enacted. By this action, we recognize that the economics of the broadcast television network industry have changed to the point that retention of the rule in its current form is no longer in the public interest.

II. Background

2. The dual network rule goes back some sixty years. The Commission first adopted a dual network rule in 1941, following its investigation of ''chain'' broadcasting. The rule adopted then mandated a flat prohibition on an entity maintaining more than a single radio network. As we noted in the *Notice of Proposed Rule Making* (''*NPRM*'') in this proceeding (65 FR 41393 (July 5, 2000)), when the Commission extended the rule to television networks in 1946, it determined that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations.

3. Title 47 CFR 73.658(g) sets forth the current version of the dual network rule. It reflects the provisions of section 202(e) of the 1996 Act. That section directed the Commission to modify its dual network rule to prohibit a television station from affiliating with any entity that owns more than one of the four major networks (ABC, CBS, Fox, or NBC) or one of the four major networks and an emerging English-language network which, on the date of the 1996 Act's enactment, ''provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes. * * *'' The legislative history of this provision indicated that it was intended to apply to only the UPN and WB television networks. Moreover, these two networks were the only two entities other than the four major networks that met this definition of a network on the relevant date. (Both UPN and WB argue that they did not meet the legislative definition of a network for these purposes. We rejected UPN's argument in this regard in considering the Viacom/CBS merger. We need not reach the merits of The WB Network's argument in this regard given our resolution herein, which renders its argument moot.)

4. The current dual network rule differs markedly from the dual network rule that existed from 1946 to 1996. The

earlier rule prohibited a broadcast station from affiliating with a network organization that maintained more than one broadcast network. As such, the old rule effectively prevented network organizations from creating a new broadcast network or merging with an existing broadcast network. In contrast, the current dual network rule permits a broadcast station to affiliate with a network organization that maintains more than one broadcast network. Such affiliation is prohibited, however, if the multiple network combination is created by a merger among ABC, CBS, Fox, or NBC, or a merger between one of these four networks and UPN or WB. While the current rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations become multiple broadcast networks. The current rule facilitates the maintenance of multiple broadcast networks created through internal growth and new entry. A broadcast network may develop multiple broadcast networks by creating new broadcast networks from scratch, or acquiring video networks from nonbroadcast media (*e.g.,* cable or satellite) and moving them to broadcast. In addition, the current rule facilitates the creation of multiple broadcast networks by permitting (1) mergers between a broadcast network created before the 1996 Act (*i.e.,* ABC, CBS, FOX, NBC, UPN, and WB) and broadcast networks created subsequent to the 1996 Act (*e.g.,* PAXtv); (2) mergers between broadcast networks created subsequent to the 1996 Act; and (3) a merger between UPN and WB.

5. Section 202(h) of the 1996 Act also requires the Commission to review its broadcast ownership rules, including rules such as the instant rule that were amended pursuant to Section 202, every two years beginning in 1998 and to ''repeal or modify any regulation it determines to be no longer in the public interest.'' In our first biennial review proceeding we examined, among other broadcast ownership rules, the dual network rule. Section 202(h) requires us to determine whether any of these rules remained ''necessary in the public interest as the result of competition.'' As a result of our analysis according to that standard we tentatively determined that the component of the dual network rule that currently prevents the UPN or WB networks from being owned by one of the four major networks may no longer be necessary in the public interest as a result of competition

6. As a result of the findings made in the *Biennial Review Report,* we issued the *NPRM* initiating the instant proceeding. In the *NPRM,* we analyzed the dual network rule pursuant to a framework that involved concepts developed in the transaction cost economics (''TCE'') literature. From a TCE perspective, the economic organization of firms and industries reflects specific attributes of the contracting process between buyer and seller. We stated that application of TCE concepts suggests that vertical integration between program suppliers and major networks may produce substantial economic efficiencies that might benefit both advertisers and viewers. We also stated that horizontal mergers between a major network and an emerging network may produce efficiencies that might benefit both advertisers and viewers. Moreover, we found that there should be little or no adverse effect on the price for network advertising as the result of such a merger. Therefore, we proposed to eliminate the major network/emerging network merger prohibition from our dual network rule.

