February 3, 2003

By Hand Delivery

The Honorable Michael Powell
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20054

Re: The 35% National Television Ownership Cap

Dear Chairman Powell:

Today, the National Association of Broadcasters (NAB) and the Network Affiliated Stations Alliance (NASA), a coalition representing the interests of more than 600 local television stations affiliated with the ABC, CBS and NBC television networks, filed reply comments demonstrating that the 35% national television ownership cap is necessary to preserve localism. Localism rests on the Communications Act and is the basis for Congress's decision to allocate television licenses to serve diverse local communities, rather than larger geographic regions, and its determination to obligate television licensees to operate their stations to serve those local interests. Localism has never been a narrow concept measured simply by tallying up local news hours or examining the addresses of station owners. Localism is about operating local television stations in the service of community – rather than national – interests.

National programming plays an important part in this service, and the networks provide high-quality national fare. But it is individual licensees that *must*, as a matter of law, retain ultimate program discretion. By and large, the networks operate good stations, but with their broad and vertically integrated business base that has expanded rapidly since 1996 when Congress reluctantly lifted the cap to 35%, the networks must inevitably pursue economic objectives other than providing through their owned and operated stations (O&Os) the best possible service to their local communities. Independent affiliates serve only this last objective. Their continuing ability to do so *depends* on retention of the 35% cap.

THE FACTS SHOW THAT THE 35% CAP IS NECESSARY TO PRESERVE LOCALISM

You have asked us for facts, and we and others have provided them – hundreds of pages worth. The attached list outlines the many facts we've submitted to date. We have submitted economic analyses demonstrating that affiliates – wherever their owners are headquartered – have incentives to ensure that their stations make *local* interests paramount, whereas networks have competing incentives that lead their O&Os to be less responsive to local needs and interests. We've submitted empirical data demonstrating that affiliates preempt to serve the particular needs of their local communities. The networks did not respond when we asked the Commission to seek from the networks preemption data that only they possessed. And they had much of those data at hand but chose, instead, to submit a selective slice of that information – information that, nonetheless, *proves our point.*

Facts are facts. Not all of them are susceptible to quantitative calculation but all of them must be considered by the Commission. The 35% cap serves localism by preserving an independent body of affiliates capable of influencing network decisions that bear on the localized service stations offer to viewers across the country. When the NBC affiliates persuaded NBC, after a long struggle, to offer its affiliates *and O&Os* the option to carry the first presidential debate in the 2000 election rather than a baseball game, localism was served because stations across the country were able to air the programming most important to their local viewers. Yet a quantitative comparison between the O&Os and independent affiliates' clearance of the presidential debate would not evidence the important role played by the latter in that case.

Localism was also served when the CBS affiliates convinced CBS to move the *Victoria's Secret Fashion Show* out of the 8:00 p.m. time slot because it was inappropriate for family viewing in their local communities. NAB and NASA have chronicled numerous examples of affiliate influence, have provided information on the extent to which affiliate board meetings are devoted to issues of content, and have demonstrated how this influence is diminished with increased network station ownership across the country. That influence, when the checks and balances of national networks and local stations are in rough equilibrium, has a lasting effect on Hollywood and New York City-based network programmers sometimes too bent on pushing the envelope – but an effect that is inherently not measurable. Nor is any yardstick available to measure the innovations made possible by there being a variety of different local-station licensees, just as there is no calculus for measuring the political benefits of federalism. Nonetheless, *these are facts.*

ANY INCREASE IN THE 35% CAP WILL JEOPARDIZE LOCALISM

We have shown that, since Congress set the cap at 35%, local affiliates' ability to influence network programming decisions and to make independent decisions about the material that goes out over their air already has been compromised by increased network station ownership and vertical integration. Congress knew there were risks associated with expanding network control over television stations beyond 25% of the country, and raised the cap to 35% only after lengthy debate on the matter. Many were concerned that increasing the cap even to 35% threatened localism both by diminishing the number of independent affiliates serving local communities and by diminishing the remaining affiliates' ability to resist network pressure towards a nationalized television service. Experience since the cap was raised demonstrates that these fears were well founded and that, as a result, the affiliates' remaining ability to serve as the principal bulwark of localism is vulnerable. The growth of other media outlets, touted by the networks, is simply beside the point when it comes to carrying out the statutory mandate of broadcast localism.

