

broadcast and cable national program services purchase at least 50 percent of the entertainment for their prime time schedules from independent producers. In essence, CPD and WGA ask us to re-impose some version of our prior financial interest/syndication rules, first adopted by the Commission in 1970. The Commission rejects these requests (collectively, the "Fin/Syn Proposals").

489. To begin with, there is substantial doubt as to whether we have adequate notice to adopt the Fin/Syn Proposals. In the *NPRM*, the Commission invited comment on, among other issues, whether diversity could be better promoted by alternatives to structural regulation, such as behavioral requirements and, if so, what behavioral requirements would be recommended. The Commission also sought comment on whether "the effects of the 1996 change in the national ownership cap [can] be separated from the effects of the repeal of the fin/syn and [prime time access] rules?" The Commission asked commenters to identify those effects.

490. Although the Commission invited comment as to whether we should, in lieu of structural rules, adopt behavioral rules to serve our public interest goals, we did not propose a re-imposition of the fin/syn rules, or anything related. The Fin/Syn Proposals, therefore, are not squarely within the four corners of our *NPRM*. Moreover, to the extent that we asked general questions about the effect of the repeal of our former fin/syn rules, or whether some behavioral rules might obviate structural regulation, we did not intend, nor do we think the *NPRM* can be fairly read to suggest, that a fin/syn overlay would or could substitute for structural regulation as a means of protecting our desiderata—localism, competition, and diversity. Accordingly, the Commission does not believe that the Fin/Syn Proposals are responsive to the *NPRM*, or that the adoption of such rules could be thought to be a logical outgrowth of the *NPRM*.

491. In any event, the Commission is not inclined to adopt the Fin/Syn Proposals. The original fin/syn rules prohibited a television network (defined at the time to include only ABC, NBC, and CBS) from syndicating television programming in the U.S., or from syndicating outside the U.S. programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication. These rules also prohibited a network from acquiring any financial or proprietary right or interest in the exhibition, distribution, or other

commercial use of television programming produced by someone other than the network for distribution on non-network stations. In 1983, the Commission proposed repealing the rules based on, *inter alia*: (i) A 44% increase in the number of TV stations available to the average viewer since 1970; (ii) the dramatic increase in the availability of cable television; and (iii) evidence of vigorous competition among the television networks.

492. In 1991, however, the Commission opted not to repeal the rules, but instead modified them. Among other things, the Commission imposed a new restriction on networks, which provided that "no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself." In 1992, the U.S. Court of Appeals for the Seventh Circuit vacated the rules. The Court criticized the Commission for not addressing earlier Commission findings, in 1983, that the networks lacked significant market power. The Court found that the development of cable, video recorders, and the advent of the Fox network buttressed the earlier findings.

493. In the proceedings on remand, the Commission decided to repeal, on a graduated basis, most of its fin/syn rules. In repealing the 40 percent cap, the Commission observed that the cap does not necessarily foster diversity. The Commission also noted that "the decline in network audience share, which largely explained the rule's relaxation in 1991, has continued unabated." On appeal, the Seventh Circuit affirmed that decision, stating that if the Commission ever decided to re-impose similar fin/syn restrictions on the networks, "it had better have an excellent, a compelling reason" to do so.

494. In 1995, the Commission removed the remaining fin/syn restrictions, finding that there was no "clear trend toward increased network ownership of [prime time entertainment programming] that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint." At the time, independent producers provided 80.97% of the prime time programming hours for ABC, CBS and NBC. Although there had been a decline in the number of packagers of programming included in the prime time schedules for ABC, CBS and NBC, the Commission believed that the decline could not be attributed to elimination of the fin/syn rules, but was "instead attributable to the inherent riskiness of prime time programming." Moreover, ABC, CBS, and NBC faced more, rather than less, competition in

broadcast television due to the emergence of FOX and two additional broadcast networks (United Paramount and Warner Brothers). The Commission also reaffirmed its finding in 1993 that alternative video delivery systems, such as DBS and wireless cable, provided sufficient competition to the broadcast networks to obviate fin/syn restrictions.

495. CPD now argues that, despite the growth of cable and DBS providers in the video programming distribution market, there still is a strong public interest supporting limitations on network programming because 43 million consumers receive only broadcast network television. CPD also points out that in 1992, 66.4 percent of the networks' prime time schedule consisted of programs produced and owned by independent producers. Today, they argue, only 24 percent of the four largest networks' prime time schedule is supplied by independent producers. CPD argues that the Commission should preserve 25 percent of the networks' prime time schedule for independent producers.

496. WGA asks that the Commission "adopt measures designed to insure [*sic*] that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers." WGA contends that consolidation in the market for video programming makes any appearance of diversity a mirage. Although there are 230 national cable programming networks, according to WGA, there are just 91 networks that can be considered major networks (defined by WGA as available in more than 16 million homes). Of these 91 networks, 80 percent (73) are owned or co-owned by 6 entities: AOL Time Warner, Viacom, Liberty Media, NBC, Disney and News Corporation.

497. Four major networks (ABC, CBS, FOX, and NBC, collectively the "Networks") filed a joint *ex parte* pleading opposing any cap on the amount of network programming a network may air during prime time. The Networks invoke much of the rationale that the Seventh Circuit used when it vacated the Commission's prior fin/syn rules. To those arguments, the Networks add that the broadcast networks' prime time audience share has dropped from 72 percent in 1993–1994 to 58.9 in 2001–2002. The Networks assert that CPD's argument ignores the fact that, whereas there were only three broadcast networks in 1970 when the Commission first adopted the fin/syn rules, there are now seven networks providing English language programming. The Networks also argue that the growth in use of the