III. Discussion

7. In this *R&O,* we consider our proposal to relax the dual network rule by eliminating the restriction on mergers between the top 4 broadcast networks and UPN or WB. Our focus, pursuant to section 202(h), is whether this aspect of the rule remains ''necessary in the public interest as the result of competition.'' Accordingly, we first identify several competitive changes and trends in the video services market that we consider relevant to the continued necessity for the rule. We then apply the framework, developed in the *NPRM,* for analyzing both the vertical and horizontal competitive impacts of the potential combinations that are currently prohibited by the rule. After addressing the impact of the rule on competition, we turn to the impacts of maintaining or changing the rule on diversity, the other primary public interest concern. Weighing these factors, we decide, as proposed in the *NPRM,* to eliminate that portion of the rule that effectively prohibits mergers between UPN or WB and one of the four major networks. We conclude that this change will not harm, and indeed is likely to promote, both competitive efficiency and diversity. Although some commenters also urged us to go beyond the tentative conclusions of the *Biennial Review Report* and the *NPRM* and to eliminate the dual network rule in its entirety, we note that the questions presented in the *NPRM* related solely to the emerging networks portion of the rule. We therefore decline to eliminate the dual network rule in its entirety at this time, finding that more information and analysis would be necessary to address the more complex issues that action would involve.

8. *Marketplace Developments.* Since the enactment of the 1996 Act, significant changes have occurred to the competitive environment in which networks, including emerging networks, operate. These changes, which have occurred both within the television broadcast industry and throughout the multichannel video programming distribution (''MVPD'') industry, have substantial implications for both the competition and diversity concerns that underpin the dual network rule. We will first detail some of these developments and then turn to an analysis of the components of the rule in light of these changes.

9. Within the broadcast industry, the number of commercial and noncommercial television stations has increased from 1550 in August 1996 to 1663 as of September 2000. This represents an increase of over 7% in 4 years. During roughly the same time, prime time viewership among the top six broadcast networks declined from 71% in 1996 to 58% in 2000. Thus, within the last 4 years, there has been both a small but significant increase in the number of television broadcast outlets available to viewers (and potentially to new broadcast networks such as PAXtv) and a substantial decrease in the dominance of broadcast networks in terms of viewership.

10. Accompanying, and largely causing, the reduction in broadcast network viewership during the last 4 years has been the steady expansion of the cable industry. At the end of 1995, the cable industry had a penetration rate of 67.8% of homes passed. By 2000, the penetration rate had grown slightly to 69.7%. While this represents only an incremental increase in penetration, the increase is significant when viewed in connection with the increase in channel capacity on cable networks. As of October 1995, 15.6% of cable systems offered 54 or more channels of video programming, and 63.8% of cable systems offered between 30 and 53 channels, indicating that 79.4% of systems provided 30 or more channels of programming. In 2000, the number of high capacity cable systems was significantly higher. By 2000, 24.2% of cable systems offered 54 or more channels of programming. With the percentage of cable systems offering 30–53 channels virtually unchanged since 1996, the increase in high capacity cable

systems means that in 2000 86.6% of cable systems offered 30 or more channels of programming to subscribers. We anticipate that channel capacity on cable systems will continue to expand as more cable systems adopt digital technology.

11. Because each additional channel of capacity on a cable system represents a distinct avenue that may be used to deliver video programming, the increase in channel capacity provides video programming producers a greater opportunity to distribute their programming to consumers. Many cable networks have been formed to take advantage of this opportunity, and, as a whole, they appear to have been successful in capturing a significant portion of viewers over the last 4 years. In 1996, there were 162 cable programming services; by 2000, the number had increased to 214. In 1996, cable networks had a 30% full-day audience share; in 2000, cable networks' share was 45.5%. As channel capacity grows, we expect that new cable networks will be formed and the reach of existing cable networks will be extended.

12. Perhaps the most significant competitive change over the last 4 years has been the rapid growth of the Direct Broadcast Satellite (''DBS'') industry. When the 1996 Act was enacted, DBS service had been available to consumers for less than 2 years. Although the DBS industry had garnered 3.82 million subscribers by October 1996, this represented only 5% of MVPD subscribers, and many of these subscribers were located in rural areas not served by cable. DBS also suffered from certain competitive disadvantages, such as the inability to offer subscribers access to local broadcast signals via the satellite signal. Over the last 4 years, the industry has significantly matured. By 2000, the DBS industry had almost 13 million subscribers, representing more than 15% of MVPD households. Moreover, bolstered in part by the new statutory right to provide ''local-into-local'' broadcast service, DBS has grown from a predominantly rural service to a viable alternative to cable in all parts of the country.

