Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF COX ENTERPRISES, INC.

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January 2, 2003

SUMMARY

As the D.C. Circuit in the *Fox* decision made clear, the Commission must retain media ownership rules that are "necessary" in the public interest and eliminate those that are not. The record evidence in this proceeding will establish that retaining the 35 percent national television ownership cap is necessary to promote competition, diversity and localism in local media markets. By contrast, because it serves none of these public policy goals, the newspaper/broadcast cross ownership restriction is not necessary and must therefore be repealed.

It is no wonder that the Commission, in its 1998 Biennial Review, rejected the conclusion of an earlier Commission that the national ownership cap could safely be jettisoned altogether. Even assuming that the Commission in 1984 used the right analysis (which it did not), the media landscape that the Commission surveyed nearly two decades ago bears little resemblance to the media marketplace of today. The major television networks no longer focus primarily on over-the-air broadcasting, with a few subsidiary business ventures. To the contrary, thanks in large part to other deregulatory government decisions, each of the networks now is part of a massive conglomerate with widespread ownership interests in an array of different media. As their web of interests has grown, so too has the networks' desire to aggressively promote distribution of their national, mass appeal programming through a variety of media platforms. And as that agenda has gained steam, the networks have adopted practices that increasingly interfere with their local distributors' ability to serve local audiences.

These comments detail Cox's experiences with the major television networks as both a local television affiliate and a local cable system operator. As the operator of 15 strong local television stations affiliated with all of the major networks, Cox has witnessed firsthand the networks' efforts to promote their national distribution agenda to the detriment of local affiliates

and consumers. Pressure not to preempt network programming, for example, is on the rise – even in the face of local demand for different programming. Network re-purposing and reverse compensation strategies, both of which undermine the competitiveness and market value of local affiliates, are increasing. The networks also are increasing their use of local affiliates to cross-promote their other offerings – even telling viewers to switch from the affiliates' local news to other network-owned, non-broadcast programming. And concerns from smaller market affiliates about inappropriate network programming are being subjugated to the networks' desires to cater to the tastes of their large market audiences.

As the operator of cable systems in 22 states, Cox also has dealt with network efforts to leverage their ownership of many of the country's largest and strongest television stations to secure nationwide carriage of untested, network-owned cable channels. Networks increasingly are using retransmission consent negotiations to tie carriage of network owned and operated stations (network "O&Os") to carriage of affiliated cable networks. These demands typically require cable operators to carry the new services in all markets they serve, often at increased rates. The end result: local cable operators enjoy less flexibility to program their systems in response to local demand, and end up charging higher prices for network-affiliated programming that many of their customers simply do not want.

Increasing the 35 percent cap would only accelerate these disturbing trends. For example, allowing the networks to acquire even more television stations nationwide would significantly increase the number of broadcasters whose loyalties are consistently divided between service to their communities and service to their parents' national programming agenda. Network threats to switch affiliation to an O&O if an affiliate does not agree to network demands concerning preemption or cross-promotion requirements would surely rise. The number of independent stations that can apply pressure to networks to make their national programming more responsive to local community needs would drop off sharply. And, the networks' leverage in retransmission consent negotiations to demand carriage of unrelated cable channels at higher rates would increase exponentially, because cable operators simply could not afford the severe disruption to American consumers that would result from forfeiting carriage of so many network stations nationwide.

These developments would have a direct, and adverse, impact on diversity and competition in local media markets as the networks further limit the independence of local broadcasters and cable operators and squeeze out competing independent programmers. But perhaps the greatest impact of raising the national ownership cap would fall on a distinct policy goal virtually ignored by the Commission in 1984: localism. The requirement that broadcast licenses be allocated to local communities is almost as old as the Communications Act of 1934. As subsequent FCC and court decisions make clear, this statutory licensing scheme includes an obligation that each broadcast licensee serve the viewers in its specific local community, not some homogenized "national" television consumer. Far from being limited to news and public affairs programming, moreover, localism encompasses all programming that a television station decides to air – or not to air – in response to local demand. Localism simply is not served when a television viewer in rural Alaska, Louisiana or Montana gets exactly the same slate of national network programming as the viewer in New York or Hollywood, except for an occasional program of intense local interest.

Limiting the number of television stations that the networks can own nationwide helps limit the networks' ability to impose their national distribution agenda on their local broadcast and cable distributors, and protects those distributors' ability to make programming decisions in response to local community needs and desires. Conversely, increasing the cap would seriously undermine the efforts of local television stations and cable systems to respond to local market forces, in defiance of the policy goal of localism adopted by Congress and long embraced by the Commission and the courts. This result is not a speculative matter, moreover. As the facts included in these and other comments will show, the networks already are using their television station ownership to further their national distribution agenda. There is no doubt the networks would enjoy a quantum leap in their ability to pursue a "national," rather than a "local," vision should they be permitted to own even more television stations nationwide.

By contrast, there is no record evidence that retaining the newspaper/broadcast cross ownership rules is necessary to protect competition, diversity or localism in either local or national markets. Indeed, in the rulemaking proceedings already conducted on this issue, the facts have demonstrated that competition and diversity would be more than adequately protected by the operation of local market forces. Moreover, elimination of the rule would have a beneficial impact on localism. By enabling local television stations to enjoy the efficiencies that can accrue from common ownership with an in-market newspaper, local stations would be better positioned to compete effectively against the networks in an increasingly competitive environment. And, far from focusing their sights on the national market, such local combinations would concentrate their efforts on delivering strong news and other programming that responds directly to local market needs, as envisioned by Congress, the Commission and the courts.

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COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits these comments in response to the *Notice* in the above-captioned rulemaking proceeding.[1] Cox applauds the Commission's effort to develop a unified philosophy to support its media ownership rules in light of recent court directives.[2] By reviewing its rules as a whole in one omnibus proceeding, the Commission has an historic opportunity to harmonize disparate rules that have, for example, needlessly prohibited newspaper owners from acquiring in-market broadcast licenses in today's

[1] *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*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503 (2002) ("*Notice*").

[2] *See, e.g., Fox Televisions Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox*"); *Sinclair Broadcast Grp. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

duopoly world.[3] Through facts such as those submitted by Cox in these comments, the Commission will also be able to assemble the record required by Section 202(h) of the Telecommunications Act of 1996 ("the 1996 Act") to retain certain ownership rules, such as the 35 percent national ownership cap, that can be shown to be "necessary in the public interest."[4]

Cox's position that the Commission should repeal the newspaper/broadcast cross-ownership prohibition is well documented, and the comments filed by Cox and others in previous proceedings on this issue are to be incorporated into this docket.[5] These comments, therefore, focus first, on why it is in the public interest to retain the 35 percent national ownership cap, and second, on why retention of the cap is consistent with repeal of the newspaper/broadcast cross-ownership rule.[6] As demonstrated below, retaining the 35 percent cap and eliminating the newspaper/broadcast cross-ownership rule are both "necessary" to

[3] *See* 47 C.F.R. §§ 73.3555(b), 73.3555(d).

[4] Under the Telecommunications Act of 1996, the Commission is required to review its media ownership rules every two years under the Section 202(h) standard. *See* Telecommunications Act of 1996, PUB. L. NO. 104-104, § 202(h) Title II, 110 STAT. 56, 111 ("The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.").

[5] *See* Comments of Cox Enterprises Inc., *Review of the Cross-Ownership of Broadcast Stations and Newspaper Rules and Newspaper/Radio Cross-Ownership Waiver Policy*, MM Dkt. No. 01-235, 96-197 (Dec. 3, 2001); *see also* Reply Comments of Cox Enterprises, Inc., *Review of the Cross-Ownership of Broadcast Stations and Newspaper Rules and Newspaper/Radio Cross-Ownership Waiver Policy*, MM Dkt. No. 01-235, 96-197 (Feb. 15, 2002); *Notice*, 17 FCC Rcd 18503, ¶ 7.

[6] Because the national television networks are presently the only entities seeking to acquire stations above the current 35 percent cap, Cox will focus its comments on the harms that will result if the networks are permitted to gain additional market power. Cox, a group station owner itself, is not opposed to group ownership *per se*, but rather is opposed to allowing the networks to acquire additional television stations to supplement their current web of ownership interests, as will be discussed further below.

promote the Commission's goals of competition, diversity and, in particular, localism, a public interest imperative mandated by Congress in the Communications Act.

BACKGROUND

Cox's commitment to localism is at the very core of its business philosophy. Starting with a single newspaper in Dayton, Ohio over 100 years ago, Cox now serves local communities in virtually every state in the nation as a television broadcaster, radio broadcaster, cable system operator, newspaper publisher, or local web site creator.

As a television broadcaster, Cox operates fifteen stations in eleven markets.[7] Cox television stations have long been affiliated with numerous television networks. At present, three stations are affiliated with ABC, two are affiliated with CBS, three are affiliated with NBC and three are affiliated with Fox.[8] Two of the Cox television stations, WHIO-TV, Dayton, Ohio, and WBS-TV, Atlanta, Georgia, are owned jointly with in-market newspapers (the *Dayton Daily News* and *The Atlanta Journal-Constitution*, respectively). Cox also owns forty-one other newspapers across the country (seventeen dailies and twenty-six weeklies total).

Cox also is the country's fourth largest cable operator, serving roughly 6.3 million video programming customers in twenty-two states. Since the passage of the 1996 Act, Cox Communications has invested roughly 14 billion dollars in its cable systems, and now provides a range of advanced communications offerings, including digital video, voice and high-speed data services. Cox's commitment to the radio business has been equally strong: Cox Radio owns and operates seventy-nine radio stations in eighteen markets and is the third largest radio broadcasting company in the United States in terms of net revenues.

[7] Cox television markets include Atlanta, Georgia; Charlotte, North Carolina; Dayton and Steubenville, Ohio; El Paso, Texas; Johnstown and Pittsburgh, Pennsylvania; Orlando, Florida; Reno, Nevada; San Francisco, California; and Seattle, Washington.

Despite the scope of its various media holdings, Cox is a local media company operating local businesses with local management empowered to make decisions at the local level. Cox recognizes that consumers in local markets are best served when businesses in their communities strive to meet their particular needs. Accordingly, all of Cox's media outlets enjoy considerable autonomy to make decisions for their local markets as they see fit. The company's commitment to localism was eloquently summarized in Cox Communications' 2001 Annual Report:

> Cox's operations are local. That means local management, local employees, local programming, local service and local commitment. Local fleets of Cox vehicles cover millions of miles of local streets every year to serve our customers. Local management teams in each Cox market manage their operations to meet the needs of the community. Business strategies are customized to local needs, rather than a single, one-size-must-fit-all strategy beamed to every customer, regardless of the diversity and demographics of their community. . . Cox operations feed millions of dollars into local economies through employment, taxes, franchise requirements and business relationships. Through our community relations programs, we provide extensive support . . . to local schools . . . and scores of local charities and organizations. . . Further, Cox provides customers comprehensive local programming, including local broadcast channels, independent networks, sports, and extensive community-interest programming. . .[9]

This statement epitomizes Cox's local business focus, which applies to each and every one of its local media outlets. Moreover, Cox's local strategy has borne notable success. Ninety percent of Cox's television stations, for example, consistently are number one in their markets for local news.[10] Cox also believes that community involvement and community service are integral to local market success. For this reason Cox has long been a recognized leader for its many community service endeavors.

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[8] Of the remaining stations, three are independent and one is a UPN affiliate.

[9] COX COMMUNICATIONS, 2001 SUMMARY ANNUAL REPORT, *Local Commitment, available at* http://media.corporate-ir.net/media_files/NYS/cox/reports/AR_2001/cxc.html.

[10] Since Cox is affiliated with all four networks, these rankings are not related to network rankings.

Cox's core focus on localism contrasts sharply, however, with the national focus of the national television networks. Like Cox, the networks own numerous television stations in markets across the country. Unlike Cox (and other independent group television owners), the networks also have financial interests in a vast, and ever-increasing, web of national programming producers and distributors. These include not only the over-the-air network television programming services, but also myriad cable program services, general release film studios, video rental services and Internet web sites.

Despite this web of media interests, the networks continue to press their case for elimination of the Commission's rule limiting the number of television stations they can own nationwide.[11] This national ownership cap dates back to the 1940s and was specifically designed to "obviate possible monopoly, and encourage local initiative."[12] In 1984, the Commission examined the cap, then set at seven television stations nationwide, and concluded that, in light of intervening market changes, the restriction could safely be eliminated.[13] Nonetheless, in recognition that total repeal of the rule might result in a significant and rapid restructuring of the

[11] *See, e.g.,* Request of Viacom Inc. for Interim Relief, MM Dkt 98-35 (Feb. 25, 2002) at 13-18; Emergency Petition for Relief and Supplemental Comments of Fox Television Stations, Inc., MM Dkt 98-35 (Nov. 18, 1999) (arguing for immediate elimination of national broadcast ownership rule); Joint Reply Comments of Fox Television Stations, Inc. and USA Broadcasting, Inc., MM Dkt 98-35 (Aug. 21, 1998) at 2-14; Comments of CBS Corporation, MM Dkt 98-35 (July 21, 1998) at 4-18; Joint Comments of Fox Television Stations, Inc. and USA Broadcasting, Inc., MM Dkt 98-35 (July 21, 1998) at 4-15.

[12] *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcasting Stations,* Report and Order, 100 F.C.C.2d 17, 21 ¶ 13 (1984) *("1984 Order"*), *quoting* Federal Communications Commission, *Sixth Annual Report Fiscal Year 1940* (1941) at 68. When the Commission first adopted broadcast ownership limitations in 1940, it began with the "six station rule" for FM stations. Due to the more limited number of television channels, the Commission prohibited common ownership of more than three television stations. By 1946, the Commission expanded its *de facto* ownership cap to seven stations. The Commission subsequently formalized its "seven station rule," which remained in place until 1984. *See, e.g., 1984 Order,* 100 F.C.C.2d at 21-23, ¶¶ 12-18.

[13] *1984 Order,* 100 F.C.C.2d at 21-22, ¶ 14.

broadcast industry that contravened public policy, the Commission on reconsideration decided simply to relax the rules to permit the networks to own no more than twelve stations, or stations that in the aggregate reached no more than 25 percent of the national television audience.[14]

In 1996, Congress, with the trepidation reflected in the Congressional Record, took an additional step and relaxed the national ownership cap even further to eliminate the 12-station limit and to raise the audience reach cap from 25 to 35 percent.[15] It also directed the Commission to evaluate each of its broadcast ownership rules every two years, and retain only those that are "necessary in the public interest."[16] Pursuant to this Congressional directive, the Commission evaluated the national ownership cap in its first "biennial review" in 1998 (the "1998 Biennial Review") and concluded that the 35 percent national ownership cap should be preserved.[17] When the networks appealed this decision to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), however, the court concluded that the Commission had not sufficiently explained the basis for retaining the cap, and remanded the case to the Commission for further consideration.[18] In particular, the court expressed concern that the Commission had not adequately explained why it now believed that the cap should be retained

[14] *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Memorandum Opinion and Order, 100 F.C.C.2d 74, 87, ¶ 31 (1985).

[15] Telecommunications Act of 1996 § 202(c)(1)(B), PUB. L. NO. 104-104, 110 STAT. 56(1996). *See also Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 12374 (1996).

[16] Telecommunications Act of 1996 § 202(h).

[17] *1998 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,* Biennial Review Report, 15 FCC Rcd 11058, 11122 ¶ 119 (2000) ("*Biennial Review Report*").

[18] *See Fox*, 280 F.3d at 1049.

when, almost sixteen years earlier in the *1984 Order*, it had concluded that the prohibition could safely be eliminated entirely.[19]

This proceeding resulted. Rather than examining the national ownership cap in isolation, however, the Commission also is seeking comment on other media ownership rules, including the current prohibition on same market ownership of local newspapers and broadcast stations. As a longstanding proponent of eliminating the newspaper-broadcast cross-ownership rule and an ardent supporter of the 35 percent national ownership cap, Cox welcomes this opportunity to participate in the Commission's deliberations.

