broadcast networks when the fin/syn rules were adopted.[1359]

650 Although CPD and WGA appear to be correct that fewer of the programs in the Networks' prime-time lineup are produced by independent producers than at times in the past, the evidence in the record does not address whether the decline in the number of independently-produced programs is attributable to changes in the regulatory environment (*i e* , the elimination of the fin/syn rules) or to other changes that have taken place in the media business in the intervening years that have increased the risk of producing prime time programming.[1360]

651 Moreover, the reduction in independently produced prime time programming on a small subset of television networks is not, by itself, a public interest harm Our concern is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers The record does not demonstrate that consumers and viewers are harmed as a result of network financial interests in the programming they carry, particularly in light of the quantity and variety of media outlets for programming in today's media marketplace

652. In particular, the record does not convince us that an "access" rule for independent producers will advance viewpoint diversity. CPD's argument, for example, is premised on the notion that the Networks are gatekeepers,[1361] if they are not, there are other outlets for independently-produced fare and no basis to impose fin/syn restrictions To the extent that the Networks actually are gatekeepers, however, fin/syn rules cannot logically advance viewpoint diversity because the Networks, as gatekeepers, can filter messages at the distribution stage just as they can at the production stage. Adopting the Fin/Syn Proposals, therefore, is not likely to promote viewpoint diversity.

653 Even if we were to adopt a broader definition of "diversity" to include general entertainment programming,[1362] a gatekeeper at distribution still may filter unwanted programming whether or not the programming is produced in-house. For example, if a network were to decide that its prime time lineup should consist only of "reality programming," or that it should target a particular audience demographic, there is no reason to believe that it could not give effect to those plans with independently-produced programming as easily as it could with programming produced by itself or an affiliated company – it simply would make known its programming intent and allow independent producers to fill the void The Fin/Syn Proposals, therefore, cannot be justified on grounds of programming diversity.

[1359] *Id*

[1360] "Whatever the pros and cons of the original financial interest and syndication rules, in the years since they were promulgated the structure of the television industry has changed profoundly " *Schurz Communications*, 982 F 2d at 1046 The Commission previously has questioned whether changes in the mix of programming on the prime time lineup can be attributed to regulatory changes or to business considerations. *See Review of the Syndication and Financial Interest Rules,* 10 FCC Rcd 12165 ¶ 20 (1995).

[1361] Ex Parte Filing of CPD (May 15, 2003) at 2.

[1362] Although CPD premised its proposal on the goals of promoting both source diversity and program diversity, its main arguments appear to be premised on a program diversity rationale. *See, e.g.*, CPD Reply Comments at 20 (arguing that its proposal would "substantially increase the possibility that more diverse genres of programming will emerge"). As discussed above, our core interest in this proceeding is in protecting viewpoint diversity; we generally rely upon market forces to deliver programming that will appeal to viewers.

654. Both CPD and WGA also fail to justify their definitions of the relevant market for purposes of their proposals. CPD, for example, has targeted its proposal only at the four major broadcast networks, and only at their prime time schedule However, aside from conclusory allegations that "the prime time television programming marketplace is a narrow, unique market,"[1363] CPD has provided no reason to exclude other video programming outlets and other day-times, were we inclined to adopt a fin/syn-like rule Viewers today have more programming choices available to them over-the-air, through cable, satellite, or home video, than ever before.[1364] Indeed, WGA considers a much larger market for these purposes (although it, too, provides little in the way of support for its market definition), and other commenters have suggested that non-prime time broadcast hours should be included in any analysis relating to programming diversity.[1365] Lacking the foundation of a sustainable market definition, the Fin/Syn Proposals cannot stand.[1366]

655 Finally, to the extent that the Fin/Syn Proposals are based on an assertion that the quality of independently-produced entertainment programming is superior to that of the Networks,[1367] we find the record devoid of evidence to that effect.[1368] We have no means or methodology to measure the quality of entertainment programming, and were we to favor one type or genre of programming over another, we would run squarely into the teeth of the First Amendment.[1369] It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns).

