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May 15, 2003 RECEIVED

By Hand

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

MAY 15 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Ex Parte Notice – MM Docket No. 02-277**

Dear Ms. Dortch:

The Coalition for Program Diversity (“CPD”)<sup>1</sup> files this letter to clarify several, but certainly not all, of the misrepresentations made by ABC, CBS, NBC and Fox (“Commenters”) in their joint filings on April 25 and April 29. In their efforts to maintain their stranglehold over the public airwaves, the four major networks have distorted facts provided by the CPD that are irrefutable – and clearly troublesome to the networks – given the Commission’s mandate to promote competition and diversity of programming sources in the narrow prime time television marketplace. Despite the

<sup>1</sup> The Coalition’s expanded membership includes:

- American Federation of Television and Radio Artists (AFTRA), New York, NY;
- Carsey-Werner-Mandabach, LLC, Los Angeles, CA;
- Wolf Films, Inc. (Dick Wolf), Los Angeles, CA;
- Directors Guild of America (DGA), Los Angeles, CA;
- Marian Rees Associates, Inc., Studio City, CA;
- MediaCom, New York, NY;
- Pariah Productions (Gavin Polone), Beverly Hills, CA;
- Screen Actors Guild of America (SAG), Los Angeles, CA;
- Sony Pictures Television, Culver City, CA;
- Stephen J. Cannell Productions, Los Angeles, CA.

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networks' "fuzzy definitions" and "fuzzy statistics," the CPD's findings accurately document the dramatically diminished sources of diversity in prime time television resulting from unregulated network control of the narrow prime time television marketplace.

1. The CPD filed its proposal for the 25% Independent Producer Rule pursuant to the Commission's NPRM issued September 12, 2002. As an interested party who would be adversely impacted by any further deregulatory action taken by the Commission as part of its Omnibus Broadcast Rulemaking, the CPD's proposal is timely, appropriate, and it responds to the Commission's requests to "seek comments on several aspects of diversity."<sup>2</sup> The Commission explicitly recognized that "a broad range of comments must be received to ensure we fulfill our mandate to further the public interest, convenience and necessity."<sup>3</sup> Contrary to the networks' claim that the CPD's issues "are not about media ownership or concentration at all,"<sup>4</sup> it is the essence of the FCC's mandate to set public interest conditions for operating a network, which it has done for over four decades. Accordingly, the CPD's proposal for a 25% Independent Producer Rule is appropriately before the Commission in this Omnibus Broadcast Rulemaking proceeding.

2. In today's narrow prime time television programming marketplace, there are four – and only four – gatekeepers who control 100% of the programming aired on network prime time television; these four gatekeepers are ABC, NBC, CBS and Fox. The four networks unlike the others (free, basic or pay cable), reach close to 100% of

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<sup>2</sup> 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).

<sup>3</sup> Id. at Appendix A, § A, p. 56.

<sup>4</sup> See Joint Network Filing, April 29, 2003, at 2-2.

U.S. households, have more than twice the ratings, and attract advertising at premier rates compared to any other networks. Since programs must first air before the networks' nationwide audiences in order to have a marketable after-life in the syndication market, the four major network gatekeepers ultimately decide whether a program will have life, and any value, in syndication. Unfortunately, in their frantic efforts to maximize profits by retaining absolute control over the prime time television programming market, the unregulated four networks have adopted business practices since 1992 (uncontradicted by the Commenters) that have dramatically reduced the ability of true independent producers to air their diverse programming on the networks' prime time schedule.

For example, since 1992, independent producer programming dropped from 66.4% to 23.9% of the networks' prime time schedule; in 1992, 22 independent producers developed and owned 46.5 hours of the networks' prime time schedule – yet, last year, only six independent producers owned 17 hours of programming on the major networks' prime time schedule. And those remaining six independent producers were all in business prior to 1990 – no new independent producers of entertainment programming on the major networks have emerged in over a decade.

In a futile attempt to distort the CPD's reasoned and transparent definitions of elements of the content neutral 25% Independent Producer Rule, the Commenters raise bogus issues. For example, they throw up a straw man on what constitutes an "independent producer." The networks repeatedly ignore the reality accepted throughout the creative community: you can only be a true independent producer on prime time television if you are not affiliated with one of the four network gatekeepers, and you retain copyright ownership and distribution rights to your creative product. By contrast,

if you work for a network, “partner” with a network, or enjoy any of the various commercial relationships that deeds ownership and control of your creative product to one of the four major networks, you are thus, “affiliated” with a major network and no longer are an independent non-network source of diverse programming. This reality is a bedrock concept in the creative community, and it is the industry-wide accepted basis for the CPD’s definition of what constitutes a true independent producer.

A true independent producer is not an entity, which, in the networks’ words, is merely “involved” in the production<sup>5</sup> or received a production credit.<sup>6</sup> In this regard, the networks obfuscate the facts with their misguided references to “credits” in their Exhibit 2.<sup>7</sup> Due to the fact that virtually every prime time program has two or more production credits, the CPD could not legitimately use production credits as a criteria for assessing what constitutes an “independent producer.” That is why the CPD chose copyright holder, not production credit, as the litmus test in distinguishing affiliated from non-affiliated producers and programs.

*Ironically, during the prior FinSyn proceeding at the Commission, it was the networks (and the Commissioners who voted in the networks’ favor) who insisted that copyright ownership was essential to “producer” status; as a result, the CPD adopted this basic criteria of copyright holder for the definition of independent producer used in its filings.*

It is also noteworthy that the Commenters’ Exhibits in their joint filing of April 29 further cloud the issue by including programs not on the Fall 2002-2003 networks’ schedule, such as "American Idol" (Fox), "My Big Fat Greek Life" (CBS), "Meet My

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<sup>5</sup> See Joint Network Filing, April 29, 2003 at Exhibit 1.