DISCUSSION

As explained below, the Commission is not bound by its analysis in the *1984 Order.* To the contrary, a detailed examination of that decision reveals that the Commission's analytical framework was fatally flawed. Not only did the Commission erroneously conclude that the cap has no impact on diversity, but it failed to consider the effect of the cap on localism, a paramount public interest principle. Moreover, the factual sands on which the *1984 Order* was based have shifted so significantly that its assumptions about the workings of the media marketplace are no longer valid.

Indeed, the seismic changes in the media landscape that have occurred since 1984 are in many ways more revolutionary than the changes that occurred between 1940 (when the Commission first adopted the national cap) and 1984. Between 1940 and 1984, a television industry that began with a small number of stations and programs had grown to encompass a

[19] *Fox*, 280 F.3d at 1044-45 ("The Commission's failure to address its *1984 Report* in the course of its contrary *1998 Report* is . . . [a] way in which the decision to retain the [35% cap rule] was arbitrary and capricious. . . . To retain the cap in 1998 without explanation of the change in the Commission's view is . . . simply arbitrary. The Commission may, of course, change its mind, but it must explain why it is reasonable to do so.").

large number of independent programming sources and outlets including broadcast, cable and potentially MDS and LPTV, leading many to foresee the end of network domination. Since 1984 and particularly following network deregulation in 1995 and 1996,[20] however, the networks have extended their ownership reach to cover every aspect of media production and distribution, including the very businesses that were expected to compete with them. These extensive programming interests now give the networks an immense economic incentive and ability to distribute mass appeal national programming over multiple media platforms nationwide.

Network consolidation across a range of media makes retention of the television ownership cap more necessary than ever to protect the public interest. Notwithstanding the longstanding requirement that broadcast licensees base their programming decisions on local needs and tastes, the programming decisions of television stations owned by the networks (the network "O&Os") necessarily are driven in significant part by their parent companies' national programming agenda. The networks' web of ownership interests likewise increases their ability and incentive to force the same national agenda on affiliate stations. Moreover, the networks now influence more than just the local programming choices of broadcasters, both network and affiliate-owned. Through the retransmission consent process, the networks have successfully tied permission to carry their O&Os to carriage of network-owned cable programming, a tactic that removes local programming choice from cable operators and increases cable prices.

The impact of this network behavior is far from theoretical. As an informal survey of its own operations reveals, Cox's local television stations and cable systems already face network tactics that interfere with local market dynamics. These experiences, and their adverse effects on

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[20] *See, e.g., Review of the Syndication and Financial Interest Rules, Sections 73.659 - 73.663 of the Commission's Rules*, Report and Order, 10 FCC Rcd 12165 (1995); Telecommunications Act of 1996 § 202(c)(1)(B), PUB. L. NO. 104-104, 110 STAT. 56 (1996).

competition, diversity and localism, are described in detail below.[21] To prevent additional harm from occurring – and to better enable local television stations to compete against the network conglomerates – the Commission should retain the 35 percent national ownership cap and eliminate the newspaper/broadcast cross-ownership rule.

I. LOCALISM IS THE FOUNDATION OF CONGRESS' BROADCAST REGULATORY SCHEME AND MUST BE PROTECTED BY THE COMMISSION'S BROADCAST OWNERSHIP RULES.

Although the Commission considered in the *1984 Order* whether modification of the national ownership cap would serve the "twin goals" of competition and diversity, it did not analyze the impact on localism of relaxing or eliminating the cap.[22] In contrast, the Commission did consider localism in its decision to retain the cap in the 1998 Biennial Review, stating that "independently owned affiliates play a valuable . . . role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed."[23]

The Commission's recognition of the importance of localism in the 1998 Biennial Review was critical to its public interest analysis. Localism is a fundamental tenet of our broadcasting system, embodied in statute, Commission orders and longstanding court precedent. At heart, Congress's decision to adopt a local, rather than a national, broadcast license scheme

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[21] *See, e.g.,* Appendices C-1 and C-2. The Cox-specific facts discussed herein were compiled from conversations with both Cox Television and Cox Communications (cable) personnel, as well as from an informal survey of the Cox stations by Cox Television. *See, e.g.*, attached Declaration of Bruce Baker; attached Declaration of Robert Wilson.

[22] *See, e.g., 1984 Order,* 100 F.C.C.2d at 24 ¶ 20.

[23] *See, e.g., Biennial Review Report,* 15 FCC Rcd at 11075, ¶ 30.

reflects the core values of the U.S. federalist system of government.[24] Just as local communities and governments are charged with overseeing and carrying out the most essential of governmental services, so broadcasters are charged with meeting the unique needs of their local communities through their programming choices. By embracing localism as a key component of its broadcast regulatory scheme, Congress has helped to ensure that local communities retain their local voice, their local character, and their local participation in our democratic system of government.[25]

As the Commission observed in the *Notice*, Congress's commitment to localism stems from the earliest days of the Communications Act.[26] After an initial period of radio chaos, the Radio Act of 1927 directed the Federal Radio Commission to allocate radio licenses among five different zones.[27] The Communications Act of 1934 (the "1934 Act") also embraced the five-zone system.[28] This allocation scheme did not last long, however. Congress quickly determined that the approach resulted in a heavy concentration of radio stations, and hence radio service, in

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[24] This focus on localism stands in sharp contrast to the broadcast licensing schemes in other countries, where broadcast licensees are directed to serve their viewers on a regional or even a national basis. *See, e.g.,* Canadian Broadcasting Act of 1991 § 3(1)(d)(ii) (directs broadcast licensees to "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity . . . .").

[25] *See, e.g., Cable Television Syndicated Program Exclusivity Rules; Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television,* Report and Order, 79 F.C.C.2d 663, 673 ¶ 26 (1980) ("Since the true value of local news and public affairs programming may not be reflected in the number of individuals who view it or the value they place on it but rather in the value it has to our society as a whole and especially to the functioning of our democratic institutions, it may be regarded as an 'externality' that needs to be accounted for in regulations since this extra or external value may not be completely accounted for by ordinary market institutions.").

[26] *See Notice,* 17 FCC Rcd at 18526-18527, ¶¶ 69-71.

[27] *See* Radio Act of 1927, PUB.L. NO. 69-632, § 12, 44 STAT. 1162, 1167.

[28] *See* Radio Act of 1934, 47 U.S.C. § 302.

urban areas, and little or no radio stations or service in less populated areas. Accordingly, only two years later, Congress adopted the current language in Section 307(b):

> In considering applications for licenses, and modifications, and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.[29]

Section 307(b)'s mandate that broadcast stations are to be licensed to local communities throughout the fifty states was specifically designed to prevent powerful networks from controlling content heard in every local market. The legislative history of the 1934 Act reveals that Congress was already concerned that the two large radio chains, Columbia Broadcasting System and the National Broadcasting Co., were attempting to push out independent stations and dominate the airwaves.[30] Accordingly, Congress required that the Commission recognize a "local service" objective.[31] As two FCC Commissioners observed in 1968:

> Congress created the present scheme in order to promote specific policies and specific kinds of programs. A system of locally based stations was deemed necessary to ensure that broadcasting would be attentive to the specific needs and interests of each local community. It was also considered a guarantee to local groups and leaders that they would have adequate opportunity for expression. Ultimately, our broadcasting system is premised on concern that the very identity of local states and cities might be destroyed by a mass communications system with an exclusively national focus.[32]

As another FCC Commissioner has observed, "Localism, in short, is no accident. Localism, by deliberate design, has been a touchstone value of broadcasting and of broadcasting regulation –

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[29] 47 U.S.C. § 307(b).

[30] 78 CONG. REC. 10309 (1934).

[31] Roger G. Noll, ECONOMIC ASPECTS OF TELEVISION REGULATION 99 (1973).

[32] *In Re Application for Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas and Nebraska,* Application, 14 F.C.C.2d 2, 7-8 (1968).

even though the importation of distant services on the nation's airwaves has always been possible."[33]

Congress's commitment to the preservation of localism in broadcasting has not wavered through the years. During the debate over the 1996 Act, Congress made clear that it did not want a monolithic "New York – Los Angeles" viewpoint to control what viewers see in every local market.[34] As the House Report to the 1996 Act observed, localism has a cost and may be less efficient than if broadcast stations were simply made "passive conduits for network transmissions from New York." But although localism may be "an expensive value . . . it is a vitally important value . . . [and] it is a principle of communications policy rooted in the Communications Act of 1934."[35]

Notably, Section 307(b)'s requirement that broadcast licenses be allocated "among the several States and communities" has always been interpreted to require *both* an allocation of licenses across the United States *and* an obligation that each licensee serve its specific local

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[33] Commissioner Ervin S. Duggan, Remarks before the Mississippi Association of Broadcasters, *Localism: Tied to the Tracks?*, 1992 FCC Lexis 3548 (Jun. 27, 1992).

[34] *See* H.R. REP. NO. 104-204, pt. 1 at 217 (1995) ("H.R. 1555 will intensify control of information and opinion in entire cities and regions of the country. Mass media outlets will increasingly become beholden to policies and programming originating in New York and Hollywood. In this new electronic environment, diversity and localism will suffer and large segments of the population will enjoy fewer and fewer options."). *See also* S. REP. NO. 104-23 at 69 (1995) (additional views of Sen. Hollings) (noting that "[a]ny modification in the national ownership cap is important because of localism concerns. Local television stations provide vitally important services in our communities.").

[35] *See* H. REP. NO. 104-204 at 221 (1995) ("No one will argue that, in general, it is not more efficient to simply make local broadcast stations passive conduits for network transmissions from New York. Localism is an expensive value. We believe it is a vitally important value, however, and like universal service, it is a principle of communications policy rooted in the Communications Act of 1934. It should be preserved and enhanced as we reform our laws for the next century.").

community.[36] "Localism" thus has been broadly construed, and stands for the proposition that each broadcast licensee must consider and meet the unique local needs of its community of license. Rather than simply ensuring that viewers have access to a range of political viewpoints, localism requires that each broadcaster undertake "a diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of his service area" — tastes, needs and desires that "may, of course, differ from community to community and from time to time."[37]

In the first decades of broadcast regulation, the Commission imposed specific programming requirements on radio and television licensees to ensure that they offered programming that addressed the full range of local audience interests.[38] These early policies grew into the "well balanced programming" concept and the Commission's "ascertainment

[36] *See, e.g., Amendment of Section 3.606 of the Commission's Rules and Regulations; Amendment of the Commission's Rules, Regulations and Engineering Standards concerning the Television Broadcast Service; Utilization of Frequencies in the Band 470 to 890 MCS. For Television Broadcasting Part 1 of 4,* Sixth Report and Order, 41 F.C.C. 148, 171-172, ¶ 79 (1952) (explaining the Commission's belief "that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs."); *Public Interest Obligations of TV Broadcast* Licensees, Notice of Proposed Rulemaking, 15 FCC Rcd 19816, 19816, ¶ 1 (2000) ("One of a television broadcaster's fundamental public interest obligations is to air programming responsive to the needs and interests of its community of license.").

[37] *Report and Statement of Policy Re: Commission en banc Programming Inquiry,* 44 F.C.C. 2303, 2316 (1960) (*"1960 Programming Policy Statement"*).

[38] The Federal Radio Commission, for example, originally required radio licensees to demonstrate at renewal how much time weekly was devoted to six specific types of programming: entertainment, religious, commercial, educational, agricultural, and fraternal. *See Deregulation of Radio,* Report and Order, 84 F.C.C.2d 968, 994 ¶ 59 (1981) (*"Deregulation of Radio R&O"*)*, recon. denied,* 87 F.C.C.2d 797 (1981)*, aff'd in part, reversed in part sub nom., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir.1983). In 1929, the same Commission reported to Congress that "service in the public interest" should include "entertainment . . . religion, education, and instruction, important public events, discussion of public questions, weather, market reports, and news and matters of interest to all

requirements," under which all broadcasters were required to conduct detailed surveys of their local communities and to provide specific types of programming in response to the community needs identified.[39]

When the Commission eliminated the "well balanced programming" requirements for radio in 1981 and television in 1984, it determined that detailed programming regulations were no longer necessary to protect localism.[40] Rather than require that all broadcasters air "one size fits all" programming, the Commission stated that "what is important is that licensees utilize their good faith discretion in determining the type of programming that they will offer and the issues to which they will be responsive."[41] Significantly, however, the Commission continued to uphold the statutory mandate of localism. The Commission stressed that "the concept of localism was part and parcel of broadcast regulation virtually from its inception, [and that] . . . the Commission has: 'given repeated and explicit recognition to the need for adequate selection in programs of *local* interests, activities and talent.'"[42] The Commission thus was clear that its

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members of the family." *Id.* (citing the Federal Radio Commission's Third Annual Report to Congress).

[39] *Id.*

[40] *See id.* at 997, ¶ 66. *See also, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 F.C.C.2d 1076, 1101-1105 (1984), *recon. denied*, 104 F.C.C.2d 357 (1986), *aff'd in part and remanded in part sub. nom. Action for Children's Television v. F.C.C.*, 821 F.2d 741 (D.C. Cir.1987) ("*Television Deregulation R&O*").

[41] *Deregulation of Radio R&O*, 84 F.C.C.2d at 998 ¶ 58. The Commission thus eliminated the requirement that each station provide some defined amount of news and other non-entertainment programming. *See also April Enter., Inc. v. KTTV*, 147 Cal.App.3d 805, 819 (Cal. Ct. App.1993) (finding that there was no merit to contentions that a television licensee's renewal expectancy should have been negated or diminished because of the reduction during the license term in the quantity of nonentertainment programming broadcast by the licensee).

[42] *Deregulation of Radio R&O*, 84 F.C.C.2d at 994, ¶ 58 (citing a 1946 report titled *Public Service Responsibility of Broadcast Licensees*, commonly referred to as the *Blue Book*, at 37) (emphasis in original).

deregulatory actions were designed only to reduce the regulatory burden on broadcast licensees, not to change the fundamental obligation that they serve the needs and interests of their local communities. Indeed, the Commission purposefully retained a broad requirement that broadcast licensees consider and address the unique needs and tastes of their community of license in all aspects of their programming. Two decades later, broadcasters still are expected to fulfill this obligation by airing a variety of different types of programming of their choosing.[43]

As the Commission recognized in the *Notice*, localism thus encompasses not only local news, public affairs, and locally originated programming, but all programming that a television station decides to air (or not to air) based on its considerations of whether a particular program (whether it be network, syndicated, local news or public affairs) will fulfill the tastes, needs, and desires of its community.[44] Programming decisions – whether concerning news or entertainment – will differ from community to community based on each licensee's assessment of how best to serve the needs of its community. This broad concept of localism is rooted in the longstanding statutory requirement that broadcasters serve their communities of license. It also explicitly recognizes that a community's local events and culture can compete against, or even conflict with, a national programming distribution agenda.

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[43] The Commission has highlighted this fundamental obligation when taking other deregulatory actions in the broadcast arena. *See, e.g.*, *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691, ¶ 1 (1998) (providing television broadcasters with flexibility in locating their main studios and local public inspection file but emphasizing that "[t]hese modifications in no way alter the obligation of each broadcast licensee to serve the needs and interests of its community. As the Commission has long recognized, this is a 'bedrock obligation' of every broadcast licensee.").

[44] *See Notice*, 17 FCC Rcd at 18526, ¶ 70 ("Stations may fulfill this obligation [of localism] by presenting local news and public affairs programming and by selecting programming based on the particular needs and interests of the station's community.").

Congress's decision to embrace a local licensing scheme for television that prevents the needs and interests of local viewers from being subjugated completely to the dictates of national program distributors has been consistently supported by the courts. Indeed, the courts repeatedly have upheld the congressional determination that the preservation of localism in broadcasting must be considered when the Commission adopts broadcasting rules and policies.[45] In *National Broadcasting Co. v. U.S.*, for example, the Supreme Court in 1943 stated that "[a] station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest."[46]

Nearly sixty years later, the D.C. Circuit confirmed in the *Fox* decision that localism can and should be considered when reviewing the necessity of a broadcast media ownership rule under Section 202(h) of the 1996 Act.[47] In evaluating the Commission's decision in the 1998 Biennial Review to retain the national ownership cap, the D.C. Circuit held that, in the context of regulating broadcasting, the "public interest" has historically embraced localism and "nothing in

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[45] *See, e.g., Nat'l Broadcasting Co. v. US*, 319 U.S. 190, 216 (1943) (In affirming the Commission's adoption of chain broadcasting rules prohibiting eight specified network abuses, the Supreme Court noted that "[a]n important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts."); *Henry v. FCC*, 302 F.2d 191, 192 (D.C. Cir. 1962) (affirming the Commission's denial of a construction permit because the applicant made "no inquiry into the characteristics or programming needs of that community and offered no evidence thereon").

