

Summary of Facts Contained in the Coalition for Program Diversity's January 2 and February 3, 2003 FCC Filings

I. A. More than 43 million Americans over 18 years of age rely solely on advertiser-supported network prime time programming aired on the free spectrum licensed by the Commission to the four major networks.¹

B. Median Household Income of Network Prime Time Television Viewers ²	Cable and Satellite households:	Households without Cable, Satellite or pay service television programming:
	\$51, 375	\$26, 588

II. Independently Produced Programs Airing on Network Prime Time Television in 1992 vs. 2002

	1992	2002
A. Independent Television Producers on Network Prime Time Schedule ³	22	6
B. Percentage of Network Prime Time Program Ownership ⁴	Independent programming 66.4%	Independent programming 23.9%
	Network programming* 33.6%	Network programming** 76.1%
C. Hours of Network Prime Time Program Ownership ⁵	Independent Producers 46.5 hours	Independent Producers 17 hours
	Network/affiliated Producers 23.5 hours	Network/affiliated Producers 54 hours

* Network programming includes in-house network produced programming and programming produced by a studio entity affiliated with one of the four major broadcast networks.

¹ See MEDIAMARK RESEARCH, INC., FALL 2002 REPORT (2002).

² See NIELSEN MEDIA RESEARCH (2002); NPower.

³ See CPD Reply Comments filed February 3, 2003 at Appendix 2.

⁴ See *id.* at Appendix 9, 19.

⁵ See *id.*

** Even when news magazines and sports programs are deleted, the four major networks own 72% of programming aired on their prime time schedule in 2002-2003.

III. Critical Nexus Between “Bland” Prime Time Network Television Programming, National Advertising and US Consumers

- National advertising is the economic engine of free over-the-air network broadcasting. From November 2001 through October 2002, advertisers spent a total of \$11,198,814,000 to air ads on the six networks over-the-air network prime time television programming.⁶ During that same time period, 682 different companies advertised 3,478 different brands with diverse consumer target audiences on over-the-air network prime time television programming.⁷
- The advertising industry, and American consumers, are significantly affected by FCC regulatory actions impacting broadcast television. When left unregulated, the networks have increasingly relied on low budget and often similarly scripted programs that they immediately rerun on co-owned cable outlets. These bland and repetitive shows draw smaller audiences. Audience size is critical to advertisers because broadcasters charge advertisers per unit of advertising space divided by the number of viewers for the program (CPM). Viewer size and viewer draw are essential components of how much advertisers pay to air ads. When network audience size decreases due to less diverse programming, advertisers pay more to advertise products. Ultimately, the American consumer pays the increased advertising costs as product prices rise.
- As a direct result of network deregulation, cross-ownership, and vertical integration, 76% of network prime time programs currently are produced in-house or in affiliation with the same four sources – ABC, CBS, Fox and NBC. Because of cross-ownership, these same four companies are immediately rerunning/repurposing shows in which they have ownership on their co-owned cable affiliates – thus maximizing profit margins by rerunning the same show across all network co-owned, cross-platformed broadcast outlets.
- While the networks retain 100% of their advertising revenue from their prime time schedules, the networks are spending a significantly lower percentage of their revenues from advertising on the prime time television programming, despite their claims that deregulation would trigger heavier investment. The networks spent 30.3% of their advertising revenue on programming in 1994 but only 26.3% in 2000.⁸
- Today, the unregulated networks are fixated on maximizing profit “margins” for their corporate parents by programming to the most common denominator across their co-owned outlets. Reality programming targeted for youthful demographic audiences has become the preferred form of low budget network programming. In this regulation-free environment, the Commission’s goals of promoting diversity and competition are being trumped by the networks’ obsession with increased profit margins. Diverse, quality programming which historically produces higher absolute revenue and profits is not the networks’ goal. For the remainder of the 2002-2003 prime time programming schedule, the networks are expected

⁶ See COMPETITIVE MEDIA REPORTS, NOV. 2001-OCT. 2002 (Dec. 2002).

⁷ See NIELSEN MEDIA RESEARCH (2002); NPower.

