



# Center for the Creative Community

VIA FACSIMILE

April 18, 2003

JONATHAN RINTELS  
Executive Director

Honorable Michael Powell, Chairman  
Federal Communications Commission

TRISH CAROSELLI  
Assistant Executive  
Director

Re: Your Letters to Senators McCain et. al, dated April 11, 2003

Dear Chairman Powell:

ADVISORY BOARD

It was a pleasure to meet you on April 11, 2003 to discuss the FCC's media ownership limits proceeding and the need for the FCC to increase the number and diversity of voices producing television programming.

TONY ADAMS

HINTON BATTLE

LIONEL CHETWYND

BLAKE EDWARDS

DIANE ENGLISH

MARSHALL GOLDBERG

CRAIG HAFFNER

Regarding the above referenced letters to Senators McCain, et al., we are perplexed by your comments that, *"Indeed, not until this late point in a proceeding that has been pending over eight months have I heard any concerns expressed about the form of the current notice of proposed rulemaking. It is late in this process to suddenly adopt an alternative, even if worthy, procedural course..."*

LEONARD HILL

CHARLES HOLLAND

GREGORY ALLEN HOWARD

MARTIN KAPLAN

RICHARD MASUR

SANDRA ORTIZ

DOROTHEA PETRIE

On January 2, 2003, the date initial comments in this proceeding were due, the Center for the Creative Community submitted the attached Comments Regarding the Initial Regulatory Flexibility Analysis. Part of the public record in this proceeding, these Comments specifically address the need under the Regulatory Flexibility Act for the Commission to issue proposed rules and allow further public comment in this proceeding prior to issuing final rules. Moreover, our Comments cite the earlier filings of the U.S. Small Business Administration in a prior part of this proceeding (on radio), which call for precisely the same procedure to assure compliance with the law.

FRANK PIERSON

SARAH PILLSBURY

DAVID RINTELS

VICTORIA RISKIN

JAMES SADWITH

SISSY SPACEK

We commend these Comments to you, along with our Comments on the substance of the NPRM dated January 2, 2003 and our Reply Comments dated February 3, 2003. We worked quite hard on them, intending that they be helpful to the Commission in its important task of crafting new rules that will promote competition and diversity of viewpoints in the production of television programming. Once you have a chance to read them, we hope you'll agree.

Sincerely,

Jonathan Rintels  
Executive Director

*Before the*  
**Federal Communications Commission**  
**Washington, DC 20554**

In the matter of	)	
	)	
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	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**COMMENTS OF THE CENTER FOR THE CREATIVE COMMUNITY**  
**REGARDING THE COMMISSION’S INITIAL REGULATORY FLEXIBILITY**  
**ANALYSIS (“IRFA”)**

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January 2, 2003

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## **America's Creative Community Consists of Small Businesses and Entrepreneurs**

America's Creative Community is made up of well over a hundred thousand writers, directors, producers, performers, and other talented people who give life to television. We are the individuals, small businesses, creative entrepreneurs, and just plain talented people who create the programming that large media corporations then distribute to the American public.

On hearing the phrase "Creative Community," many in the general public and press conjure up a vision of highly paid celebrity stars. In fact, stars and celebrities constitute a minute fraction of the members of the Creative Community who work in film and television. In reality, its members are the tens of thousands of Americans of all ages, persuasions, and incomes who pursue a dream to create film, television, literary, musical, and other art and entertainment works. Because there are so many talented people pursuing the same dream in this precarious business, supply always exceeds demand. While a few will become stars, most will not, toiling in relative obscurity with little or no job security.

According to statistics compiled by the Department of Labor, median annual earnings of actors were \$25,920 in 2000. The middle 50 percent earned between \$16,950 and \$59,769. The lowest 10 percent earned less than \$12,700, and the highest 10 percent earned more than \$93,620. Noted the government, "(S)ome well-known actors – stars – earn well above the minimum; their salaries are many times the figures cited, creating the false impression that all actors are highly paid. For example, of the nearly 100,000 SAG members, only about 50 might be considered stars. The average income that SAG members earn from acting, less than \$5,000 a year, is low because employment is erratic."<sup>1</sup>

Median annual earnings of producers and directors were \$41,030 in 2000. The middle 50 percent earned between \$29,000 and \$60,330. The lowest 10 percent earned less than \$21,050 and the highest 10 percent earned more than \$87,770. Median annual earnings in motion picture production and services were \$50,280. For radio and television broadcasting, the median earnings were \$34,630.<sup>2</sup>

Of the nearly nine thousand members of the Writers Guild of America, west, barely half reported covered writing earnings in 2001. The median income of those who did report earnings was \$87,104.<sup>3</sup>

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<sup>1</sup> *Occupational Outlook Handbook – 2002-2003 Edition*, Bureau of Labor Statistics, U.S. Dept. of Labor, <http://www.bls.gov/oco/text/ocos093.txt>.