<sup>6</sup> See *id.* at Exhibits 2, 3.

<sup>7</sup> See *id.* at Exhibit 2.

Folks" (NBC) and "All American Girl" (ABC).<sup>8</sup> Here the Commenters attempt to confuse the Commission by mixing oranges with apples.

Despite the Commenters disingenuous efforts to confuse the Commission, the FCC record now confirms that the independent producer – as an important source of program diversity – is virtually an endangered species today as a result of the networks' anti-competitive and diversity-stunting conduct over the last decade.

3. The Schurz court<sup>9</sup> indeed rejected complicated FinSyn rules primarily because of an incomplete record of source diversity before the court in 1992 that did not justify the rules. Today, by contrast to 1992, there is the hard empirical data now in the FCC record of radically reduced sources of program diversity. Importantly, the Schurz court laid the groundwork for future Commission regulatory actions when irrefutable data demonstrated seriously diminished sources of diversity in the prime time television marketplace. The Schurz court explicitly stated, "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 ... a diversity of programming sources and outlets that might result in a great variety of perspectives and imagined forms of life than the free market would provide."<sup>10</sup>

No matter how the networks tiptoe or jackknife through the Schurz opinion, they cannot turn a blind eye to this fundamental judicial green light that this court gave to a future FCC to impose a content neutral independent producer rule that would "carve out" a portion of the networks' prime time schedule in order to promote program diversity.

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<sup>8</sup> See id. at Exhibits 1 – 3.

<sup>9</sup> See Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1043 (7th Cir. 1992).

<sup>10</sup> Id. at 1049.

Moreover, the networks cannot ignore Judge Posner's blunt admonition: "reruns are the antithesis of diversity."<sup>11</sup> The network fixation today on airing reruns (a.k.a. "repurposed programming") naturally leads to diminished program and source diversity.

While the networks scramble to create the illusion that the case law supports their efforts to remain totally unregulated while dominating the public's free broadcast spectrum, their charade is transparent; Schurz, Fox and Turner II all provide a solid and sustainable judicial foundation for the FCC's adoption of the 25% Independent Producer Rule.

4. The networks, as has been their wont for two decades, launch ad hominem attacks on the production community whenever members of the creative community attempt to restore or create diversity of program sources on the Commenters' prime time schedules. In their latest Ex Parte filings of April 25 and April 29, the Commenters neglect to mention that leading members of the CPD include a major national advertising agency/media buyer and three (of the four) above-the-line guilds, representing over 150,000 Americans in their capacity as directors, performers, announcers, recording artists — all of whose principal stake and motivation in this proceeding is to enhance employment opportunities and source diversity for the American public. Importantly, the Commenters also neglect to note that even under the CPD's proposal, the networks retain 100% of the advertising revenues, the freedom to select any programs they wish aired (of which 75% may be "in house") and to schedule those programs wherever they choose. In this regard, such industry luminaries as Grant Tinker and Barry Diller have recently

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<sup>11</sup> Id. at 1055.

expressed serious concerns about the loss of program diversity that is addressed by CPD's proposal for the 25% Independent Producer Rule.<sup>12</sup>

5. The networks inexplicably dismiss the 43 million American television viewers who only have access to free television. They insist that these 43 million adult U.S. consumers are of no concern from a public policy perspective because of “expanded viewer choices made available by VCRs and other consumer electronic devices (including DVD players, personal video recorders and computers).”<sup>13</sup> These cavalier comments, reminiscent of Marie Antoinette’s “Let them eat cake,” unfortunately mirror the networks’ attitude regarding their public interest obligations to promote diversity when using free spectrum owned by the public. Owning a VCR or a DVD – luxury items for many Americans – is not comparable to viewing diverse programming on free-over-the-air advertiser supported network television. These 43 million Americans who do not have access to pay services are being ill served by the networks who, by their own admission, fixate on the bottom line program profitability.<sup>14</sup>

As the Commission votes on various aspects of the Omnibus Broadcast Rulemaking, the 25% Independent Producer Rule must be adopted as a content neutral means to advance the Commission’s fundamental goal of promoting diversity and competition on network television.

All Americans – but especially the 43 million Americans who rely solely on network controlled broadcast television – deserve the most diverse programming options,

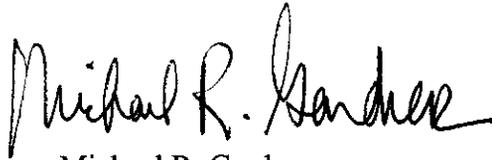
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<sup>12</sup> See Brian Lowry, Wishing Grant Could Tinker with Prime Time, L.A. Times, April 30, 2003, at E1; see also Bill Moyers, Barry Diller Takes on Media Deregulation, NOW with Bill Moyers, April, 28, 2003 available at [http:// www.alternet.org/story.html?storyID=15768](http://www.alternet.org/story.html?storyID=15768)

<sup>13</sup> See Joint Network Filing, April 29, 2003, at 2-7.

<sup>14</sup> See Joint Network Filing, April 25, 2003, § Broadcast Network Programming Development 101, Do the Math at p. 32.

not the cheapest to produce. Adoption of the 25% Independent Producer Rule is a sustainable and reasoned means for the Commission to advance its goals of diversity and competition – goals in the public interest yet not amongst the priority goals of today’s four corporate gatekeepers of prime time television.



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