⁸ See Federal Communications Commission, Broadcast Television: Survival in a Sea of Competition, OPP Working Paper Series 37, at 132 (Sept. 2002).

collectively to exhibit 30 new reality shows. That is 20% more than the combined number of comedies and dramas.⁹

- The networks' primary goal of maximizing profit "margins" while cutting programming costs is best illustrated with the network misnomer: "repurposed programming" (a.k.a. reruns). FCC Study 5 appropriately labeled this network trend as "Blanding the Landscape."¹⁰ Study 5 also acknowledged that syndication in the non-network time periods over broadcast and cable outlets is now happening simultaneously as networks' use a multiple exposure strategy to maximize profits from the same source:

"...networks have begun selling shows into broadcast and cable outlets at the same time even at the risk of reducing viewership of newly-produced episodes of that show."¹¹ "In addition to accelerating the traditional point for selling programming into syndication, networks are attempting to reap more immediate financial benefits on shows they own by repurposing them on cable networks."¹²

- Different programming appealing to diverse viewers attracts larger audiences and typically results in increased revenue and profits. The FCC's OPP Working Paper 37 points out that "[t]he jump in subscription revenues for advanced analog and digital services attests to the value subscribers apparently place on expanded programming choice."¹³ Unfortunately, due to the networks' reliance on redundant, low budget programming (including reality shows), these diverse programming choices often are only available on pay services and are no longer available to the public on network prime time television.
- Network prime time programming generally cannot be substituted with other programming; importantly, no other programming option allows advertisers to reach nationwide audiences that typically are only reached through advertising placed on the four major networks' prime time schedules.
- With the Commission's adoption of the 25% Independent Producer Rule to promote the FCC's fundamental goals of diversity and competition in the narrow prime time television programming marketplace, the advertising industry will have the competitive alternative of independently produced programming when seeking to advertise products to consumers on a nationwide basis; without the option of independently produced prime time programming, national advertisers will be forced to pay even higher advertising fees for network programming that delivers ever diminished national audience reach. Ultimately, American consumers will bear the burden of increased costs for the price of products and services they use.

⁹ See Bill Carter, Reality Shows Alter Way TV Does Business, N.Y. Times, Jan. 25, 2003, at A1.

¹⁰ Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity, at 45 (Sept. 2002).

¹¹ Id. at 34-35.

¹² Id. at 36.

¹³ Federal Communications Commission, Broadcast Television: Survival in a Sea of Competition, OPP Working Paper Series 37, at 45 (Sept. 2002).

IV. The Narrow Prime Time Television Programming Marketplace

As the courts have recognized for more than a quarter century, scripted fictional prime time production for the major national over-the-air networks is unique for its high cost, generally high quality and viewer appeal.¹⁴ Moreover, the Supreme Court explicitly recognized the distinct features of broadcast television when it stated that protecting noncable households from loss of broadcast television service due to cable expansion is “an important federal interest.”¹⁵ The Court acknowledged the unique nature of broadcast television, a valuable public resource utilized for free by the four networks, as a “demonstrably principal source of information and entertainment for a great part of the Nation’s population.”¹⁶ Indeed, the unrivaled, narrow network dominated prime time television schedule is the only source of news and entertainment for over 43 million US adults dependent on the information disseminated by the networks over the public airwaves.

Network prime time television programming represents a unique market where only this programming routinely attracts nationwide viewing audiences that advertisers require to sell their products and services. Network prime time television programming is typically high cost, scripted fictional programming that is generally not substitutable with programming generated for other video sources, including cable distribution.

Because of the uniqueness and national audience appeal of the network prime time television programming, the four major networks are able to charge advertisers significantly more per rating point to advertise their products on network television, as opposed to weblets, first run syndication or cable outlets. The record compiled by the Coalition for Program Diversity in its January 2, 2003

¹⁴ See generally Mt. Mansfield Television, Inc. v. Federal Communications Commission, 442 F.2d 470 (2nd Cir. 1971) (“The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming.” Id. at 475. “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Id. at 477. “The evidence demonstrates that despite the fairly wide range of choice available to licensees (networks), they have consistently decided to limit themselves to one program source during prime time.” Id. at 478. “The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation’s population.” Id. at 481. “In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.” Id. “[T]he courts should not overrule an administrative decision merely because they disagree with its wisdom, but only if they find it to be ‘arbitrary or against the public interest as a matter of law.’” Id. at 482. “The Commission’s regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme.” Id. at 485, n. 52) (internal citations omitted); see also Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1043 (7th Cir. 1992); see also Cap Cities/ABC, Inc. v. Federal Communications Commission, 29 F.3d 309 (7th Cir. 1994).

