

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

In the Matter of)	
)	
2018 Quadrennial Regulatory Review)	MB Docket No. 18-349
– Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules)	
Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
Twenty-First Century Communications)	
and Video Accessibility Act of 2010)	

**COMMENTS OF
VIACOMCBS INC., FOX CORPORATION AND NBCUNIVERSAL MEDIA, LLC**

ViacomCBS Inc. (“ViacomCBS”), Fox Corporation (“Fox”), and NBCUniversal Media, LLC (“NBCU”) (collectively, the “Network Commenters”) submit these joint comments in response to the Commission’s invitation to update the record in the 2018 Quadrennial Review proceeding.¹ Specifically, in response to the request for “information regarding the broadcast industry’s evolution since early 2019 and its current trajectory,” the Network Commenters document the many reasons that the Dual Network Rule² decidedly is no longer “necessary in the public interest as the result of competition.”³

¹ See *Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, MB Docket No. 18-349, Public Notice, (Jun. 4, 2021) (“*Refresh the Record PN*”).

² 47 C.F.R. § 73.658(g) (“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).”).

³ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

The Dual Network Rule provides that *under no circumstances*—regardless of the facts presented—shall there be a transaction that would bring under common ownership two of the entities that were “the networks” as of the date that the Telecommunications Act of 1996 (the “1996 Act”) was enacted. As defined, this universe of uniquely targeted parties consists of just four broadcast networks: ABC, CBS, Fox, and NBC.⁴ The Rule achieves this prohibition by making it unlawful for *any* broadcast television station to affiliate with one of the named networks if that network is under common control with any of the other named networks. This outright prohibition applies regardless of any evolution in the marketplace or change in market position of one or more of the named networks. While the current iteration of the Dual Network Rule has been frozen in place for over a quarter century, the notion that there is need for Commission rules to forever prohibit mergers among specific broadcast networks is rooted in an even earlier time gone by: The Commission first implemented a version of the Dual Network Rule with respect to radio broadcasting in 1941 before extending it to television networks in 1946.⁵ That is, the restriction on the Commission’s books today has been in place with only modest changes for 75 years.

In light of the “presumption in favor of repealing or modifying the ownership rules” set by Section 202(h) of the 1996 Act,⁶ the Commission cannot retain the Dual Network Rule absent evidence that a prohibition of such uncompromising rigidity remains necessary to protect the public interest. A basic review of current marketplace conditions, however, leads to the

⁴ 47 C.F.R. § 73.658(g).

⁵ See, e.g., *Amendment of Section 73.658(g) of the Commission’s Rules – The Dual Network Rule*, MM Docket No. 00-108, Report and Order, 16 FCC Rcd 11114, para. 2 (2001).

⁶ See, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (“Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. Under § 202(h) the Commission may retain a rule only if it reasonably determines that the rule is ‘necessary in the public interest.’”).

inevitable conclusion that this inflexible ban is *not* necessary in 2021 or beyond. First, the vast expansion of the internet and online content distribution have led not only to an explosion of new networks and other sources of content, but also to an exponentially larger and more diverse quantity of content. Netflix, Apple, HBO, YouTube, and Amazon are just a few of the ever-growing list of providers producing and distributing content that competes alongside that of the four broadcast networks saddled with the Dual Network Rule. Even the number of *broadcast* networks on the airwaves has dramatically risen, owing in part to the advent of multicasting.⁷ At the same time, digital platforms such as Google and Facebook are dramatically reshaping the advertising marketplace, decreasing the share of advertising spending once allocated to the named broadcast networks.⁸

Second, substantial checks would remain in place to scrutinize the impacts of any proposed combination (if one were to emerge) of any two of the four named networks following repeal of the Dual Network Rule. In today's marketplace, a fact-specific transaction review conducted by antitrust regulators or the Commission, as opposed to an *ex ante* prohibition, is a more appropriate method to determine whether, and under what circumstances, a combination of two of the four named networks would be permitted.

⁷ See, e.g., Brad Adgate, *TV Stations are Launching Multicast Networks as an Opportunity to Reach Cord Cutters*, Forbes, June 10, 2021, at <https://www.forbes.com/sites/bradadgate/2021/06/10/tv-stations-are-launching-multicast-networks-as-an-opportunity-to-reach-cord-cutters/?sh=751bb9547136>.