<sup>2</sup> *Id.*

<sup>3</sup> "The Marketplace for Film, Television and Other Audio-Visual Writers," 2002 WGAw Annual Report to Writers, Writers Guild of America, west, Inc., [http://www.wga.org/thewga\\_index.html](http://www.wga.org/thewga_index.html).

Actors, directors, writers, and independent producers are categorized under the Small Business Administration's North American Industry Classification System -- Revisions for 2002 (NAICS) classification number 711510, which deems them a small business when their gross receipts do not exceed \$6 million.<sup>4</sup> As the median income levels above suggest, the vast majority of actors, directors, writers, and independent producers fall within the government's definition of "small business."

In fact, the vast majority of all members of the Creative Community are individual creative entrepreneurs and small businesses, surviving and, hopefully, thriving by virtue of their imagination and talent. They are the engines of creativity that drive America's entertainment industry. In this way, they are no different from the individual entrepreneurs and small businesses that drive creativity and innovation throughout the rest of the nation's economy.<sup>5</sup>

### **The Initial Regulatory Flexibility Analysis ("IRFA") Fails to Consider the Effects of Potential Rule Changes on the Creative Community**

The Commission states in its IRFA:

*We are required under the Regulatory Flexibility Act to demonstrate a flexible and responsive awareness of the interests of small business entities that are subject to the rules under review in this Notice. Accordingly, we solicit comment from all small business entities, including minority-owned and women-owned small businesses. We especially solicit comment on whether, and if so, how, the particular interests of these small businesses may be affected by the rules.<sup>6</sup>*

We are concerned by the Commission's failure to mention in the IRFA the considerable impact of any changes in the media ownership rules on the small businesses and creative entrepreneurs who write, direct, produce, and perform in the television programming industry. These entrepreneurs and small businesses will be affected significantly – and negatively -- if the FCC relaxes or eliminates either the dual network rule or the national television multiple ownership rules.

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<sup>4</sup> [www.sba.gov](http://www.sba.gov), <https://eweb1.sba.gov/naics>

<sup>5</sup> That members of the Creative Community are small businesses is also recognized by the Los Angeles City Council, which now collects its business tax from them, whether they work out of their home or in an office. "L.A. tones down tax letter," Variety.com, December 15, 2002.

<sup>6</sup> *Id.*, p. 57.

Further, unless the Commission adopts a rule promoting source diversity on television, such as the flexible rule we propose, the small businesses and creative entrepreneurs who independently produce television programming will be dealt a potentially fatal blow.

As we explain more fully in our main Comments in the Rulemaking, the Commission's prior relaxation of the dual network rule, which allowed CBS and UPN to operate under joint ownership, has not produced more programming. It has produced less programming. What the rule change did was produce more reruns. And, as Judge Richard Posner wrote in *Schurz Communications v. FCC*, "reruns are the antithesis of diversity."<sup>7</sup>

For every rerun that a network airs, an opportunity is lost to air new, original, diverse, competitive programming. We have no problem when a network reruns its own programs on the same network months after the original airing. But when it reruns a program on a sister network a mere few days after the original airing, when the sister network may have a far different demographic appeal -- that is a clear example of an opportunity lost for an original program to appeal to that different demographic. And that is an opportunity lost for the small businesses and creative entrepreneurs who constitute the Creative Community. The FCC's IRFA makes no mention of this significant harmful impact in its discussion of relaxing further or eliminating the dual network rule.

Further, as we explain more fully in our main Comments, the broadcast and cable networks are constructing programming and distribution "walled gardens" in which they favor their own corporate in-house programming production over programs produced by small independent producers. This preference for in-house production exists even if the in-house show is of lesser quality. In the event a network wants to air an independent's production, it extracts a significant financial stake in the independent program as the price of access to the network's schedule.

