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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re the Matter of )

Review of the Prime Time Access )  
Rule, Section 73,658(k) )  
of the Commission's Rules )

MM Docket No. 94-123

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JOINT OPPOSITION TO MOTION FOR AN ORDER  
REQUIRING COMMENTERS TO SERVE ON OTHER COMMENTERS ALL DATA  
RELIED ON IN ANY ECONOMIC ANALYSIS THEY SUBMIT TO THE COMMISSION

The Association of Independent Television Stations, Inc. (INTV), Viacom, Inc. (Viacom), and King World Productions, Inc. (King World), oppose the motion, described above, that was filed by the Coalition to Enhance Diversity (Disney Coalition) on December 13, 1994. According to the Disney Coalition's request, parties submitting economic data should be required to serve on all requesting parties "(a) all data relied on in the economic analysis and (b) a copy of the materials from which such data is [sic] derived."<sup>1</sup> Moreover, "any data or data bases shall be filed and served in a machine readable format."<sup>2</sup>

In this proceeding, the Commission asked the parties to submit a rigorous economic framework for analysis and provide it with

<sup>1</sup>Disney Coalition Motion, filed December 13, 1994 at 1, para. 2.

<sup>2</sup>Id. at 2 para. 4.

detailed economic data.<sup>3</sup> INTV, Viacom and King World have done their utmost to assist the Commission, retaining the Law and Economics Consulting Group, Inc. (LECG), one of the top economic consulting firms in the country. There is no question that the Commission, or for that matter any other party, will be able to independently analyze this analysis. We remain committed to providing the Commission with all the information it needs to render a decision in this proceeding.

Nevertheless, the Disney Coalition's motion calls for an unprecedented modification of Commission procedure, permitting party based discovery in the context of a notice and comment rule making. It is a blatant attempt by one party to manipulate the Commission's procedures, imposing unwarranted burdens on both the Commission and the parties involved. If granted, it will impede, not enhance, the Commission's efforts to obtain accurate data concerning the Prime Time Access Rule.

**I. THERE IS NO LEGAL OR POLICY JUSTIFICATION FOR EXTENDING PROCEDURAL STANDARDS EMPLOYED IN TARIFF RATE MAKING PROCEEDINGS TO INFORMAL, NOTICE AND COMMENT MASS MEDIA RULE MAKINGS.**

The Commission's *Notice of Proposed Rule Making* adopted in this proceeding initiated a classic informal rule making. The procedures governing the informal rule making process are set forth in Section 553 of the Administrative Procedure Act, 5 U.S.C.

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<sup>3</sup>*Notice of Proposed Rule Making*, in MM Docket No. 94-123, FCC 94-266 (released October 25, 1994) at 2.

Section 553. This motion seeks to invoke the standards contained in Sections 556 and 557. However, under Section 553(e) these standards apply only where "rules are required by statute to be made on the record after an opportunity for an agency hearing." There is nothing in Title III of the Communications Act or the Administrative Procedure Act requiring this proceeding to be a formal, on the record, proceeding.

Lacking any support in mass media or administrative case law, the Disney Coalition relies on common carrier tariff cases to buttress its position. Those cases are inapposite. Title II of the Communications Act requires the Commission to conduct a hearing regarding the lawfulness of tariffs and establishes specific hearing and discovery procedures. See 47 U.S.C. Sections 203-205. Hearings and discovery are appropriate in the tariff context because the Commission is evaluating the rates that will be charged to consumers by the telephone companies -- a task far different from examining issues related to television program production and the broadcasting of such programming.<sup>4</sup> Moreover, in rate hearings all of the critical cost data are solely within the hands of the telephone company. Unless data are provided by the telephone

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<sup>4</sup> The cases upon which the Disney Coalition relies demonstrate the procedural distinction. The *800 Data Base Access Tariffs* case was an order designating issues for investigation pursuant to sections 201-205 and section 403 of the Communications Act. *800 Data Base Access Tariffs*, 8 FCC Rcd 5132, 51238 (1993). The NECA case involved specific settlement formulas for average schedule companies receiving compensation for the costs of providing interstate access pursuant to 47 C.F.R. section 69.606. *National Exchange Carrier Association*, 9 FCC Rcd 3266 (1994).

company there is no way for the Commission to evaluate the reasonableness of the rates.

Even the inapposite cases relied on by the Disney Coalition do not support its wide ranging discovery request, which covers all underlying data and copies of the materials from which such data is derived. None of these cases required commenters to engage in the massive production of documents and raw data envisioned by the Disney Coalition's motion.<sup>5</sup> Similarly, the Disney Coalition's

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<sup>5</sup> In the *800 Data Base Access Tariffs* case, the FCC, in the context of an investigatory proceeding, required local exchange carriers to submit the economic models on which the LEC's planned to rely in order to develop cost support for rates. *800 Data Base Tariffs*, 8 FCC Rcd at 5135. It did not require submission of all underlying raw data on which the models were based, much less serving such data on all parties. The decision's focus was to insure that the economic models were placed in the record. Also, the case expressly recognized that cost models would not have to be fully disclosed on the record if they included proprietary information. *Id.* at 5134-5135, n.24.