⁸ See, e.g., Keach Hagey and Suzanne Vranica, *How Covid-19 Supercharged the Advertising 'Triopoly' of Google, Facebook and Amazon*, Wall St. Journal, March 19, 2021.

I. COMPETITION AND DIVERSITY IN THE PROGRAMMING AND ADVERTISING MARKETS HAVE ELIMINATED ANY JUSTIFICATION THAT ONCE MAY HAVE EXISTED FOR THE DUAL NETWORK RULE.

The Commission is right to refresh the record and “seek information regarding the broadcast industry’s evolution since early 2019 and its current trajectory, including the effects, if any, of technological change, new entry, consolidation, or changing market conditions.”⁹ There have been significant changes in the media landscape even in this short period of time,¹⁰ accelerating trends that have been ongoing for decades.¹¹ These changes have continued to increase the sources of video content, alter the ways individuals consume that content, and modify the advertising priorities of companies across sectors. In the *2018 Quadrennial Review NPRM*, the Commission observed that previously it had found the Dual Network Rule “necessary to promote both competition in the provision of primetime entertainment programming and the sale of national advertising.”¹² The rule is no longer necessary for either of these purposes.

Substantial Competition in the Programming Market. The Dual Network Rule rests on the assumption that the named networks are the primary source of content in the marketplace. But this has not been the case for some time, and the changes to the market in recent years have been staggering. In addition to broadcast and cable offerings, consumers increasingly access

⁹ *Refresh the Record PN* at 4.

¹⁰ See, e.g., *Communications Market Report*, GN Docket No. 20-60, 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 3047, para. 150 (2020) (“*2020 Communications Marketplace Report*”) (“While the three primary categories of market participants remain constant, the past two years have seen a number of changes in terms of competition among these participants, changes in consumer viewing habits, and the continued expansion of video programming options.”).

¹¹ *2018 Quadrennial Review NPRM* at 12112, para. 2.

¹² *Id.* at 12141, para. 79.

programming online through “a variety of business models, including advertising-supported video offerings; a subscription model for access to an entire video library; and a transactional approach where consumers pay to view a movie or television episode on a per-program basis.”¹³

The Commission has long acknowledged the important role that the internet would come to have in the media marketplace. Even a decade ago, the Commission explained that “[t]he proliferation of broadband Internet and other new technologies has had a dramatic impact on the media marketplace. Consumers are increasingly turning to online and mobile platforms to access news content and audio and video programming...[C]ontent providers are increasingly looking to the Internet and other new media platforms to bypass traditional media and reach consumers directly.”¹⁴ As these online models have continued to grow in popularity, they have diminished the influence previously enjoyed by national networks subject to the dual network rule.¹⁵ Today, consumers have access to an ever-expanding array of original television and film programming, causing further segmentation of the traditional broadcast viewing audience.¹⁶ Streaming

¹³ *2020 Communications Marketplace Report* at 3048, para. 152.

¹⁴ *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 09-182 et al., 26 FCC Rcd 17489, 17490-91, para. 2 (2011).

¹⁵ See e.g., *2020 Communications Marketplace Report* at 3065, para. 193 (“84% of respondents to the Kagan Consumer Insights Spring 2019 Survey indicated that they or someone in their household used one or more free websites or services to watch online video.”); *id* at 3066-67, para. 195, Figure II.D.9 (noting that from Q4 2018 to Q4 2019 the number of U.S. SVOD subscribers increased from 164.0 million to 219.8 million – an increase of 34.1% in just one year); Brad Agate, *As Their Ratings Drop, TV Networks Fault Nielsen. Media Researchers Weigh In*, *Forbes*, Apr. 20, 2021, available at <https://www.forbes.com/sites/bradagate/2021/04/20/as-ratings-drop-tv-networks-fault-nielsen-media-researchers-weigh-in/?sh=25935f142ee1> (last visited Aug 1, 2021) (“The ratings decline of broadcast TV has been ongoing since the emergence of cable TV in the 1980s. With the growth of streaming video in the past few years, the ratings of broadcast and now cable TV have been falling.”).