Should either the dual network rule or the national television multiple ownership rule be relaxed or eliminated, the oligopsony power of networks to exclude independent programming, or extract significant financial stakes in the independent programming they do air, will be exponentially increased. The same holds true for any relaxation of the national cable ownership limits. This may inflict a potentially mortal blow to the Creative Community's independent small businesses and creative entrepreneurs. Again, the FCC's IRFA makes no mention of this negative impact.

Even today, with the rules as they presently exist, because of the networks' favoring of their in-house production, independent producers are leaving the business, as we document in our Comments. Again, the FCC's IRFA makes no mention of this negative impact.

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<sup>7</sup> *Schurz Communications v. FCC*, 982 F.2d 1043, (7<sup>th</sup> Cir. 1992), at 1055.

In both the NPRM and the IRFA, the Commission notes it “has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses.”<sup>8</sup> But there is no chance that minorities, women, and small businesses can successfully compete as independent sources of programming against the networks when those same networks favor their own production and control access to their schedules. Relaxation or elimination of these rules would cause even more harm to the ability of minorities, women, and small businesses to compete. Again, the FCC’s IRFA makes no mention of this negative impact.

Nor does the IRFA discuss the destructive impact on ownership of television stations by minorities, women and small businesses that relaxation of the national television ownership rules would cause. Obviously, if networks are permitted to own more of their local stations, there are fewer opportunities for minorities, women and small businesses to own independent affiliates.

### **The NPRM Imposes a Difficult Burden on Small Business**

The NPRM imposes a difficult burden on the small businesses and creative entrepreneurs that constitute the Creative Community. The FCC has released a dozen studies, yet given the public an extremely short time to review them and/or conduct additional research. Such review and research is extremely expensive and a burden on small business. In addition, the FCC has refused to hold public hearings at which small businesses could participate, with the exception of one hearing scheduled for Richmond, VA. Richmond is a continent away from Los Angeles, the home of most television programming production businesses. We request hearings in this proceeding in Los Angeles, so that we might meaningfully participate.

### **The IRFA Should be Reissued and Supplemented**

The Office of Advocacy, U.S. Small Business Administration, filed Comments in the radio dockets of this combined proceeding stating that an earlier IRFA was insufficiently specific with regard to its effect on small businesses because it does not propose any specific rules.<sup>9</sup> Thus, it should be supplemented when specific rules are proposed, prior to their effectiveness, so that the proposed rules’ effects on small business can truly be analyzed.<sup>10</sup> The same holds true for this IRFA. To not do so would make a mockery of the entire IRFA process.

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<sup>8</sup> 2002 Biennial Regulatory Review, NPRM, par. 50.

<sup>9</sup> Comments of the Office of Advocacy, U.S. Small Business Administration, on the IRFA of the NPRM, MM Docket No. 01-317 and MM Docket No. 00-244, March 13, 2002 .

<sup>10</sup> *Id.*

We believe that our proposed flexible rule requiring source diversity in the production of television programming, more fully explained in our main Comments, is necessary to the success of small businesses in the television programming industry. Should the rules at issue in this rulemaking be relaxed or eliminated, such a source diversity rule would become even more imperative. Such a rule would help the FCC promote its goal of supporting minorities, women, and small businesses in the television industry while also promoting its policy goals of competition and viewpoint diversity. We believe this proposed source diversity rule should be addressed in a reissued IRFA.

### **The Center for the Creative Community**

The Center for the Creative Community, Inc. (CCC) is a newly formed nonprofit 501(c)(3) organization representing the tens of thousands of individual writers, directors, producers, performers, and other talented people who give life to America's popular and literary works of art and entertainment. To more effectively represent creative artists in Washington, the CCC has been founded as an individual-based organization. The CCC's Board of Advisors is made up of prominent members of the Creative Community and academia.

The CCC's mission is to serve both America's Creative Community and the general public by working to safeguard and enrich the vitality and diversity of our nation's culture. Further information regarding the CCC is available online at our website, [www.creativecommunity.us](http://www.creativecommunity.us).

### **Conclusion**

By failing to address the impact of any potential rule changes in this proceeding on the small businesses and creative entrepreneurs who constitute America's Creative Community, this IRFA is inadequate. It should be reissued to fully consider how these potential rule changes will affect the Creative Community.

Further, when the FCC formulates specific rules in this proceeding, it should issue a new IRFA, so that the Creative Community can meaningfully consider and comment on their potential impact. No new rules should take effect until these comments on the new IRFA are considered and addressed by the Commission.

Respectfully submitted,

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