656. When the Seventh Circuit affirmed the Commission's decision repealing all of the fin/syn rules, it questioned whether the rules "ever had much basis" and cautioned that, if the Commission ever decided to re-impose similar restrictions, "it had better have an excellent, a compelling reason" to do so.[1370] None appears on this record. Accordingly, we reject the Fin/Syn Proposals.[1371]

[1363] CPD Comments at 3-4

[1364] *See* Joint Comments, Bruce M Owen and Michael G Baumann, Economic Study E, *Concentration Among National Purchasers of Video Entertainment Programming*, at 2.

[1365] NASA Comments at 63-64 (arguing that the 35% national cap should be retained to promote programming diversity during non-prime time)

[1366] *See Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd at 12171 ¶ 27 (concluding that the fin/syn rules focused too narrowly on the broadcast networks to the exclusion of other distribution channels).

[1367] *E.g* , CPD Reply Comments at i, 6, 13, WGA Comments at 10

[1368] *Cf* MOWG Study No 5, Program Diversity and the Program Selection Process on Broadcast Network Television by Mara Einstein (Sept. 2002).

[1369] To be considered content-neutral, regulations must have neutral means and ends. *See News America Publishing, Inc v. FCC*, 844 F 2d 800 (D.C. Cir 1988) (strict scrutiny applied to structural regulations that had a direct effect on content and viewpoint); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D C. Cir. 1998) (invalidating EEO regulations under strict scrutiny to the extent that they would implicate programming content)

[1370] *Capital Cities/ABC, Inc v FCC*, 29 F 3d 309, 316 (7th Cir 1994).

IX. NOTICE OF PROPOSED RULEMAKING

657. In the Local Radio Section of this *Order*, we replaced our current contour-overlap methodology for defining radio markets with a geography-based market definition. For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule. A significant portion of the country, however, is not covered by Metro markets We initiate this rulemaking proceeding to define radio markets for those areas.

658 We seek comment on how to draw specific market boundaries in areas of the country not located in Arbitron Metros. What factors should we consider in grouping radio stations into markets? We propose that radio markets be county-based, as Arbitron Metros are. We seek comment on that proposal. In the western United States, counties are significantly larger. We seek comment on whether we should, like Arbitron, divide counties into separate radio markets in certain circumstances. We also propose that radio stations be assigned to radio markets based on the location of their communities of license. We seek comment on this proposal.

659 We seek comment on whether we should rely on any pre-existing market definitions in delineating radio markets for non-Metro areas. As indicated in the Local Radio Section, Arbitron traditionally has based its Metro definitions on the Metropolitan Area (MA) definitions developed by OMB. Should we also do the same for non-Metro areas? OMB recently released new MA definitions based on the results of the 2000 Census.[1372] The 935 new MAs, moreover, cover a greater portion of the country. Previously, MAs were defined only for urban areas with a population of 50,000.[1373] The new MA definitions cover areas with a population of 10,000 to 50,000 (known as Micropolitan Statistical Areas), which should greatly increase the number of radio stations located in MAs.[1374] If we rely on MAs, how should we address future changes to MA definitions, and the creation of a new, or the deletion of an existing, MA?[1375] In addition, even with the expanded reach of the new MAs, there will be areas that they do not cover. How should the radio market be defined in those areas if MAs are used? One possible method is to establish geographic markets based on the location, distribution, and density of populated areas [1376] Because population clusters are likely to indicate areas of economic and social interaction, the location and distribution of the centers of population should give us a reasonable indicator of the boundaries of the relevant geographic market in which radio stations compete. Because the

(Continued from previous page)

[1371] Aside from the reasons enumerated above, we reject WGA's proposal because it is far from clear that the Commission has jurisdiction over the programming carried on cable networks.

[1372] See OMB Bulletin No. 03-04, http://www whitehouse gov/omb/omb/bulletins/b03-04 html. In 2000, OMB revised its procedures for defining MAs In addition, it adopted the more generic term Core Based Statistical Area (CBSA) to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas. *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed Reg. 82228 (2000). Although less accurate, we will use former term – i e., MAs – to avoid confusion.