Reliance on the *NECA* case is also misplaced. In response to MCI's questions regarding *NECA*'s sampling methodology, the Commission merely cautioned *NECA* to supply such information in its present filing and not rely on prior filings. *National Exchange Carrier Association*, 9 FCC Rcd at 3267. Also, the Commission merely required *NECA* to provide all statistical measurements that were necessary for an objective assessment of its formulas. *Id.* at 3270 n.66 This included information regarding measures of statistical significance of the models, sample design criteria and the significance of estimated coefficients. To the extent *INTV*, *Viacom* and *King World* rely on similar statistical techniques, this information obviously will be part of any study that is filed.

The *Price Cap Performance Review* case also is not on point. *Price Cap Performance Review for Local Exchange Carriers*, 9 FCC Rcd 2748 (1994). In stark contrast to the present proceeding, the data requested by the Ad Hoc Committee could not be obtained from any other source. Also, the Ad Hoc request was predicated on the fact that *USTA* omitted specific data from a report that was filed previously with the FCC. In the instant case, the FCC is not confronting a situation where specific data have been omitted from

reliance on the Common Carrier Bureau's experiment regarding computer filings is misplaced.<sup>6</sup>

The Commission should weigh carefully the implications of superimposing tariff procedures onto informal notice and comment rule making proceedings. As demonstrated below, applying such standards undermines the very efficiencies that make the informal rule making process a valuable administrative tool.

**II. THE DISNEY COALITION'S REQUEST FOR ALL UNDERLYING DATA AND MATERIALS CONSTITUTES AN UNWARRANTED INTRUSION INTO THE BUSINESS AFFAIRS OF THE PARTIES IN THIS PROCEEDING, THEREBY PREVENTING THE DEVELOPMENT OF MEANINGFUL ECONOMIC ANALYSES.**

Not only does the Disney Coalition want access to all underlying data, but it wants parties to distribute copies of the materials to anyone who requests them. This unprecedented request raises important issues regarding the provision of confidential information and underlying contractual commitments with data suppliers.

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a report. Moreover, the Ad Hoc Committee was requesting *composite* data relating to specific facts, not all underlying raw data and materials.

<sup>6</sup>The motion cites to an experimental program developed by the Common Carrier Bureau concerning filing comments and reply comments on computer disks in addition to traditional paper filings. *Price Cap Performance Review Data Base*, 9 FCC Rcd 1390 (1994). The program had nothing to do with filing underlying raw data on computer disks. Also, the entire experiment focused on providing the *Commission* with a diskette as opposed to providing the diskette to all parties. Finally, the program was voluntary.

- A. The Disney Coalition's request would require parties to produce confidential business information.

The Commission has never required parties to make proprietary information public. Procedures have been developed whereby parties can submit confidential information to the Commission under seal without risking exposure to their competitors. See 47 C.F.R. Section 0.459. If granted, the motion would completely eviscerate these time honored policies.

The Disney Coalition provides no rational for abandoning these principles simply because economic consultants will be submitting studies. In order to develop accurate economic analyses, the parties must remain free to provide information to their economists without risking exposure to their competitors.

For example, Viacom will be furnishing to the consultant and its counsel its own economic analysis of the effects of the repeal of the Prime Time Access Rule on its stations and the establishment of the United Paramount network. That analysis will be based partially on published data sources (some of which are copyrighted) and also on proprietary business data of a highly sensitive nature. Likewise, King World will be providing confidential information to the consultant. As a trade association, INTV will be providing information supplied by its member stations, on the condition that the information remains confidential. The importance of confidentiality is illustrated by our arrangement with LECG, which includes an agreement that LECG will not divulge confidential information even among ourselves. Confidentiality is essential

because Viacom competes with King World and INTV member stations compete with each other. If granted, the motion would not only destroy confidentiality among INTV, Viacom and King World, but it would force us to provide this information to a formidable competitor -- Disney.

Forced disclosure of such highly confidential business data to its competitors could be damaging to the parties and would be without justification or precedent. The unprecedented level of disclosure envisioned by the Disney Coalition destroys our ability to work with our consultant. If such a disclosure requirement were adopted INTV, Viacom and King World would be much more circumspect in sharing such data with our consultant.