¹⁵ Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180, 190 (1997) (hereinafter Turner

II)
¹⁶ Id.

and February 3, 2003 filings in this proceeding confirms that programs on the major networks' prime time schedule dominate the ratings, not only in their initial exhibition window, but thereafter. And no commentators in this proceeding can point to more than a handful of series – if any – which successfully ran in domestic syndication after initially airing on a weblet or cable network. In fact, in the case of successful sitcoms, all aired initially on a major network. In addition, post first run successful drama programs – either on a financial or performance basis – have, with minor exceptions, been programming which initially aired on ABC, CBS, Fox and NBC.

V. The Legal Elements of the Content-Neutral 25% Independent Producer Rule

1. A major network (which now includes ABC, CBS, FBC (hereinafter “Fox”) and NBC) is an over-the-air network with 95% or more NTI and with greater than a 4.0 Household Rating.
2. An independent producer is an entity other than one affiliated with a major network.
3. The category of “25%” independently produced programming is computed on a semi-annual basis. Exhibition of motion pictures initially theatrically released which then air on the networks are excluded from the computation. Thus, if a major network regularly scheduled two hours a week on its prime time schedule for viewing theatrical motion pictures, as described above, the denominator for applying the 25% Independent Producer Rule would be 20 hours, rather than the standard 22 hours, which typically constitutes a major network's prime time schedule. (Only 15 hours is the norm for Fox).
4. The “75%” network programming includes a major network's in-house or network affiliated programming and programming from owners of other major networks.
5. To qualify for the 25% carve out, a major network could not take a financial interest or domestic syndication rights in any independent produced programming.
6. The “Term” or a “license period” for the networks' licensing of independent produced programming could not exceed six full seasons (plus a “half” season in the event of a winter start.)
7. The 25% Independent Producer Rule would be gradually implemented over a two year period (24 months) from the date of the Commission's adoption of the 25% Independent Producer Rule.

VI. The Judicial Sustainability of the 25% Independent Producer Rule

1. Fox Television Stations, Inc. v. Federal Communications Commission:¹⁷

In Fox Television, the DC Circuit specifically noted that Commission regulation of broadcasting has historically promoted diversity.¹⁸ “In the context of the regulation of broadcasting, ‘the public interest’ has historically embraced diversity (as well as localism), see FCC v. Nat. Citizens Comm. For Broad., 436 U.S. 775, 795 (1978), and nothing in § 202(h) signals a departure from that historic scope.”¹⁹

2. Schurz Communications, Inc. v. Federal Communications Commission:²⁰

In 1992, the Schurz court rejected a complicated FinSyn rule adopted by an earlier Commission, which did not have a record before it confirming diminished sources of program diversity in the narrow prime time network television marketplace. By contrast, today the Coalition for Program Diversity has provided the Commission with hard, empirical data in the record confirming seriously diminished sources of diversity in the prime time television marketplace. (See Section II supra).

Based on this irrefutable record, the Schurz ruling has added relevance today and provides the Commission with the explicit language and precedence for the judicial sustainability of an independent producer carve out rule.

- “...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 would provide. That could be a judgment within the Commission’s power to make.”²¹

Regarding the relevance of network market power when deciding to adopt a content neutral, diversity promoting independent producer carve out, the Schurz court said:

¹⁷ See Fox Television Stations, Inc. v. Federal Communications Commission, 280 F.3d 1027 (D.C. Cir. 2002).

¹⁸ See id. at 1042.

¹⁹ See id.

²⁰ See Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1043 (7th Cir. 1992).

²¹ See id. at 1049.

- “...even if the networks had zero market power, the Commission might in the discharge of its undefined, uncanalized responsibility to promote the public interest restrict the networks’ programming activities in order to create a more diverse programming fare.”²²
- “Anyway, the Commission’s concern, acknowledged to be legitimate, is not just with market power in an antitrust sense but with diversity, and diversity is promoted by measures to assure a critical mass of outside producers and independent stations.”²³
- “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 market....”²⁴

Based on the fact that 76% of 2002 network prime time schedule was owned in total or in part by the network’s, the Schurz court is particularly relevant today; as the Court noted, if the network’s effectively monopolize broadcast television, which they do today, “minority tastes would go unserved.”²⁵ The Schurz court’s statement that “reruns are the antithesis of diversity,”²⁶ is also relevant to the Commission’s current analysis of diversity in prime time television marketplace where the networks rely heavily on reruns, known today as “repurposed programming.”

