BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of:

CS Docket 98-82: Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; and

CS Docket 96-85: Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996; and

MM Docket 92-264: The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules; and

MM Docket 94-150: Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; and

MM Docket 92-51: Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry; and

MM Docket 87-154: Reexamination of the Commission's Cross-Interest Policy

JOINT COMMENTS OF WRITERS GUILD OF AMERICA, WEST, PRODUCERS GUILD OF AMERICA, SHUKOVSKY ENGLISH PRODUCTIONS, JOHN WELLS PRODUCTIONS, BUNGALOW 78 ENTERTAINMENT, OH SHOOT PRODUCTIONS, GIDEON PRODUCTIONS, AND UBU PRODUCTIONS

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Introduction and Summary

The marketplace for independently produced television programming in the United States has changed dramatically in the past decade. The small, entrepreneurial businessmen and women who created classic weekly television programs such as "Mary Tyler Moore", "All in the Family", "The Cosby Show" and television movies such as "The Autobiography of Miss Jane Pittman", and miniseries such as "Roots" have almost entirely shut their doors or are now resigned to working as employees of the major networks. The consolidation and vertical integration of the large corporate media giants has created a barren landscape in program production that mirrors the "vast wasteland" predicted in the l960's. The data to support this massive concentration of programming sources is clear. In 1992, only 15% of new prime time series were produced by the major networks. By 2002 that number has increased over five times to 77%. Similarly, when viewed with respect to all prime time series (both new and returning), in 1992 only 25% of all such series were produced by the major networks. By 2002 that number has increased more than two and a half times to 69%.

It is not sufficient to counter this clear evidence of broadcast television program concentration by pointing to the number of outlets now available for distribution of programming by cable television networks. While the Commission suggests that there are 230 cable program services available to viewers, it fails to note that only 91 of these services reach at least 16 million cable homes. And of those 91 services, almost 80% (73 such networks) are owned or co-owned by only six companies, More significantly, five of these six companies are the very same companies that control the broadcast network program marketplace. Thus, five companies are now the gatekeepers and decision makers for the programming choices of the vast majority of American people both on broadcast television and cable networks combined.

None of the studies prepared by the Commission address the tremendous consolidation and danger posed by these changes in the marketplace for independently produced television programming. All of these studies fail to recognize or assess what the data makes abundantly clear: When viewed by any standard, source diversity has almost completely disappeared from the American television scene. In our view, it must be restored.

The Commission has recognized that two key touchstones of the public interest standard applicable in this proceeding are competition and diversity. Source diversity should be a clear component of Commission policy. It is premised on the notion, fundamental to our American democracy, that to assure a functioning marketplace of ideas, multiple speakers are preferred, if not crucial. Source diversity is also content neutral. It does not spring from any judgment of individual programming and does not offend traditional notions of First Amendment protection or raise censorship concerns.

The Commission needs to redress the significant imbalance that has evolved in the marketplace in recent years because of the dramatic mergers of studios and networks. It should adopt measures designed to insure that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers. Such a measure is designed simply to recognize that the Commission has a public interest obligation to protect the interests of the viewing public and to take steps, when those interests are clearly threatened, to redress the imbalance and to insure that the liberty and freedom of choice which are critical to the American experience are steadfastly protected and maintained.

Statement of Interest

The Writers Guild of America, west, represents 8,500 writers who write most of America's films and entertainment television programs (hereafter, "WGA" or "The Guild").

The Producers Guild of America represents over 1,800 members who are engaged in producing programs for television, motion pictures and new media.

Shukovsky English Productions (owned by Joel Shukovsky and Diane English) is a television production company that has produced such programs as "Murphy Brown."

John Wells Productions (owned by John Wells) is a television and motion picture production company that has produced such programs as "ER", "The West Wing", "Third Watch", and "Presidio Med".

Bungalow 78 Entertainment is a television production company (owned by Barry Kemp) that has produced such programs as "Coach", "The Bob Newhart Show", the film "Patch Adams." Mr. Kemp served as Executive Producer on the film "Catch Me if You Can".

Oh Shoot Productions is a production company that has produced television and motion pictures. Its president, Frank Pierson, a writer, director and producer, is currently president of the Academy of Motion Picture Arts and Sciences. Mr. Pierson also directed "Conspiracy" and "Citizen Cohn" for HBO and wrote "Dog Day Afternoon", "Cat Ballou", and "Cool Hand Luke", and other feature films.

Gideon Productions is a television production company that has produced such programs as "Gideon's Trumpet", "Day One", "World War II: When Lions Roared", "The Member of the Wedding", and "The Last Best Year." It's president, David Rintels, also wrote "Sakharov" and produced "NBC Live Theatre: Roses in December" and "My Antonia."

UBU Productions is a television production company (owned by Gary David Goldberg) that has produced such programs as "Family Ties" and "Spin City."

