Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
2006 Quadrennial 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. 06-121
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. 02-227
Cross-Ownership of Broadcast Channels and Newspapers	)	MB Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Channels in Local Markets	)	MB Docket No. 01-317
Definition of Radio Markets	)	MB Docket No. 00-244

COMMENTS OF
SCREEN ACTORS GUILD, THE DIRECTORS GUILD OF AMERICA, THE PRODUCERS GUILD OF AMERICA, AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO

Screen Actors Guild (SAG), the Directors Guild of America (DGA), the Producers Guild of America (PGA), and American Federation of Television and Radio Artists, AFL-CIO ("AFTRA") (hereinafter "Joint Commenters") respectfully submit these comments in the above-captioned proceedings.

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BACKGROUND

Screen Actors Guild is the nation's premier labor union representing actors. With twenty branches nationwide, SAG represents nearly 120,000 actors in film, television, industrials, commercials and music videos. The Guild exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights. The Directors Guild of America represents more than 13,400 directors and members of the directorial team-working in U.S. cities and abroad. Their creative work is represented in feature films, television, commercials, documentaries, and news. The DGA's mission is to protect the economic and creative rights of directors and the directorial team.

The Producers Guild of America represents the entire producing team in motion pictures, television and new media, comprising the entertainment industry's most distinguished collection of both above- and below-the-line producing talent. The PGA is charged with promoting the profession of producing and the spirit of entrepreneurship in entertainment, providing educational and employment opportunities for its members, and protecting the integrity of the producing credit. American Federation of Television and Radio Artists, AFL-CIO ("AFTRA"). AFTRA is a national labor organization with a membership of over 80,000 professional employees working in the news and broadcast, entertainment, advertising and sound recordings industries. AFTRA's membership includes news reporters, anchors, sportscasters, talk show hosts, announcers, disc jockeys, producers, writers and other on-air and off-air broadcast employees as well as actors, singers and other performers on dramatic programs, game shows, talk and variety shows and other entertainment television programming. AFTRA members work at networks and in stations in markets of varying size throughout the United States.

Joint Commenters represent substantial numbers of individuals who are deeply involved in the creation of programming utilizing our public airwaves, and have standing to submit comments it this proceeding. In addition, each of the Joint Commenters presented testimony before the Commission during the October 3, 2006 public hearing on media ownership. These testimonies can be found in Attachment H.

I. INTRODUCTION

In its Further Notice of Proposed Rulemaking, the Commission affirms that its long-standing goals of competition, diversity, and localism will continue to guide its actions in regulating media ownership, and that these policy objectives also will guide its actions on remand.[1] Also, in its Further Notice, the Commission asks that, in addition to requests for comments on the specific rules at issue in the remand, "commenters address whether [the Commission's aforementioned] goals would be better addressed by employing an alternative regulatory scheme or set of rules."[2] Moreover, the Commission urges commenters to discuss, *inter alia*, the potential effects of any "changes proposed in this proceeding on . . . the availability of independent programming."[3]

As its rationale for repealing the majority of its Fin-Syn restrictions in 1993, the Commission relied in large part upon the decline in network market share that had resulted from the growth of the cable television industry and other video entertainment options available.[4] However, since 1993 (and in large part in reaction to the relaxation of the Fin-Syn rules), tectonic shifts have taken place in the television production and distribution marketplace.

The most notable of these changes is the unparalleled vertical consolidation resulting from both the merger of broadcast networks with television and movie studios and the growth (through purchase or development) of cable television networks by broadcast

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[1] *Further Notice of Proposed Rulemaking*, 21 FCC Rcd. 8834, ¶ 4.
[2] *Id.*
[3] *Id.* ¶ 6.
[4] See *Evaluation of the Syndication and Financial Interest Rules, Second Report and Order*, 08 FCC Rcd. 3282 (1993), ¶ 12.

networks.[5] Over the thirteen years since the repeal of Fin-Syn, these shifts have led to a reconstitution of the broadcast networks' oligarchic control over programming options available to American television viewers. This control has led to the near elimination of the independent television production community, resulting in a marked contraction in viewpoint diversity in television programming.

Indeed, the total number of independent producers supplying primetime programming to the networks has shriveled from *twenty-two* in 1992[6] (before Fin-Syn was repealed), to *two* independent producers today. The remaining two, Warner Bros. and Sony Pictures TV, are affiliates of major motion picture studios. Since the Commission's 2002 Biennial Regulatory Review*, two-thirds* of the six then-existing independent producers have disappeared from primetime network television.[7]