13. The growth of the DBS industry since 1996 significantly affects the opportunities available to network programming producers and consumers. Currently, the two operating DBS providers, DirecTV and EchoStar, each offer subscribers access to hundreds of channels of video programming. As with a cable channel, each DBS channel provides an independent avenue through which producers of video programming can distribute, and viewers may access, video programming. Although a certain number of DBS channels are used to provide the same network programming found on cable channels, a DBS operator could choose, except where must carry obligations are involved, to provide regional or local programming in response to market demand.

A. Competition

14. *Mergers Between A Major Network and UPN or WB.* The developments in the broadcast, cable, and DBS industry have had a significant effect on the competitive landscape in which broadcast networks operate. Where almost 84 percent of households subscribe to an MVPD service, and as television broadcast stations and MVPDs, because of the increase in the number of available channels, seek a greater number of attractive programs to offer their viewers, new opportunities are created for producers to obtain distribution channels. Moreover, non-broadcast networks, whose niche programming can provide advertisers with more focused demographics, may continue to erode the audience share of broadcast networks and compete for advertising revenue, especially with the emerging networks. While we cannot definitively predict how these competitive forces will play out, we believe that competitive developments since the enactment of the 1996 Act have diminished the importance of obtaining broadcast affiliates to establish a successful video programming network. We believe that these developments require us to consider whether the dual network rule should be modified.

15. As discussed above, markets for video services have broadened and grown, reflecting shifts in market demand and supply in recent years. Competitive rivalry between and among suppliers of video services has intensified as consumers find increased choice of video programming and new vendors that supply video programming and video delivery services. Increased competitive rivalry intensifies the pressure on management to (1) improve internal operating efficiency by using inputs of production more effectively and organizing the firm to reduce redundancy in staffing or business functions; and (2) reorganize the firm through horizontal and vertical mergers to achieve economies of scale and scope. We focus here on the effect our rules may have on the networks' ability to achieve economic efficiencies through vertical and horizontal integration. As explained in the *NPRM,* TCE provides a conceptual framework for assessing possible gains and losses in organizational efficiency that may result from the intensified pressure on firm management to improve operating efficiency induced by the greater competitive rivalry confronting the firm.

16. In the *NPRM,* the Commission noted that the commercial television broadcast network industry today consists of a number of vertically-integrated firms. For example, ABC (a broadcast network) is vertically integrated with Disney (a program supplier), Fox (a broadcast network) is vertically integrated with 20th Century Fox (a program supplier), UPN (a broadcast network) is vertically integrated with Viacom (a program supplier), and WB (a broadcast network) is vertically integrated with AOL Time Warner (a program supplier). In addition to these well-know examples, NBC produces programs through NBC Studios and CBS produces programs through CBS Enterprises (formerly Eyemark Entertainment and King World Productions). Because mergers between broadcast networks may involve mergers between vertically-integrated firms, the Commission examined and sought comment on (1) the potential efficiencies of vertical integration between a program supplier and a broadcast network and (2) the effects of a horizontal merger between two broadcast networks.

17. Our analysis of the economic effects of the dual network rule decomposes a hypothetical merger between two vertically-integrated broadcast networks into two parts. First, the relationship between a program supplier and a broadcast network is examined to determine whether vertical integration is either more or less efficient than simply negotiating an arms-length contractual relationship between the program supplier and the broadcast network. The comparative assessment of the efficiency of contracting versus vertical integration relies on TCE concepts. Second, the effects of a horizontal merger between two broadcast networks is assessed by relying on measures of market concentration and an analysis of price competition in the national market for network television advertising. Finally, the economic gains or losses resulting from the analysis of vertical integration are combined with the expected economic gains or losses resulting from the horizontal merger to determine the overall benefits and costs of a merger between two vertically-integrated firms.

18. As explained in the *NPRM,* our economic analysis focuses on the contemporary contracting environment between television networks and

program producers. We have concluded that specific attributes of television network output and the complexities of contract negotiations between a television network and a program supplier tend to favor the replacement of market contracting with a vertical organizational relationship between the network and the program supplier. Applying TCE concepts, we further conclude that this substitution of vertical integration for a contractual relationship is most likely an economically-efficient response to the hazards of market contracting rather than the exercise of market power by the television network. Thus, the vertical integration of program suppliers and television networks (1) reflects competitive pressures induced by more intense competition for viewers that now enjoy greatly expanded video programming choices compared to a decade ago; and (2) minimizes transaction costs by eliminating the costly adverse effects of negotiating contractual relationships between the programmers and the networks. We conclude that the merger of a program supplier with a broadcast network would result in transaction efficiencies compared to a contractual relationship between the network and the program supplier. Given the growing competition for viewers of video programming, we anticipate that the efficiencies of vertical integration between the programming assets of an emerging network and a major network could accrue to the benefit of consumers.