¹⁶ See, e.g. *Peak TV Hits a New Peak, With 532 Scripted Shows*, *New York Times*, Jan. 9, 2020, available at <https://www.nytimes.com/2020/01/09/business/media/tv-shows-2020.html> (“There

platforms account for a considerable portion of media consumption, and the market share appears poised to increase.¹⁷

Changes to the Advertising Market. In the past, the Commission has considered competition in the sale of national advertising to be a rationale for the Dual Network Rule.¹⁸ Today, however, national broadcast advertising no longer enjoys the market share it once had. Even in 2018, the Commission noted that the increasing popularity of online program distribution had begun to make an impact on the advertising market.¹⁹ This impact has continued to grow, and it has changed the way that companies prioritize their advertising dollars. For example, from 2010 to 2019, “national advertising revenue earned by online platforms increased

were more than 500 scripted television series in the United States last year, a high. The estimated number: 532 comedies, dramas and limited series that were broadcast or streamed, according to the research department of the cable network FX, which tabulates and releases the figure every year. It marked the first time the 500-show threshold had been crossed, representing a 7 percent increase over the number of scripted shows in 2018.”). *Id.* (“According to FX, there were 24 series from so-called online services in 2013. That same year, there were 131 series from the broadcast networks and 161 basic cable shows. Five years later, in 2018, the streaming platforms accounted for 160 series, more than the number of shows made by the networks (146) or basic cable (144).”).

¹⁷ See, e.g., *The Gauge Shows Streaming Media is Taking a Seat at the Table*, Nielsen, June 17, 2021, available at <https://www.nielsen.com/us/en/insights/article/2021/the-gauge-shows-streaming-takes-a-seat-at-the-table/> (last visited Aug. 1, 2021) (“[S]treaming usage across all television homes has climbed to 26% of all time spent on TV. Streaming and broadcast now account for half of television time, with usage split evenly between the two channels.”); see also John Lafayette, *Broadcast Stalls as Entertainment and Media Revenue Recover: PwC, Broadcasting+Cable*, available at <https://www.nexttv.com/news/broadcast-stalls-as-entertainment-and-media-revenue-recover-pwc> (last visited Aug. 1, 2021) (citing a PWC report and noting “[s]treaming video-on-demand (SVOD) revenues will grow at a 10.6% CAGR through 2025, by which point SVOD will be an \$81.3 billion industry.”).

¹⁸ See, e.g., *2018 Quadrennial Review NPRM* at 12141, para. 79.

¹⁹ See *Id.* at 12142, para. 83 (“Today, OVDs—including linear multichannel streaming services, both those from social media companies and other online platforms, and direct-to-consumer offerings by broadcast networks themselves—reach millions of consumers. Digital advertising on these or other online platforms is steadily increasing in market share and revenue share.”).

to nearly four times its 2010 value.”²⁰ In contrast, “[n]ational advertising revenues for broadcast television stations, broadcast networks, and cable networks were relatively flat over the same period.”²¹ Other noteworthy trends in digital content consumption impact advertising as well, such as the popularity of ad-supported podcasts and other streaming audio and video.²²

As time spent online has dramatically increased, advertisers have followed these trends, and as a result, “[f]or the first time, more than half of U.S. advertising spending is set to go to digital platforms such as Google and Facebook.”²³ Indeed, online advertising was the only ad segment to grow during 2020, while television advertising saw substantial declines.²⁴ The greatest beneficiaries of this trend are what have been called the “triopoly” of Google, Facebook and Amazon.²⁵ While national television advertising spend is expected to grow somewhat in 2021 (rebounding from the declines in 2020), it is not expected to grow nearly at the rate of

²⁰ *2020 Communications Marketplace Report* at 3083, para. 232.

²¹ *Id.*

²² See, e.g. *Understanding Consumer Trends and Panel Integrity During the Time of Covid-19*, Nielsen, Apr. 9, 2021, available at <https://www.nielsen.com/us/en/insights/article/2021/understanding-consumer-trends-and-panel-integrity-during-the-time-of-covid-19/> (last visited Aug. 1, 2021) (“Consumers continue to grow their audio streaming diets, especially while staying at home more. Streaming audio consumption increased by 39% on computer/mobile between May 2020 and January 2021.”).

²³ Suzanne Vranica, *Google, Facebook and Amazon Gain as Coronavirus Reshapes Ad Spending; Digital Ads to Account for More than Half of Year’s U.S. Advertising Expenditures for First Time*, Wall St. Journal, Dec. 1, 2020; see also *id.* (“Three years ago, digital advertising accounted for just one-third of all U.S. ad spending, GroupM said—about the same size as newspapers, radio, magazines and local TV combined. As of 2020, these four categories’ combined share of the U.S. advertising market has shrunk to 21%.”).