[46] *National Broadcasting Co. v. US*, 319 U.S. at 203.

[47] *Fox*, 280 F.3d at 1027.

Section 202(h) signals a departure from that historic scope."[48] Although the court remanded the national ownership cap back to the Commission, it did so because the Commission had not sufficiently explained the underlying reasons why the cap is necessary to preserve localism – not because a decision to retain the national cap based on localism is legally infirm.[49]

Shortly thereafter, the D.C. Circuit again ruled that the "public interest" component of Section 202(h) permits an analysis of localism and diversity.[50] In the *Sinclair* decision, the court reviewed the propriety of the Commission's local television ownership rule using a Section 202(h) analysis. The court again found that the Commission could reasonably retain the local television ownership rule under Section 202(h) based on diversity and localism goals.[51]

These court decisions confirm that, because the entire structure of broadcast regulation is based on the congressionally established policy of promoting and protecting localism, the Commission must consider and uphold localism as part of its public interest analysis when reviewing its media ownership rules. As demonstrated below, localism is served both by retention of the 35 percent national ownership cap and elimination of the newspaper-broadcast cross-ownership rule.

II. THE MEDIA LANDSCAPE HAS CHANGED DRAMATICALLY SINCE 1984 AND, INDEED, SINCE 1996.

The media landscape analyzed by the Commission in the *1984 Order* no longer exists. And, far from supporting additional relaxation of the national ownership cap, the intervening

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[48] *Id.* at 1042; *see also Notice*, 17 FCC Rcd at 18509, ¶ 14.

[49] *Fox*, 280 F.3d at 1042.

[50] *Sinclair*, 284 F.3d at 148.

[51] *Id.* The court nonetheless remanded the rule to the Commission because it had employed a "voice test" that was inconsistent with similar tests used to implement other broadcast ownership regulations.

changes since 1984 confirm that retention of the current 35 percent cap is "necessary in the public interest."

In 1984, the networks were bound by a variety of restrictions that sought to limit the networks' ability to use their near-monopoly on "prime time" quality programming in ways that might be contrary to the public interest. As the number of media outlets (including new networks, independent stations, cable systems and DBS operators) increased, the Commission began to ease or repeal these restrictions. Rules that were significantly relaxed or eliminated over the ensuing years included the finsyn rules, the prime time access rule, the dual network rule and local broadcast ownership rules. Against this backdrop of relaxed broadcast regulation, Congress decided, with considerable trepidation, to permit a 40 percent increase in the national ownership cap from 25 to 35 percent.[52] This action in 1996 was quickly followed by an enormous increase in the scope and scale of network ownership interests. As a result of decades of deregulation, the networks now control vast programming and content resources in virtually every form of mass media, a phenomenon never considered in the *1984 Order*.

A. Most Restrictions on Network Market Power Have Been Eased or Eliminated Since 1984.

In 1984, the market power of the three existing television networks was constrained by a variety of broadcast regulations in addition to the national TV ownership cap. These rules were intended to limit network control over television programming and to encourage the development of a diversity of programs through a variety of independent programming sources.[53] Since 1984, many important elements of these regulatory constraints have been eased or eliminated.

[52] *See, supra* notes 34 and 35.

[53] *See, e.g, 1984 Order,* 100 F.C.C.2d at 24, ¶ 18.

One set of such restrictions, the finsyn rules, originally imposed in 1970, generally prohibited the networks from syndicating programs they produced or from purchasing syndication rights to independently-produced programs, or otherwise obtaining a financial interest in such programs. In 1993, under intense political pressure and lobbying from the networks and after extensive proceedings, the Commission eliminated many of the finsyn restrictions,[54] and repealed the remainder in 1995.[55] The Commission expected that its actions would result in greater network funding of independent programmers.[56] Instead, as detailed below in Section III.B, the elimination of the finsyn rules has led the networks to increase their ownership interests in television and film production and to compel broadcast and cable carriage of network-owned programming, to the detriment of independent programmers.

At the same time that it eliminated the finsyn restrictions, the Commission eliminated another long-standing restriction on the networks, the prime time access rule ("PTAR").[57] The PTAR generally prevented the networks from compelling their affiliated stations in the top 50 television markets to broadcast more than three hours of network programs (or former network programs) during the four prime time viewing hours. Like the finsyn restrictions, PTAR was intended to promote programming diversity by increasing the level of competition in program production and reducing the networks' control over their affiliates' programming decisions. In the absence of PTAR, the networks now are able to require affiliates to carry national network programming during the entire prime time viewing period.

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[54] *Evaluation of the Syndication and Financial Interest Rules*, Second Report & Order, 8 FCC Rcd 3282 (1993), *on recon., Evaluation of the Syndication and Financial Interest Rules*, Memorandum Opinion & Order, 8 FCC Rcd 8270 (1993) ("*1993 Finsyn Order*").

[55] *Review of the Syndication and Financial Interests Rules, Sections 73.659 – 73.663 of the Commission's Rules*, Report & Order, 10 FCC Rcd 12165 (1995) ("*1995 Finsyn Order*").

[56] *1993 Finsyn Order,* 8 FCC Rcd at 3295-3305, ¶¶ 30-45.

In addition to the elimination of these programming-related restrictions, many of the direct restrictions on media ownership in place in 1984 have since been relaxed or repealed as a result of the 1996 Act. For example, the Act modified the long-standing rules prohibiting common ownership of more than one network.[58] Section 202(e) of the Act directed the Commission to modify its dual network restriction to prohibit combinations of the four major networks (ABC, CBS, NBC and Fox) with each other or with the two then-existing emerging networks, UPN and WB, effectively permitting the acquisition of broadcast networks created after the 1996 Act. Then, in 2001, pursuant to its biennial review of all ownership rules, the Commission relaxed the dual network rule to permit mergers between the major networks and the emerging networks (UPN and WB), a rule change that immediately resulted in the Viacom CBS purchase of UPN.[59]

In short, by the time the 1996 Act raised the national ownership cap from 25 to 35 percent, the networks already were enjoying significant deregulation. As described below, the radical changes in network ownership and consolidation that have since ensued – and their eroding impact on competition, diversity and localism – were never envisioned by the Commission in 1984.

B. Broadcast Networks' Web of Ownership Interests Has Vastly Increased Since 1984.

The networks occupy a dramatically greater presence in the media landscape today than they did two decades ago. Moreover, the networks' vertical integration and reach into other media platforms have accelerated since the national television ownership cap was raised from 25

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[57] *See, Prime Time Access Rule*, 11 FCC Rcd 546, 547-548 (1995) at ¶ 3 ("*PTAR Order*").

[58] Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 STAT. 56, Section 202(e).

[59] *Amendment of Section 73.658(g) of the Commission's Rules – the Dual Network Rule*, 16 FCC Rcd 11114, 11133 (2001) at ¶ 46 ("*Dual Network Order*").

to 35 percent in 1996. Disney merged with ABC in 1996; Viacom acquired CBS in 2000; and Fox merged with Chris-Craft Industries in 2001. Today, each of the major networks is part of a massive entertainment or industrial conglomerate with widespread ownership interests.[60]

In contrast to their ownership interests today, in 1984, ABC was the most highly integrated network with interests in twelve television stations, four cable networks, and a film production company. CBS owned five television stations, Tri-Star Pictures, a minority interest in the fledgling regional Sportschannels, and an interest in the Rainbow Service Company, producer of the American Movie Classics and Bravo cable channels. NBC owned seven television stations and assorted minor cable ventures. Fox did not yet exist.

Today, it takes a multiple page appendix to describe the networks' various intertwined interests.[61] CBS provides an illustrative example of how the networks have evolved from the providers of network programming in 1984 to the media empires of today. CBS now is owned by Viacom Inc. after a merger between CBS Corporation and Viacom in May 2000. A partial list of Viacom CBS video production and distribution-related interests includes the following:[62]

- CBS Television Network
- UPN Television Network
- Viacom Television Stations Group (owns thirty-five television stations and four satellite stations with duopolies in eight major markets)
- CBS Entertainment, CBS Sports, and CBS News (produces CBS network programming)
- Paramount Television (produces and distributes programming through six production units: Paramount Network Television, Viacom Productions, Spelling Television, Big

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[60] The web of network ownership interests (acquired since 1984) discussed below is fully detailed in Appendix A.

[61] *See* Appendix A.

[62] A complete listing of Viacom's current holdings, including radio and publishing interests are included in Appendix A.

Ticket Television, Paramount Domestic Television, and Paramount International Television)

- Cable Television Networks including: MTV Networks (owns and/or operates MTV, Nickelodeon/Nick at Nite, VH1, TNN, TV Land, MTV2, CMT, Digital Suite from MTV Networks, and MTV Films); Black Entertainment Television (owns BET Cable Network and BET Jazz); Comedy Central; Noggin cable channel (joint venture between Nickelodeon and Sesame Workshop); Gulf DTH Entertainment, LDC (satellite direct-to-home platform offering MTV, VH1, Nickelodeon, TV Land, and The Paramount Comedy Channel in the Middle East; joint venture); Showtime Networks Inc (including Showtime, The Movie Channel, Flix, Sundance Channel (joint ownership with Robert Redford and Universal Studios and managed by Showtime Networks Inc.); and Showtime Event Television (pay-per-view distributor of special events)).
- Paramount Pictures (producer and distributor of feature films)
- Paramount Home Entertainment (distributor of filmed entertainment on videocassette and DVD)
- Blockbuster Inc. (retail distribution and rental of videocassettes, DVDs and video games)

While CBS' revenue in 1984 equaled $4.924 billion, Viacom CBS' revenue in 2001 was approximately $23.223 billion.[63]

Each of the broadcast networks can boast of similarly broad media holdings. ABC, after successive mergers with Capital Cities and the Walt Disney Company, is now part of a media empire whose video programming operation includes ten television stations, ten cable networks,[64] four television production and distribution studios, five film studios (and two home video production companies), and numerous Internet interests.[65]

NBC, following its merger with General Electric, and General Electric's recent acquisition of the Telemundo network, now owns twenty-four television stations, and a

[63] Consolidated Financial Statements of CBS, Inc. for 1984; Viacom 10-K, filed Mar. 29, 2002.

[64] Included in these are ABC Family, The Disney Channel, Toon Disney, SoapNet, ESPN, ESPN2, ESPN News, ESPN Now, ESPN Extreme, and the Classic Sports Network. Disney also has a minority ownership interest in five other cable networks: A&E Television, the History Channel Lifetime Television, Lifetime Movie Network, and E! Entertainment.

[65] *See* Appendix A.

significant interest in Paxson Communications Corporation.[66] NBC's stable of stations now includes duopolies in five of the top ten markets and six markets overall. In addition, NBC owns an interest in eleven cable channels including its wholly owned CNBC and its home shopping channel, Shop NBC. NBC's extensive Internet operations, including its partnership with Microsoft on MSNBC.com, also support its programming interests.

NewsCorp. Fox merged with Chris-Craft Industries in 2001, and currently controls thirty-five television stations, including duopolies in five of the top ten markets and nine overall.[67] Fox stations currently reach over 40 percent of American television households. Fox's cable channels include Fox News Channel, the many national and regional channels comprising the Fox Sports Network, the FX Network, the Speed Channel, and the Fox Movie Channel showing movies from the Fox library. NewsCorp. Fox also maintains control over Twentieth Century Fox Television and Fox Filmed Entertainment, which produces major motion pictures through its Twentieth Century Fox production studio.

In addition to their direct ownership interests, the networks also have numerous investments and partnerships in properties that they share with other media companies. These additional holdings only spread the networks' web of intertwining interests even further and deeper into every sector of the mass media landscape.[68] This dramatic vertical integration,

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[66] *Id*.

[67] *Id*.

[68] For example, Disney ABC has joint ownership interests in media properties together with NBC, the Hearst Corporation, RCA Cable, Inc., Comcast, and Liberty Media among others. Viacom CBS joint ownership interests include those with B Sky B, Universal Studios, and the Rainbow Service Company. NewsCorp. Fox has joint ventures with the NFL, NBC, E.W. Scripps, InfoSpace and Microsoft among others. NBC's joint venture partners include Disney ABC, NewsCorp. Fox, Microsoft and Gannett. *See, e.g.,* Appendix A.

spurred in large part by the deregulatory decisions of the last eight years, has significantly altered the media landscape, to the detriment of competition, diversity and localism.

C. Changes in the Media Landscape Require Reassessment of the Commission's 1984 Conclusions.

The *1984 Order* and other decisions loosening broadcast restrictions relied heavily on the growth of alternative programming sources and outlets such as independent stations, emerging networks, cable channels, and videocassettes to compete with the established broadcast networks.[69] Yet with the removal of many of the regulatory safeguards that existed at the time of the *1984 Order,* the networks have expanded into the very businesses that were expected to provide competition and market discipline to the networks.

As discussed above, the networks' ownership interests have reached deep into the programming sources and outlets with which they were expected to compete. For example, the combination of Viacom, Blockbuster Entertainment Corp., and Paramount Communications, Inc. was cited by both the Commission and CBS as a strong competitor to the networks in the 1995 proceeding that led to the elimination of the finsyn restrictions.[70] Yet this very combination subsequently merged with CBS to form an even more dominant entity. Viacom CBS also now owns production company King World, whose argument that the networks have "bottleneck power" was rejected by the Commission in the finsyn order because the Commission believed that the networks faced increasing competition in video production and distribution.[71] Just as

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[69] *See*, *e.g.*, *1984 Order*, 100 FCC Rcd at 25-31, ¶¶ 25-43; *1993 Finsyn Order*, 8 FCC Rcd at 8291-8293, ¶¶ 44-48; *PTAR Order* 11 FCC Rcd at 560-573, ¶¶ 26-36; *Dual Network Order,* 16 FCC Rcd at 11118-11120, ¶¶ 11-14.

[70] *1995 Finsyn Order*, 10 FCC Rcd at 12170, ¶ 25.

[71] *Id.* at ¶ 26.

they did with programming distribution outlets, the networks have developed or acquired many formerly independent programming production sources.

Given the repeal of virtually every other regulatory restraint on the networks that was in place in 1984, the networks now enjoy dominant positions in the production and distribution of media content across multiple platforms. The national television ownership cap is one of the very few limitations remaining on the further expansion of network market power – market power that threatens competition, diversity and localism. As described below, these fundamental changes in the media landscape provide overwhelming evidence that the Commission must depart from its conclusion in 1984 that the national ownership cap could safely be further relaxed or eliminated altogether.

III. MARKET FORCES ALONE WILL NOT PROTECT LOCALISM, DIVERSITY AND COMPETITION.

The Commission asks in the *Notice* whether market forces alone are sufficient to protect localism and diversity interests.[72] Specifically, the *Notice* poses the Section 202(h) question of whether the 35 percent national ownership cap is "necessary in the public interest as the result of competition."[73] Cox generally agrees that, in a "healthy marketplace," competitive forces often produce the market dynamic that best serves the public interest. Here, however, the facts show that the market is not operating efficiently or appropriately to protect competition, localism and diversity, even with the 35 percent cap in place.[74]

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[72] *See Notice*, 17 FCC Rcd 18503, ¶ 31.

[73] *Id.* at ¶ 129.