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[5] As Attachment A shows, during this time, the networks' programming holdings have grown to include the following:
ABC: Disney Channel, Toon Disney, ABC Family, SOAPNet, ESPN Networks, A & E, Biography, History Channel, Military History Channel. ABC owns 40% (Comcast owns the other 60%) of E! and Style Network. These channels are in addition to the studio holdings of ABC's parent company Disney: Walt Disney Pictures, Walt Disney Feature Animation, DisneyToon Studios, Buena Vista Pictures, Touchstone Pictures, Miramax, and Hollywood Pictures.
CBS: Showtime, FLIX, The Movie Channel, Sundance Channel, College Sports TV, the CW (50% with Warner Bros.) The majority of shows on CBS' 2006-2007 primetime lineup are produced by CBS Productions, CBS Paramount.
NBC: Telemundo, CNBC, Bravo, USA, Sleuth, Sci-Fi, MSNBC. These channels are in addition to the studio holdings of NBC's parent company: Universal and Focus Features.
Fox/News Corp: FX, National Geographic, Fox News, Fox Sports, Fox Movie Channel, Fuel TV, Speed Channel. Fox's parent company, News Corporation, also owns the motion picture studios 20th Century Fox Pictures, Fox Searchlight Pictures and Blue Sky Studios.

[6] See Attachment B: "Network Primetime Independent Television Producers." This attachment demonstrates that in 1992 the following independent producers were supplying the major networks with primetime programming: Aaron Spelling Productions, Carsey-Werner, Castle Rock, Columbia Pictures TV, Cosgrove-Murer, HBO Independent, Hearst, Lorimar Television, Lucasfilm, MGM/UA, Mozark Productions, New World (Four Star Holdings), Paramount TV, Reeves Entertainment, Shukovsky/ English, Stephen J. Cannell Productions, Steven Bochco Productions, Touchstone Television, TriStar TV, Universal, Viacom Productions, Warner Bros

[7] *Id.*

This diminution in independent voices has had a dramatic impact on the diversity of programming offered on primetime network television. During the 1992-1993 season, approximately one-third of the network primetime lineup was comprised of network-produced programming, while about two-thirds was independently-produced. By contrast, based on published schedules issued by the four networks, more than 75% of the current 2006-2007 network primetime lineup will be dominated by network-produced programming.[8]

Against this backdrop, the Joint Commenters respectfully submit that the Commission's overarching goal of diversity, specifically viewpoint diversity, would be more effectively addressed by enactment of a narrowly tailored, content-neutral additional rule, specifically aimed at ensuring viewpoint diversity — namely a 25% independent producer requirement for network primetime programming (hereinafter "independent producer requirement"). Such a requirement is critical to the preservation of a viable independent producer marketplace that will deliver to the American viewing public a diverse array of programming options representing a variety of viewpoints beyond merely those of the four major broadcast networks.

In relaxing the Fin-Syn rules, the court in *Schurz Communications Inc. v. FCC* observed that "in the years since they were promulgated, the television industry had changed profoundly" because, in part, the broadcast networks had "lost ground" to the cable

[8] See Attachment C: TV Season Primetime Network Program Ownership (ABC, CBS, Fox, NBC) (Coalition for Program Diversity Study 2006-2007, dated 09/15/06).

industry.[9] Likewise, in the years since Fin-Syn was repealed, the television industry has again undergone profound changes—resulting in unparalleled concentration of content and distribution by the broadcast networks. Over the past fifteen years, the broadcast networks have reclaimed any "lost ground" through the rampant acquisition of the very cable channels which were the competitive basis for the *Schurz* decision. By virtue of this reclaimed control of primetime network programming, the networks have reconstituted a level of market domination in television programming commensurate with the level extant at the enactment of the original Fin-Syn rules. This consolidation of power necessitates the adoption of a new independent production rule.

Moreover, the Commission should preserve the existing Dual Network Rule, which is one of the last regulatory defenses against further consolidation of the networks' oligarchic control of the airwaves. Recent changes in the marketplace only justify increased, not decreased, regulatory control over media consolidation.

II. THE COMMISSION HAS TRADITIONALLY SOUGHT TO PROMOTE ITS GOAL OF BROADCAST DIVERSITY

As the Commission has stated in its 2003 Report & Order in this proceeding, there are five types of diversity pertinent to media ownership policy: viewpoint, outlet, source, program, and minority/female ownership diversity.[10] Viewpoint diversity, outlet diversity, and source diversity are the most pertinent to our comments, although program and minority/female ownership diversity would certainly be positively impacted by the

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[9] *Schurz Comunications Inc. v. FCC*, 982 F.2d. 1043 (7th Cir. 1992)
[10] *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 13620 (2003)("R&O"), ¶ 18.

independent producer rule that the Joint Commenters herein recommend.