3. Turner Broadcasting System, Inc. v. Federal Communications Commission:²⁷

The Supreme Court in Turner II, explicitly stated:

“As noted in Turner, must-carry was designed to serve ‘three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.’ 512 U.S. at 662. We decided then, and now reaffirm, that each of those is an important governmental interest. We have been most explicit in holding that ‘protecting noncable households from loss of regular television broadcasting service due to competition from cable systems’ is an important federal interest’.”²⁸

Moreover, the Turner II Court repeatedly focused on the legitimate role of “predictive judgment” in formulating public policy that promotes the Commission’s bedrock goal of diversity.²⁹

Based on the hard data now in the Commission’s record in this proceeding confirming severely diminished sources of diverse prime time television programming from independent producers (see Sec. II supra), the Commission can make a reasoned and sustainable predictive judgment that adoption

²² See id. at 1054.

²³ See id. at 1050.

²⁴ See id. at 1049.

²⁵ See id. at 1054.

²⁶ See id. at 1055.

²⁷ See Turner II, 520 U.S. 180 (1997).

²⁸ See id. at 189-90.

²⁹ See id. at 188, 204.

of the 25% Independent Producer Rule will reverse this trend and promote increased sources of diverse prime time television programming.

When Fox, Schurz, and Turner are read collectively they provide ample precedent for the Commission to use its predictive judgment based on the solid factual record to adopt the 25% Independent Producer Rule.

VII. The CPD's Standing and Standard of Review for Proposing the 25% Independent Producer Rule

- The Administrative Procedures Act states that following the issuance of a notice of proposed rulemaking “Each agency shall give an *interested person* the right to petition for the *issuance, amendment, or repeal of a rule.*”³⁰
- “After notice of proposed rulemaking is issued, the Commission *will afford interested persons an opportunity to participate in the rulemaking proceeding.*”³¹
- The NPRM specifically solicits comments “on several aspects of diversity,”³² recognizing that, “a broad range of comments must be received to ensure we fulfill our mandate to further the public interest, convenience and necessity.”³³
- The Commission acknowledged the magnitude of the Rulemaking and recognized the need to “consider whether there are additional objectives that the Commission should strive to achieve through our media ownership rules.”³⁴
- The Commission acknowledged in the NPRM that its stated objective in this Rulemaking is “to consider these rules collectively, as any change to one rule may affect the need for other rules to be retained, modified, or eliminated.”³⁵ The 25% Independent Producer Rule is related to any action regarding the 35% Broadcast Cap because the record before the Commission now confirms that even with the status quo, there is severe diminished sources of diversity on network prime time television.
- The NPRM encouraged commentators to “submit empirical data and analysis demonstrating both change (either increase or decrease) in diversity levels and the causal link, as opposed to mere correlation, between those changes and greater consolidation in local markets.”³⁶ (See Sec. II supra).
- The NPRM noted that “If we are to maintain ownership limits predicated on preserving diversity, we must inquire into whether our traditional theory of diffused ownership policy is in fact more likely to preserve diversity than a policy that relies on market forces or other measures to foster diversity.”³⁷
- Commissioner Capps in the NPRM specifically stated that “commentators should not feel they have to limit themselves to the questions posed in this item. The Commission labors under no illusion that we have asked every possible question;... so I urge those who respond to look at every aspect of these issues that you deem relevant to our decision-making process.”³⁸

³⁰ 5 U.S.C.A. § 553(e) (1996) (emphasis added).

³¹ 47 C.F.R. § 1.415 (emphasis added).

³² 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 02-277, ¶ 40 (proposed Sept. 23, 2002).

³³ See id. at Appendix A, § A, p.56.

³⁴ See 2002 Biennial Regulatory Review, supra note 32, at ¶ 5.

³⁵ See id. at ¶ 8.

³⁶ See id. at ¶ 43.

³⁷ See id. at ¶ 44.

³⁸ See id. at 64.