

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

In the matter of

Second Periodic Review of the Commission's)	
Rules and Policies Affecting the)	MB Docket No. 03-15
Conversion to Digital Television)	
)	
Carriage of Digital Television Broadcast Channels)	CS Docket No. 98-120
)	

**COMMENTS OF THE
CENTER FOR THE CREATIVE COMMUNITY**

Jonathan Rintels
President and Executive Director
CENTER FOR THE CREATIVE COMMUNITY
464 Black Cat Road
Keswick, VA 22947
(434) 971-3699
www.creativecommunity.us
jonr@creativecommunity.us

December 12, 2003

I. SUMMARY

The Commission's consideration of digital television must-carry is inextricably entwined with its fundamental media policy goal of – and the public's interest in – viewpoint diversity. Today, viewpoint diversity in television is on life support. As the Commission concluded in its 2002 Biennial Order, concentrated media ownership harms viewpoint diversity. These grim statistics document today's excessively concentrated ownership:

- Five giant media conglomerates (Viacom/CBS/UPN/MTV/etc., GE/NBC/MSNBC/CNBC/Bravo/etc., Disney/ABC/ESPN/etc., News Corp./FOX/FX/Fox News/etc., and Time Warner/WB/CNN/TNT/etc.) control approximately a 75% share of broadcast and cable prime-time viewing, roughly the same share of TV households in prime time as the three broadcast networks controlled 40 years ago, pre-cable. This concentration will increase if and when NBC takes over Vivendi/Universal, owner of USA and Sci-Fi Networks.
- Of the 91 major cable television networks each available in more than 16 million homes, fully 80 percent (73 networks) are owned or co-owned by just six media conglomerates – the same five giant media conglomerates plus Liberty Media. This concentration will increase if and when NBC takes over Vivendi/Universal, owner of USA and Sci-Fi Networks.
- The same five giant media conglomerates plus Vivendi/Universal (which NBC, one of those five giants, may soon take over) now also produce the vast majority of programming for television. Of the 40 new series airing on the four major broadcast networks in the 2002 season, 77.5 percent are owned in whole or part by the same four networks, up from 56.3 percent the prior season – an increase of over 37 percent in just one year -- and up from just 12.5 percent in 1990.

Digital must-carry provides the Commission with a golden opportunity to ameliorate this excessive concentration and improve today's impoverished viewpoint diversity. But the Commission must explicitly link its digital must-carry approval to public interest obligations that increase viewpoint diversity, including a source diversity mandate. Only by making this link explicit will the Commission assure that digital must-carry promotes viewpoint diversity, rather than extinguish it.

II. INTRODUCTION

The Center for the Creative Community (CCC) provides public education, research, and policy development on behalf of the tens of thousands of writers, directors, producers, performers, and other media artists who give life to our nation's popular entertainment. Many Oscar, Emmy, Peabody, Tony, and other creative award winners are members of CCC's Board of Advisors. CCC actively participated in the 2002 Biennial media ownership proceeding, filing Comments, Comments on the Initial Regulatory Flexibility Analysis, Reply Comments, and *ex parte* filings.¹

The FCC is considering whether cable operators must carry all the digital multicasts broadcast by a local licensee or whether cable must carry only one of that licensee's broadcasts.

At the same time, the FCC has not yet clarified what public interest obligations will attach, if any, to the added digital streams broadcast by each local licensee.

As demonstrated by the millions of comments it received – and the strong public and Congressional interest in – the 2002 Biennial, the public is extremely concerned about the absence of viewpoint diversity in media. Viewpoint diversity is one of the

¹ Comments of Center for the Creative Community, *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, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, January 2, 2003 (CCC 2002 Biennial Comments); Comments on the Initial Regulatory Flexibility Analysis, MB Docket No. 02-277, January 2, 2003; Reply Comments of Center for the Creative Community, MB Docket No. 02-277, February 3, 2003; Testimony of Jonathan Rintels, Executive Director of CCC at FCC En Banc Hearing, Richmond, VA, February 27, 2003; *Ex Parte* submissions, MB Docket No. 02-277, filed April 14, 2003 (2), April 18, 2003, May 14, 2003.