**B. Providing copies of materials which were used to derive data may violate contracts with data suppliers and contravene existing copyright laws.**

Unlike the telephone companies, which generate their own data bases, much of the raw data used in the broadcast and programming industries is owned by independent companies. For example, contracts with Nielsen preclude customers from distributing their data base.<sup>7</sup> Accordingly copying and distributing underlying ratings data would place parties in a position where they would be

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<sup>7</sup>See Joint Network Comments on Motion of the Coalition to Enhance Diversity, filed December 21, 1994 at 3. The networks correctly observe that these contracts bar divulgence of raw data "to non-client stations or their representatives under any circumstances."

breaching their contract with the ratings services and possibly infringing their copyrights.<sup>8</sup>

In addition, as we noted previously, LECG has contracted with a leading university for access to specific information.<sup>9</sup> While it is permitted to copy this material, the license granted by the library does not permit LECG to make subsequent copies for distribution.<sup>10</sup> The same is true with respect to copying trade publications and newsletters which have been a source of data used by the parties. Also, distributing additional copies of these materials could subject parties to liability under the copyright law.

**III. THE DISNEY COALITION'S REQUEST IS UNNECESSARILY BURDENSOME AND WILL IMPAIR THE COMMISSION'S ABILITY TO RESOLVE THIS PROCEEDING IN A TIMELY FASHION.**

There is no doubt that granting this motion will divert both Commission and the parties from their central task -- submitting

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<sup>8</sup>With respect to ratings data, the Disney Coalition has ready access to databases regarding program clearances and viewing patterns. Disney is one of the largest program syndicators in the industry and presumably has contracts with Nielsen. Given Disney's vast resources, it can certainly purchase ratings data if it needs to. Also, nowhere does the Disney Coalition claim that it lacks the ability and the resources to independently verify data that will be submitted in this proceeding.

<sup>9</sup>*Joint Motion for Extension of Time*, in MM Docket Nol 94-123, filed November 29, 1994.

<sup>10</sup>Again, the Disney Coalition can easily obtain these data through the university. Given Disney's resources, it should not be permitted to "free ride" on the efforts of other parties.

and evaluating economic data relating to the Prime Time Access Rule. The motion would will delay, not expedite the proceeding.

Granting this motion would create an administrative nightmare, causing the Commission to become involved in needless and prolonged disputes over data production. As we observed in previous filings, audience data alone could amount to over 100,000 data entries.<sup>11</sup> Sixteen major parties responded to the Commission's *Public Notice*. An additional 44 parties filed *ex parte* submissions.<sup>12</sup> It is reasonable to expect that the number of commenters responding to the *Notice* will be even greater. Approval of the Disney Coalition's request would require the Commission staff to referee and review the reproduction of hundreds of thousands of data points and related documents for requesting parties. The FCC would be required to define the nature and scope of what constitutes "underlying data" and "material from which the data are derived" as requesting parties haggle over whether their opponents have furnished them (and the Commission) with all economic data used in their economic submissions to the FCC. The Commission should not be bogged down in such peripheral issues.

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<sup>11</sup>Letter from James A. Clifton of the Law and Economics Consulting Group, Inc, attached to *Joint Motion for Extension of Time*, filed November 29, 1994.

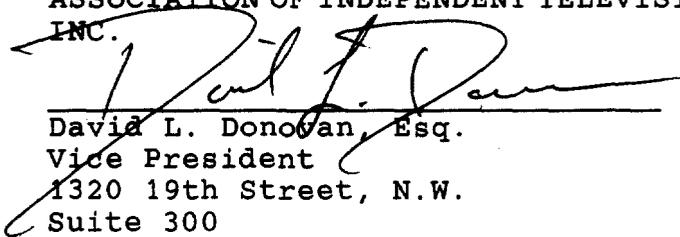
<sup>12</sup>*Notice of Proposed Rule Making* in MM Docket No. 94-123, FCC 94-266, (released October 25, 1994) at Appendix A.

## VIII. CONCLUSION

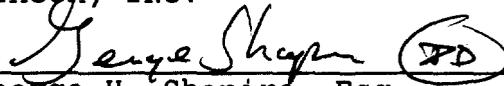
The Disney Coalition's petition simply goes too far. It would apply the rigors, complexities and delays of civil litigation to informal rulemaking, thereby impeding, rather than enhancing, the Commission's policymaking. It would tack an unwieldy discovery process onto the existing public notice and comment requirements - - with no discernable benefit to the public or the Commission. Indeed, it would create unnecessary administrative burdens for the Commission and inevitably delay thoughtful and focused review of the substantive issues at hand. The motion is inconsistent with past practices, existing precedent and the public interest. For all these reasons, it should be denied.

Respectfully submitted

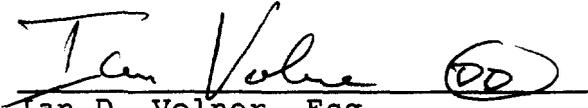
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December 23, 1994

**CERTIFICATE OF SERVICE**

I, Valerie Lynch, do hereby certify that true copies of the foregoing **JOINT OPPOSITION TO MOTION FOR AN ORDER REQUIRING COMMENTERS TO SERVE ON OTHER COMMENTERS ALL DATA RELIED ON IN ANY ECONOMIC ANALYSIS THEY SUBMIT TO THE COMMISSION** were hand delivered, unless otherwise indicated below, to the following individuals on this 23rd day of December 1994:

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