19. We also explained in the *NPRM* how our analytical framework allows us to assess the horizontal effects of the merger of an emerging network with a major network on the national market for network advertising. We explained that within the national television advertising market, which includes national spot sales by affiliated and independent stations, a *strategic group* consisting of the major networks, *i.e.,* ABC, NBC, CBS, and Fox, can be identified. (A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies.) At present, the network firms comprising this strategic group provide the greatest reach of any medium of mass communications. Major broadcast networks attract much larger audiences than emerging broadcast networks. Since delivering a mass audience is becoming more difficult for all media with the proliferation of media outlets, media that can still produce mass audiences have become more valuable. As a result, notwithstanding some recent erosion in revenue growth, broadcast networks have achieved substantial gains in revenues in recent years despite their loss of audience relative to years past. The major mobility barrier impeding entry into the major network strategic group is the availability of affiliated stations. Mobility barriers are barriers to entry that deter the movement of a firm *within* a given industry from shifting from one strategic group to another. Different strategic groups will be defended by different mobility barriers that vary in their effectiveness in restricting entry into a given strategic group. In general, firms protected by high mobility barriers will have greater profit potential than firms in other strategic groups protected by low mobility barriers. Notwithstanding some growth in the number of stations over the last decade, obtaining sufficient affiliated stations remains a major obstacle to developing a new broadcast network that can achieve sufficient national reach to be attractive to national advertisers seeking to reach a mass audience.

20. With respect to our analysis of the potential benefits of vertical integration of a program producer and a television network, Viacom was the only commenter to specifically address the potential efficiencies associated with vertical integration, and Viacom's pleadings support the Commission's findings. With respect to our analysis of the effects of horizontal integration of an emerging network with a major network, no commenter disagrees with our finding that a horizontal merger between a major network and an emerging network (*e.g.,* UPN or WB) would generate net economic benefits.

21. We conclude that a merger between an emerging network, such as WB or UPN, and a major network is likely to produce net benefits to network advertisers and viewers of network television. With respect to vertical integration, such a merger may produce significant efficiencies by internalizing the contentious issue of program production risk-sharing within a vertical relationship. For example, an emerging network acquired by a major network provides the major network with an additional ''window'' for the distribution of network programming. In effect, this additional window allows the merged network to broadcast the same program in different time slots in the same market if both the major and emerging networks have affiliates in the same city. Alternatively, if the emerging and major network do not have affiliates in the same city, then the merged network entity will now reach more households than before the merger. In either case, the fixed costs of program production are spread over additional viewers in different time slots or additional cities. As a result, the effective program cost per viewer is reduced in either case. Similarly, a network program that fails, or is only marginally successful, on the major network's affiliated station might succeed when broadcast to the niche audience reached by the affiliates of the emerging network. The risks of network program development are clearly attenuated for the merged networks as a consequence of reaching additional viewers at different times or in additional cities or with audience attributes that may differ from the mass audience ordinarily targeted by a major network.

22. With respect to horizontal integration of a major and emerging television network, the merger should have little or no adverse effect on competition or pricing in the market for television network advertising, since major and emerging networks compete in different strategic groups. To the extent that the emerging network continues to offer programming following the merger that targets niche or special interest audiences, then the welfare of viewers of both mass audience and niche programming should not be adversely affected by the merger and may indeed be advanced by the resulting efficiencies.

23. *Mergers Among the Four Major Networks.* After the rule change we are making herein, the only multiple network operations that will be prohibited by our dual network rule will be the common ownership of multiple broadcast networks created by mergers between ABC, CBS, Fox, or NBC. Although the questions presented in the *NPRM* related solely to the emerging networks portion of the dual network rule, Fox, Viacom, and WB argue for elimination of the rule in its entirety. They contend that the rule, established over fifty years ago, is no longer justified in light of prevailing conditions. They argue that new competitors—both broadcast and nonbroadcast—have entered and attracted large portions of the market formerly controlled by the networks. They also argue that developments over the past 20 years have increased competition, reduced the networks' share of television viewership, and reduced the networks' share of television advertising revenue. These developments, they conclude, support elimination of the dual network rule.