[74] The Commission should note that the network behavior described herein has coincided with two networks exceeding the national ownership cap pursuant to waivers granted by the Commission in anticipation of this proceeding. *See UTV of San Francisco, Inc., et al., and Fox Television Stations*, Memorandum Opinion and Order, 16 FCC Rcd 14975, 14982 ¶ 25 (2001) (granting temporary waiver of Fox stations' 40.91 percent national coverage), *aff'd*, *United Church of Christ v. Federal Communications Commission*, No. 01-1374 (D.C. Cir. November 8,

A. The National Networks Are Promoting Their National Agenda to the Detriment of Localism, Diversity and Competition.

More so than at any point in the past, the networks today dominate every facet of mass media from production to distribution to syndication. As discussed above, ABC, NBC, CBS, Fox and their corporate parents have assembled a web of interests that extends throughout the media landscape, from old media such as radio, television, and print, to new media such as cable television channels and the Internet. The networks are national entities and they compete on a national level, offering content designed to appeal to the national mass market, not tailored to local interests and certainly not to the interests of less eye-ball and revenue producing rural communities.

Many have remarked upon the negative effect that this consolidation is having on the diversity and quality of American entertainment and newsgathering.[75] The Commission need not engage in subjective judgments about the quality of American media, however, to recognize the negative effects that network consolidation is having in areas firmly within its jurisdiction. As described in greater detail below, the growth of network power is steadily eroding local

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2002); *Shareholders of CBS Corporation and Viacom, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 8230, 8235 (2000) (granting temporary waiver and describing merged Viacom/CBS entity as covering "slightly more than" 41 percent of U.S. households); *see also Fox*, 280 F.3d at 1036 (describing Fox and CBS ownership interests as 40 percent and 41 percent respectively, and noting that it granted stay to prevent forced divestiture of Viacom/CBS to satisfy 35 percent cap).

[75] *See e.g.*, *Hearing of the Senate Commerce, Science and Transportation Committee on Media Concentratio*n, 107th Cong. (2001) (statements of Sen. Hollings, Sen. Inoue, Sen. Wyden, and Sen. Byron); Letter dated December 2, 2002, from Children NOW to Chairman Michael K. Powell, Federal Communications Commission; Senator Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 Fed. Comm. L.J. 551 (2000); Tom Lowry, *The Case Against an ABC/CNN Merger*, BUSINESS WEEK ONLINE, Dec. 2, 2002, *available at* http://www.businessweek.com/magazine/content/02_48/b3810105htm; Nikki Finke, *Deadline Hollywood: The Untold Story: How Corporate Takeovers Make the Media Less Curious*, L.A. WEEKLY, Nov. 22-28, 2002, *available at* http://www.laweekly.com/ink/03/01/deadline-finke.php.

broadcasters' and cable operators' ability to distribute programming that suits local, rather than national, tastes and needs.

1. Vertically Integrated Networks Have the Incentive To and Are Capable of Distributing Homogenized Content Across Mass Media Platforms Nationwide, Threatening Localism, Crowding Out Diversity and Hindering Competition.

Because the networks compete on a nationwide basis, their business and marketing strategies focus on aggregating the largest possible nationwide audience for their program content and building dedicated followers for their network "brands."[76] Significantly, all but one of the networks (NBC) have vertically integrated with film and television companies, a strategy that enables them to retain both first run and syndication rights in many of their programs. Equally important to the networks' national focus, each network has developed or acquired extensive cable programming holdings and has developed significant Internet operations. To make these ventures profitable, the networks must press their programs' national exposure in a never-ending national quest for additional eyeballs. The importance of creating and maintaining the visibility of all the networks' national content has become paramount.

Today's networks openly discuss their national programming strategies. Disney ABC's CEO Michael Eisner has described Disney ABC's goal as building a "national duopoly" to promote the company's core brands, such as Disney and ESPN.[77] Under this strategy, Disney's ABC and cable programming operations seek to create a unified program distribution platform with the "alignment of ABC prime time with ABC Family, ABC daytime with SoapNet and

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[76] *See, e.g.,* Laura M. Holson, *"Lizzie McGuire" Has Become a Hot Disney Brand*, NEW YORK TIMES, Dec, 2, 2002, at C1; Diane Mermigas, *Take Some New Paths to Avoid Rocky Road Ahead*, ELECTRONIC MEDIA, Oct. 21, 2002, at 12 (describing network practice of accumulating network and cable ratings for ad sales purposes).

[77] *See* Diane Mermigas, *Disney Plans New TV Model; Big ABC Loss Spurs Eisner to Action,* ELECTRONIC MEDIA, Oct. 7, 2002, at 1.

ABC Saturday morning with Disney Channel, Playhouse Disney and Toon Disney," and ABC Sports with ESPN.[78] In news, Disney ABC has been exploring a partnership with CNN for its news operation.[79] The declared aim of these combinations is to use Disney ABC's various cable channels to repackage, repurpose, and cross-promote Disney-owned programming across multiple platforms to gain aggregate market share and, thereby, to increase the rates that Disney ABC can demand for advertising packages covering all of its channels. Under this business model, the interests of the ABC broadcast assets play an inferior role to the interests of their parent's vast program holdings. For example, although Disney ABC uses the nationwide platform the network gives it to push its stable of programming interests, it does not view ABC itself as a "stand-alone brand" worth promoting.[80]

One of the primary ways in which the networks are leveraging their web of ownership interests to increase their profits is through the practice of "repurposing," or recycling of programming. As the ABC Network Affiliate Program II ("NAP II") proposal currently defines it,

> the terms "repurpose" and "repurposing" shall mean a presentation of an ABC Television Network program simultaneously with or subsequent to the airing of that program on the Network. Subject to [certain provisions], a program that incorporates some, but not all of the content of an ABC Television Network program will not be considered repurposing unless such program substantially replicates the ABC Television program from which it derives.[81]

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[78] *Id.*

[79] Jeff Barcovici, *ABC-CNN News Pact Gets Closer: Big Boys Still Power-Jockeying Over Edit Control*, MEDIALIFE, Oct. 28, 2002, *available at* http://209.61.190.23/news2002/oct28/1_mon/news4Monday.html.

[80] *See* Charles Dubow, *Clarification: Eisner Discusses the ABC Brand and Other Disney Brands*, FORBES.COM, Nov. 13, 2002, *available at* http://www.forbes.com/2002/11/13/cx_cd_1113disney.html.

[81] Letter from Alex Wallau, President, ABC Television Network, to ABC Affiliates (Oct. 3, 2002) at 4.

Thus, repurposing involves the network's recycling of network programming (or programming that "substantially replicates" it) on other media outlets, such as network owned cable channels, that compete against the affiliate station. Repurposing allows the broadcast networks to tap dual revenue streams for programs that otherwise provide only initial advertising revenue.

The essence of the network-affiliate relationship traditionally has been the network programming exclusivity provided to the network's affiliates. Network repurposing is rapidly eroding that basic principle, as the networks aggressively reduce or eliminate this exclusivity. For example, the 1999 ABC Network Affiliate Program I ("NAP I") introduced the concept of repurposing, allowing the network to recycle, without restriction, up to 25 percent of its primetime network programming to other media outlets that compete directly against ABC affiliates.

The trend in both boilerplate affiliate agreements and ancillary agreements is toward ever increasing network repurposing of programming. Thus, the NAP II proposal provides for repurposing to occur within a few hours of the program's first run on the affiliate station.[82] The hypocrisy of the networks' practice is that they insist stations brand themselves as ABC, CBS, NBC or Fox affiliates, yet the networks' repurposing activities are diluting the very meaning of that affiliation. Network pursuit of repurposing is systematically eroding the uniqueness and competitiveness of the broadcast stations' programs and their air times.

The most common form of the networks' repurposing strategy is where networks air a program on an affiliated broadcast or cable network following the program's first run. Viacom CBS, for example, is rerunning *The Amazing Race* on UPN (also owned by Viacom CBS) on Friday nights after CBS initially airs it on Wednesdays. ABC is repurposing its *According to*

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[82] *Id*. at 3.

Jim, *Alias* and *Bachelor* programs to ABC Family, and is rerunning its daytime talk show *The View* on the A&E Network, in which Disney ABC also has an ownership interest. Likewise, Fox's *24* is aired twice on the affiliated FX network after its initial network run. In some cases, the broadcast networks are on the receiving end, airing programs that originally aired on cable channels.

Aggressive repurposing also is driving network acquisitions of cable channels.[83] Last year, Disney ABC spent $2.9 billion to acquire the Family Channel and rename it ABC Family. The channel will serve as a recycling outlet, and has plans to air ABC reruns, programs featuring old ABC news footage, and kids programming from the Disney library that already has run on other Disney-owned cable channels.[84] More recently, NBC followed suit in purchasing Bravo for $1.25 billion.[85] NBC announced plans to share advertisers and programming with Bravo, including programs created from old NBC News footage or shared events and award shows, but with no independent studio production just for Bravo.[86] The acquisition evoked widespread concerns regarding the future use of Bravo as a "dumping ground" for homogenized programming. With the A&E Network (another arts and entertainment channel co-owned by NBC and Disney ABC) already moving away from that format, Bravo was one of the few remaining cable channels that "delved into the arts [with] much quirkier programming."[87]

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[83] *See* Appendix B.

[84] Gary Leven, *Disney Refocusing Family Channel*, USA TODAY, Dec. 2, 2001, *available at* http://www.usatoday.com/life/enter/tv/2001-12-03-family-channel.htm.

[85] David Goetzl, *NBC to Buy Bravo for $1.25 Billion: Cable Entertainment Property Reaches 68 Million Homes*, ADAGE.COM, Nov. 4, 2002, *available at* http://www.adage.com/news.cms?newsId=36484.

[86] Linda Moss & R. Thomas Umstead, *Ops: We Don't Want "Dumping Ground,"* MULTICHANNEL NEWS, Nov. 11, 2002, at 55 ("*Dumping Ground*").

[87] *Id.*

Similar homogenization had occurred when Viacom CBS turned country-music channel The Nashville Network into TNN: The National Network, a general-entertainment channel.[88]

The networks' strategy of distributing homogenized, mass appeal programming over multiple platforms obviously decreases the diversity of programming available to local audiences. By crowding out alternative programming, it also impedes competition in the programming market and reduces competition between local broadcast stations and cable channels. And, by jeopardizing the uniqueness of local affiliate programming, repurposing weakens those stations' competitive position at the very time that they face increasing competition from other network-owned program distributors.

Moreover, the harmful effects of the networks' national programming strategy are compounded by their drive to acquire broadcast stations in the largest urban markets.[89] It is not hard to understand the networks' motivation for wanting to increase their ownership of television stations in these areas: nearly 30 percent of the nation's population lives in the top 10 television markets, making those markets the quickest way to attain the critical mass of viewers necessary to give a show survivability and amass advertising dollars. As a result of their concentration of station ownership in the largest television markets, however, the networks skew their programming to the tastes of these markets, with less regard for the remainder of the country, much less the interests of smaller, rural communities. Moreover, to maximize profits from their programming interests, the networks' national programming strategy must maximize distribution (and re-distribution through repurposing) of that very same content to all markets nationwide

[88] *Id.*

[89] NBC, Viacom CBS and NewsCorp. Fox have concentrated on acquiring station duopolies in the nation's major television markets. The fact of network owned stations dominating major markets has been long recognized, but the networks' aggressiveness in assembling major market duopolies indicates that they are committed to placing an absolute hammerlock on those markets.

over all media platforms. The ultimate success of the networks' national distribution strategy – supported by widespread television station ownership – thus would cause direct harm not only to diversity and competition but also to localism, with smaller local communities suffering the greatest isolation.

2. The Networks' National Strategies Have Put Them at Odds With the Traditional American Broadcasting System and Its Focus on Preserving Localism and Diversity.

The current network business model is far from the traditional model for American broadcasting, with its heavy focus on localism. While the American broadcasting system was built on the tenet of diverse voices serving local markets, the newly configured television networks are national entities, competing in a national entertainment market. The networks' national focus is undermining broadcasting at the local level in several ways. In Section III.B, below, Cox describes its stations' experience with the difficulties the networks' national programming strategies pose to the stations' ability to serve their local communities. Just as alarming, however, is that the networks are promoting their national content in head-to-head competition against affiliates' local programming.

The networks now cross-promote their affiliated programming and Internet services during network programs, a practice designed to induce viewers to switch from the local broadcast station to network-owned alternative programming at the close of the network program. In announcing its acquisition of Bravo, NBC Cable president David Zaslav emphasized that "'Bravo will benefit tremendously from NBC's promotional platform . . . . A few spots on NBC for Bravo is practically half their marketing budget.'"[90] Cox affiliates have experienced this practice in many instances. For example, NBC uses Cox affiliates to encourage

[90] *Dumping Ground* at 55.

viewers to go to MSNBC for particular coverage of breaking and developing news stories and tells viewers to tune into MSNBC and CNBC with "teases" that appear in the *Today Show*, *Dateline*, and *Nightly News.* During the NBA playoffs and finals, NBC encouraged viewers to turn to CNBC for post game coverage and interviews. NBC's *Dateline* also has promoted the network's affiliated cable channel COURT TV and used its reporters at various times. In the past, NBC also encouraged viewers to watch additional Olympic coverage on NBC owned cable outlets.[91] These promotions often are aimed at leading viewers away from affiliates' local news offerings.

The other networks are pursuing similar cross-promotional strategies. On a weekly basis, Fox tells viewers to tune in to its Fox Sports channel as well as the Fox News channel for its hour-long newsmagazine. Fox's broadcasts of NASCAR frequently cross-promote the races that will be shown on FX, and also include day and date specific promos for other FX product, such as the sports program *Beyond the Glory*. Similarly, ABC promoted ESPN and ESPN.com during an entire season's broadcast of Monday Night Football in direct competition with the ABC affiliates' local news programs that directly followed the game. ABC also uses its prime time programming to promote repurposed and other programming seen on its affiliated cable networks. Indeed, the recently concluded Network Affiliate Program II agreement between ABC and its affiliates expressly recognizes and permits ABC to air day and date specific promotions for other Disney-owned properties, such as ABC Family and ESPN, so long as the affiliate has no corporate restrictions on this type of advertising.[92]

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[91] These and the following examples of network behavior were collected from the Cox television station employees and other Cox personnel.

[92] *See* Michael Schneider, *ABC Passes Pigskin Buck*, DAILY VARIETY, Oct. 3, 2002, at 1.

Cox's extensive experience with the networks' cross-promotional strategies is shared by all other network affiliates. In fact, the networks consistently promote their national programming product on cable channels against non-network programming appearing on local broadcast stations. This relentless promotion of the networks' national product occurs at the expense of the programming selected by local stations to serve their communities. The practice cuts especially hard when the networks promote their national programming against a station's local news offerings, as local news has long been a core component of affiliates' service to their communities.

B. Affiliation Agreements Are Used to Decrease Affiliate Flexibility to Program Locally.

Programming to meet the tastes and needs of community viewers is the very essence of localism. During contract negotiations in recent years, however, the networks have been exerting more pressure on affiliates to cede programming control to the networks. Whereas in the past the networks allowed their affiliates to preempt the network feed under the Commission's "right-to-reject" rule,[93] in recent years the networks have strayed from both the letter of and policy behind the right-to-reject rule. While the networks have always attempted to extract maximum concessions from their affiliates, the networks' heightened pursuit of a national agenda in recent years has led the networks to increasingly interfere in local broadcasters' programming decisions as a matter of corporate policy. Notwithstanding some consolidation at the local level, the typical network affiliate currently does not have sufficient market power

[93] 47 C.F.R. §73.658(e). ("No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or (2) *substituting a program which, in the station's own opinion, is of greater local or national importance*.") (emphasis added).

against its principal programming source to withstand increased demands on such things as limited preemption, reverse compensation, affiliation transfer provisions and control of newly allocated digital spectrum.

1. Network Preemption Policies Do Not Permit Local Broadcasters to Program Their Stations to Best Serve Their Communities.

Restricted preemption is the key network policy that is constraining local broadcasters' ability to program their stations to best serve their communities. The networks' increasing insistence on full-line clearance of all network programming is closely linked to the networks' national agenda described above. The networks have made light of the preemption issue, saying that network anti-preemption rules simply keep affiliates from preempting prime national content to show syndicated programming.[94] In Cox's experience, however, network preemption rules and threats of strict enforcement have had a much more direct and negative impact.