²⁴ Keach Hagey and Suzanne Vranica, *How Covid-19 Supercharged the Advertising ‘Triopoly’ of Google, Facebook and Amazon*, Wall St. Journal, March 19, 2021.

²⁵ *Id.*

spending on advertising on digital properties, including that of Google, Facebook, and Amazon.²⁶

Notably, the Dual Network Rule is wholly incapable of accounting for these dramatic shifts in the advertising market. Instead, the rule incorrectly presumes that national advertising on just *four* broadcast networks is an autonomous market not impacted by any of these developments, and that circumstances in the market dictate an outright *ban* on any combination among any of those networks. This of course is not the case. As the trends in consumption continue to lean towards newer technologies and media, and increased digital spend, the historical views around national broadcast advertising on just four networks will only become more outdated.

II. THE *EX ANTE* DUAL NETWORK RULE IS UNNECESSARY AND ITS PURPOSE WOULD BE BETTER ACHIEVED THROUGH A FACT-SPECIFIC REVIEW OF ANY PROPOSED MERGER.

In the dynamic media marketplace of 2021, an *ex ante* prohibition that singles out just four actors in one segment of the industry is not necessary and could block an otherwise pro-competitive and pro-consumer transaction. Without the dual network rule, regulators would still retain the authority to review individual transactions involving the named broadcast networks and make appropriate decisions on a case-by-case basis. Competition law, together with the Commission's own review in the context of any license transfers, is a more appropriate method to determine whether and under what circumstances a particular combination of any of the four named networks should be allowed to take place.

²⁶ GroupM, *This Year Next Year: U.S. 2021 Mid-Year Forecast* (June 2021), at <https://www.groupm.com/this-year-next-year-us-2021-mid-year-forecast/> (estimating 33% growth of digital advertising (excluding political) in 2021, compared to 8.7% growth of television advertising (excluding political) in the same year).

To directly answer a question raised in the *2018 Quadrennial Review NPRM*: yes, if the Commission removed the Dual Network Rule, “antitrust statutes” would “serve as a sufficient backstop to prevent undue consolidation between or among the Big Four networks.”²⁷ Antitrust laws would sufficiently address any concerns on a case-by-case basis, considering potential harms (and benefits) under robust antitrust precedent. Moreover, a fact-specific transaction review would provide antitrust regulators the ability to consider a market definition that is more reflective of the ways individuals consume media, rather than relying on outdated notions of the video programming industry. Reliance on antitrust reviews will enable better, nuanced competition analysis, as compared to the decades-old, inflexible assumptions built into the Dual Network Rule. This is particularly the case as the number and types of content and content providers have continued to grow.

Moreover, to the extent that a combination of any of the four named networks were to involve the transfer of Commission-issued licenses (*e.g.*, of local broadcast stations owned by one or both of the parties to a transaction), the Commission also would have the opportunity to conduct a transaction review under the public interest standard of Section 310(d) of the Communications Act of 1934, as amended, and any other applicable rules. The Commission would conduct any such review under its well-established precedent for considering a proposed transaction’s compliance with its rules and any impacts on competition, diversity, or localism.

To be clear, the Network Commenters do not argue that the Commission should presume combinations of any of the four named broadcast networks are in the public interest. The Network Commenters merely urge the Commission to rely on a framework for transaction reviews that enables it to conduct an informed analysis regarding the transaction-specific effects

²⁷ *2018 Quadrennial Review NPRM* at 12142, para. 84.

of any merger. Antitrust regulators and, where applicable, the Commission, are fully capable of assessing any such merger, and there is no need for *ex ante* prohibitions to short-circuit established merger review processes.

CONCLUSION

The trend is clear: market competition continues to flourish and expand with more online consumption and more content options. 2021 is not 1946 or even 1996. Nevertheless, the Dual Network Rule continues to single out four broadcast networks with an unyielding merger ban that leaves no room for transaction-specific analyses. In light of these facts, and consistent with the deregulatory mandate under which it conducts the Quadrennial Review, the Commission should repeal the Dual Network Rule.

Respectfully submitted,

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