24. The questions presented in the *NPRM* related solely to the emerging networks portion of the dual network rule; the question of eliminating the rule

in its entirety was not squarely presented to this Commission for review. Therefore, we will not address that issue in this proceeding. This issue was considered in the 1998 Biennial Review, which was completed in 2000.

B. Diversity

25. In addition to the competitive concerns discussed above, the modification of the dual network rule involves diversity issues. In fact, the only commenter urging retention of the entire current dual network rule did so on the basis that the proposed modification would undermine traditional Commission diversity concerns. In this regard, UCC argues that the *NPRM* in this proceeding ignored the ''vital first amendment issues that animate the dual network rule.'' Allowing one of the top four networks to buy UPN and/or WB will, by definition, result in the elimination of one or more independently owned broadcast outlet at the national level. The record demonstrates that emerging networks make a significant contribution to diversity of programming at the national level and the stability of their affiliates, thus promoting outlet diversity at the local level. The record also demonstrates, however, that maintaining the dual network rule in its current form would actually jeopardize those contributions to diversity, rather than promote them.

26. The record shows that some form of relief from the dual network rule will promote the viability of the UPN network and thus promote diversity at the national level. Viacom now owns and operates both the CBS and UPN broadcast networks. Absent today's action, Viacom/CBS would have until May 4, 2001, to come into compliance with the rule, which, as a practical matter, would involve divestiture of UPN. The record reflects that UPN is a financially struggling network that has suffered losses in every year of its existence. The reasons for UPN's financial struggles include competition from both broadcast and non-broadcast video sources, decreasing broadcast network viewership, and diversion of investment capital to other competitors partly as a result of the current dual network rule. These factors affect both UPN and the WB networks. Given these factors, there is substantial likelihood that the present level of independent network ownership would not be maintained absent the action we take herein. In addition, as noted above, our analysis suggests that the UPN broadcast television network benefits from the efficiencies of vertical integration with Viacom's program production facilities. Divestiture would deprive UPN of these efficiencies.

27. Retaining the current version of the dual network rule could also have cascading adverse consequences on diversity at the local level. Affiliates of a failed network, without network affiliation and the programming it brings, may not be able to sustain the increases in the cost of programming that they would have to bear should they have to purchase programming in the syndication market. Additionally, such affiliates would be deprived of a recognized brand that is promoted locally by each affiliate and nationally by the network and of first run programming that affiliates would have to replace by purchasing programming in the syndication market. Thus, the failure of a network could imperil the position of many of that network's affiliates and have a negative impact on diversity of outlets at the local level.

28. Additionally, we agree with those that argue that the proliferation of video programming networks warrants relaxing the rule. At present, some 83.8 percent of television households obtain their service from an MVPD such as cable, direct broadcast satellite or Multichannel Multipoint Distribution Service. Most of the subscribers to such systems have available to them a cornucopia of video services. As discussed above, nearly 87 percent of cable television systems have 30 or more channels. These systems serve 99 percent of cable subscribers. Although many of the video programming networks presented on cable systems are vertically integrated with cable multiple system operators, they nevertheless contribute to diversity by providing programming to most viewers that is from a source other than the six broadcast television networks covered by the instant rule. Such developments have diminished the importance of maintaining UPN and WB as independently owned network ''voices.''

29. Also, we agree with commenters that a major network and an emerging network under common ownership would have a strong economic incentive to diversify their program offerings, particularly by increasing service to minority or ''niche'' tastes and interests. A single broadcast network has the incentive to attract the largest possible audience with mass appeal programming (which is similar to the programming offered by its rivals). However, if two networks are owned by a single entity, the entity has an incentive to attract an array of viewers with differing interests to produce the largest combined audience for the overall enterprise. This allows for the major network to pursue mass tastes, with the smaller network programming to minority and niche tastes.

30. The record also supports the proposition that eliminating the emerging network portion of the dual network rule will not adversely affect the provision of news and public affairs programming. As noted by Viacom, common ownership may offer the only realistic potential for the carriage of a substantial amount of news and public affairs programming by affiliates of the emerging network by allowing the resources of the larger network to be re-deployed in ways that serve the viewers of the emerging networks by providing them with news and public affairs.