[1373] *See* U.S. Census Bureau, Cartographic Boundary Files, http://www.census gov/geo/www/cob/ma_metadata html (visited May 30, 2003)

[1374] *See* 65 Fed Reg at 82236-37 for a detailed description of the standards OMB uses to define MAs

[1375] See *id* at 82237 for the rules governing future updates to MAs

[1376] Population data is available over the Internet from the Census Bureau.

geographic areas involved generally will be low-density and rural areas of the country, moreover, we believe that population data could provide a fairly reliable and easily determinable market definition. We seek comment on this and any other methods

660 Another possibility is to treat Cellular Market Areas (CMAs) as the relevant geographic market for radio. CMAs were developed in the mid-1980s to be the geographic basis for licensing cellular spectrum CMAs consist of MAs (as they were defined after the 1980 census) and Rural Service Areas (RSAs),[1377] which the Commission delineated for areas of the country not located in MAs.[1378] Although CMAs were not developed in the context of radio broadcasting, they were designed to follow "natural social and economic communities" through "multi-county groupings drawn along . . . county boundaries "[1379] Are CMAs a reasonable proxy for radio markets in non-Metro areas of the country? We seek comment on this issue.

661. For any market definition we establish, how should we address situations in which that market overlaps an Arbitron Metro If we use MAs or CMAs, there will be existing areas of overlap. Even if we define radio markets around existing Arbitron Metros, Metro boundaries may change, or Arbitron may create or delete a Metro. We seek comment on how to address the possibility of a market overlap (or in the case of a deleted Metro, the possibility of an undefined market).

662 The goal of this rulemaking proceeding is to generate a map or a list of markets for radio stations across the entire country, using Arbitron Metros where available and a Commission-endorsed market definition everywhere else. We therefore encourage parties to use this opportunity to submit specific information that would assist is in properly delineating the boundaries of the local radio markets in which they are interested.

663 *Comments and Reply Comments* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[1380] interested parties may file comments on the notice of proposed rulemaking on or before 30 days after date of publication in the *Federal Register*, and reply comments on or before 45 days after date of publication in the *Federal Register* Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg 24121 (1998).

664. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http //www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S Postal Service mailing address, and the applicable docket, which in this instance is MB Docket No. 03-130. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings

[1377] *See Amendment of the Commission's Rules for Rural Cellular Service*, 1985 WL 260366, FCC 85-646, ¶ 1 (rel Dec 17, 1985).

[1378] *Amendment of the Commission's Rules for Rural Cellular Service*, 60 Radio Reg. (P&F) 1029, ¶ 1 (1986)

[1379] *Id* at ¶ 11

[1380] 47 C F R §§ 1 415 and 1 419

can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S Postal Service mail (although we continue to experience delays in receiving U S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E , Suite 110, Washington, D.C 20002 The filing hours at this location are 8·00 a.m. to 7.00 p m All hand deliveries must be held together with rubber bands or fasteners Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

665. Parties must also serve either one copy of each filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, S W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each filing via email or one paper copy to Amy Brett, Media Bureau, 445 12th Street, S W , 2-C134, Washington, D.C., 20554. Parties should serve one copy of each filing via email or five paper copies to Linda Senecal, 445 12th Street, S.W., 2-C438, Washington, D C., 20554.

