

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
2002 Biennial Regulatory Review –)	MB Docket No. 02-277
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules)	
Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
Cross-Ownership of Broadcast Stations)	MM Docket No. 01-235
And Newspapers)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations)	
In Local Markets)	
Definition of Radio Markets)	MM Docket No. 00-244

REPLY COMMENTS OF THE WALT DISNEY COMPANY

The Walt Disney Company hereby submits these reply comments in the above-captioned proceedings. As more fully detailed in the opening comments, The Walt Disney Company files these comments on behalf of itself and on behalf of the ABC Television Network, which is fully owned by Disney.

INTRODUCTION

As stated in Disney/ABC’s opening comments, Disney/ABC supports broad and principled deregulation of the Federal Communications Commission’s (“FCC” or “Commission”) broadcast ownership limits. Disney/ABC is well-positioned to make this

¹ The Walt Disney Company and the ABC Television Network are referred to collectively herein as “Disney/ABC”.

argument because it is not currently constrained by the FCC's national broadcast ownership cap. Disney/ABC owns ten television stations that, collectively, have a theoretical reach of less than 25% of U.S. Television Households, well below the current 35% national network cap. Nonetheless, Disney/ABC supports broad and principled deregulation of the FCC's broadcast ownership rules because the historical factual predicate for those rules no longer exists.

**THE FACTUAL PREDICATE UNDERLYING
THE IMPOSITION OF THE BROADCAST OWNERSHIP RULES
NO LONGER EXISTS**

Disney/ABC strongly supports the Commission's announced intention to focus on the factual record developed in this proceeding. That record documents the wealth of media outlets available to consumers.² It also demonstrates that the historical scarcity of news and entertainment media outlets that provided the legal foundation for the broadcast ownership restraints has given way to an era of previously unimagined media abundance.³ Thus, the record does not provide a legal foundation for continuation of the FCC's broadcast ownership rules.

Disney/ABC urges the Commission not to be swayed by the hypocritical pleadings of some interested parties in this proceeding. For example, in its comments, Cox Enterprises Inc. argues for repeal of the rule that constrains its business aspirations (the newspaper-broadcast cross-ownership rule).⁴ Yet, in the same breath, Cox argues for retention of the rule that constrains the business aspirations of its competitors (the 35%

² See, e.g., Comments of the National Association of Broadcasters; Comments of Fox Entertainment Group, Inc. and Fox Television Stations, National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom.

³ *Id.*

⁴ See Comments of Cox Enterprises, Inc. ("Cox Comments") at 70 (arguing that "[g]iven current competitive conditions, the Commission cannot find that the newspaper/broadcast cross-ownership rule is necessary to achieve this goal.>").

national television cap).⁵ The record does not support the retention of either rule. In fact, local markets – where Cox seeks deregulation – raise more concerns regarding concentration than the national media marketplace where Cox seeks continued regulation. In addition, Cox complains about what it calls the broadcast networks’ “myriad [national] cable program services,” but specifically neglects to include references to Cox’s own substantial cable network investments.⁶

Moreover, in its comments, (although strangely irrelevant to the subject of the broadcast ownership rules), Cox also criticizes the retransmission consent “asks” of broadcasters like ABC while engaging in the same retransmission negotiations for its own television stations.⁷ It is Disney/ABC’s practice to seek cash payments from cable operators (and all multichannel video programming distributors) for the right to retransmit the signals of the ten ABC owned television stations.⁸ For cable operators that do not wish to pay cash, Disney/ABC offers the alternative of carrying other Disney/ABC programming.⁹ As reported by Multichannel News,¹⁰ Cox similarly seeks a cash payment from cable operators for the right to retransmit the signals of the Cox stations

⁵ See *id.* at 25 (arguing that “fundamental changes in the media landscape provide overwhelming evidence that the Commission must depart from its conclusion in 1984 that the national ownership cap could safely be further relaxed or eliminated altogether”).

⁶ See Cox Comments at 5 and Appendix B (showing broadcast network ownership of top cable programming). Cox’s cable network investments include: Animal Planet (19.7%); Discovery Channel (24.6%); Discovery Civilization (12.3%); Discovery En Español (24.6%); Discovery Health (24.6%); Discovery HD Theatre (24.6%); Discovery Home & Leisure (24.6%); Discovery Kids (24.6%); Discovery Science Channel (24.6%); Discovery Wings: The Aviation and Adventure Network (24.6%); iN Demand (11%); PIN (Product Information Network) (45%); TLC (The Learning Channel) (24.6%); Travel Channel (24.6%); and Viewers Choice 1-10 and Hot Choice (20%). See Ninth Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (rel. Dec. 31, 2002) (“2002 Competition Report”) at Table C-1.

⁷ Compare “Must-See Retrans Spat: Small Ops vs. Cox TV”, Multichannel News, Volume 24, Number 3, January 20, 2003 at 1 (“Must-See Retrans Spat”) with Cox Comments at 42 (arguing that networks force “higher costs” on cable operators).

⁸ See Exhibit A, Affidavit of Ben Pyne.

⁹ See *id.*

¹⁰ See Must-See Retrans Spat.

(“The broadcaster has asked [Country Cable TV] to either pay 20 cents a month per subscriber to carry the station’s signal, or – in lieu of that – to carry the broadcaster’s cable network, the Pittsburgh Cable News Channel, for about 40 cents a month.”). Thus, the Cox pleading is hypocritical (even by Washington standards) and violates the principle, frequently invoked by Cox management, that business issues should be resolved across the business table, not in government proceedings.

Disney/ABC supports the FCC’s comprehensive approach to reviewing the broadcast ownership rules and developing a factual record that accurately depicts the media landscape of today. As described more fully below, the media landscape is vastly changed from the landscape of ten, twenty, and certainly thirty years ago.

**REIMPOSITION OF THE FINANCIAL INTEREST
AND SYNDICATION RULES
IS ENTIRELY WITHOUT MERIT**

Perhaps the least meritorious and least legally defensible suggestion in the record is the proposal¹¹ to resurrect a version of the Commission’s previously-repealed network financial interest and syndication rules (the “Finsyn Rules”). Those rules were based on traditional antitrust principles and date back to an era when the entire television industry was powerfully dominated by the then three broadcast networks. For example, in 1975, the three network share of all prime time viewing was 93%.¹² Cable was still little more than a twinkle in the eyes of that industry’s early pioneers. There were no cable

¹¹ See Comments of the Center for the Creative Community Regarding Competition and Media Concentration in the Television Industry at 29, 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 (“Joint Comments”) at 3.

¹² See Second Report and Order, Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282 at para. 44 (1993) (“Fin Syn Repeal Order”).

networks. The consumer satellite television industry had not yet been invented. The Internet had not been invented.

On the facts extant in the early 1970's, the Commission reasonably found that the then three television networks represented a "three network funnel" that justified regulatory intervention.¹³ However, the growth of additional broadcast and cable outlets eventually eliminated the factual predicate, and therefore the legal justification, for the Finsyn Rules. Following a strong rebuke by the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") in Schurz Communications v. FCC,¹⁴ the Commission repealed the Finsyn Rules in 1993. In repealing its rules, the Commission noted that the three network prime time share of viewing had declined from 93% in 1975 to 61% in 1990.¹⁵ The Commission also noted that the number of cable networks had grown from 34 in 1982 to 100 by 1993.¹⁶ On these facts, the Commission concluded that it could not legally sustain the financial interest and syndication restrictions on the three original broadcast networks.

In the opening round of comments, some commenters cite Schurz Communications as support for the reimposition of the financial interest and syndication rules.¹⁷ However, a fair reading of Schurz Communications reflects the Seventh Circuit's disdain for the now-repealed Finsyn Rules. For example, the Seventh Circuit found that, as a result of the Finsyn Rules, television production became a "riskier business" and that "the production of primetime programming [became] more concentrated."¹⁸ The Seventh

¹³ See Second Report and Order, Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, 50 FCC 2d 829, 835 (1975).

¹⁴ 982 F.2d 1043 (7th Cir 1992).

¹⁵ See Fin Syn Repeal Order at para. 44.

¹⁶ *Id.* at para. 45.

¹⁷ See, e.g., Joint Comments at 12.

¹⁸ 982 F. 2d at 1046.

Circuit also found that the basis for the rules “was never very clear.”¹⁹ Finally, the Seventh Circuit found that what the FCC “could not do, consistent with the principles of reasoned decision-making, was pretend that it had never found that the networks had lost market power.”²⁰ As described below, the networks’ market power has only continued to decrease since 1993.

