

## **RESPONSE COMMENTS THE CAUCUS FOR PRODUCERS, WRITERS AND DIRECTORS**

### **Introduction**

In their joint comments, Fox, NBC and Viacom attempt to make the case that "...the time has come for the Commission to abandon the media ownership regulatory scheme in its entirety."<sup>1</sup> They argue that "... market forces coupled with antitrust enforcement are more than adequate to protect the agency's legitimate public interest objectives".<sup>2</sup> The Caucus for Producers, Writers and Directors (The Caucus) strongly dissents from these assertions.

The Joint Commenters have peppered their response with seemingly benign terms like "economic efficiencies"<sup>3</sup> and "synergies"<sup>4</sup>. The Caucus asks that the Commission consider that these seemingly innocuous terms are used as stand-ins for the evidently noxious concept of monopoly.

The impression encouraged by those filing for yet greater deregulation is one of benevolent dynamism. Gone are the images of back-room deals. Their pleadings suggest that regulations impede progress and are just so many speedbumps on the technological superhighway that promises to unite the land of the free.

But the suggestion that regulation has been an impediment to innovation is misleading and self-serving. The media syndicates who expertly manipulate government subsidy to convert public property to their private benefit, have the audacity to suggest that the same regulators, who freely bestowed the unique benefit of exclusive spectrum access, now thwart real progress by maintaining vigilance over the manner in which that public asset is exploited. The media syndicates don't own the airwaves. They just want the license to behave as if they do.

### **Regulation has fostered innovation and promoted diversity**

The assertion that regulation has defeated innovation or eroded diversity is contradicted not only by the original comments filed by the Caucus, it has been eloquently rebutted by the most senior executives of the distinguished (and hugely profitable) firms that have filed in favor of eliminating virtually all regulatory safeguards. No less an expert than Sumner Redstone, Chairman of Viacom, observed:

*"The Financial Interest Rules have greatly increased the diversity of available programming.... Nobody wants a monopoly or an oligopoly, except for the monopolist and the oligopolist... The most ominous scenario would be a merger or consolidation of a network and a major studio in an environment where the financial interest and syndication*

*rules no longer existed. If the conditions that existed and which led to the imposition of these rules in the first place seemed horrendous then, I can only say, in the words of Al Jolson, "Wait a minute, folks, you ain't seen nothin' yet".*<sup>5</sup>

Mr. Redstone has proven to be both an astute businessman and a candid commentator. His warning about the anti-competitive implications of broadcast deregulation foretold the market-numbing practices that The Caucus warned of at the 1990 En Banc and further elaborated on in its most recent filing. The combination and recombination of media assets in the wake of the repeal of the Financial Interest and Syndication Rules has been startling. It has skewed competition and undermined diversity to the delight of a few media oligopolists but to the detriment of the public interest.

### **Deregulation has decimated the community of independent program suppliers**

The joint filing of Fox, Viacom and NBC neither comments on nor even notes the catastrophic implications deregulation has had on the community of independent program suppliers. Yet the public interest in preserving a vital, entrepreneurially driven community of independent production companies has been widely proclaimed by NBC President Robert Wright who has observed:

*"The success of America's television networks depends on the preservation of a healthy independent production industry... Television's most successful break-through programs have frequently come from independent producers. The major studios compete directly against the independents... Networks depend on a robust independent production industry and benefit from having as many prospective suppliers as possible. Economically and creatively, NBC does not want to be dependent on only five or six studios for all our programming. That is not in NBC's best interest, and it is not in the public interest."*<sup>6</sup>

As was evident in our original comments, The Caucus concurs with the president of NBC. The preservation of a dynamic community of competitive independent program suppliers is in the public interest. We call the Commission's attention to the absence of such arguments in the filing of the joint commenters. And we note with alarm that NBC is now dependent on essentially one studio for all its programming. That studio is NBC Productions.

NBC is not alone. Just seven companies (AOL-Time Warner, Viacom, Sony, Disney, News Corp., Vivendi-Universal and NBC) now account for over 75 per cent of the income earned by all members of the Writers Guild of America.<sup>7</sup> Independent production companies have been driven to the verge of extinction. Gone are MTM, Cannell Studios, Reeves, Rysher, New World, Lorimar, SEE, Witt-Thomas, Miller-Boyett, Orion, Republic, ITC and the like. The few remaining independent companies, Bochco, Kelley and Wolf most notably, have survived only because their established

shows were originally launched when Financial Interest and Syndication Regulations were still in place. There are no new companies with deals that even remotely resemble the fortunate legacy that sustains the last few independents.