Contrary to the plain language of the Commission's right-to-reject rule, current network affiliation agreements narrowly define what types of preemptions are "acceptable" and allow the networks to impose financial penalties for preemptions that do not fall within that category. While the network affiliates have petitioned the Commission to enforce the right-to-reject rule,[95] at the station level, general managers cannot wait for Commission determinations on the propriety of network actions. They must make daily business decisions in the face of network badgering that attempts to interfere with local programming and community service.

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[94] *See* Doug Halonen, *Networks Say Affiliates Abuse Pre-Emptions; Disney Appeals to FCC to Halt NASA Request*, ELECTRONIC MEDIA, Jul. 30, 2002, at 2.

[95] *See* Petition of Network Affiliated Stations Alliance, *Petition for Inquiry into Network Practices*, (Mar. 8, 2001) ("*NASA Petition*"); *see also*, *Comment Sought on "Petition for Inquiry into Network Practices" Filed by Network Affiliated Stations Alliance "Permit but disclose" Ex Parte Status Accorded*, Public Notice, DA 01-1264 (May 22, 2001).

For example, Cox's west coast stations have had recent battles with their networks over increasing weekend sports programming obligations that have made it very difficult for the stations to comply with the Commission's children's programming rules. In September, 2002, Fox demanded that Cox's Fox affiliate station in Reno, Nevada (KRXI-TV) preempt children's programming for a celebrity golf tournament. Because of other Fox network sporting events that weekend, the station could only reschedule the children's programming into a time reserved for Fox kids programming. Although the station had to preempt the Fox kids programming to meet its FCC requirements, Fox told the station that the preemptions would be classified as "unauthorized," thus possibly subjecting the station to penalties.[96] Cox's CBS affiliate in Seattle, Washington (KIRO-TV) also has experienced difficulty with weekend networks sports that encroach on its children's programming schedule. KIRO had to cancel a locally produced Sunday sports show to make room for children's programming second-home make goods because of the network's heavy national sports schedule. KIRO-TV further reports that national weekend sports coverage has prevented the station from producing weekend local noon newscasts and Sunday morning local newscasts as a service to its local community.[97]

In fact, Cox stations nationwide have had disputes with the different networks when the Cox stations have wanted to preempt national programming in favor of programming of higher local interest.[98] Much of this programming was local and regional sports, a type of programming that is highly valued by local audiences. A significant amount of local news and public affairs

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[96] *See* Appendix C-1. Appendix C-1 contains numerous examples of situations where different Cox stations have been unable to best serve their local communities because of restrictive network preemption practices. While Cox has not attempted to capture all instances where its stations have had conflicts with their networks over preemption issues, Appendix C-1 contains representative examples of preemption problems from a representative sample of Cox stations.

[97] *Id.*

[98] *Id.*

programming also has been eliminated because of network demands. Many Cox stations would prefer to run different programming, such as local sports, movies or syndicated programming, in place of network programs that are of little interest in their individual markets, but network preemption caps force them to air programs their viewers do not want. As stated by Cox's station in Charlotte, North Carolina, "we are not permitted to use a selective process for what works best in our market."[99] While the networks might argue that it is of little concern if viewers in Charlotte are unable to watch a local sports event because the network wants to run a non-local ice hockey game, such a decision is at the crux of Congress's determination that television stations make programming choices that reflect the local views and tastes of their communities.

Station frustration over network preemption limitations is at an all time high. Affiliate preemption of network programming has steadily eroded over the past 10 years as the networks have tightened their grip on affiliate preemption practices. Today, some Cox stations report that they preempt half as much network programming as they did five to ten years ago.[100] Other Cox stations report that they frequently remove themselves from the market for independently produced programming because they would have little or no opportunity to air such programming (without penalty) in the face of the networks' clearance demands.[101]

At the same time, however, stations are extremely reluctant to approach their network-imposed "preemption cap" in any given year because of the heavy network penalties that could result if a station exceeds the cap.[102] In fact, Cox's stations attempt to reserve preemption

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[99] *Id.*

[100] *Id.*

[101] *See id.*

[102] For example, Cox's station in Pittsburgh, Pennsylvania, WPXI(TV), reports that it broke off negotiations to carry Pittsburgh Pirates games, games of intense interest to the station's local audience, because if it had preempted the network programming necessary to carry the games, it

opportunities so that they maintain some flexibility to provide programming of local interest that might or might not arise at the end of the calendar year. Failure to have such a "reserve" greatly increases the possibility that the station will exceed the permitted preemption cap by year's end and thus run the risk of incurring draconian penalties.

Disagreements with the networks over "allowable" preemptions are increasingly common as the networks' incentive to maintain their national audience grows. All of this comes at the expense of localism, diversity and competition, as the networks force all stations, both network owned and affiliated, to offer an ever expanding schedule of the same, homogenized national programming.

2. Upside Down Demands That Affiliates Compensate Networks Reduce Stations' Ability to Use Their Resources Locally.

As Cox repeatedly has stated, the controversy over preemption practices and the 35 percent cap is not about network compensation paid or not paid to affiliates. That is a proper subject for negotiation between the parties. Today, however, networks are seeking compensation from their affiliates. These network efforts to siphon cash from their affiliates result in fewer affiliate resources being available to invest in local programming and other community activities. Such a topsy-turvy world is not consistent with a national policy that requires the maintenance of strong local, independent broadcasters.

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could have faced network penalties in excess of one million dollars for unapproved preemptions. As the Commission is aware, the penalties for unapproved preemptions can be as extreme as the loss of a station's network affiliation. *See Update of Record*, at 8, submitted by Network Affiliated Stations Alliance ("NASA"), DA 01-1264 (Dec. 16, 2002) ("*NASA Update of Record*").

Confidentiality agreements restrict Cox's ability to discuss its specific network–affiliate compensation arrangements.[103] Cox can, however, speak in general terms about the types of agreements it is seeing from the networks. For example, in its recent negotiations with NBC, Cox was presented with the network's "boilerplate" agreements. Included were documents such as a "News Channel Participation Agreement" that is intended to have network affiliates pay for development and delivery costs of the network news, and a "Distribution Contribution Agreement" that is intended to have network affiliates pay for the network's conversion to digital television. These sorts of additional demands under which the affiliates pay the networks for network programming ventures were unheard of just a few years ago.[104]

Any mechanism under which network affiliates pass money to the networks results in only one thing: fewer dollars for the affiliates to use to produce and purchase programming responsive to local needs, and more dollars for the networks to use to pursue their national agenda. Local audience tastes, needs and desires not met by the networks' nationalized program content will suffer as a result.

3. Network Demands In Areas Such As Transfer Approvals and Digital Spectrum Force Stations to Compromise in Other Areas.

While network preemption restrictions and compensation flows have a direct impact on affiliate stations' ability to program locally, the Commission must keep in mind that affiliation agreements are negotiated globally with each one having a number of deal points. Accordingly, when the networks present affiliates with boilerplate agreements containing any number of

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[103] For obvious reasons, the networks do not want stations in comparable markets to be able to compare their network compensation packages.

[104] Cox notes that provisions such as these were discussed in the *NASA Petition* and have apparently been accepted by some of the smaller station groups. *See NASA Petition* at B-3, B-4 (discussing the NBC affiliation agreement signed by Granite Broadcasting Corporation).

overreaching provisions, stations are forced to accept trade offs on the provisions that impact them the most. Network power in these additional areas thus can hurt localism, as stations might, for example, bargain away some of their preemption rights in order to eliminate other onerous provisions from their affiliation agreements.

Examples in recent years of new network overreaching include provisions concerning network rights of first refusal, unilateral network rights to terminate an affiliation upon assignment, and network rights to the affiliate station's digital spectrum. As detailed in a recent NASA filing that updates the record on various network abuses,[105] these network practices are having a chilling effect on affiliate station operations. For those station owners who might be considering an eventual sale, the network requests for rights of first refusal and affiliate termination provisions give the networks ample leverage to extract concessions on other matters, such as preemption rights and compensation.[106] Further, even when these provisions are negotiated away, the networks still routinely inject themselves into station sales negotiations by attempting to extract concessions from new station owners in exchange for approval of affiliation assignments.[107]

Network grabs for affiliate digital spectrum also have the potential to hurt localism. Fox, for example, has been demanding that affiliates devote all of their digital capacity to Fox-originated services.[108] Any affiliate that agrees will, of course, lose the ability to use its digital

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[105] *See NASA Update of Record*.

[106] For example, ABC was able to extract from its affiliates payments to contribute to ABC's continued carriage of NFL games by agreeing not to interfere in station transfers through 2004. *See* Michael Schneider, *Alphabet Affils OK Footing Football Bill,* DAILY VARIETY, October 18, 2002 at 46; Michele Greppi, *ABC and Affiliates Near NFL Pact: Stations Ante Up $34M, Get Prime Concessions,* ELECTRONIC MEDIA, October 7, 2002 at 2.

[107] *See NASA Update of Record* at 8.

[108] *Id*. at 10.

spectrum to provide service that is specifically designed to meet local community needs, including local news.

In short, network attempts to wring concessions from their affiliates on a myriad of matters harms affiliate efforts to serve their local communities. Not only do these negotiations waste valuable station resources during the bargaining process, they also too often result in station compromises that inhibit the station's ability to best meet the needs of its local viewers. The adverse effects have their greatest impact on smaller station owners in mid- and small-size markets who simply lack the resources or negotiating leverage to resist overreaching network demands.

C. Networks Use Retransmission Consent to Force Unwanted National Programming on Cable Operators at Inflated Rates, Thus Reducing Local Programming Choice and Increasing Local Cable Rates.

In support of relaxing broadcast regulations, including the national ownership cap, the Commission repeatedly has stressed the role of cable as a primary competitor to the broadcast networks.[109] In particular, cable operators' offering of programming tailored to local tastes is expected to spur the broadcast networks to provide diverse, quality programming that satisfies local needs. As Chairman (then Commissioner) Powell has explained,

> The importance of cable, DBS and other systems is not just to increase video competition. These mediums also have ushered in greater diversity, for they can program to distinct parochial interest on a daily basis . . . .[110]

But cable operators cannot take the place of regulation to discipline and spur the networks to respond to local needs when these same conglomerates are taking away cable operators' programming choices.

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[109] *See, e.g.*, *1984 Order*, 100 F.C.C.2d at 28, ¶ 35; *1995 Finsyn Order*, 10 FCC Rcd. at 12171, ¶ 27.

The networks' broad and steadily increasing ownership reach has allowed them to force unwanted programming and higher costs on cable operators and their customers, thereby reducing the responsiveness of cable operators' programming decisions to local communities and driving up local cable rates. Congress and the Commission established the retransmission consent process to preserve local broadcast service to the community – specifically, to maintain the competitive position of local broadcast voices against vertically-integrated cable operators in local markets.[111] Today, however, the vertically-integrated networks' ability to leverage the retransmission consent process is undermining the localism principle that is at the heart of the statutory scheme. The networks' extensive ownership interests in both broadcast stations and cable channels, coupled with their increasingly national and cross-platform focus, have converted the retransmission consent process into the prime tool for implementing the networks' new national distribution and marketing strategies. The networks now negotiate retransmission consent for all of their O&Os nationwide at the same time, and condition such consent on carriage of their affiliated cable programming on all of the cable operator's systems nationwide (not just where the cable system and the O&O share a market). Consequently, retransmission negotiations no longer are based on the value of the broadcast station to the local market. Nor is the negotiation for the carriage and pricing of the network's affiliated cable programming based on its value to the local cable audience.

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[110] *See Biennial Review Report*, 15 FCC Rcd 11058, Separate Statement of Commissioner Powell.

[111] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Memorandum Report & Order, 9 FCC Rcd 6723, 6745 ¶104 (1994) (describing must-carry and retransmission consent rules as intended to "help preserve local broadcast service to the public"); *see also Turner Broadcasting System Inc. v. Federal Communications Commission*, 520 U.S. 180, 191-92 (1997).

As both a broadcast station group owner and a cable television operator, Cox has had the worst of both worlds, suffering from the networks' efforts to increase affiliate distribution of national broadcast programming and from the networks' increasingly overreaching demands for carriage of affiliated cable programming in exchange for retransmission consent for network O&Os. Many problematic network uses of the retransmission consent process have been described to the Commission in the American Cable Association's *Petition for Inquiry into Retransmission Consent Practices*, but the damage that these network practices cause is not restricted to smaller cable operators in smaller markets.[112]

In Cox Communications' experience, network demands to package carriage of affiliated cable programming together with retransmission consent for network O&Os nationwide were unheard of prior to the 1996 Act.[113] During and after the 1998 retransmission consent election cycle, however, network practices changed. Since then, Cox Communications has had similar experiences in negotiating retransmission consent agreements with NewsCorp. Fox, Disney ABC, and NBC. In each case, the network has demanded carriage of specified affiliated cable programming as a condition of retransmission consent for the network O&Os in Cox Communications' markets. Moreover, each network has effectively demanded carriage of its affiliated programming on all Cox Communications systems nationwide, not just in those markets where a Cox cable system carries a network O&O. In the case of Disney ABC, this meant that Cox Communications had to agree to nationwide carriage of SoapNet, even though

[112] *Petition for Inquiry into Retransmission Consent Practices*, American Cable Association, (Oct. 1, 2002) ("ACA Petition").

[113] *See* attached Declaration of Robert Wilson.

Cox Communications carries ABC O&Os in systems serving only about 500,000 (or approximately 1/12) of its customers.[114]

A high level of corporate involvement now characterizes negotiations for retransmission consent for network O&Os. The networks conduct the negotiations with Cox Communications corporate personnel, leaving the local station and cable operator largely out of the process. Moreover, the negotiations are driven by the networks' national concerns for maximizing the number of outlets carrying their affiliated cable programming. The focus of these negotiations is thus no longer the assurance of cable carriage for local broadcast stations, but rather what concessions in the form of national programming deals the networks can extract for allowing such carriage.

For example, during Cox Communications' last comprehensive O&O carriage negotiations with NBC, the network required Cox Communications to renegotiate its existing MSNBC and CNBC carriage contracts, including the imposition of new surcharges for Olympic programming, and to agree to carriage of Shop NBC. NBC used the renegotiations to increase the price for both CNBC and MSNBC, even though the MSNBC carriage contract had several years remaining at a lower rate. Again, NBC demanded carriage of its cable channels on all Cox Communications systems, even though Cox Communications carries NBC O&Os on systems serving only about half its subscribers. Cox Communications was not alone in this respect, moreover. It was well-known that "NBC leveraged retransmission consent and the Olympic games to extract a special charge from distributors, and to secure long-term deals and higher prices for CNBC and MSNBC."[115] Similarly, in announcing the acquisition of Bravo, "NBC

[114] In the case of NBC and Fox, Cox carries network O&Os to about half its subscribers.

[115] Linda Moss & R. Thomas Umstead, *Ops: We Don't Want "Dumping Ground,"* MULTICHANNEL NEWS, Nov. 11, 2002, at 55.

said its No. 1 priority is to increase Bravo's distribution" and "'[p]utting Bravo together with our other services in a package would be the most valuable way to do it,'" according to NBC Cable president David Zaslav.[116] These "services" will undoubtedly include NBC's broadcast O&Os.

The contrast between negotiating with a network for retransmission consent for its O&Os and negotiating with non-network local television stations is aptly demonstrated by the differences between two retransmission consent battles recently waged by Cox Communications. In 1999-2000, Cox Communications and NewsCorp. Fox negotiated a retransmission consent agreement to cover the Fox television stations for which Cox Communications did not have an existing retransmission consent agreement (including WTTG, the Washington, D.C. Fox station). NewsCorp. Fox insisted that Cox Communications carry either its Fox Movie Channel or Fox Sports World to all Cox Communications digital subscribers nationwide, even though less than a quarter of Cox Communications' cable customers were receiving service from the Fox O&Os directly involved in the negotiations.