The 2003 Report & Order also asserts that “viewpoint diversity refers to the availability of media content reflecting a variety of perspectives.”[11] The Commission affirmed its belief that a diverse and robust marketplace of ideas is the foundation of our democracy and that broadcast ownership limits are necessary to preserve and promote viewpoint diversity, "adhere[ing] to [its] longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity” and concluding that “outlet ownership can be presumed to affect the viewpoints expressed on that outlet.”[12]

Outlet diversity “simply means that, in a given market, there are multiple independently owned firms.”[13] The Commission has “previously found that outlet diversity has not been viewed as an end in itself, but as a means through which [the Commission] seek[s] to achieve [its] goal of viewpoint diversity” and found that “independent ownership of outlets by multiple entities in a market contributes to [the Commission’s] goal of promoting viewpoint.”[14] Hence, the Commission justifies its broadcast ownership restrictions on the grounds that they are necessary to ensure outlet diversity, which is essential for the preservation of viewpoint diversity.

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[11] Id. ¶19. The Commission has held that viewpoint diversity can be measured not only through news and public affairs programming, but also through entertainment programming, citing as evidence certain shows, such as *Will & Grace* and *All in the Family* which, for example, "involved characters and storylines that addressed racial and sexual stereotypes . . . [and] in so doing they contributed to a national dialogue on important social issues.” *Id.* ¶ 33.
[12] *Id.* ¶¶ 26-27.
[13] *Id.* ¶ 38.
[14] *Id.* ¶¶ 38-39.

Source diversity refers to the availability of media content from a variety of content producers.[15] In its Notice for its 2002 Biennial Regulatory Review, the Commission explained that "[a] wide array of content producers can contribute both to viewpoint diversity (particularly where the content is news and public affairs programming) and program diversity."[16] However, notwithstanding the fact that the Commission recognized that source diversity can contribute to viewpoint diversity, the Commission, in its 2003 Report and Order, concluded that, "[g]iven the explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rules."[17] In other words, the Commission's 2003 Report and Order suggested that, given the quantity of channels in the marketplace — regardless of who owns the channels — the existing number of outlets is presumed sufficient to ensure viewpoint diversity and otherwise foreclose the need to adopt source diversity as a broadcast ownership policy goal. However, the broadcast landscape has changed even from 2002-2003, and a full examination of the current evidence (particularly the ownership of various outlets) demonstrates that the seeming diversity of outlets is illusory and therefore insufficient, in and of itself, to ensure true viewpoint diversity.

[15] *Id.* ¶ 42.
[16] *Notice of Proposed Rulemaking*, 17 FCC Rcd. 18517-18, ¶ 37.
[17] *R&O* ¶ 45.

III. IN THE CURRENT MEDIA MARKETPLACE, SOURCE DIVERSITY IS AN ESSENTIAL COMPONENT OF VIEWPOINT DIVERSITY

Undoubtedly, the number of television channels available to the American viewing public has sharply increased over the past thirty years. While there exists a multiplicity of outlets when measured by the volume of television channels, both broadcast and non-broadcast, available in the marketplace,[18] many of the broadcast network and non-broadcast network channels share common ownership, calling into question whether such outlets are, in fact, diverse in a manner sufficient to protect viewpoint diversity.

As stated above, the Commission has premised its media ownership regulation on ensuring outlet diversity as a way to guarantee viewpoint diversity (*i.e.*, as long as there is enough outlet diversity, a sufficient level of viewpoint diversity should follow).[19] However, although there may be an array of outlets, this sheer volume cannot ensure viewpoint diversity due to the unprecedented media consolidation that has occurred since the repeal of the Fin-Syn rules. As demonstrated below, since 17 of the top 20 highest-rated primetime cable channels are owned by the four networks (and two other conglomerates — Viacom and Time Warner),[20] the Commission cannot rely solely upon the sheer volume of channels as the only proxy for whether there is adequate viewpoint

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[18] This excludes the approximately 14% of American households who do not subscribe to cable or satellite service, and therefore only have access to a small number of over-the-air broadcast channels. See *2005 FCC MVPD Competition Report*, ¶ 17.

[19] *R&O* ¶ 38.

[20] See the chart in Attachment D, which graphically demonstrates the extent of consolidation of the top 26 channels (both broadcast networks and ad-supported cable) for the 2004-2005 primetime schedule.

diversity. Consequently, the Commission must pursue source diversity as a policy goal in order to ensure robust viewpoint diversity.

Since vertical consolidation in the media industry has resulted in the drastic diminution of independent sources that produce television programming, the Commission must adopt proactive measures to safeguard source diversity and thereby ensure that its overarching goal of viewpoint diversity is advanced in the current environment of massive media consolidation. However, the Commission needn't undertake sweeping structural reforms (such as reversing the vertical integration of broadcast networks and production entities) to expand source diversity.

To the contrary, the diversity of viewpoints to which American television viewers are exposed could be dramatically increased through the implementation of a discreet, narrowly-defined requirement that 25% of the prime time television programming on each of the four major networks must be produced by an independent production entity not owned by the network. This requirement is lower than the 60% independent content required under Fin-Syn and represents a total of 5 hours of primetime programming per week for each network, except for 4 hours in the case of FBC.