Commission's primary goals in formulating its ownership rules and policies.² In August, Chairman Powell told the Aspen Summit of the Progress and Freedom Foundation that the Commission will study concentration of media ownership this fall and "put itself back in the leadership position in trying to look at these concerns."³

As CCC noted in its Petition for Reconsideration of the Commission's Report and Order in the 2002 Biennial Regulatory Review,⁴ and will be discussed further below, the Commission's Report and Order is fundamentally flawed in its analysis of the adequacy of viewpoint diversity on television. While the Commission's Report and Order correctly concludes that concentrated media ownership harms viewpoint diversity, it then fails to analyze compelling evidence documenting extreme concentration of ownership in television. The Commission's Order then authorizes additional concentration of ownership, thus further reducing already inadequate viewpoint diversity.

The Commission's consideration of digital must-carry must be informed by – and explicitly linked to -- its consideration of the public interest obligations that will attach to these digital signals. The Commission's consideration of these public interest obligations

² *Report and Order, 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, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, June 2, 2003, para. 18.

³ "FCC to Probe Media Ownership Concentration," by David Ho, AP, *Yahoo News*, August 18, 2003. To date, the Commission has not commenced this study.

⁴ *Petition for Reconsideration of the Center for the Creative Community and the Association of Independent Video and Filmmakers, 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, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, September 4, 2003 (CCC Petition for Reconsideration).

necessarily must include adequate, non-flawed analyses of the current state of localism and diversity of viewpoints in television. Considering the evidence using the principles it laid down in the 2002 Biennial, the Commission will find that television today is excessively concentrated. The Commission must explicitly link its approval of digital must-carry to public interest obligations that will remedy this extreme concentration which harms viewpoint diversity. It should include as part of this public interest obligation a mandate of source diversity in television production, which, as the Commission has noted, promotes its “retail” goal of viewpoint diversity.⁵

Conversely, if the Commission decides no added public interest obligations will attach to these added digital signals, we believe there can be no public interest in compelling by government regulation the carriage of those signals on local cable systems, rather than leaving that decision to market forces and public demand. This is especially true when, as we will discuss below, absent public interest conditions, digital must-carry will devastate already scarce viewpoint diversity.

In short, the Commission must not put the digital must-carry “cart” before the public interest “horses.”

III. TODAY, EXCESSIVE CONCENTRATION OF OWNERSHIP IN TELEVISION HAS DEVASTATED VIEWPOINT DIVERSITY

We agree with the Commission in its 2002 Biennial Report and Order that viewpoint diversity should remain a core policy objective in regulating media ownership.⁶ We agree with the Commission that a “diverse and robust marketplace of

⁵ CCC 2002 Biennial Comments, pp. 27-31.

⁶ 2002 Biennial Report and Order, para. 18.

ideas is the foundation of our democracy” and that “it has been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁷

We support the Commission’s conclusion that “outlet ownership can be presumed to affect the viewpoints expressed on that outlet.”⁸ This is a sound and fundamental principle upon which to regulate television, and, more broadly, media ownership, well-supported by precedent and the record. After all, few would suggest that Chevrolet and Cadillac are separate automotive company “viewpoints.” Rather, the “viewpoint” is that of their conglomerate owner, General Motors. The same principle holds true in television with regard to conglomerates that own multiple distribution outlets positioned to appeal to different segments of the viewing audience, just as Chevrolet and Cadillac are positioned by GM to appeal to different segments of the car market. The “viewpoint” is that of the owner – the conglomerate – and not of its subsidiary distribution outlet.

Unfortunately, however, while the Commission articulated this sound principle in its Order, it failed to apply it in its analysis. Instead, throughout the Order, the Commission merely counts the number of distribution outlets and concludes viewpoint diversity is sufficient, without any further inquiry into either the ownership of those outlets or the share of the audience those owners control.

For example, the Commission concludes that “the diversity of viewpoints by national media on national issues is greater than that regarding local issues. This is principally due to the vast array of national news sources available on the Internet, cable

⁷ 2002 Biennial Report and Order, para. 19.