This unfortunate situation should not surprise those who have observed the entertainment industry. In 1990, Bob Wright warned that “At the same time that distribution opportunities have exploded, control over supply has been driven into the hands of an extremely powerful cartel. This is certainly not what the FCC desired when they designed the Rules.”<sup>8</sup> Again, The Caucus concurs in Mr. Wright’s conclusion. Yet we note that the comments submitted by NBC in 2003 contain no similar warnings about the dangers inherent in the extremely powerful media cartels that have been spawned by deregulation.

### **Regulation was responsible for the creation of new networks**

The joint respondents have chosen to rewrite the very history authored by their long-serving chief executives. And, subsequent to their filing, they have gone even further. Ellen Agress, senior vice president, Fox Entertainment, addressed the public forum on media regulation hosted by Columbia University Law School. In her remarks, Ms. Agress said “...history has shown that deregulation in the early 1990s helped create the Fox network...”<sup>9</sup> Those remarks reflect an erroneous interpretation of the facts.

Contrary to Ms. Agress’ assertion, the birth of the Fox network was testimony to the salutary effects of regulation. The network launched in 1987, seven years prior to the deregulatory decisions that Ms. Agress credits for its creation. Fox was able to assemble a critical mass of independent, non-affiliated stations precisely because the restrictions contained in the 1970 regulations promulgated by the FCC made it impossible for the dominant networks to control the off-network rights to the programs they aired. Fin/Syn had the intended, and wholly desirable consequence of greatly expanding the number of independent stations.

In this regard, it is worth citing the testimony given by the President of Warner Bros. to the FCC in 1990. Speaking of the impact of FCC regulation on competition, Robert Daly noted:

*“In the twenty years since the Rule was adopted, the number of independent stations has increased five-fold - from 70 stations in 1972 to 340 today. By freeing the syndication market from Network control, the Rule has fueled the growth of independent stations, which rely on off-network syndicated programming for a substantial portion of their revenue. The growth of program producers under the Rule has paralleled that of independent stations. The Rule has achieved and continues to achieve the Commissions stated goal of fostering ‘greater diversity of programs and program sources’.”*<sup>10</sup>

The launch of the Fox network was a significant accomplishment. Its innovative spirit has contributed to the public interest. But let's set the record straight. The launch of Fox reflects positively on the far-sighted regulations adopted by the FCC to encourage competition and protect against the predatory practices of incumbent media chains.

It is noteworthy that Fox, which so evidently benefited from the pro-competitive bias of the broadcasting rules, sought to have those same rules overturned in the early 1990's. Once blessed with the competitive advantage inherent to incumbency, Fox determined that there were enough networks. It is reasonable to conclude that the crusade to overturn federal media regulations now reflects Fox's self-interest and not the interest of the public at large.

### **Competition can only be secured by carefully crafted regulation**

There seems to be broad consensus that competition is the only dependable guarantor of a vital, diverse national media. Not surprisingly Fox, Disney, Viacom, Time/Warner and the other established media syndicates have argued to the Commission that competition results from the absence of regulation. And that contention, a contention which the Caucus strenuously rebukes, is the nub of the argument before the Commission.

The Caucus, indeed the entire creative community, would ask that the Commission consider that carefully crafted, content-neutral, self-enforcing regulations do not restrict competition, they preserve and enhance it. Without regulation the already awesome power of incumbent programming services will swell. The free marketplace of ideas will be trampled. The entrepreneurial spirit that animates so many small and mid-sized companies survives only so long as regulations are maintained that prohibit the predatory tendencies of incumbent oligopolies.

The success of the American experiment has been premised on the repudiation of entrenched prerogative and a distinct distaste for preferential treatment. Recent events, particularly those involving Enron, WorldCom, and Adelphia only reinforce the need for federal regulation aimed at maintaining transparency and focused on rooting out anti-competitive conflicts of interest.