IV. THE INDEPENDENT PRODUCER REQUIREMENT IS NECESSARY AND JUSTIFIED DUE TO THE LACK OF VIEWPOINT DIVERSITY IN TODAY'S TELEVISION MARKETPLACE AND IS NARROWLY TAILORED TO A SEGMENT OF NETWORK BROADCASTS

During the Commission's 2002 Biennial Regulatory Review on media consolidation, numerous commenters[21] argued that a 25% independent rule is not necessary due to the proliferation of cable and satellite channels available to many American television viewers and the declining viewership share of the broadcasting networks. This argument, however, fails to take into account three important factors. First, a significant percentage of American citizens do not subscribe to cable or satellite services. Second, the most popular channels carried by cable and satellite operators are owned by the four networks and two other media conglomerates (Viacom and Time Warner). Lastly, primetime broadcast network programming is a unique segment of the television marketplace due to its inordinate share of viewership and the networks' ownership of the programming in this segment (especially combined with their ownership of "competing" cable channels) remains overwhelming.

A. One out of every 7 Americans can only view broadcast television

While the majority of Americans receive their television signals via cable or satellite subscription services, a full fourteen percent (or over 43 million people)[22] of Americans rely on over-the-air broadcasts. These viewers are often in rural, underserved areas and are, on average, less affluent than cable or satellite subscribers—the median household income of prime time television viewers in households without cable, satellite or pay

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[21] Most notably, Fox, NBC/Telemundo and Viacom Joint Reply Comments.
[22] See *2005 FCC MVPD Competition Report*, ¶ 17.

service television programming is $26,588, as compared to a median income of $51,375 for cable and satellite households.[23] The range of channels available to these Americans is significantly constrained, often limited to some combination (though not always all) of ABC, CBS, Fox and NBC, as well as perhaps one or two other channels such as PBS, religious programming, or the newly-formed CW network.

These 43 million viewers are almost entirely reliant on the viewpoints reflected on network television. However, not only is the number of over-the-air outlets extremely narrow for these viewers, the diversity of viewpoints represented within those outlets is limited as well.

As recently as fifteen years ago, American television audiences who had access only to network television could rely on programming that represented a diverse range of viewpoints. Because the three major broadcast networks were restricted in terms of their ownership and syndication rights in the programming carried over their networks, the majority of primetime programming on the major networks was provided by independent producers rather than the networks themselves. This resulted in a tremendous diversity of viewpoints on network television.

After the repeal of the Fin-Syn rules, many of the independent producers with whom the networks had relationships were subsumed into the network structure and became owned by network affiliates. Additionally, buoyed by their newfound might stemming from vertical mergers, the networks began demanding ownership and syndication rights in the

[23] See NIELSEN MEDIA RESEARCH (2002); NPwer.

shows produced by independents but shown on the networks. The vertical consolidation resulted in an imbalance of bargaining power whereby the independent producers had no choice but to accept the networks' new financial terms if they wanted to ever see their show on the air. This trend is reflected in an apocryphal joke within producers' circles wherein a television producer gets a call from a network executive who says "the good news is that we're picking up your show; the bad news is… we own it."

These factors contributed to a precipitous decline in the number of independent producers. Not surprisingly, the total of independent producers supplying primetime programming to the networks has shrunk from *twenty-two* in 1992[24] before Fin-Syn was repealed, to *six* in 2002[25] to *two* independent producers today.[26] As noted below, these lone remaining two are affiliates of major motion picture studios, and don't in any way resemble independent production companies as they have historically been comprised. This includes the unfortunate demise in 2005 of Carsey-Werner-Mandabach — the last independent producer to produce a scripted series that was not affiliated with a major motion picture studio.

This trend has all but ended America's independent production marketplace, which has been an important source of diverse programming. Some of television's most beloved shows were created by producers unaffiliated with the then existing networks[27]. If

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[24] See Attachment B.
[25] Id.
[26] As noted *supra*, the remaining two, Warner Bros. and Sony Pictures TV, are affiliates of major motion picture studios.
[27] Including, to name but a few: Alice, All in the Family, Barney Miller, Bonanza, Cagney & Lacey, Cheers, China Beach, Columbo, Family Ties, Green Acres, Gunsmoke, Happy , ays, Hill Street Blues, I Dream of Jeannie, L.A. Law, Laverne & Shirley, Little House on The Prairie, M*A*S*H, Magnum P.I.,

developed today, the shows may have never found a way onto American primetime television, to the incalculable detriment of the nation's entertainment and cultural landscape. If the percentage of independently produced programming which the networks consume was allowed to slip below its present level, then there is a distinct possibility of the complete erosion of independent voices in the primetime network lineup.