A prime example is the experience of the Fox affiliates with respect to the same 2000 presidential debate referred to above. While the NBC affiliates eventually succeeded in convincing NBC to allow them to air the presidential debate rather than the baseball game, Fox, which now exceeds the 35% ownership cap, insisted that its stations carry the sci-fi program *Dark Angel*, rather than the debate. Further evidence is that since 1996, affiliate preemptions are down a quarter. At 35%, the balance of power between networks and affiliates that protects localism is fragile; above 35%, it quickly will be lost.

RETAINING THE 35% CAP AND RELAXING LOCAL OWNERSHIP RULES SERVE THE SAME GOAL – LOCALISM

Unlike the local ownership rules, the national television ownership cap preserves the ability of local stations to make programming decisions responsive to their local communities. Localism is also the reason why many broadcasters urge relaxation of the local ownership rules. Hit with the double whammy of having to pay the networks as opposed to receiving compensation for carrying network commercials and the heavy costs of the digital transition, many stations, particularly serving rural areas and minority interests, are threatened with extinction or the necessity of severely cutting back community-oriented service. Duopolies make it possible to sustain and enhance local service, but prior liberalization of the rules afforded relief only in the largest markets. Similarly, common ownership of a local newspaper and a local television station or of local television stations and radio stations in no way compromises the incentives of those media to serve the particular interests of their local communities. By contrast, increased network ownership of stations on a national level harms localism because it jeopardizes the independence of local stations to make decisions geared towards local – rather than national – interests.

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Embedded in the Communications Act, localism is a bedrock principle of our country's television service. The court in the *Fox* case recognized this and held that localism is a sufficient policy objective to sustain national television ownership restrictions. That same court asked for a showing to support the cap. We submit that that showing now has been made.

Respectfully submitted,

Edward O. Fritts
President and CEO
National Association of Broadcasters

Alan Frank
Chair
Network Affiliated Stations Alliance

Attachment

cc: Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Assistant Secretary Nancy J. Victory
Susan Eid
Catherine Bohigian
Alexis Johns
Stacy Robinson
Sarah Whitesell
Kenneth Ferree
Paul Gallant
Roy Stewart
Jane Mago
Nandan Joshi
Simon Wilkie
Jonathan Levy
Robert Ratcliffe
Royce Sherlock
Jerry Duvall
Robert Pepper
Mania Baghdadi
Linda Senecal
Qualex International

MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244 (2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules)

LIST OF FACTUAL AND ECONOMIC SUBMISSIONS BY NAB AND NASA

Early Submission (December 9, 2002)

- Analysis of FCC's Media Ownership Working Group Study "The Measurement of Local Television News and Public Affairs Programs" demonstrating that it used flawed data and methodology.

- Analysis of FCC data set using corrected methodology demonstrating that affiliates outperform O&Os in awards for quality of news and public affairs programming, that there is no difference between the quantity of news and public affairs programming for affiliates and O&Os of ABC, CBS and NBC, and that any differences between Fox affiliates and O&Os are due to factors other than network ownership.

Comments (January 2, 2003)

- Economic study by Professors Marius Schwartz and Daniel Vincent finding that:

  - the 35% national TV ownership rule serves the public interest and, in particular, localism, because the programming decisions of non-network owned affiliates are more closely attuned to the interests of local viewers than those of O&Os,

  - the 35% cap limits the ability of networks to control programming on local stations,

  - broadcasting remains a significant force in the video marketplace, despite the growth of cable and DBS, and

  - the debate about the 35% cap is not simply about the division of profits between networks and affiliates and impacts the programming available to viewers.

- Results of NAB/NASA joint survey of ABC, CBS, and NBC affiliates, with 201 stations responding to the survey, corroborating findings of Schwartz and Vincent study.

  - Provides extensive data about preemptions by network affiliates, including average hours per year of preemptions over a 10 year period and demonstrating a reduction in preemptions since the cap was raised to 35%.