Background

In this proceeding, the Federal Communications Commission undertakes the most massive reexamination of media ownership rules in its history.

Due to simultaneous, multiple technological revolutions, a headlong rush toward consolidation in the media over the course of the past decade, court decisions requiring such a reexamination, and scheduled reappraisals stemming from the mandates of the Telecommunications Act of 1996, such a review is required, necessary, and appropriate.

But a review of such an immense scope, with serious implications for its impact on fundamental American values, should not be undertaken lightly or capriciously. Before it takes any steps to reorder the regulations on media ownership, the FCC should make certain it is looking carefully at the whole media landscape and what the effects of further consolidation might be on the policy goals the FCC has historically sought to advance and which are mandated by law.

State of the Television Program Production Marketplace

There has been a dramatic transformation in the marketplace for independently-produced television programming in the last decade. The end result of this transformation has been a marked reduction of source diversity. The decade since the disappearance of the financial interest and syndication rules has seen a reshuffling of the entertainment industry with the end result that independent entrepreneurs have been all but completely shut out of the program supply process.

We urge the Commission to define the relevant marketplace as the economic marketplace for national program production. Importantly, this market must be viewed not only as an economic market, but also as a marketplace of ideas that vitally supports our national discussion of important political and policy issues. The analysis of the program production market as a marketplace of ideas takes into account that more people may form an opinion on major public issues after seeing an episode of the “Practice” or “NYPD Blue” or “West Wing” than after seeing the evening news.

The general consensus regarding the media market today is that it has developed greater competition in recent years.[1] This is not true in the national program production market. To the contrary, the market has gradually failed. The public airwaves are quickly headed for complete domination by a handful of mega-corporations that are both vertically and horizontally integrated and which serve to limit both diversity and competition.

The following charts present the number of prime time series produced by the six broadcast networks for themselves. The situation has changed dramatically over the last ten years. For series new to the network schedule, the networks have moved from 15% in-house production to 77%.

New Prime Time Series

	1992			2002		
Network	**# Of Series From In-House Producers**	**Total # Of Series On Air**	**% From In-House Producers**	**# Of Series From In-House Producers**	**Total # Of Series On Air**	**% From In-House Producers**
ABC	1	7	14%	6	7	86%
CBS	0	8	----	4	7	57%
NBC	4	9	44%	4	5	80%
FOX	0	9	----	6	7	86%
WB	----	----	----	5	6	83%
UPN	----	----	----	2	3	67%
Total	**5**	**33**	**15%**	**27**	**35**	**77%**

Looking at both new and returning series, the networks have moved from 25% in-house to 69%.

[1] 2002 Biennial Regulatory Review, NPRM, par. 4.

Further, setting aside programs produced by one conglomerate for another, there was only one new series ("Dinotopia" by Hallmark) that was completely independent. Of both new and returning series, only 9 series were completely independent, a number that will decline as independently-produced series end their runs and are replaced by in-house productions.

All Prime Time Series

	1992			2002		
Network	# Of Series From In-House Producers	Total # Of Series On Air	% From In-House Producers	# Of Series From In-House Producers	Total # Of Series On Air	% From In-House Producers
ABC	7	28	25%	15	22	68%
CBS	6	25	24%	20	24	83%
NBC	6	27	22%	12	24	50%
FOX	7	23	30%	17	20	85%
WB	----	----	----	10	17	59%
UPN	----	----	----	7	10	70%
Total	**26**	**103**	**25%**	**81**	**117**	**69%**

This analysis satisfies the Commission's need to determine that the market does not provide a sufficient level of competition in the program production sector to promote the goal of diversity.[2]

This consolidation has a direct and adverse impact on actors, directors, writers, and other creative entrepreneurs in the entertainment industry. They have found their creativity curtailed by networks that hold all the cards in programming. By using their oligopsony power, networks can effectively decide which programs are aired on the public airwaves and which never see the light of day. Since almost all

[2] 2002 Biennial Review NPRM, par. 31.

of the independent producers once active in the creative community have now been forced to become mere employees of large media empires, they have virtually no power to offer rejected ideas and programs to other networks. With so little ability of artists to act independently, creativity and innovation is not just stifled, it is strangled.

While such anti-competitive conduct certainly harms members of the creative community and their careers, much more is at stake. The fundamental American values of free expression and the competition of ideas, which have been at the core of American democracy since before the revolution, are at risk.

Threatened with extinction in the wave of consolidation that would certainly be unleashed by a further haphazard loosening of media ownership rules are the already endangered values of independent entrepreneurship and open competition. The notion that an independent producer with a creative idea for a new show can with determination and dedication find success and bring his or her creation to the general public is now a chimerical proposition.