⁸ 2002 Biennial Report and Order, para. 27.

television and DBS.”⁹ But who owns those news sources and how much of the audience do they control? The Commission doesn’t say. However, the record in the 2002 Biennial is replete with evidence as to who does own the sources and how much audience they control. To cite just one example, the Biennial record contains a research study titled “Returning Oligopoly of Media Threatens Cable’s Power” by respected Wall Street analyst Tom Wolzien which finds, “Together, the five companies (Viacom/CBS/UPN/etc., Disney/ABC/ESPN/etc., GE/NBC/MSNBC/CNBC/Bravo/etc., News Corp./FOX/FX/Fox News/etc., and Time Warner/WB/CNN/TNT/TBS/etc.) controlled about a 75% share of prime-time viewing, not including their nonconsolidated partnerships like A&E, Court TV and Comedy Central... roughly the same percentage of TV households in prime time as the three nets did 40 years ago. The programming oligopoly appears to be in a process of rebirth.”¹⁰

Unless the Commission analyzes who owns these outlets – and then further analyzes whether there is excessive concentration in that ownership – by its own reasoning it hasn’t really analyzed viewpoint diversity at all and has no basis to make any conclusion about national viewpoint diversity.

Another example of the Commission’s flawed approach is its rejection of source diversity as a separate policy goal because the “the average U.S. household receives

⁹ 2002 Biennial Report and Order, para. 35.

¹⁰ Tom Wolzien and Mark McKenzie, “*Returning Oligopoly of Media Threatens Cable’s Power*,” Bernstein Research, Sanford C. Bernstein & Co., February 7, 2003, p. 3. This study was completed prior to the announcement of the purchase by GE/NBC of Vivendi Universal Entertainment, which includes the USA and Sci-Fi Networks, as well as Universal’s television production business. This consolidation raises the percentages of concentration of ownership and audience significantly.

seven broadcast television networks and an average of 102 channels per home.”¹¹ But who owns those 102 channels per home? Again, the Commission in its Biennial Order does not analyze this critical question. However, the Biennial’s record shows that of the 91 major cable television networks each available in more than 16 million homes, fully 80 percent (73 networks) are outlets owned or co-owned by the same five giant media conglomerates that control a 75% share of the national audience, plus Liberty Media.¹² If and when NBC takes over Vivendi/Universal, owner of USA and Sci-Fi Networks, the numbers will be even worse.

These same five giant media conglomerates plus Vivendi/Universal now also produce the vast majority of programming for television. Of the 40 new series airing on the four major broadcast networks in the 2002 season, 77.5 percent are owned in whole or part by the same four networks, up from 56.3 percent the prior season – an increase of over 37 percent in just one year -- and up from just 12.5 percent in 1990.¹³ Again, if and when NBC takes over Vivendi/Universal, owner of USA and Sci-Fi Networks, these dismal numbers will be even worse.

In response to the Commission’s repeated requests for empirical data, CCC, Writers Guild of America, west, the Coalition for Program Diversity, and Consumer

¹¹ 2002 Biennial Report and Order, para. 45.

¹² Comments Of The Writers Guild Of America Regarding Harmful Vertical And Horizontal Integration In The Television Industry, Relating To: CS Docket 98-82: *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Appendix A, pp. 17-21, January 4, 2002, cited in CCC Comments, pp. 10-11. Wolzien and McKenzie, p.3.

¹³ William T. Bielby and Denise D. Bielby, Sociology Department, University of California, Santa Barbara, “*Controlling Primetime: Organizational Concentration And Network Television Programming Strategies*,” forthcoming article in *Journal of Broadcasting and Electronic Media*, attached to CCC 2002 Biennial Comments as Table 1, p. 40, with the kind permission of its authors.

Federation of America all placed into the Biennial record compelling data that confirm Wolzien's conclusion: ownership of production and distribution in television is highly – and dangerously -- concentrated in the hands of a few giant media conglomerates.¹⁴ This evidence was barely addressed by the Commission's Order, even though it is critical to the question of the adequacy of viewpoint diversity.

To properly analyze viewpoint diversity, the Commission must consider the substantial evidence of the concentration of ownership in television. The evidence shows that while there are many more outlets available to the American public today than in the past, there is excessive concentration in the number of owners of those outlets. Thus, applying the principles the Commission itself articulates in its 2002 Biennial Order, there is not sufficient viewpoint diversity in television today.