The dispute arose near the beginning of the NFL playoffs, was national in scope, and subjected Cox Communications to significant negative customer relations in several of its markets when Fox required Cox Communications to cease carriage of its O&Os. Because the NewsCorp. Fox demands had national implications for Cox Communications, negotiations took place exclusively between network and Cox Communications corporate personnel, with no significant involvement from the local stations or cable systems themselves. The negotiations were long and difficult. Eventually, Cox Communications agreed to pay NewsCorp. Fox a rate based on all Cox Communications digital subscribers nationwide, even though only approximately 65 percent of these customers subscribed to a service tier that contains Fox Sports

[116] *Id.*

World or Fox Movie Channel. Because Cox Communications pays NewsCorp. Fox a per-subscriber rate for these channels that is based on all digital subscribers nationwide rather than just those subscribers who actually receive these channels, Cox Communications' per-subscriber rate for the programming is effectively inflated by approximately 50 percent. This inflated rate is directly attributable to NewsCorp. Fox's packaging of retransmission consent for its O&Os together with carriage of the cable channels on Cox Communications systems nationwide.[117]

Cox Communications' dispute with NewsCorp. Fox contrasts with another recent, well-publicized dispute with Allbritton Communications over carriage of WJLA-TV, ABC's Washington, D.C. affiliate. In exchange for continued carriage of WJLA-TV, Allbritton requested compensation for carriage of the station's affiliated local cable television news channel. The negotiations were long and challenging, but were carried on by local Allbritton and local Cox Communications officials who were familiar with the local issues at stake in the dispute. Eventually, the parties reached a solution that serves their customers in the Washington metropolitan area under terms that will last ten years and do not require Cox Communications to undertake any obligations outside the parties' immediate service area.[118] These negotiations thus were focused on the value of the local broadcast station and cable news station to the local market – not driven by a far broader national distribution agenda.

In contrast, the networks' economic interests no longer allow retransmission consent for their O&Os to be negotiated based on local needs and demands. Yet the networks'

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[117] A similar outcome resulted when Disney ABC was launching its SoapNet cable channel. To secure carriage of ABC's O&Os, Cox Communications effectively agreed to carry the network's untested cable channel nationwide.

[118] *See, e.g.,* Press Release, Cox Communications, Cox Communications and Allbritton Communications Reach Long-Term Agreement for Continued Carriage Of WJLA/ABC-7 and NewsChannel 8 on Cox Communications, (Nov. 8, 2001), *available at* http://www.cox.com/PressRoom/Allbritton2.asp.

retransmission consent practices are resulting in higher cable service rates to consumers and a crowding out of independent cable programming and local broadcast digital programming on local cable platforms. In both the NewsCorp. Fox and Disney ABC examples described above, increased prices for the carriage of the networks' cable programming have found their way to customers' cable bills. Moreover, the more money drained away from cable operators by the networks for cable channels that customers may not want, the less money cable operators have to spend on other programming and services that consumers do want. The net effect of these influences can only be a long-term decrease in the local responsiveness and diversity of channels available to cable consumers, as cable bandwidth and capital are spent on network-affiliated programming services, and non-affiliated programmers and broadcasters are systematically squeezed out.

Allowing the networks to increase their station ownership would only increase their leverage and accelerate these trends. The stakes and severe consumer disruption involved in losing carriage of network O&Os in more, or possibly even all, of a cable operator's markets would give the networks undue power to dictate the operator's programming choices and costs. Just as the networks are increasingly able to impose their national programming agenda on broadcasters, allowing them to increase their station ownership would only increase their ability to impose their national distribution agenda on local cable operators, to the detriment of localism, diversity and competition.

IV. STRONG LOCAL MEDIA COMPANIES PROMOTE LOCALISM AND INVEST IN THEIR COMMUNITIES.

As demonstrated above, network affiliates and network O&Os have fundamentally different orientations that reflect the differing business interests of their parent companies. Each makes rational economic judgments about the programming its carries, but their divergent incentives necessarily produce different results.

Network O&Os provide value to their parent companies in large part through their function as national distribution outlets.[119] Accordingly, network owned stations have built-in incentives to clear and carry as much of their parent's national programming as possible. This economic reality requires network O&Os to constantly balance the benefit to the network of guaranteeing advertisers a national audience reach against the benefit to the station of preempting network programming in favor of programming of greater interest to its local audience. Network O&Os also have divided loyalties when it comes to controversial network practices, such as cross-promotions and re-purposing, that serve to undermine their competitive position in their local markets.

Network affiliates, by contrast, are driven solely by their desire to maximize their station's value in the local media market. In many cases, that value is best promoted by airing the networks' national broadcast programming. In many other cases, however, that value is better served by preempting the national network feed in favor of programming that is of greater interest to local viewers.[120] Similarly, it is economically rational for affiliates to strongly contest

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[119] The networks use the profits generated by their O&Os to support other network ventures. *See, e.g.,* Diane Mermigas, *CBS, Fox reap rewards of robust owned stations*, ELECTRONIC MEDIA, October 28, 2002 ("[W]hile the broadcast network and station businesses remain joined at the hip, the real profit margins are in the station business, where both companies' [CBS and Fox] margins are soaring."); *Mass Media*, COMMUNICATIONS DAILY, October 3, 2002 (The FCC Office of Plans and Policy Paper on media concentration (released on October 1, 2002) said "'television networking is a barely profitable business,' but 'one should not place too much emphasis on the meager aggregate profits of television networks' because of higher profits in program production and TV station ownership.").

[120] Network affiliates do not seek to preempt network programming solely because a particular preemption will increase revenue for the station. Rather, affiliate preemptions seek to maximize the value of the station overall, both to viewers and to advertisers, by offering local audiences opportunities to view programs of interest to them. In fact, affiliate preemptions can sometimes

network practices that weaken their local brand (*e.g.*, re-purposing), that reduce their audience size (*e.g.*, cross-promotions), or that hamper their ability to devote resources to programming of specific local interest (*e.g.*, reverse compensation).

Even a cursory review of Cox television station practices reveals that these network affiliates are driven by their economic incentives to respond exclusively to local market forces. For example, while Cox stations do not have the preemption flexibility they would like, they do preempt network programming in favor of programs of local interest or importance.[121] In a telling example of localism at work, in early December, 2002, Cox's station WSB-TV in Atlanta, Georgia, preempted one hour of *Good Morning America* to carry live coverage of the Nobel Peace Prize presentation to Georgian and former President, Jimmy Carter. Viewer interest in this ceremony was intense. Indeed, viewers did not call the station to complain that their usual morning programming was preempted, but rather called to complain that the station had not

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cost a station money when, for example, a station invests in programming of local interest before advertiser commitments are assured. For example, in the WSB-TV Nobel Peace Prize coverage discussed below, the station did not know whether it would be able to recover its costs before it committed the resources necessary to send its news crew to Oslo, Norway. Because, however, the station determined that its Georgia viewers should have the opportunity to view live coverage of the presentation ceremony, it made the financial commitment so as to solidify the station's position as the preeminent television station in Georgia, thereby increasing the overall value of the WSB-TV "brand."

[121] Cox stations report that network O&Os competing in their markets rarely preempt their network feeds in favor of local news, sports, or other programming. Cox supported the NASA request that the Commission require the networks to provide information on program preemptions and clearances from both network owned and operated and network affiliated stations. *Request for Data Collection by FCC of the Network Affiliated Stations Alliance*, MB Dkt No. 02-277 (Nov. 25, 2002). Regrettably, the Commission has missed the opportunity to insure a complete record by denying the NASA request. *See 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*, Order, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No 01-317, MM Docket No. 00-244, DA 02-3611 (Dec. 31, 2002) at ¶ 3

provided simultaneous translation for the Norwegian parts of the ceremony. WSB-TV also preempted prime time evening network programming to produce and air a one-hour special on the Carter roots, a program that was also well received in the Atlanta community. Further, WSB-TV's commitment to the Nobel event included sending its two chief anchors, news producers and support staff to Oslo for three days of live news coverage from Norway. These activities were undertaken at considerable expense to the station, yet were done without hesitation because of the perceived importance of this historic event to Georgia viewers.

Cox television stations also are extensively involved in their local communities and undertake numerous efforts to ensure that they are meeting local needs and interests. For example, Cox made a significant corporate commitment to the political process during the last election cycle by offering local political candidates open blocks of time during which candidates could directly inform voters about their campaigns. Under the Cox "Candidate Access 2002" election initiative, gubernatorial and congressional candidates in all of the Cox markets were offered the opportunity to record and air a five-minute position statement to describe themselves and their campaigns. While many of Cox's non-O&O competitors offered similar programs, [122] its network O&O competitors did not.

(Bureau denial of the NASA request citing a concern that grant would "unnecessarily delay this proceeding.").

[122] In addition to Cox, network affiliates Post-Newsweek, Belo, Media General, Capitol Broadcasting, Granite Broadcasting, Liberty Corporation, the New York Times Broadcast Group, and Scripps Howard Broadcasting all offered free airtime to political candidates on their stations during the period before the November, 2002 election. *Post-Newsweek Stations, Belo Corp. Expand Election Coverage Traditions for 2002*, AT YOUR SERVICE (Nat'l Ass'n of Broadcasters, Wash., D.C,), Sept. 2002 at 2; *Broadcast Groups Commit to Free Air Time for 2002*, AT YOUR SERVICE (Nat'l Ass'n of Broadcasters, Wash., D.C.) Aug. 2002, at 3. To assist the Commission in building its record, a representative list of other Cox station community outreach programs is included in Appendix C-2.

In addition, a number of network affiliates across the country, including Cox, participate with cable operators in developing all-news local cable channels.[123] These channels serve their local communities by providing expanded local news, especially during the busy morning hours when affiliates have been prohibited from carrying local news because the networks require them to carry the national network feed.[124] Cox is unaware of any network O&O participating in such a project.

The network O&Os do, of course, produce some programming of local interest, including local news.[125] As discussed previously, however, localism is about more than just local news and public affairs programming. Indeed, localism encompasses all of the programming decisions made by local television stations, and requires that television licensees be responsive to the full range of local audience interests, not simply their desire for local news.

Finally, network affiliates continue to play an important role in making network programming more responsive to viewer tastes and needs, especially those of mid-sized and

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[123] A listing of local and regional cable news channels is included in the Commission's annual Cable Competition Report. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* Eight Annual Report, 17 FCC Rcd 1244, 1347 at Table D (2002).

[124] For example, CBS has been unwilling to relinquish its 7 to 9 a.m. time slot despite dismal ratings for *The Early Show* because "[t]here's too much money to be made. . .," Steve McClellan, *Revamped CBS morning newscast hopes to do something new: Succeed,* BROADCASTING & CABLE, Oct. 21, 2002 at 25. Because of poor ratings, large-market CBS affiliates have asked for the time back to air local news. CBS also has tried to reclaim local news time during morning hours from affiliates who have been airing *The Early Show* as a "co-op" or "blended" broadcast under which affiliates have the opportunity to air significantly more local content from stations carrying the standard broadcast. *See* Steve McClellan, *CBS's latest rework of troubled program expected to focus on hard news,* BROADCASTING & CABLE, Oct. 14, 2002, at 9. Affiliates prefer to air the "blended" broadcast, reporting that they tend to do fifty percent or better in the ratings than stations that air the standard program. *Id.*

[125] *But see, e.g.*, Dan Trigoboff, *CBS Drops News in Detroit* , BROADCASTING & CABLE, Nov. 25, 2002, at 12 (discussing how Viacom has stopped producing its own local news on both of its duopoly stations in Detroit, the nation's 10th-largest market).

small communities. For example, Cox stations have relayed to the networks viewer complaints about numerous programs, including episodes of *Fear Factor*, the *Victoria's Secret Fashion Show, NYPD Blue* and the *Grammy Awards*. Viewers also have objected to network-sanctioned nudity and vulgar language, especially when programs start at 8 p.m. or when viewers are not warned in advance.[126] The networks often respond when Cox stations give voice to these expressions of local community tastes, usually by promising not to repeat the specific offending behavior again. Cox television stations and other network affiliates thus play a direct and critical role in helping to promote the interests of local viewers and communities in discussions over network programming.

In short, it is local affiliates, not network O&Os, that have the strongest economic incentives to respond to local market forces. It is thus no surprise that the programming and related practices of Cox stations and other affiliates nationwide best demonstrate a longstanding commitment to localism.

V. REPEAL OF THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE AND RETENTION OF THE NATIONAL OWNERSHIP CAP IS CONSISTENT WITH LAW AND IS IN THE PUBLIC INTEREST.

Fox, the first court decision to review the Commission's biennial review responsibilities under Section 202(h), provides the analytical road map the Commission must follow when reviewing its media ownership rules. Application of that road map to the record facts and arguments in this proceeding demonstrates that the 35 percent national television ownership cap must be retained and the newspaper/broadcast cross ownership rule must be eliminated.

First, following its own precedent set in *Time Warner II* (which in turn was based on the Supreme Court's holding in *Turner I*), the *Fox* decision states that the Commission must review

[126] For example, several Cox stations reported that their viewers complained after ABC showed the movie *Saving Private Ryan* starting at 8 p.m. without deleting vulgar language.

the facts in the record.[127] If a media ownership rule is to be maintained, as the Supreme Court has stated, the Commission must do more than "simply 'posit the existence of the disease sought to be cured.'"[128] The Commission must "draw 'reasonable inferences based on substantial evidence'"[129] and any predictive judgments involving its expertise and experience must not be made in a factual vacuum.[130]

Next, after it has determined that record facts are available, the Commission must weigh those facts carefully to determine whether the rule at issue *is necessary* to further competition, diversity or localism. As the court found in both *Fox* and *Sinclair*, Section 202(h) does not stand for the proposition that competition trumps other public interest factors.[131] Rather, the Commission must examine competition, diversity and localism in turn to see whether a rule should be maintained. If a rule is necessary to further any *one* of these policies, it must not be eliminated.

As these comments fully attest, the ample evidence in this proceeding shows that retention of the national ownership cap furthers competition and diversity. More importantly, the record facts show that retention of the cap is necessary to preserve and protect localism, a statutory imperative dictated by Congress and a bedrock foundation of the U.S. broadcast regulatory scheme.

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[127] *See, e.g., Fox,* 280 F.3d at 1041-42 (discussing the lack of evidence in the record from the 1998 Biennial Review regarding the impact of the national ownership cap on competition).

[128] *Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("*Time Warner II*") (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985))).

[129] *Id.*

[130] *Id.*

[131] *See Fox*, 280 F.3d at 1050; *Sinclair*, 284 F.3d at 159.

By contrast, as discussed in more detail below, the record does not support a finding that the newspaper/broadcast cross-ownership rule is necessary to further competition, diversity or localism. To the contrary, the rule actually inhibits these policy goals by preventing the creation of strong, viable local competitors.

As the courts have stressed, it is important that the Commission harmonize its media ownership rules.[132] In the case of the newspaper/broadcast cross-ownership rule, it is difficult to see how that restriction can lawfully be retained in light of other local media ownership rules that have been relaxed or repealed.[133] It is not inconsistent, however, to eliminate the newspaper-broadcast cross-ownership rule, on the one hand, and retain the 35 percent national ownership rule, on the other. Rather, each of these steps is necessary to serve the public interest. The national ownership cap limits the television networks' ability to distort local market dynamics through pursuit of a national distribution agenda, to the detriment of local television and cable audiences. Rather than allowing local media outlets to respond freely to the demands and desires of their customers, the networks are leveraging their national web of ownership interests to override local decision making and to weaken the competitive position of local affiliates and independent program suppliers. Retaining the cap is essential to curbing this disturbing trend.

By contrast, as shown by extensive comments submitted by Cox and others in the Commission's earlier proceeding completed this year, there is no evidence that the newspaper/broadcast cross-ownership rule is needed to ensure that local market forces operate to serve the needs of local communities. In fact, repealing the rule would strengthen local media

[132] *See, e.g., Sinclair*, 284 F.3d at 162-164.

[133] For example, the Commission would have to explain why it is more harmful for one owner to have both a broadcast television station and a newspaper in the same market than it is for one owner to operate two broadcast television stations or a cable system and a broadcast television station in the same market. *See id.*, 284 F.3d at 164-165.

outlets and greatly enhance their ability to serve their customers in competition with the network conglomerates, which have an ever-growing presence in their markets.

In short, far from creating a troubling inconsistency, retaining the national cap and repealing the newspaper-broadcast cross ownership prohibition would serve the same vital public interests.