C. Additional Matters

31. The WB Network argues that if we relax the dual network rule we are obligated to also eliminate the cable/television cross-ownership rule. Otherwise, it contends, we will actually be allowing only the UPN Network to be merged with a major network because the cable/television cross-ownership rule precludes The WB from such a merger. It argues that the Commission cannot, as a matter of law, grant regulatory relief to certain competitors but not equivalent relief to others. Since the cable/television cross-ownership rule ''stands in the way of similar creative business arrangements with an established network, The WB cannot be part of a corporate family with any attributable interests in licensed broadcast stations in numerous major DMAs. This, it asserts, violates fundamental fairness and administrative law that requires the Commission to accord comparable treatment to similarly situated parties.

32. Modification or elimination of the cable/television cross-ownership rule is not within the scope of the *NPRM* issued in this proceeding. We will consider it again in a future proceeding or our next biennial review of our broadcast ownership rules. WB network is receiving equal treatment by reason of the modification of the dual network rule we are making herein.

33. Additionally, the UPN and WB Networks have each raised arguments that the provision of the 1996 Act that defines an emerging network does not include it. Given our decision herein, this issue is moot.

34. Finally, we have previously granted Viacom, Inc., a period of twelve months, commencing May 3, 2000, within which to come into compliance with the dual network rule. Given our action herein, we will extend that temporary waiver of the rule until the

effective date of the instant rule amendment.

IV. Conclusion

35. Based upon the record and our own analysis, we find that the benefits of vertical integration between a program producer and television networks will not be lost and may well be augmented by a merger of one or more emerging networks with a major network. Additionally, the horizontal integration of an emerging and major network should not adversely affect competition or pricing in the relevant television advertising markets and may produce merger-specific efficiencies that provide new benefits to viewers and advertisers not otherwise available prior to the merger. The aggregation of the possible efficiencies of both vertical and horizontal integration that provide the resources for viewer and advertiser benefits support our decision to abolish today that part of the dual network rule that prohibits the merger of one or more emerging network with a major television network.

36. With regard to diversity, we do not believe that the loss of up to two independently owned networks that potentially could result from our modification of the dual network rule would seriously compromise our diversity concerns. On the contrary, diversity of programming will be fostered at the national level as a result of our permitting struggling emerging networks to combine with major networks, thereby allowing them to continue serving their current niche and minority audiences. At the local level, our action will contribute to outlet diversity by strengthening the emerging networks and thus promoting the stability of their affiliated stations. Therefore, on balance, we believe that the modification of the dual network rule is warranted on diversity grounds, as well.

37. We do not believe that a waiver is the better approach to this issue and so do not reach those arguments of commenters favoring such relief. The subject portion of the dual network rule is unusual because, while in form it is a rule of general applicability, in effect it only applies to one entity other than UPN (*i.e.,* the WB Network). Thus, the rule is so narrow that the specific facts concerning one of the only two parties to which the rule applies are quite relevant. Also, the two networks are similarly situated from the standpoint of economic analysis. Both UPN and WB are nascent broadcast networks that target younger audiences compared with the major networks. In addition, both networks use UHF stations and LPTV facilities that result in a substantial coverage disadvantage compared with the major networks. Our foregoing analysis pertains equally to UPN and WB and demonstrates that distinct benefits for either or both of them can be derived generally from elimination of that section of the rule that prohibits these two entities to merge with a major network. Accordingly, elimination of that provision of the rule itself, rather than grant of waiver relief to only one of the two parties affected by that portion of the rule, is appropriate.

38. In view of the foregoing, we conclude that the dual network rule should be amended by eliminating the provision prohibiting the common ownership of one of the four major networks and the emerging networks. We will reexamine that part of the dual network rule that prohibits mergers between the major networks in a future proceeding, possibly our next Biennial Review. At that time we will explore in greater detail how repeal or modification of that part of the rule may affect diversity and consider whether the rule remains necessary in the public interest as the result of competition.

V. Administrative Matters

39. *Paperwork Reduction Act of 1995 Analysis.* This *R&O* has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new reporting requirements on the public.