  - Data regarding the reasons affiliates preempt network programming.

  - Data regarding the pressure affiliates experience from the networks not to preempt and regarding the increase in such pressure in recent years.

  - Appendix listing nearly 1,000 illustrative preemptions by affiliates.

  - Evidence provided by survey respondents who had previously worked for O&Os demonstrating that O&O station managers have less freedom to preempt network programming than affiliate station managers.

- Specific examples of the networks making programming judgments at odds with the needs and tastes of local audiences and affiliates taking action (whether by preemptions or otherwise) in response to such judgments.

- Data concerning the frequency with which network program content is discussed during affiliate board meetings and the participation of network executives in such meetings.

- Specific examples of the valuable input that affiliates have given to the networks concerning the content of network programming and the influence that such input can have on network programming decisions.

- Information regarding the degree to which network ownership adversely impacts access by charitable organizations such as the Muscular Dystrophy Association to broadcast television for purposes of fundraising.

- Data and analysis on networks' ownership and control of network programming.

- Data and analysis of the national broadcast television advertising market, demonstrating the effect the 35% cap has on competition in the advertising market.

- Statistics on the networks' increased ownership of broadcast stations.

- Information regarding the networks' and their parent companies' holdings in domestic cable networks.

- Specific examples of increased network encroachment and stiffer restrictions on affiliate discretion as demonstrated in the network affiliation agreements and otherwise.

- Data regarding the degree to which network programming delays or preempts local affiliate programming.

- Data demonstrating that broadcast networks dominate the 100 top-rated prime-time programs to the virtual exclusion of even the most popular cable programs – in November 2002 broadcast television accounted for 99 of the top 100 prime-time programs, with the only cable program on the list ranking 76. In May 2002 broadcast television accounted for 92 of the top 100 prime-time programs.

<u>Reply (February 3, 2003)</u>

- Economic report of Professors Marius Schwartz and Daniel Vincent analyzing the economic material submitted by the networks and reaffirming their conclusion that the 35% cap promotes localism and other Commission goals.

- Analyses of data provided by the networks concerning affiliate and O&O preemptions demonstrating:

  - a decline in affiliate preemptions since the cap was increased to 35% due to growing network dominance,

  - far more frequent preemptions by independent affiliates as compared to O&Os, and

  - that affiliate preemptions serve the tastes and needs of local viewers in a variety of ways and that O&Os are far more limited in their preemption decisions.

- Specific examples of affiliate preemptions of programming found to be unsuitable for local viewers, in contrast to an absence of such preemptions by O&Os.

- Additional specific examples regarding affiliate input with respect to network programming decisions that fail to reflect the interests of local communities and the immediate and future impact such affiliate influence has on network decisions.

- Evidence that 35% is the tipping point in the network/affiliate equilibrium, including:

  - Evidence that affiliate influence on network decisionmaking and sensitivity to local needs has diminished even with the cap at 35% and quickly will be eliminated with any increase in station ownership by the networks.

  - Data demonstrating that ownership of stations covering 35% of the country results in control over a far greater percentage of advertising revenues nationally and that network ownership of stations in the largest markets already has resulted in their capturing a disproportionate share of advertising revenues, thereby diminishing the influence of independent affiliates.

  - Data demonstrating that affiliate preemptions already have been driven down by increased network ownership.

- Evidence of distribution of largest (non-network) TV groups in cities around the country, while the networks reside only in New York and Los Angeles.

- Specific examples of affiliates' contributions to innovation in broadcast service.

- Specific examples of increased pressure from networks not to preempt programming, as borne out by the data submitted by both the networks and NAB/NASA.

- Additional evidence that independent affiliates surpass O&Os in the quality of local news and public affairs programming, as demonstrated by an analysis of the prestigious Dupont and Peabody Awards.

- Evidence illustrating that Fox should not be included in the analysis of quantity of local news programming, including data on local news aired by Fox O&Os versus affiliates, data showing the preponderance of UHF stations among Fox affiliates and VHF stations among Fox O&Os, and a demonstration that the quantity of local news aired by Fox stations is tied to the type of station (VHF vs. UHF) rather than network ownership.