The filing of the joint commenters, ignores the simple fact that program suppliers occupy a competitively disadvantaged position in the electronic entertainment marketplace. There are a plethora of sellers and a paucity of buyers. New channels may have been added to the dial, but control over those channels still rests in the hands of essentially six huge media syndicates.

Government regulation has granted special franchise rights to those who own the arenas in which programming is played and thus allowed programming services to have an inherently advantaged position when dealing with the creators of content. And it is, therefore, fitting that the Commission take steps to maintain a level playing field.

## **Predatory practices in entertainment are best cured by regulation and not litigation**

It is fatuous for Fox or NBC or Viacom to argue that small businesses and individual creative talent can be secure in the notion that anti-trust remedies can cure predatory practices. Programming moves with lightning speed. The same cannot be said of the application of anti-trust actions.

The Justice Department filed suit against NBC in 1972 for anti-trust violations. That suit was not settled until 1980. No independent program supplier can afford the costs, measured in either time or money, required to prosecute an anti-trust action.

## **Preferential treatment and self-dealing must be curbed**

Restrictions on self-supply are essential to restore a semblance of fair competition. Programs supplied by entities owned or controlled by the programming service are subject to market-numbing self-dealing. Without limits on the amount of in-house production that a given programming service can transmit, the suppliers of content are forced to surrender economic considerations in order to gain access to the national audience.

Unlimited in-house production of entertainment reduces both the economic and the creative independence of the program supplier. In-house producers are subject to the creative directives of the executive hierarchy of the programming service at every step of the production process. This centralized authority over all aspects of creative decision making is antithetical to diversity and innovation.

Restrictions on in-house production need to be coupled with a prohibition on the ownership of multiple networks. The assertion by Viacom that "... common ownership of television networks can lead to increased diversity of programming..."<sup>11</sup> is far-fetched. Even when the two networks target different demographics, the creative control over all manner of production related decision making is still concentrated in the hands of a single executive. No one executive should be entitled to have veto power over who produces, writes, directs and acts in the programs of two different networks. That concentration of decision making authority is antithetical to diversity and creative freedom.

Dual network ownership also promotes "repurposing" and cross-promotion, neither of which contribute to diversity. Witness the manner in which CBS reran "The Amazing Race" on UPN just two days after its first run on what industry pundits referred to as "the mother ship"<sup>12</sup> Likewise, UPN stations ran a one hour special entitled "The March to Madness" that was an extended commercial for the NCAA Men's Basketball Tournament that was to air exclusively on the CBS mother ship.

When affiliated networks rerun each other's programs or engage in collusive cross-promotion, the public's interest is sacrificed for corporate profit. Repurposing steals away scarce programming slots that would otherwise be filled with original fare. Even Judge Richard Posner seems to have understood that "reruns are the antithesis of diversity".<sup>13</sup>

### **Consolidated media ownership is a threat to the public welfare**

As Marshall McLuhan once suggested, television is our tribal fire. And that fire is ignited by the friction of creative ideas competing against one another in a free and open market. Well crafted regulation serves to shield that fire from the suffocating effects of concentrated control.

The position of the Caucus has remained constant over the last twenty-eight years. Consolidated media ownership is a threat to the public welfare. The same consistency cannot be found in the position espoused by the major studios. It is worth recalling that only thirteen years ago the distinguished CEO of the MPAA testified before the FCC that:

*"Concentration of power in any medium – particularly one which is, for all intents and purposes, the gatekeeper to three out of every five U.S. television homes – is to be feared and must be curbed. Concentration of power denies consumers the benefits of competitive pricing and of diverse programming. Concentration of power also denies those who produce programming the ability to obtain a fair market price for their products, and may even deny producers access to the market altogether."*<sup>14</sup>

The articles of faith that Disney and Paramount and their sister studios preached to the Commission only a few years ago are strangely absent from their latest filings. Jack Valenti, once counseled the FCC that it "... must not craft any decision that is tolerant of huge corporate enterprises so overwhelmingly in control that the national television audience becomes the province of the few to the dismay of the many".<sup>15</sup> The always ebullient Mr. Valenti is now uncharacteristically quiet.