IV. DIGITAL TELEVISION MUST-CARRY WILL SIGNIFICANTLY HARM ALREADY INADEQUATE VIEWPOINT DIVERSITY

Nearly all of the local licensees that will broadcast multiple digital signals, other than public broadcasters,¹⁵ are owned by or affiliated with the five giant media conglomerates that already control primetime television viewing in America. If each local licensee will soon broadcast and program up to five distinct digital channels and all of those channels must be carried by the local cable operator, then Americans will find it

¹⁴ CCC 2002 Biennial Comments, pp.10-14 and Table 1, p. 33; *Joint Comments of Writers Guild of America, west, et al.*, January 2, 2003; *Comments of Consumer Federation of America, Consumers Union, Center for Digital Democracy, Media Access Project*, January 2, 2003; *Comments by the Coalition for Program Diversity*, January 2, 2003.

¹⁵ We believe public broadcasters are diligent in promoting viewpoint and source diversity. Thus, we believe there should be no problem applying the same public interest rules and conditions to their digital signals as well as to private broadcasters.

increasingly difficult to avoid watching a program produced and distributed by one of these five giants, whether they receive their television over the air or on cable. In this explosion of network digital channels, the current extreme concentration in television ownership will become even more extreme.

But the concentrating effect of digital must-carry on ownership in television will be greater than simple multiplication indicates. When cable operators enter into a must-carry negotiation with the networks and their local affiliates for transmission of these added digital signals, the networks will have even more leverage over cable than they do now. Already, the networks use the must-carry rules against cable operators to move their cable networks up to a broader tier of cable service or extract other concessions that harm independent voices and viewpoint diversity. If the Commission grants each individual network the power to compel carriage on a cable operator's system of up to five local channels – or in markets where they are allowed to own a duopoly or triopoly, up to 10 or 15 local channels – cable networks not affiliated with a network will be forced off the more favorable tiers into “cable Siberia.”

In the 2002 Biennial, the Commission stated that “the average U.S. household receives seven broadcast television networks and an average of 102 channels per home”¹⁶ in rejecting calls for it to act to promote both viewpoint and source diversity. But if in the digital age, on a local cable system those seven networks occupy not just seven channels, but 35 (or 70 or more in duopoly or triopoly markets), and those seven networks own a large number of the other 102 channels, as they already do, then clearly digital must-carry will have a profoundly negative impact on viewpoint and source

¹⁶ 2002 Biennial Report and Order, para. 45.

diversity. This impact must be considered by the Commission before it allows digital must-carry.

The Commission must also consider another potential effect of digital television – whether it causes viewers to drop cable. If 24 hour news and weather, the networks’ own cable channels, and/or other content formerly available only on cable becomes available free on over the air digital television, will a significant number of viewers forsake cable? If so, what are the implications for viewpoint and source diversity? The Commission cites the widespread adoption of cable as justification for eliminating rules on source diversity in broadcast television and relaxing rules on media ownership.¹⁷ What effect should the potential migration of viewers away from cable have on the Commission’s regulatory policies? If cable is to become the haven for those seeking non-network voices, should cable operators be compelled to carry what viewers are paying them to avoid? And will the possible shrinking of the cable audience change the economics of independent cable channels to the point where they are not able to survive?

We don’t know the answers to these questions. We do believe, however, that the stakes are high and the answers must be known before the Commission acts. Viewpoint diversity is already reeling from the effects of extreme media concentration in television. Digital television may deal it a devastating knockout punch. Therefore, the Commission must analyze these questions – and many more – as it considers whether it is in the public interest to approve digital must-carry. Then, should it approve digital must-carry, it must at the same time link strong public interest obligations and rules that promote the public interest in viewpoint diversity.

¹⁷ Id.