Simply put, as a result of Fin-Syn's repeal, the networks grew so large and powerful that they were able to put the independent producers out of business. The result for the American television viewer has been less diverse programming, representing fewer and fewer viewpoints, especially in news and scripted programming. By virtue of this control of the primetime network programming, the networks exert a level of market domination that necessitates adoption of the independent production rule. The Commission must act to address these significant changes in the primetime network programming marketplace, and to prevent further erosion of independent voices available to American television viewers.

As the charts in Attachment C demonstrate, in the 2006-2007 network primetime schedule (as proposed in the spring-summer of 2006), more than three-quarters of the lineup will be dominated by network-produced programming; as opposed to less than one-quarter that will be produced by independent sources not affiliated with the

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Miami Vice, Mission: Impossible, Moonlighting, Mork & Mindy, Night Court, Remington Steele, Roseanne, Rowan & Martin's Laugh-In, St. Elsewhere, Taxi, The Bob Newhart Show, The Cosby Show, The Golden Girls, The Mary Tyler Moore Show, The Odd Couple, The Rockford Files, The Waltons, The Wonder Years, and WKRP in Cincinnati.

networks.[28] By contrast, during the 1992-1993 season, approximately one-third of the network primetime lineup was comprised of network-produced programming, while two-thirds was independently-produced.

Of the total number of independently produced primetime network programs for the 2006-2007 season, a significant percentage (as high as 42% on ABC) are scheduled to be reality shows.[29] Thus, for scripted programming, network control of the programming lineup is even more pervasive. The relegation of independent producers to reality programming severely limits the ability of independent producers to recoup investment through syndication since reality programming is not conducive to repeat broadcasts or syndication.

Thus, the overwhelming majority of programs on this fall's schedule are produced by the networks themselves, resulting in a striking lack of viewpoint diversity. For the over 43 million U.S. adults who depend on over-the-air broadcast television, network programming — particularly prime-time network programming — is their only source of television news and entertainment. To compound this problem, the overwhelming majority of the programming available to these viewers represents only the viewpoints of the four major networks.

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[28] See Attachment C. The percentage of network-produced shows includes those "cross-over" programs produced by both a network-owned production company and an independent producer. The number of network-produced television shows varies from network to network (ABC - 70.4%; CBS - 84.1%; Fox - 72.4%; NBC - 75%), but these shows represent an overwhelming majority of each network's prime-time schedule.

[29] On ABC's 2006-2007 primetime lineup, 42% of independent productions a0re scheduled to be reality shows; 33% on NBC; 20% on CBS; and 16% on Fox. See Attachment C.

Another factor that is contributing to lack of viewpoint diversity is advertiser influence over network production. In the Fin-Syn era, network producers were insulated from advertiser influence because of the separation of production from distribution. Advertisers paid the networks rather than the producers of TV content. Because the categories of production and distribution have become commingled following the repeal of Fin-Syn, advertisers have more direct access to network production, because they now pay directly to organizations that produce as well as distribute.

B. Viewpoint Diversity on Cable Television is Illusory

For cable and satellite viewers, the number of channels alone might not provide a full picture of the lack of viewpoint diversity available to subscribers. The average basic cable package consists of approximately seventy channels, while premiere packages have offerings in excess of 150 channels.[30] But this quantitative profusion of channels/outlets does not necessarily equate to a corresponding increase in different viewpoints, since the top cable and satellite channels are owned by the four broadcast networks and two other companies. Accordingly, outlet diversity cannot be gauged by numbers alone without a determination of who owns the outlets.

An analysis of the top fifteen ad-supported cable channels in terms of viewership demonstrates that each of these channels is owned by one of the four broadcast networks[31] or either Time Warner or Viacom.[32] Indeed, as Attachment D demonstrates, an analysis of the ownership of the six highest-rated primetime broadcasting channels and

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[30] http://www.comcast.com/shop/buyflow/default.ashx?SourcePage=Cable
[31] See Attachment A and D.
[32] *Id.*

the twenty highest-rated primetime cable channels (which cover more than 68 million viewers on any given night) shows that ABC, CBS, Fox and NBC own 75.92% of the channels. ABC, CBS, FOX, NBC, Viacom and Time Warner own 94.17% of the channels.

Moreover, in 2002 Disney controlled 18% of the prime-time television market through its broadcast and cable networks; NBC and Fox each controlled approximately 10-12%; and CBS controlled 22% (when combined with the programming of its former affiliate Viacom). Factoring in Time Warner, these five companies controlled approximately 75% of all prime-time viewing.[33] By way of analogy, a proliferation of hundreds of ventriloquist dummies cannot conceal the fact that there are only four to six actual ventriloquists.

This lack of diverse viewpoints is compounded by the fact that networks often rerun or "repurpose" their shows across a variety of network-owned broadcast and cable platforms. Massive media consolidation has dramatically enhanced the ability of networks to amortize programming costs by leveraging programming across a variety of network properties. During the 1990s, for example, FOX sold the syndication of *The Simpsons* to more than 70 FOX O & O stations and affiliates, where reruns of this program are still shown today. Thus, not only is the content on different channels from the same source and reflective of the same viewpoint, it is often the exact same content.