VI. THE NATIONAL OWNERSHIP CAP IS NECESSARY TO PROTECT LOCALISM, DIVERSITY AND COMPETITION.

Relaxing or eliminating the national television ownership cap would only make it more difficult for local media outlets, including both broadcast stations and cable systems, to respond to local market forces. The growth of the network conglomerates is a relatively recent phenomenon, and results from a series of market and regulatory changes that have occurred over the last several years. The current breadth of the networks' holdings in programming production and distribution would have been unimaginable when the Commission eliminated the seven station rule in 1984. Likewise, the Commission could not have foreseen that the networks would implement a national strategy of leveraging their web of media ownership interests to push their homogenized content over multiple distribution platforms nationwide. The accelerated (and continuing) growth of network consolidation and power following repeal of finsyn and the 1996 increase of the ownership cap from 25 to 35 percent already has harmed local markets. As discussed below, a further increase in the cap would have an even more devastating impact.

A. The *1984 Order* Is Fatally Flawed and Does Not Support Relaxation or Elimination of the National Ownership Cap.

Even though the D.C. Circuit in *Fox* fully supported the policy goals of localism and diversity as valid bases for retaining the 35 percent national ownership cap, the court was troubled by the Commission's failure to "set forth the reasons – either analytical or empirical – for which it no longer adheres to the conclusions in its 1984 Order" that the cap was irrelevant to the service of these vital governmental interests.[134] The court's remand gives the Commission the opportunity to lay out the ample reasons, both analytical and empirical, why the *1984 Order* does not control the outcome in this proceeding.

When the Commission adopted the *1984 Order*, the media marketplace was dramatically different than it is today. There were but three major television networks, which long had dominated the broadcast television business. Although their activities were sharply curtailed not only by the national ownership restrictions but also by a range of other regulations (such as the finsyn and prime time access rules), other entities had to date been unable to break into the television network business. In addition, the media marketplace had witnessed significant changes, including the emergence of cable and numerous independent television stations, since the "seven station" rule had been adopted in 1946. It was against this backdrop that the Commission set out in 1984 to analyze the potential benefits of permitting greater station group ownership.

The Commission's analysis in the *1984 Order* accordingly was focused on assessing the benefits to competition of relaxing the national cap. The Commission found that repeal of the national ownership cap would allow important efficiency gains by station group owners. Specifically, the Commission reasoned that such efficiencies could encourage "news gathering, editorializing and public affairs programming, and the development of independent programming by regional or national *ad hoc* networks."[135] The Commission noted that these gains would "advanc[e] the Commission's diversity goal by providing alternatives to the three television networks."[136] The Commission also emphasized the rise of competing media outlets,

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[134] *Fox*, 280 F.3d at 1048.

[135] *1984 Order*, 100 F.C.C.2d at 44-45, ¶ 82.

[136] *Id*. at 45, ¶ 82.

particularly independently-owned broadcasters and cable operators, and found that "this growth in the number of programming sources is a significant factor that supports abolition of the rule."[137]

The Commission also was persuaded that changes in the media marketplace ensured that the cap could safely be lifted not only for non-network station group owners, but also for the networks themselves. The Commission concluded that it was unnecessary to apply a different set of rules to the networks, given the lack of evidence that the networks limited the editorial independence of their O&Os, or that the benefits of increased group ownership (including greater investment in programming to compete against the networks) would be adversely affected by increased network ownership of stations.[138]

The Commission's 1984 decision is no longer apposite, however, for several critical reasons. *First*, the Commission's analysis was based on a set of facts that simply doesn't exist today. As detailed in Section II.B above, today's television networks barely resemble the networks of 1984, and their expansion into virtually all aspects of program creation and distribution (including the very businesses that were expected to compete against them) requires the Commission to take a fresh look at the impact of eliminating or even relaxing the national ownership cap on local media markets.

Second, the Commission erroneously concluded in 1984 that the national ownership cap has no bearing on the range of viewpoints to which citizens are exposed in their local media markets. The Commission acknowledged that "ideas can migrate from one local market to another," and that "national ownership rules might address this concern for the emergence of good ideas by preventing a single owner from echoing an identical voice in a large number of

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[137] *Id.* at 29, ¶ 36.

markets."[139] The Commission nonetheless dismissed this possibility, citing three reasons why the theory would not likely be borne out in the marketplace. Yet each of the reasons is readily impeached today.

The Commission observed, for example, that group owners did not appear to impose monolithic viewpoints on their local media outlets.[140] In making this observation, the Commission focused solely on editorial viewpoints expressed in news and public affairs programming, to the exclusion of all other programming. As is the case with localism, however, diversity concerns are not limited to local news and public affairs programming. Rather, as a host of previous decisions makes clear, the Commission has long been concerned about diversity in a wide variety of programming.[141]

The Commission also asserted in the *1984 Order* that the abundance of "idea sources" in the aggregate nationwide would minimize the impact of the potential decrease in idea sources that could be caused by eliminating the national ownership cap.[142] Since 1984, however, there has been significant consolidation of such idea sources in network hands. For example, the *1984 Order* placed special emphasis on cable as the prime "idea source" that would compete with broadcast stations. Yet, as discussed in detail above, today's "broadcast family trees have branches that reach into almost every corner of cable," and further cable programming ownership "contraction is well on the way."[143] Such extensive network involvement in the very idea

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[138] *Id*. at 54, ¶ 107.

[139] *Id*. at 37, ¶ 61.

[140] *Id.*

[141] *See, e.g., 1960 Programming Policy Statement*, 44 F.C.C. at 2314.

[142] *1984 Order*, 100 F.C.C.2d at 37 ¶ 61.

[143] Matt Kempner, *Television Realignment*, ATLANTA JOURNAL AND CONSTITUTION, Nov. 12, 2002, at 1D ("TV is consolidating into giant families that group broadcast networks with the

sources that were meant to compete with the networks clearly was not contemplated by the Commission in 1984.[144]

Finally, the *1984 Order* theorized that the potential benefits of increased national ownership (particularly, increased investment in programming) outweighed the potential benefits from promoting many sources of ideas.[145] However, there is no basis today for concluding that the national cap must be lifted above 35 percent for the networks to achieve the benefits of group ownership. To the contrary, all evidence is that, through their ownership of television stations in the country's largest markets and their vast stable of other mass media interests, the networks already have more than sufficient scope and scale to achieve operational efficiencies and spread their economic risks.[146] And, in any event, as the *Fox* court emphasized, theories of economic efficiency do not trump the public interest in diversity of broadcast ownership.[147]

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cable networks that were once their rivals. . . [P]arents of the top six broadcast networks own or have stakes in 29 of the 40 most watched cable channels supported by advertising, including all but two of the top 10.") By way of comparison, the Commission extended the prohibition on cable programming exclusivity contracts in June 2002 based on cable operators' ownership interests in only 35 percent of the national cable programming networks. *In the Matter of Implementation of the Cable Television Consumer Protection Act of 1992; Development of Competition in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, FCC 02-176, 2002 FCC Lexis 3150, ¶ 17 (June 28, 2002) ("*Program Access Order*").

[144] As one example, the *New York Times* recently reported that Disney ABC's *Lizzie McGuire,* aired over both ABC and the Disney Channel, is viewed by one of every two girls age 9 to 14, and faces as its primary competitor Viacom CBS' "Nickelodeon, which has long dominated children's cable programming." *See* Laura M. Holson, *"Lizzie McGuire" Has Become a Hot Disney Brand*, NEW YORK TIMES, Dec. 2, 2002 (Indeed, Debbie Solomon, a senior partner in charge of research for Mindshare U.S., which represents major advertisers buying commercial time on TV, "cites the kids' TV market, where the number of major players is down to three: Viacom (CBS, Nickelodeon), AOL Time Warner (WB, Cartoon Network) and Disney (ABC, Toon Disney, Disney Channel).").

[145] *1984 Order,* 100 F.C.C.2d at 37 ¶ 61.

[146] In evaluating a similar evidentiary question in the June 2002 cable program access decision, the Commission based its conclusion that "retention of the exclusivity prohibition will not reduce the incentives to create new or diverse programming" on the finding that the number of national

Third, and perhaps most tellingly, the Commission in 1984 virtually ignored the importance of the national cap to preserving localism, long a bedrock principle of our broadcast regulatory scheme. Indeed, in the only brief mention of localism in the *1984 Order,* the Commission opined that network ownership would not "result in stations' *refusing* to transmit programming of intense local interest in order to clear a less desirable part of the network feed."[148] This assertion misses the point. As previously discussed, a television station can only fulfill its obligation to operate in the public interest by basing its entire programming schedule on the needs and interests of the local community. The public interest in localism is not served when a television viewer in rural Alaska, Louisiana or Montana gets exactly the same slate of national network programming as the viewer in New York or Hollywood, except for the occasional "program of intense local interest." Moreover, as discussed above, unlike affiliate stations whose programming decisions are driven by local market forces, network O&Os have a strong incentive to ensure that their parents' programming is aired to as wide a national audience as possible. There is thus no basis for the *1984 Order*'s erroneous assumption that the networks

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programming services and vertically integrated services both had increased since the enactment of the prohibition. *Program Access Order*, 2002 FCC Lexis 3150, ¶ 64. Likewise, the continued growth in network production of programming for broadcast, cable and other media outlets that has occurred since the *1984 Order* demonstrates that the 35 percent national television ownership cap has not been an impediment to network investment in programming.

[147] *See Fox*, 280 F.3d at 1047:

> An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as a result of the Rule. But that is not to say that the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency – including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable – therefore not unconstitutional – for the Congress to prefer having in the aggregate more voices heard, each in roughly one-third of the nation, even if the number of voices heard in any given market remains the same . . . .

would place their local station interests ahead of their national programming interests in making their economic decisions.[149]

For all of the foregoing reasons, the *1984 Order* is not binding in this proceeding. Indeed, when the proper diversity analysis is applied to the current competitive landscape and localism is given its rightful due, it is clear that the national ownership cap must not be relaxed, let alone eliminated entirely.

B. Increasing the 35 Percent Cap Would Harm Localism, Diversity and Competition.

It is a matter of simple economics. The networks generate more profits the more they (a) mold their programming to reflect the tastes of their most lucrative large, urban markets and (b) air (and re-air) network-owned programming through multiple media outlets nationwide. Increasing the national ownership cap above 35 percent would only enhance the networks' ability to pursue this national distribution agenda, at the expense of local media outlets such as local broadcasters and cable systems. The resultant harms to localism, diversity and competition are inescapable.

Localism. As discussed above, localism is a bedrock principle of Congress' broadcast regulatory scheme that the Commission must consider and protect when analyzing its media

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[148] *1984 Order*, 100 F.C.C.2d at 51, ¶ 99 (emphasis added).

[149] *See Capital Cities/ABC v. FCC*, 29 F.3d 309 (7th Cir. 1994) (In evaluating the financial interest and syndication rule, the court rejected the argument that a network would sacrifice revenues it could receive from the distribution of its programs to independent stations in order to strengthen its owned and operated stations' competitive position in the local market.) In a recent example, *Broadcasting & Cable* reported in December that CBS O&Os may be losing money on *Hollywood Squares*, produced by Viacom CBS affiliate King World, due to low audience ratings. Although "the CBS O&Os wanted to dump the show," they continued carrying it – at least until the launch of a replacement show owned by another Viacom CBS affiliate, Paramount, that includes recycled content from their *Entertainment Tonight* program. The "deal" was reached, despite low local audience interest, "because Paramount, King World and CBS are all

ownership rules. Yet localism already is being threatened by network behavior, even with the 35 percent cap. Permitting the networks to own even more television stations nationwide would only jeopardize localism further.

As described previously, the networks are pursuing an aggressive national distribution agenda to maintain their grip over an increasingly fragmented media marketplace. Pressure to deliver mass audiences to advertisers across a range of programming outlets has never been greater. Yet, in contrast to non-network owned programming producers and distributors that are struggling to remain competitive in this challenging marketplace, the networks long have specialized in and mastered the distribution of mass appeal broadcast programming. As they build on that strategy by investing in an ever-growing variety of non-broadcast, national distribution platforms, their incentive to promote each and every one of those platforms to American consumers (and hence advertisers) only increases. Indeed, far from being the exclusive distributor of the networks' national product, local affiliates now find themselves competing head-to-head with the networks' other programming distributors.

The networks' pursuit of their national distribution agenda takes precedence over ensuring that local distributors – be they affiliate television stations or cable system operators – retain the financial resources and ability to serve their local communities and meet local needs. Whether the issue is preemption practices, cross-promotion strategies, re-purposing tactics or retransmission consent negotiations, the end result is the same: the interests of local audiences are being subjugated to the networks' broader national vision.

Increasing the 35 percent cap would only accelerate this disturbing trend. For example, allowing the networks to acquire even more O&Os would significantly increase the number of

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owned by Viacom." Page Albiniak and Dan Trigoboff, *Paramount to Clone ET*, BROADCASTING stations nationwide whose loyalties are consistently divided between service to their local communities and service to their parents' national programming interests. With a further increase in the 35 percent cap, a network also could increase the threat to an affiliate that the network will switch its affiliation to an O&O station if the affiliate does not agree to the network's terms – terms which could well relate to preemption practices or cross-promotion requirements. For instance, shortly after the cap was increased from 25 to 35 percent in 1996, NBC and KRON-TV went through their well-publicized dispute over affiliate compensation that led to NBC revoking KRON-TV's network affiliation.[150] With the cap in place, the networks have a decreased opportunity to threaten affiliates in this way.

Increasing the cap also would reduce the number of independent stations that can apply pressure to networks to make their national programming more responsive to local community needs. Preserving a critical mass of strong local affiliates ensures that the networks receive feedback from stations serving a wide range of local media markets, not just those serving urban population centers. Indeed, networks today largely concentrate their station ownership in the top 50 markets. Because the networks would almost surely, if given the chance, purchase more stations primarily in the top 50 markets, mid-sized and smaller markets would soon find that they had no influence over national programming decisions.

Permitting networks to own more TV stations nationwide also would dramatically increase networks' ability to dictate cable operators' programming choices – and costs – through retransmission consent negotiations for network O&Os. As the number of network-owned stations grew, the networks' leverage to demand carriage of unrelated cable programming

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& CABLE, Dec. 2, 2002, at 1.

[150] Elizabeth A. Rathbun, *The King of KRON; Young Broadcasting Inc. outbids NBC for KRON-TV, San Francisco*, BROADCASTING & CABLE, Nov. 22, 1999, at 22.

services would increase exponentially, because the cable operator simply could not afford the severe consumer disruption that would occur by forfeiting carriage of so many network stations nationwide. The result: cable operators would have far less flexibility to program their systems with services most desired by consumers in their specific communities. Moreover, these same customers would be required to pay for unproven cable networks in which they may have no interest at what, in all likelihood, is an inflated rate.

Diversity. Increasing the 35 percent cap also would harm diversity in local markets in a number of ways. Networks already are able to leverage their TV station ownership to elbow other independent cable programming services out of the way on local cable systems. Permitting them to own more television stations nationwide would significantly escalate this trend, and sharply reduce the number of independent programming sources viewed by cable (and even DBS) customers. Moreover, by forcing even greater cable carriage of network-affiliated programming at inflated rates, the networks would further drain away the bandwidth and capital that cable operators otherwise would have to spend on other, independent programming desired by consumers.

Increasing the cap also would give the networks more strong local outlets over which to distribute their programming, and decrease their reliance on affiliate stations. With the networks in control of all programming decisions made by the strongest television stations in even more large markets, independent program producers would face a shrinking number of affiliates who might buy their programming. As noted above, in today's increasingly competitive media marketplace, programmers' survival depends on the delivery of mass audiences to advertisers. If independent producers were precluded from distributing their programs to large segments of the national audience, they could be forced out of business altogether. Furthermore, as discussed in

Section III.A, affiliates also are withdrawing themselves from the independent programming market in the face of increasing pressure from their networks to clear all network programming. This trend would only accelerate if network ownership of television stations were permitted to increase.