V. SHOULD THE COMMISSION APPROVE DIGITAL MUST-CARRY, IT MUST AT THE SAME TIME MANDATE SOURCE DIVERSITY TO REMEDY INADEQUATE VIEWPOINT DIVERSITY IN TELEVISION

Despite the Commission's emphatic declaration that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"¹⁸ the Commission refuses in its 2002 Biennial Order to make diversity of sources a separate goal of its broadcast ownership policies.¹⁹ We disagree with this conclusion. The Commission admits that source diversity contributes to its "retail" goal of viewpoint diversity.²⁰ Moreover, source diversity furthers other important Commission goals, such as program diversity,²¹ promotion of opportunities for minorities, women, and small businesses, and competition.²² It is also easy to measure, unlike viewpoint diversity, and has been sanctioned by the courts as a valid means for the Commission to promote viewpoint diversity.²³

The Commission concedes that "fewer of the programs in the Networks' prime-time lineup are produced by independent producers than at times in the past." Indeed, the evidence shows source diversity has been reduced dramatically. Of the 40 new series airing on the four major broadcast networks in the 2002 season, 77.5 percent are owned

¹⁸ 2002 Biennial Report and Order, para. 19.

¹⁹ 2002 Biennial Report and Order, para. 43.

²⁰ CCC 2002 Biennial Comments, pp. 27-31.

²¹ 2002 Biennial Report and Order, para. 42.

²² CCC 2002 Biennial Comments, p. 28-8.

²³ *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) at 1049. "...it should be apparent that the networks have no hope of proving to our satisfaction that the Commission is without *any* power to restrict the networks' participation in television programming." (Judge Posner's emphasis.)

in whole or part by those networks, up from 56.3 percent the prior season – an increase of over 37 percent in just one year -- and up from just 12.5 percent in 1990.²⁴

However, the Commission goes on to say “the evidence in the record does not address whether the decline in the number of independently-produced programs is attributable to changes in the regulatory environment (i.e., the elimination of the fin/syn rules) or to other changes that have taken place in the media business in the intervening years that have increased the risk of producing prime time programming.”²⁵ We disagree. We believe the record is full of evidence that the elimination of independent sources from program production is the direct result of regulatory changes that allow the networks to leverage their control of the publicly-owned airwaves to create an oligopoly in both the production and distribution of programming.²⁶

For example, Part II of the FCC’s commissioned study of diversity by Professor Mara Einstein, mentioned just once in the Commission’s Order, documents the network takeover of television program production in the past decade.²⁷ Interestingly, since completing this study for the Commission, Professor Einstein has subsequently written, “we cannot know whether deregulating ownership will be beneficial so why let the horse out of the barn when it is unlikely that we will be able to get it back in once we do? Better to err on the side of caution. More, not less, regulation of the five media giants that dominate the communications landscape is called for.”²⁸

²⁴ Bielby and Bielby, attached to CCC Comments as Table 1, p. 40.

²⁵ 2002 Biennial Report and Order, para. 650.

²⁶ CCC 2002 Biennial Comments, pp. 10-14.

²⁷ MOWG Study No. 5, *Program Diversity and the Program Selection Process on Broadcast Network Television*, by Mara Einstein (Sept. 2002).

²⁸ “*Dereg? We should talk Re-Reg,*” Mara Einstein, *Broadcasting & Cable*, April 28, 2003.

Since source diversity promotes the Commission’s “retail” goal of viewpoint diversity, which is lacking due to excessive concentration of ownership, the best way for the Commission to promote viewpoint diversity is for it to promote source diversity in the production of television programming. It worked before and it will work again.

The adoption of digital must-carry must be explicitly linked to the adoption of a public interest obligation that mandates source diversity in the production of television programming. With such a linked mandate, digital must-carry will promote the public interest in viewpoint diversity. Absent this mandate, digital must-carry will inflict irreversible harm on viewpoint diversity.

VI. CONCLUSION

The Commission’s consideration of digital television must-carry is inextricably entwined with its fundamental media policy goal of – and the public’s interest in – viewpoint diversity. Today, viewpoint diversity in television is on life support as a result of excessively concentrated media ownership.

Digital must-carry provides the Commission with a golden opportunity to ameliorate this excessive concentration and improve today’s impoverished viewpoint diversity. But the Commission must explicitly link its digital must-carry approval to public interest obligations that increase viewpoint diversity, including a source diversity mandate. Only by making this link explicit will the Commission assure that digital must-carry promotes viewpoint diversity, rather than extinguish it.

Respectfully submitted,

Jonathan Rintels
Executive Director
Center for the Creative Community