While the quantitative data on the consolidation of ownership of networks points to near complete domination of program production by five horizontally and vertically integrated corporations, the Commission proposes to further loosen checks on ownership. The basis for such a further relaxation of the rules is that new technologies that have reshaped the media terrain – most fundamentally cable television – have provided an explosion of options and that "during the past twenty years, the broadcast television industry has faced increasing competition both from additional television stations and form other video delivery systems."[3]

However, the appearance of a diversity of options on cable television separate and apart from broadcast television's domination by a few big players is, in fact, a mirage. While the FCC cites the existence of "230 national cable programming networks,"[4] there are just 91 networks that can be considered "major" networks (defined as available in more than 16 million homes).[5] Of these 91 networks, fully 80 percent (73 networks) are owned or co-owned by just 6 corporate entities (AOL Time Warner, Viacom, Liberty Media, NBC, Disney, and News Corporation). Far from being an oasis of program source diversity, cable television's domination by big players makes it a mirror image of the anti-competitive marketplace in broadcast television. More significantly, five of these six corporations are the very same entities that dominate the program production market for broadcast television programming. Further, they often use their affiliated cable networks not for new programming, but to "repurpose" –i.e., repeat for profit – programs that their affiliated broadcast networks originally telecast.

Program Source Diversity Goal

We urge the Commission to maintain program source diversity as a distinct policy goal – and to proactively work to see it flourish again. To the extent that

[3] 2002 Biennial Regulatory Review, NPRM, par. 53.
[4] 2002 Biennial Regulatory Review, NPRM, par. 25.
[5] *Further Notice of Proposed Rulemaking*, adopted by the Commission September 12, 2001, at par. 46, especially footnote 102, and paragraph 58.

program source diversity has served as a proxy for viewpoint diversity, the public has been well served. We submit that the proper content neutral policy goal that the government can pursue is to ensure the maximum number of participants in the public square. We urge the Commission to find that a greater number of participants in the production of national television programs is a desirable policy goal on its face. Furthermore, we hope that the Commission will recognize that freer and more open competition serves the public at large.

In this regard, we note that the Commission has assembled a record in the related proceeding regarding national cable system ownership limits.[6] At the time of this filing deadline, the Commission has not issued a revised rule. The current ownership limit is 30% of cable homes; the now-merged AT&T Comcast reaches virtually that portion of the US cable homes. If the Commission raises the limit, it can be anticipated that AT&T Comcast and Time Warner Cable (currently the second-largest cable system owner with 15% of cable homes) will pursue the greatest ownership permitted. Assuming such ownership growth occurs, either one of these cable system owners would possess a life or death power over individual cable program services. Such power makes the policy goal of program source diversity all the more urgent. Only if a diversity of program suppliers is established “upstream” can consolidation “downstream” be tolerated. For that reason, we are filing these same comments in the cable ownership proceeding so that our concerns may be fully considered in that proceeding as well.

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[6] *Further Notice of Proposed Rulemaking*, adopted by the Commission September 12, 2001.

Nothing in *Schurz v. FCC* [7] is to the contrary. There the Court recognized that the "networks have no hope of proving to our satisfaction that the Commission is without any power to restrict the networks' participation in television programming."[8] While invalidating the Commission's attempt to restructure the then–existing financial interest and syndication rules, and also to restrict network in-house program production, the Court made clear that its decision was based on a failure by the Commission to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[9] Judge Posner was very specific about the Commission's authority in this area:

> "Even if we were persuaded that it would be irrational to impute to the networks even a smidgen of market power, the Commission could always take the position that it should carve out a portion of the production and distribution markets and protect them against the competition of the networks, in order to foster, albeit at a higher cost to advertisers and ultimately to consumers, a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market might provide. That would be a judgment within the Commission's power to make."[10]

We believe there is a clear connection between a rule limiting television and cable network in-house production and a diversity of programming. The data of the last decade makes apparent that five large corporate entities now control and exercise market power with respect to the choices available to the viewing public on

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[7] *Schurz Communications, Inc. v. FCC*, 982.F.2d (7th Cir. 1992)
[8] *Id.*, at 1043, 1049
[9] *Id.*, at 1049
[10] *Id.*

both broadcast television and cable networks. All decisions about ideas, program choices, financial terms and other indicia of television program development and ownership are controlled by these five entities. If the Commission has any doubt about this conclusion then it should hold public hearings where further evidence can be obtained by direct testimony from participants in the television production process.

But even on the record as it now exists before the Commission, the data is convincing that an essential component of the public interest standard, namely, a diverse range of sources of programs, is in imminent danger of extinction.

The Commission has acknowledged the Supreme Court finding that: “promoting the widespread dissemination of information from a multiplicity of sources” is a goal of the “highest order.”[11] We submit that as outlet diversity disappears through mergers and acquisitions, stimulated by a relaxation of Commission rules designed to prevent such media concentration, then program source diversity must be assured by the Commission if a public interest goal of the “highest order” is to be maintained.