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[33] See Attachment F: Bernstein Research Report, "Returning Oligopoly of Media Content Threatens Cable's Power", February 7, 2003.

C. <u>Primetime network programming still commands an inordinate share of viewers</u>

Although not as sweeping as an independent producer requirement that would apply to all channels during all hours, this requirement advances the Commission's diversity goals by targeting only that unique segment of the television marketplace that attracts the largest amount of viewers (and advertisers) — broadcast network primetime programming. This independent production rule is narrowly-tailored to network primetime programming primarily because this segment of the programming schedule attracts an inordinate share of the viewing public and advertising revenue.

Comparing primetime broadcaster viewership with that of primetime cable, the prominence of broadcast viewership is readily apparent. For the 2005-2006 broadcast season, the average nightly primetime viewership was over 30 million households nightly during primetime; compared with a just over 20 million viewers for the top *twenty* cable networks. Thus, primetime viewership for ABC, CBS, Fox and NBC is nearly 50% greater than all of the viewers on cable's top *twenty* networks. Indeed, each of the networks primetime lineups have triple or quadruple the primetime viewership of the largest cable channel. For instance, during the 2005-2006 season, prime time programs on CBS (the highest ranked network) averaged 12.6 million viewers and NBC (the fourth–ranked network) averaged 9.7 million viewers. During a comparable time period, primetime viewing on USA (the highest ranked cable channel) averaged only 2.6 million viewers.[34] The average number of primetime viewers on any of the four major broadcast

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[34] <u>See</u> Attachment E, which lists the average nightly viewership statistics for the highest ranked primetime broadcast networks and cable channels, as compiled by Nielsen Media Research. These statistics represent

networks during primetime is over *eleven* times greater (10,767,500) than the average number of viewers on one of the top twenty cable channels (957,650).[35]

While some viewers may have access to several hundred channels, they have exposure to a limited number of viewpoints. Accordingly, because viewpoint diversity cannot be safeguarded through outlet diversity alone due to vertical consolidation, it must be achieved through a source diversity requirement such as the independent producer rule.

As such, we respectfully submit that this independent production rule will preserve, at a minimum, the present level (approximately 25%, taking the programming of all four networks into account) of independent primetime programming and will create currently nonexistent financial incentives for creating innovative programming outside the network structure. It will provide a modest backstop to ensure that the market for independent production survives as a source of diverse programming for an increasingly consolidated television marketplace. Moreover, by ensuring that these independent voices have a financial stake in the programs and their syndication rights, this rule will promote financial incentives for investment in, and rapidly revive the role of, independent non-network producers on network television.

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the average number of viewers watching a particular channel during any single minute increment of primetime programming.

[35] See Attachment E. These averages are calculated by adding the total number of viewers across both the four broadcast networks and the top twenty cable channels, and dividing by the number of channels.

V. THE INDEPENDENT PRODUCER RULE

This proposed independent producer rule would simply require that 25% of the each of the major networks networks' primetime television schedules must be reserved for the airing of programming from producers not affiliated with any network. The networks would be free to own and produce the remaining 75% of their primetime lineups, and they could hold up to a 1/3 ownership stake in any independently produced show. This requirement would apply only to an over-the-air network with 95% or more NTI[36] and with greater than a 4.0 Household Rating.[37] Currently only ABC, CBS, Fox, and NBC meet this definition of a gatekeeper; however, should another network attain this level of broadcast market share, it would likewise become subject to the rule.

If the Commission were to enact such an independent producer rule, it should adopt several precautionary measures to ensure robust and genuinely independent, diverse programming. First, to allow the marketplace an opportunity to develop and begin production ventures, it should be gradually implemented over a 24 month period from the date of adoption. In order to qualify as an independent production, a major network could not take a financial stake in any independently produced program greater than 33% or control domestic syndication rights. This condition will allow independent productions to be truly financially viable, since all scripted productions are deficit financed during their initial run and only recoup investment and turn a profit upon

[36] Nielsen Media Research measurement of TV households (NTI).
[37] Neilsen Media Research assigns a "point" to every one percent of current television-owning households in the United States. As Attachment G shows, for 2006-2007 there are over 111,400,000 TV households (98.2% of all households), thus 1 Household rating point is equal to 1,114,000 viewers. Currently, only the four broadcast networks have above a 4.0 Nielsen rating.

syndication. Such a provision would secure the full participation — without network control — in these revenue streams for independent producers.

Additionally, programming from owners of other major networks, as well as motion pictures initially released theatrically, would not qualify as independent programming. Lastly, the term or license period for the networks' licensing of independent programming could not exceed six full seasons. This six year cap would substantially further competition in the television programming market by freeing shows for competitive bids elsewhere. During the Fin-Syn era, the network licensing period was customarily four years to ensure that the networks could not warehouse a series nor favor its affiliated stations in licensing.