Raising the ownership cap thus would have an adverse impact on all four aspects of diversity described by the Commission in the *Notice*: viewpoint diversity, outlet diversity, source diversity and program diversity. As the *Notice* recognized, the Commission has strived to preserve "the diversity of viewpoints ultimately received by the public by providing opportunities for varied groups, entities and individuals to participate in different phases of the broadcast industry."[151] The network conglomerates present a unique threat to such viewpoint diversity because their ownership reach already covers every aspect of, not only the broadcast industry, but the entire national media. Increasing the networks' ownership of local television stations would only further undermine the "'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,'" as noted by the Supreme Court.[152]

Increasing the cap obviously would directly reduce outlet diversity by placing additional television stations in network hands. But outlet diversity would also be adversely affected in two additional ways. First, outlet diversity would be harmed by the networks' increased leverage to reduce the independence of other outlets, such as local affiliates and cable operators. These harms would then be compounded by the networks' control of still other media outlets, such as Internet and cable channels, that they compel affiliates to cross-promote.

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[151] *Notice*, 17 FCC Rcd at 18516, ¶ 34.

[152] *Id.* n.104 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663-64 (1994)).

Similarly, raising the cap would reduce source diversity by increasing the networks' ability to compel carriage of their national content at the expense of independent program producers. The networks' strategy of airing and re-airing the same national network programming across multiple outlets, and their crowding out of independent producers, also would harm program diversity by reducing the variety of programming formats and content that ultimately would reach the public.

In contrast to other group ownership situations (such as radio) where the group owner has incentives to differentiate its various offerings to the public, the networks' national programming distribution agenda is directed to delivering the same content as many times over as many outlets to as many consumers as possible. As demonstrated in Section III above, this network philosophy is manifest in the networks' announced strategy of increasing their profitability by aligning their broadcast, cable, Internet and other programming to the same orientation, under the same operating units, and by increasing the recycling and cross-promotion of their national content. Indeed, the networks have gone so far as to acquire niche cable channels only to turn them into homogenized outlets for recycled network programs, putting an end to these channels' independent, niche program production.[153] Rather than supporting or even allowing specialized programming, the networks have concentrated on pressuring their O&Os and affiliates to clear more network national programming and allow more repurposing, thus reducing the uniqueness of these stations' programming in the marketplace. Accordingly, by increasing the networks' ability to pursue their national distribution agenda, any increase in the national ownership cap would cause an exponential reduction in diversity.

[153] *See* Section III.A, *supra*.

Competition. Finally, increasing the national cap would threaten competition in local markets. As discussed above, greater television station ownership would increase the networks' ability to pursue their national distribution agenda and would increase both their ability and their incentive to force affiliates and cable systems to follow suit. Raising the cap thus would strike a direct blow against competition from independent program producers, who otherwise would be selling alternative programming to these local distributors. Indeed, local competitive forces would no longer drive local programming choices; rather, the market would be skewed heavily toward network-owned programming and the typical "national" media consumer.

Moreover, enhancing the networks' ability to engage in ever-increasing repurposing of programming would further undermine the uniqueness of broadcast stations' programming and, hence, their ability to compete with network-owned cable channels. By gaining greater ability to cross-promote and package their media properties together in retransmission consent negotiations, the networks would further subvert competition between network-affiliated and independent cable programming, as well as competition between the networks and cable operators in the marketplace of ideas.

C. Maintaining The 35 Percent Cap Is an Effective and Efficient Means of Protecting the Public Interest.

Because the networks' ownership interests are spread over such a wide range of media sources and outlets, antitrust enforcement (which is generally limited to individual markets) would prove inadequate to address the resultant harms to competition. In any case, the antitrust law cannot address the Communications Act's goals of localism and diversity. Given the networks' economic ability and incentives to skew the workings of local markets, only Commission rules can put a check on harmful network behavior.

Chairman Powell has recognized both the dangers of intertwining ownership interests and the difficulty in untangling them, when he stated that the sale of AT&T Comcast's ownership interest in Time Warner Entertainment, L.P. was "the most significant public interest benefit of the transaction."[154] As he further explained in the AT&T Comcast merger order, this "complex relationship of intertwining programming and distribution assets . . . has plagued the Commission for years."[155] Allowing the increased network consolidation that would follow an expansion of the 35 percent national ownership cap would only lead to more such situations and the complex and expensive negotiations that they entail.

In the June 2002 cable program access order, the Commission took steps to address the dangers of vertical integration and the market power of owners of "marquee" programming services.[156] Given the television networks' extensive interests in marquee programming and distribution assets, and their established practice of leveraging this web of ownership interests, raising the cap to allow network domination of local station ownership would create dramatic ripple effects for other sectors of the media industry. Regulatory efforts to monitor and manage the results of this ripple effect would be extremely difficult and complex.[157] Maintaining a simple national cap to prevent the development of adverse and unforeseen consequences in other market sectors would be a much more predictable and reliable regulatory tool.

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[154] *See Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* MB Docket No. 02-70, Memorandum Opinion and Order, FCC 02-310, (Nov. 14, 2002), Separate Statement of Chairman Michael E. Powell.

[155] *Id.*

[156] *See Program Access Order,* 2002 FCC Lexis 3150, ¶ 69.

[157] *See id.* ("Besides being difficult to classify which programming services would be deemed essential [and thus necessitating regulation], making such a . . . determination would place the Commission in the untenable position of designating certain programming as more essential than others and thus raise constitutional questions.").

The inescapable ripple effects and difficulties of divestment mean that the Commission cannot follow the networks' call to cavalierly increase the national television ownership cap with a wait-and-see attitude and assurances that any resultant harms can be addressed later through other regulations or transaction-specific conditions. As Chairman Powell has emphasized,

> It is a constant mantra of this Agency that the public and industry benefit from clear and specific rules and regulations. . . . In cable and broadcast regulation, for example, we have an extensive and comprehensive set of structural rules whose goal is the redress of myriad harms to the public interest. . . . [A]n approach [that relies on transaction-specific remedies] subsumes the rules and puts too much weight on our more ambiguous "public interest" authority. . . . [I]t adds a layer of uncertainty that makes the application of even the clearest of our rules a vague and ambiguous process.[158]

The Commission should adhere to this mantra and retain the 35 percent national ownership cap as a clear and specific structural rule that will redress myriad harms to the public interest.

VII. THE RECORD DEFINITIVELY SHOWS THAT THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE SHOULD BE REPEALED.

In contrast to the national ownership cap, the newspaper/broadcast cross-ownership rule is a relic of regulatory days gone by. As two current Commissioners have observed, unlike the Commission's other media ownership rules, the newspaper/broadcast cross-ownership rule has stayed firmly in place despite the elimination or loosening of the Commission's other local media ownership restrictions.[159] Given that *Fox* vacated the cable/broadcast cross-ownership rule (another local media restraint) and that *Sinclair* requires consistency across media ownership

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[158] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee,* Report & Order, 15 FCC Rcd 9816, 9912 (2000), Separate Statement of Commissioner Michael E. Powell ("AT&T-MediaOne Order").

[159] *See Biennial Review Report*, 15 FCC Rcd 11058, Separate Statement of Commissioner Michael E. Powell*; Notice,* 17 FCC Rcd 18503, Separate Concurring Statement of Commissioner Martin.

restrictions, at the very least the newspaper/broadcast cross-ownership rule rests on shaky legal grounds.

As discussed above, *Fox* confirmed that the rule can only be retained if the Commission can demonstrate, based on record evidence, that the restriction is necessary to further competition, diversity or localism.[160] The Commission already has an extensive contemporaneous record, and that record contains no evidence that the rule furthers any of these public interest objectives.[161] To the contrary, the facts establish that the newspaper/broadcast cross-ownership rule actually harms the public interest because it hampers creation of strong, locally-focused media competitors, contrary to the Commission's competition, diversity and localism goals.

Competition. For competition to suffice as the basis for an ownership rule's retention, the rule must be "necessary" to promote competition.[162] Given current competitive conditions, the Commission cannot find that the newspaper/broadcast cross-ownership rule is *necessary* to achieve this goal. All of the evidence in the record points the other way. Nothing in the record shows that co-ownership harms competition, and substantial evidence shows that co-ownership benefits the operation of local media markets.[163] Further, because the Commission has already

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[160] *Fox*, 280 F.3d at 1043-1046.

[161] *See Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy,* Order and Notice of Proposed Rulemaking, 16 FCC Rcd 17283 (2001) ("*Newspaper/Broadcast Cross-Ownership NPRM*"). The comments and reply comments discussed within this Section refer to the comments and reply comments filed in the *Newspaper/Broadcast Cross-Ownership NPRM.*

[162] *Fox*, 280 F.3d at 1042.

[163] Many commenters in the Commission's 2001-2002 *Newspaper/Broadcast Cross-Ownership NPRM* provided evidence of the public interest benefits in the delivery of local news and information that have been derived from co-owned efforts. *See, e.g.,* Comments of Media General at 6-8, Comments of Hearst Corporation at 16-19, Comments of The New York Times Co. at 7-16, Comments of Hearst-Argyle Television at 10-15.

found that competition is not harmed if a broadcaster owns multiple in-market media properties, it is difficult to see how the Commission could, with any consistency, conclude that a local newspaper/broadcast combination should be disallowed.[164] Accordingly, when the Commission examines the competitive prong of Section 202(h) it must reach the conclusion that "competition" cannot sustain the newspaper/broadcast cross-ownership rule.

Diversity. In *Fox*, the court found that the Commission can retain a media ownership restriction if the Commission determines that the rule is necessary to promote diversity at the local or national level.[165] For the newspaper/broadcast cross-ownership rule, however, that determination cannot be made. As was discussed extensively in the comments and reply comments filed in 2001 and 2002, the record establishes that newspaper/broadcast cross-ownership does not harm viewpoint, outlet, source or program diversity. For example, the record shows that co-owned media properties do express different viewpoints, even when they have been under common ownership for many years.[166] The record also shows that cross-ownership actually increases source diversity because it enables broadcasters to enhance their delivery of

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[164] Indeed, given the Commission's relaxation of the duopoly and one-to-a-market rules and the court's vacatur of the cable/broadcast cross-ownership rule, the Commission cannot meet the consistency requirements in *Sinclair* if it retains the newspaper/broadcast cross-ownership rule. *Sinclair*, 284 F.3d at 164.

[165] *Fox*, 280 F.3d at 1048.

[166] *See, e.g.*, Reply Comments of Cox Enterprises at 8-10, Reply Comments of Media General at 5; Reply Comments of National Association of Broadcasters ("NAB") at 10; Reply Comments of Newspaper Association of America at 16. This was further shown by one of the Commission's own media ownership studies. *See* David Pritchard, "Viewpoint Diversity in Cross-Owned Newspaper and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign," Washington, D.C.: Federal Communications Commission, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.txt.

local programming, news and information.[167] Further, program diversity, as discussed in the *Notice*, is not of concern in considering the repeal of the newspaper/broadcast cross-ownership rule because the concept of programming formats is inapplicable to newspapers and, therefore, common ownership of a newspaper and a television station *per se* will not reduce program diversity.[168] Finally, while outlet diversity is always reduced by common ownership, the Commission already allows co-ownership of multiple outlets in local media markets – with the stark exception of newspaper-broadcast combinations. The Commission thus has already made the policy decision that the slight reduction in outlet diversity that would occur through joint ownership of a broadcast station and newspaper in the same market is insufficient, in and of itself, to support retention of the cross-ownership restriction.

As numerous parties have demonstrated, opponents of newspaper/broadcast cross-ownership repeal have placed nothing in the record to establish that a rule preventing a newspaper from owning a broadcast station has a positive impact on diversity.[169] In fact, the record shows the opposite: forced increases in diversity of ownership can actually lead to decreases in the delivery of local news.[170] Accordingly, while *Fox* acknowledges that diversity is a permissible policy justification for regulation, the record in this docket and the Commission's own actions in analogous contexts establish that the Commission cannot

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[167] *See* Reply Comments of Newspaper Association of America at 23-25; Reply Comments of Morris Communications at 3; Reply Comments of Journal Broadcasting Corporation at 3-4; Reply Comments of Tribune Company at 3-5.

[168] *See Notice*, 17 FCC Rcd 18503, ¶¶ 38-39.

[169] *See* Reply Comments of Cox Enterprises at 4; Reply Comments of Hearst-Argyle Television at 9-11; Reply Comments of West Virginia Media Holdings, LLC at 9-10.

[170] *See* Reply Comments of NAB at 12; Reply Comments of Herald Media, Inc. at 4-5.

reasonably determine that diversity justifies retention of the newspaper/broadcast cross-ownership rule.[171]

Localism. Because daily newspapers, with a few notable exceptions, are inherently local in nature, localism has not been a significant concern in analyses of the newspaper/broadcast cross-ownership rule.[172] Nevertheless, the record contains many examples of how the co-ownership of newspapers and broadcast stations allows media companies to increase their service to their local communities through enhanced news and local programming.[173] The record also shows that the efficiencies gained from common ownership would help network affiliates such as Cox, Tribune, Belo and Media General compete and invest more in programming and services, which would be attuned to local interests.[174] In contrast, those who would keep the rule

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[171] The Commission itself, when it adopted the rule, cited a study that showed no differences between the amount of news and information delivered by co-owned properties and individually owned properties. *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1073, ¶ 97 (1975); s*ee also id.* at 1120, n.17 (Statement of Commissioner Glen O. Robinson, concurring in part and dissenting in part) (noting that the Commission found in its own study that co-owned stations programmed more local news and information than independently owned stations).

[172] *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17283, ¶ 1 ("The rule was designed to promote two of the Commission's longstanding goals in broadcast regulation – competition and diversity of information sources.").

[173] *See* Comments of Bonneville International Company at 5; Comments of Norwell Television at 7; Comments of Schurtz Communications, Inc. at 8; Comments of E.W. Scripps at 8.

[174] *See, e.g.,* Comments of Media General at 6 (discussing the shared "multi-media desk" and resources shared between WFLA-TV and *The Tampa Tribune* which increases the quality of local stories); Comments of The New York Times Co. at 7 (discussing the use of *The New York Times* reporters on WQXR-FM's news programs to highlight stories published in *The New York Times* in an effort to broaden the scope of WQXR-FM's local news*);* Comments of the Tribune Co. at 45 (discussing the use of *Chicago Tribune* reporters on WGN-TV's news programs to highlight stories covered by *Tribune* reporters in an effort to broaden the scope of WGN-TV's local news); Comments of Belo Corp. at 4 (discussing the use of a shared reporter pool between *The Dallas Morning News* and WFAA-TV which allows more reporters to be available to cover local stories); Comments of Gannett Co. at 7 (discussing the efficiencies and consumer benefits derived from Gannett's common ownership of *The Arizona Republic* and KPNX-TV).

in place fail to provide the evidence necessary under Section 202(h) to show that the rule is necessary to preserve and protect localism. Accordingly, localism cannot be the basis for retaining the newspaper/broadcast cross-ownership rule.

If anything, the market developments described above only heighten the urgency for repealing the rule in order to affirmatively promote localism. To compete effectively against the network conglomerates in an increasingly competitive marketplace, local television stations in particular would benefit significantly from the local efficiencies that can accrue from common ownership with an in-market newspaper. And, far from focusing their sights on the national market, such local combinations would concentrate their efforts on delivering strong news and informational programming that responds directly to local market demands. This result, of course, is just what Congress envisioned when embracing localism as a fundamental public policy goal.

VIII. CONCLUSION.

Cox has shown, as required by Section 202(h), why it is necessary to retain the 35 percent national ownership cap. Absent an effort to preserve localism through the use of a national cap, the powerful media conglomerates that own the networks will dominate the nation's airwaves and cable systems, leading to less local programming choice, diversity and competition. Even a small increase in the cap would have an exponential effect by allowing the networks to further broaden their pervasive web of national programming outlets and interests, to the detriment of local media outlets. By the same token, to promote competition, diversity and localism, the Commission should enhance the ability of television stations to serve their local markets by repealing the newspaper/broadcast cross-ownership rule. Strong local affiliates are best suited to compete with the networks and serve their local communities, in furtherance of the statutorily required goal of localism.

Respectfully submitted,

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