Since the repeal of the Finsyn Rules, the television marketplace has become even more fiercely competitive. In the early 1990’s the Commission was impressed that the number of broadcast networks had grown from three to four.²¹ Today, there are seven national broadcast television networks.²² In 1993, the Commission was impressed that there were 100 cable networks.²³ Today, there are 308 satellite-delivered programming national networks and 85 regional cable networks available via cable systems.²⁴ In fact, with the advent of upgraded cable channel capacity, the average cable system now devotes 82.5 channels to video programming.²⁵ Moreover, as the FCC reported recently, “viewership shares of broadcast television stations continue to decline,” while cable network viewership continues to increase.²⁶ These numbers do not include the additional influence and growth of direct broadcast satellite (“DBS”) and the programming offered by DBS providers. And, according to Nielsen, the collective prime-time viewing share of ABC, CBS, and NBC has decreased from 99.6% in 1960 to 38.3% last season.²⁷

¹⁹ *Id.*

²⁰ 982 F. 2d at 1054.

²¹ Fin Syn Repeal Order at para. 45 n.47.

²² See 2002 Competition Report at para. 79 (in which the FCC reports that advertising revenues for the seven networks fell 8% from 2000 to 2001, while advertising revenues for the cable networks increased 3.8% during this time).

²³ See Fin Syn Repeal Order at para. 45.

²⁴ See 2002 Competition Report at paras. 13 and 25.

²⁵ *Id.* at para. 23.

²⁶ *Id.* at para. 24.

²⁷ Nielsen Television Index, Primetime Shares, Premiere through April/May.

The Commission's previous intervention in the programming marketplace was based upon the fact that in 1970, program producers had only three networks to which they could try to sell a program. Today, program producers have hundreds of networks to which they can offer their programs. In the face of the indisputable growth in the number of television channels available to both consumers and program producers, it is simply ludicrous to suggest that there is any legal basis for the Commission to re-regulate the programming business. The idea of re-regulating the networks is particularly absurd since as many as 85%²⁸ of US households gain access to television (and, increasingly, the Internet) through distribution via cable or satellite. Since consumers have a choice of only two or three such cable or satellite providers, it is those facilities that currently would represent any bottleneck or funnel as viewed by the FCC. Disney/ABC does not believe that the record supports any re-regulation of the television programming marketplace. But if, notwithstanding Disney/ABC's view to the contrary, the Commission believes that some program re-regulation is necessary, any such regulations would most appropriately be directed toward the satellite and cable distribution systems (including those owned by Cox) that have replaced the broadcast networks as today's bottlenecks or funnels.

²⁸ *Id.* at para. 5 and n.5.

CONCLUSION

Disney/ABC supports broad and principled deregulation of the FCC's broadcast ownership rules and urges the Commission focus on the factual record developed in this proceeding.

Respectfully submitted,

THE WALT DISNEY COMPANY

By: /s/ Preston R. Padden

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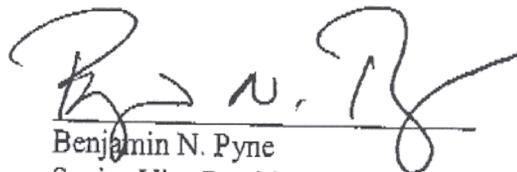
Dated: February 3, 2003

EXHIBIT A**DECLARATION OF BEN PYNE**

I am Senior Vice President of Affiliate Sales and Marketing for ABC Cable Networks Group. Among other responsibilities, I am responsible for working with the ABC owned television stations to negotiate retransmission agreements for the ten ABC owned television stations.

I attest that, in negotiating for retransmission consent, ABC offers MVPDs a cash stand-alone price for retransmission consent for the ABC owned stations. If the cable operator accepts that offer, that decision results in no additional obligation to carry any Disney/ABC programming. To the extent that any given MVPD decides not to accept ABC's stand-alone cash offer, and instead elects the alternative to negotiate to carry programming, that decision is made by the individual MVPD. We attempt to work with the MVPD to customize a reasonable offer to address their particular needs.

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information, and belief, all of the factual information contained in this Declaration is accurate and complete.



Benjamin N. Pyne
Senior Vice President of Affiliate
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ABC Cable Networks Group

February 3, 2003