While media consolidation has resulted in the evisceration of the independent producer ranks, the Joint Commenters are confident that, upon implementation of this rule, independent productions will once again become viable investments and, consequently, capital will flow into the newly resurrected market. This infusion of non-network capital and creativity will result in a new wave of fresh voices and perspectives on broadcast television, thereby greatly benefiting the public interest by increasing both diversity and competition in programming. By injecting new voices into the closed primetime programming marketplace, it would dramatically increase genre diversity. As such, the rule would be content neutral; it would neither favor nor disfavor any particular type of genre.

VI. THE COMMISSION HAS THE REGULATORY AUTHORITY TO PROMULGATE A 25% INDEPENDENT PRODUCER RULE

Problems of interference among broadcast signals, and other issues, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the "public interest."[38] As the Court in *Prometheus* (quoting the U.S. Supreme Court in *FCC v. National Citizens Committee for Broadcasting*) noted, "In settling its licensing policy, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."[39]

Section 202(h) of the Telecommunications Act of 1996 affords the Commission the authority to "repeal or modify any regulation it determines to be no longer in the public interest."[40]And while section 202(h) of the Telecommunications Act of 1996 was enacted in the general context of deregulatory amendments (the 1996 Act) to the Communications Act, it is not exclusively a deregulatory mandate. Specifically, the Court in *Prometheus* stated that it:

> [did] not accept that [provisions of 202 (h)] must . . . operate only as a one-way ratchet, i.e., the Commission can use the review process only to eliminate then-extant regulations. What if the Commission reasonably determines that the public interest calls for more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction to the contrary.[41]

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[38] *Prometheus Radio Project, et. al. v. FCC*, 373 F.3d 372, 382 (3d. Cir. 2004) citing *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1975) ("NCCB").
[39] *NCCB* at 780.
[40]
[41] *Prometheus Radio Project, et. al. v. FCC*, 373 F.3d 372, 382 (3d. Cir. 2004)

The original Fin-Syn rules, adopted by the Commission in 1970, prohibited a television network (defined at the time to include only ABC, NBC, and CBS) from syndicating television programming in the U.S., from syndicating outside the U.S. programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication. These rules also prohibited a network from acquiring any financial interest or proprietary right or interest in the exhibition, distribution, or other commercial use of television programming produced by someone other than the network for distribution on non-network channels.[42] In 1991, the Commission modified the rules and, among other things, imposed a new restriction on networks which provided that no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself. [43]

In *Schurz Communications Inc. v. FCC* [44], the Seventh Circuit Court of Appeals reviewed the Commission's modified Fin-Syn rules (including the 40% cap). And while the court vacated the rules, it did so on the grounds that as a matter of administrative procedure, the Commission failed to adequately justify its reasoning for imposing the rules. Notably, however, in vacating the rules, the court affirmed that "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 perspective and imagined forms of life than the free market would provide. That would be a judgment within the

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[42] *R&O* ¶ 643.
[43] *Id*. ¶ 644.
[44] *Schurz Communications Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

Commission's power to make."[45] Moreover, the court suggested that 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."[46]

Therefore, based on the Commission's longstanding, and judicially sustained, authority to regulate broadcast licensees in the public interest to, among other things, ensure diversity of mass media ownership, and the Third and Seventh Circuit's affirmation of the Commission's authority to restrict the network's programming activities in order to create a more diverse programming fare, we respectfully submit that the Commission has the authority to impose a 25% independent producer requirement. Indeed, given the rampant vertical consolidation in the television programming and distribution marketplace, the Commission must act in such a fashion to preserve the public interest and protect diversity and competition.

VII. THE DUAL NETWORK RULE REFLECTS THE COMMISSION'S REGULATORY GOALS AND MUST BE MAINTAINED

The Joint Commenters support preserving the "Dual Network" Rule in its current form, and should not be revised or amended. The rule properly serves the FCC's important regulatory priorities of competition, localism, and diversity, as set forth in the Telecommunications Act of 1996 (the "1996 Telecom Act").[47] Moreover, in an era of unprecedented consolidation in the media and entertainment industries, the Rule is one of

[45] *Id*. at 1049.
[46] *Id*. at 1054
[47] See Pub. L. No. 104-104, 110 Stat. 56 (1006).

the last layers of regulatory defense against further oligarchic power and control of the airwaves. Decreasing from four to three (or even two) the number of networks would be disastrous for the American viewing public and would be the final nail in the coffin of broadcast competition, localism and diversity. Instead, the Joint Commenters believe that a more productive and practical allocation of Commission resources should be directed at addressing the lack of independent broadcast content in primetime.