The Proposed Program Source Diversity Rule

In order to achieve the policy of a maximum number of program suppliers for broadcast and cable television, the Commission should adopt a program source diversity requirement. Such a rule would require that national program services on broadcast and cable television purchase at least 50% of their prime time

[11] 2002 Biennial Regulatory Review, NPRM, par. 21.

programming, measured quarterly, from independent producers. An independent producer is one not owned or controlled by or affiliated with the same entity owning or controlling the national program service. Newscasts and sports programs and telecasts of feature films would be excluded from the requirement. There would be no limitation on the ability of one network to purchase programming from another. Cable program services reaching less than 16 million cable homes would be excluded from the requirement.

The Need to Maintain the Dual Network Rule

The current Dual Network Rule is also an essential limitation on the market power of the largest television corporations. ABC, CBS, NBC and FOX occupy a distinct place in the distribution of television programming and consolidation of one of these networks with another would dramatically and immediately concentrate control of the national television marketplace to an unconscionable degree. Any relaxation of this rule would negatively affect not only the program production market that we have highlighted, but also would narrow control of the choice of programs scheduled, regardless of their production source.

Relevant Data

In its drive to relax the rules governing media ownership, the FCC released twelve studies. These studies have been criticized as incomplete, inconclusive, and relying on both flawed methodologies and researchers of questionable impartiality. For instance, Dean Baker, co-director of the Center for Economic Policy and

Research said, “The write-ups are often different from what they found. They were to a large extent poorly designed. The data they actually found showed there was a danger in consolidation.”[12] Moreover, the studies do not even attempt to ask questions or delve seriously into the implications of media consolidation in the program supply market.

The only study the Commission has entered into the record regarding diversity of programs on Network Prime Time television is by Professor Mara Einstein. The conclusion of the study is that there exists a diversity of programs. The Study and its conclusions have been sharply criticized by the Caucus for Television Producers, Writers and Directors. See “A Response” filed by the Caucus with the Commission on December 20, 2002. We support the views expressed by the Caucus.

We observe only that the study defines diversity of programs in terms of diverse formats. Thus, an hour drama is distinct from a half-hour situation comedy, from a game show, or from a news magazine.[13] The Commission apparently accepts this analysis of genre as a measure of diversity of programs.[14] We submit that genre is an inappropriate measure of diversity of programs and is of no import in the current policy review. A situation comedy and an hour drama may, for instance, establish no diversity of viewpoint. Nothing inherent in the distinctions that separate the genres provides for any certain diversity of viewpoints.

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[12] Brooks Boliek, *Unions blast FCC's studies on media-ownership rules*, The Hollywood Reporter, December 19, 2002.
[13] Mara Einstein, FCC, *Program Diversity and the Program Selection Process on Broadcast Network Television*, October 1, 2002, p.7.
[14] 2002 Biennial Regulatory Review NPRM, par. 38.

We have several comments, as requested, on the Commission's data regarding the range of potential competitors in the media marketplace and the significance of that data for the biennial review.[15]

The Commission notes that over 60% of commercial television stations are affiliated with one of the top four networks.[16] This statistic alone justifies the Dual Network rule. No one entity should be permitted to control two of the four vital conduits into the nation's living rooms.

The Commission notes the availability of various audio services and newspapers and the Internet as substitute media for broadcast and cable television.[17] We disagree and urge the Commission to consider these as distinct media markets. They are not interchangeable with broadcast and cable television.[18] The television market is designed to supply moving audio-visual images to the viewing public and is therefore a unique experience for the viewing public, distinct from either audio-only services or newspapers. These media cannot be considered interchangeable with broadcast and cable television by their very natures. The markets must be considered separately. With regard to the Internet, we note that delivery of video is still in its infancy and cannot be considered a viable substitute for broadcast or cable delivery of television content at this time.

[15] 2002 Biennial Review NPRM, par. 23.
[16] 2002 Biennial Review NPRM, par. 24.
[17] 2002 Biennial Review NPRM, par. 26 and 27 and 28.
[18] 2002 Biennial Regulatory Review NPRM, par. 42.

Conclusion

The march of technological progress has not brought an increase in the number of voices with access to the American marketplace of ideas via television. The evidence is overwhelming that there has been a massive concentration of power in the hands of a few giant corporations who now control the vast bulk of programming in prime time both in broadcast and cable television. The Commission has a public interest obligation to ensure that television offers a real diversity of voices to the American public.

We urge the Commission to adopt a source diversity rule to ensure that the national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers. We also urge the Commission to retain the Dual Network rule in its preset form. Finally, we submit that the Commission should hold public hearings at which all affected parties can be heard.

Respectfully Submitted,

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