40. *Regulatory Flexibility Analysis.* Pursuant to the Regulative Flexibility Act of 1980, as amended, 5 U.S.C. 601 *et seq.*, the Commission's Final Regulatory Flexibility Analysis in this *R&O* is as follows. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in this proceeding. The Commission sought written public comment on the proposals in this *NPRM,* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

41. *Need For, and Objectives of, Report and Order.* In February 1996, the Telecommunications Act of 1996 (''1996 Act'') was signed into law. Section 202 of the 1996 Act directed the Commission to make a number of significant revisions to its broadcast media ownership rules. Section 202(h) also requires us to review our broadcast ownership rules every two years commencing in 1998. One of the rules reviewed in our first such biennial reviews was § 73.658(g), the dual network rule. In our *Biennial Review Report* we tentatively concluded that a portion of this rule was no longer necessary in the public interest. Accordingly, we issued an *NPRM* proposing the elimination of this rule consistent with the goals of the 1996 Act.

42. *Significant Issues Raised by the Public in Response to the Initial Analysis.* No comments were received concerning the Initial Regulatory Flexibility Analysis.

43. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.* The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The Regulatory Flexibility Act defines the term ''small entity as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under section 3 of the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

44. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**. A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 1992, there were approximately 275,801 small organizations. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

45. The SBA defines small television broadcasting stations as television broadcasting stations with $10.5 million or less in annual receipts. According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database, fewer than 800 commercial TV broadcast stations (65%) have revenues of less than $10.5 million dollars.

Approximately 90 of these small TV broadcast television stations are affiliates of the WB or UPN networks and may be affected by our rule change. We note, however, that under SBA's definition, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. Therefore, our estimate may overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-television affiliated companies. It would appear that there would be no more than 800 entities affected.

46. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* The *R&O* imposes no reporting, recordkeeping, or compliance requirements.

47. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

48. As indicated, the *R&O* allows licensees to affiliate with a network entity that maintains two or more networks unless such multiple networks consist of more than one of the ''big four'' networks (NBC, ABC, CBS and Fox). This eliminates the bar on affiliation with an entity that maintains one of the ''big four'' networks and the UPN and/or WB networks. All significant alternatives, *i.e.,* retention of the existing rule, modification of the existing rule, and elimination of the dual network rule altogether, were considered in the Commission's 1998 biennial review of its broadcast ownership rules (MM Docket No. 98–35) and herein. In the Biennial Review proceeding the Commission tentatively determined that elimination of the subject provision would be in the public interest. The Commission considered the results of this top-to-bottom review of the subject rule in its consideration of alternatives to the course proposed herein in the instant proceeding. The instant action provides television licensees, including those considered to be ''small businesses,'' with increased flexibility with regard to the broadcast networks with which they may affiliate. It also may help small stations that are affiliated with the UPN or WB networks survive and prosper in an increasingly competitive media marketplace. Finally, it gives the four major and two emerging broadcast television networks, none of which are small businesses, more merger flexibility.

49. *Report to Congress.* The Commission will send a copy of this *R&O,* including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of this *R&O,* including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *R&O* and FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

50. Accordingly, pursuant to the authority contained in 47 U.S.C. 154(i) and (j), 303(r), 308, 310 and 403, as amended, 47 CFR part 73 is amended as set forth in ''Rule Change.''

51. Viacom, Inc.'s, temporary waiver of 47 CFR 73.658(g) of the Commission's Rules, will be extended until the effective date of this rule amendment.

52. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *R&O,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

William F. Caton,

Deputy, Secretary.

List of Subjects in 47 CFR Part 73

Television.

Rule Change

For the reasons discussed in the preamble the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The Authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.658 is amended by revising paragraph (g) to read as follows:

§ 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

* * * * *

(g) *Dual network operation.* A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations *unless* such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were ''networks'' as defined in § 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC).

* * * * *

[FR Doc. 01–14936 Filed 6–13–01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–99–6578]

RIN 2105–AC49

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Request for comments on final rule.

SUMMARY: On December 19, 2000, the Department of Transportation published its final rule on drug and alcohol testing procedures. One provision of this rule requires employers to inquire into the drug and alcohol testing records of applicants for employment. A group of maritime industry organizations requested that the Department provide a comment period on this provision. In response to this request, the Department is opening a comment period for 30 days.

DATES: Comments on 40 CFR 40.25 must be received by July 16, 2001.

ADDRESSES: Comments should be sent to Docket Clerk, Attn: Docket No. OST–99–6578, Department of Transportation, 400 7th Street, SW., Room PL401, Washington DC, 20590. Persons wishing their comments to be acknowledged should enclose a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the sender. Comments may be reviewed at the above address from 9:00 a.m. through 5:30 p.m. Monday through Friday. Commenters may also submit their comments electronically.