### **Specific remedies**

Though the original comments submitted by The Caucus were directed largely at repudiating the pseudo-science that led Dr. Mara Einstein to suggest that regulation was antithetical to diversity, we now seek, by way of this response, to more fully articulate the specific regulations that we believe are consistent with the Commission's stated desire to foster diversity, competition and localism.

The Caucus believes that the Commission must maintain the regulations currently under review. We support the retention of the restrictions against dual network ownership, the local station ownership cap, the regulations aimed at limiting common ownership of multiple stations in a single market and the rule that bars common ownership of a newspaper and a TV station in the same city.

Furthermore, we propose a set of minimal, interrelated, content-neutral safeguards that should be enacted to counter the anti-competitive implications of the ever accelerating merger of media conglomerates.

Specifically, The Caucus proposes that:

1. Established broadcast networks (those that schedule more than 15 hours of weekly content) and large scale cable or satellite programming services (those that reach more than 35 per cent of the national audience) shall be restrained from producing more than 50 per cent of their entertainment programming in-house.
2. Established networks and large scale cable and satellite services shall be restrained from controlling distribution or having a financial interest in the off-network or off-cable/satellite rights of that portion of their entertainment schedule provided by outside suppliers.
3. Established networks and large scale cable and satellite services shall be restrained from obtaining in-perpetuity licenses to entertainment content. License terms shall be capped at four years for series and two years for movies.

These three regulations will promote competition and stimulate diversity. Without a limitation on in-house production, media syndicates will be free to engage in self-dealing and artificially manipulate the value of programs to the disadvantage of the creative community and the public alike. Absent a bar on acquiring a financial interest in secondary rights, the dominant media chains will simply extract the benefits of ownership from the program producer. And, lacking a specific limitation on license term, independent outlets will be deprived of access to vital program inventory and the fair value of content will not be tested against the competitive dynamics of the open market.

## In conclusion

The Commission is to be commended for the thorough review of the rules that it has undertaken. Many pundits dismissed this preceding even before it began. Noted editor and historian, Lewis Lapham, despaired:

*“All the questions (of media regulation) touch on the democratic character of the joint American enterprise, but none of them is likely to engender a public debate. Allied with the commercial ambitions that it supposedly restrains, the government will do what is necessary to muffle the political argument, and the press, dazed by the wonders of technology and the splendor of money, will provide the cues for sustained applause.”*<sup>16</sup>

The preceding now undertaken by this FCC will determine, in large measure, whether Mr. Lapham was a cynic or a seer. The willingness of the Commission to promote an open debate encourages The Caucus to believe that the public interest will not be subverted. We are daunted by the array of powerful corporate forces whose access to the national audience gives them unique leverage in this debate. But we are confident that the FCC will fully ventilate the issues and arrive at a rulemaking that is aligned with the interests of diversity, competition and localism.

## SOURCES:

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<sup>1</sup> Joint Filing, January 2, 2003, p. iv

<sup>2</sup> *ibid.* p. 58

<sup>3</sup> *ibid.* p. 43

<sup>4</sup> *ibid.* p. 45

<sup>5</sup> Redstone, Sumner; remarks to The Caucus, January 11, 1990, in *The Caucus Quarterly*, April, 1990

<sup>6</sup> NBC Press Release, Washington DC, October 3, 1990, p. 2

<sup>7</sup> Comment of the Writers Guild of America, FCC Filing, January 4, 2003, p. 22

<sup>8</sup> *ibid.* p 3

<sup>9</sup> Los Angeles Times, January 17, 2003, p. C3

<sup>10</sup> Daly, Robert; (December 14, 1990) FCC En Banc (MM Docket 90-162) Testimony of Robert Daly, p. 2

<sup>11</sup> Joint Filing, January 2, 2003, p.46

<sup>12</sup> “Quick TV Reruns”, CBSNEWS.COM, March 21, 2002

<sup>13</sup> *Schurz Communications v. FCC*, 982 F.2d 1043, (7<sup>th</sup> Cir.), 1992, at 1055

<sup>14</sup> Valenti, Jack (March 1, 1990) FCC Hearing on Cable Regulation

<sup>15</sup> Valenti, Jack (December 14, 1990) FCC En Banc (MM Docket 90-162) Testimony of Jack Valenti, p.12

<sup>16</sup> Lapham, Lewis, *Harper’s Magazine*, January, 1994, p. 10