A. Overview of the Origin and Evolution of the Dual Network Rule

The FCC first promulgated a rule restricting the dual ownership of broadcast operations in 1941.[48] In essence, the original FCC rule prohibited the issuance of a broadcast license to a station affiliated with a network organization maintaining more than one broadcast network.[49] The Commission's decision to propose and eventually adopt what would become known as the Dual Network Rule was based, in part, on the findings of an investigation that examined whether the public interest required "special regulations," as applied to radio broadcast operators engaged in "chain broadcasting."[50]

In 1946, the FCC decided to extend the Dual Network Rule to the emerging television domain.[51] At the time of the rule's extension (Amendment of Part 3 of the Commission's Rules), the Commission reasoned that one network might preclude new television networks from developing and affiliating with "desirable channels," since those channels

[48] See 65 FED. REG. 41,393 (July 5, 2000).

[49] *Id.*

[50] *Id;* see *also*, 6 Fed. Reg. 2,282 (May 6, 1941).

[51] See 11 FED REG. 33 (Jan. 1, 1946).

might already be associated with a more powerful network..[52] At the time, the Commission commented that the Dual Network Rule "was intended to remove barriers that would inhibit the development of new networks, as well as to serve the [FCC's] more general diversity and competition goals."[53]

This approach served as the very foundation and guiding rationale embedded in the Dual Network Rule for decades—in fact, the prohibition remained unaltered from its 1946 form until passage of the 1996 Telecom Act.[54]

B. Practicality of the Rule in Today's Marketplace

The Dual Network Rule, as currently drafted, "permits broadcast networks to provide multiple program streams (program networks) simultaneously within local markets, and prohibits only a merger between or among [the four major networks, *i.e.*, ABC, CBS, Fox, and NBC]."[55] Practically speaking, the rule prohibits the existing major networks from merging with one another. The Commission recently concluded that the Dual Network Rule continued to be "necessary to promote competition in the national television advertising and program acquisition markets . . . promotes localism by preserving the balance of negotiating power between networks and affiliates."[56]

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[52] See *supra* Note 4.

[53] *Id.*

[54] The Commission adopted revisions to the Dual Network Rule following the enactment of the 1996 Act to conform with the mandate specifically found in Section 202(e).

[55] See 47 C.F.R. § 73.658, *et seq.;* see *also* 67 FED. REG. 65,751 (Oct.28, 2002).

[56] "FCC Media Ownership Rules: Issues for Congress," CRS Report for Congress (Sept. 17, 2003) at 8.

In May 2001, the Commission slightly modified the Dual Network Rule — for only the second time in over 60 years — as part of its biennial review of media ownership rules (as required by the 1996 Telecom Act). This recent regulatory adjustment to the dual network prohibition permitted the four major networks to own, operate, maintain, or control broadcast networks other than the four networks.[57] With the rule change in place, Viacom (then the owner of CBS) was clear to acquire UPN, and NBC was authorized to purchase Telemundo (at the time, the second largest Spanish-language network in the United States).

In deciding to amend the Dual Network Rule, the FCC examined the "emerging network provision of the rule in the context of the significant changes in the video marketplace that have taken place since the 1996 Act."[58] In issuing its public announcement on the rule modification, the FCC noted "between 1996 and 2000, the number of commercial and noncommercial television channels had increased, but in that same period prime time viewership among the top six broadcast networks declined from 71% in 1996 to 58% in 2000."[59] Continued growth of the cable and satellite sectors was cited by the Commission as having an affect on broadcast network viewership.[60]

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[57] *Id.*

[58] See FCC News Release, MM Docket No. 00-108 (April 19, 2001).

[59] *Id.*

[60] *Id.*

After careful consideration, the FCC concluded that eliminating the emerging network portion of the Dual Network Rule would preserve — not diminish — "the diversity of voices at the local level."[61]

C. A Status Quo Approach to the Dual Network Rule is Prudent Policy

In light of the long-standing regulatory scheme firmly grounded in the Dual Network Rule, the Commission's most recent examination, and consequential modification of the rule, the Joint Commenters firmly maintain that there is no policy need to consider additional revisions to or elimination of the rule itself.

Elimination of the rule would invariably lead to more concentration of power in giant media behemoths to the detriment of diversity, localism, and competition in programming for the American television viewer. No changes in market conditions would justify elimination of the rule. Indeed, the recent round of rampant market consolidation only justifies increased, not decreased, regulatory oversight. As interested stakeholders, the Joint Commenters call on the Commission to focus attention on reducing, not increasing, the networks' oligarchic control of primetime programming by resolving the lack of independent content in the primetime hours.

VII. CONCLUSION

In order to stem the continued erosion of viewpoint diversity, the Joint Commenters urge the Commission to enact, for the reasons set forth above, a narrowly tailored, content-neutral 25% independent producer requirement for network primetime television

[61] *Id.*

programming. Additionally, the Commission should not revise or amend the Dual Network Rule which properly preserves the Commission's overarching goal of competition, localism and diversity.

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