666 *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267, (202) 418-7365 TTY, or bcline@fcc.gov. These documents also will be available electronically at the Commission's Disabilities Issues Task Force web site. www.fcc.gov/dtf, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, S.W., Room, CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail at qualexint@aol.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY)

667. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[1381] Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[1382] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Parties submitting written ex parte presentations or summaries of oral ex parte presentations are urged to use the ECFS in accordance with the Commission rules discussed above. Parties filing paper ex parte submissions must file an original and one copy of each submission with the Commission's Secretary,

[1381] 47 C F.R § 1 1206(b)

[1382] *See id* § 1 1206(b)(2)

Marlene H Dortch, at the appropriate address as shown above for filings sent by either U S mail, overnight delivery, or hand or messenger delivery. Parties must also serve either one copy of each ex parte filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D C , 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com In addition, parties should serve one copy of each ex parte filing via email or one paper copy to Amy Brett, Media Bureau, 445 12th Street, S.W., 2-C134, Washington, D.C., 20554. Parties should serve one copy of each ex parte filing via email or five paper copies to Linda Senecal, 445 12th Street, S.W , 2-C438, Washington, D.C., 20554

668 *Initial Regulatory Flexibility Analysis* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1383] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the *Notice of Proposed Rulemaking* initiated herein. The IRFA is set forth in Appendix I. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice of Proposed Rulemaking*, and they should have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), in accordance with the Regulatory Flexibility Act.[1384]

669. *Paperwork Reduction Act.* This *Notice of Proposed Rulemaking* contains modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

670. *Authority.* This *Notice* is issued pursuant to authority contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S C §§ 154(i), 303, and 307, and Section 202(h) of the Telecommunications Act of 1996.

X. ADDITIONAL ADMINISTRATIVE MATTERS

PAPERWORK REDUCTION ACT

671. This *Order* contains both new and modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. They will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

REGULATORY FLEXIBILITY ACT

[1383] *See* 5 U.S C § 603. The RFA, 5 U.S.C § 601 *et seq.*, has been amended by the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA"), Pub. L No 104-121, Title II, 110 Stat. 847 (1996).

[1384] *See* 5 U.S.C § 603(a)

672 Pursuant to the Regulatory Flexibility Act of 1980, as amended,[1385] the Commission's Final Regulatory Flexibility Act Analysis is contained Appendix G.

DOCUMENT AVAILABILITY

673. This document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W , Room CY-A257, Washington, D.C. 20554 This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 12th Street, S W., Room CY-B402, Washington, D.C. 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. This document is available in accessible formats (computer diskettes, large print, audio recording, and Braille) to persons with disabilities by contacting Brian Millin in the Consumer & Governmental Affairs Bureau at 202-418-7426, TTY 202-418-7365, or at bmillin@fcc.gov

XI. ORDERING CLAUSES

674 Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Report and Order* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 IS ADOPTED.

675 IT IS FURTHER ORDERED that Part 73 of the Commission's Rules IS AMENDED as indicated in Appendix H.

676 IT IS FURTHER ORDERED that the Interim Policy set forth herein IS ADOPTED.

677. IT IS FURTHER ORDERED that the Motion for Revision of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record, filed on October 9, 2002 by Minority Media and Telecommunications Council and National Association of Black Owned Broadcasters, is DENIED in part and GRANTED in part to the extent described herein; the Motion to Bifurcate and Repeal, filed on March 11, 2003 by Media General, Inc., IS DISMISSED; and the Motion to Postpone, filed on May 31, 2003 by the Diversity and Competition Supporters, et al., IS DENIED.

678. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, that the ownership requirements and rules adopted in this *Report and Order* SHALL BECOME EFFECTIVE thirty (30) days after publication of the text or summary thereof in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which SHALL BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.

679. This action is taken pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996. If any section, subsection, paragraph, sentence, clause or phrase of this *Report and Order* or the rules adopted herein is declared invalid for any reason, the remaining portions of this *Report and Order* and the rules adopted herein

[1385] *See* 5 U S C. § 604.

SHALL BE severable from the invalid part and SHALL REMAIN in full force and effect.

680 IT IS FURTHER ORDERED THAT the proceedings in MB Docket No 02-277, MM Docket No 01-235, MM Docket No 01-317, and MM Docket No. 00-244 ARE TERMINATED.

681 IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration

682 IT IS FURTHER ORDERED that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Notice of Proposed Rule Making* in MB Docket No. 03-130 IS ADOPTED.

683 IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary