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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE NETWORK AFFILIATED STATIONS ALLIANCE

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SUMMARY

In their initial comments, the National Association of Broadcasters ("NAB") and the Network Affiliated Stations Alliance ("NASA") urged the Commission to retain the 35 percent national television ownership cap because it furthers core communications policies, particularly localism and competition. In addition, NASA urged retention of the dual network rule because it fosters competition and the emergence of new networks. The record in this proceeding only strengthens the case for retaining these two rules.

The National Television Ownership Rule. The 35 percent cap is not a figure pulled out of thin air. Unlike any of the other television ownership rules, it was legislated by Congress. In 1996 Congress barely voted to raise the cap to 35 percent. It declined to go higher because it realized that (1) once national concentration had gone too far, it could not be undone, (2) other regulatory changes – the repeal of the financial interest and syndication rules and the liberalization of the duopoly rules – and industry trends could dangerously heighten the power of the networks over affiliated stations, and (3) the independence of non-network-owned affiliates could be seriously threatened if network ownership exceeded 35 percent.

Notwithstanding the carefully considered 35 percent limit on television station ownership, Congress's fears have been realized. Aggressive vertical integration has given the networks substantial power over national program content, and the needs of viewers in diverse local communities around the country are being subordinated to the networks' broader business objectives of national advertising revenues, program production and investment, syndication and foreign program sales, cable program services, and Internet ventures. The evidence in this record demonstrates that these post-1996 developments seriously threaten the balance between high-quality national programming, which the major networks *do* provide, and *local*-licensee

program discretion, which network interests undermine. While the 35 percent cap has not prevented the nationalization of television programming, it has kept it in check. Heeding Congress's warnings, therefore, the Commission should reaffirm the 35 percent cap.

The Commission has recognized that "the national [TV] ownership rule may have the most direct impact of our rules on attaining localism." NAB and NASA have now presented a mountain of evidence confirming that the national TV ownership rule furthers localism – a goal that is embedded in the Communications Act and has been upheld not only by the Commission, but also by Congress and the courts. The statutory mandate of localism goes hand-in-hand with the statutory mandate of licensee responsibility. If independent affiliates lose control over program decisions affecting their local communities because they no longer have a critical mass to counter the networks' desire to promote their national program strategies, the ability of local licensees to exercise responsibility for their station offerings also will be gutted.

The networks' comments give short shrift to localism and to local licensee responsibility. The networks' economist erroneously equates localism with local content (or, even more narrowly, local news content) and then dismisses the policy of localism as a mistake. In focusing primarily on local news programming, the networks ignore the broader scope of the Commission's localism policy. Yet the networks also emphasize that looking only at a station's local news programming is myopic. In any event, the record of Dupont and Peabody Awards shows that the quality of affiliates' local news and public affairs programs exceeds that of O&Os, while affiliates and O&Os are roughly equal in the quantity of local news and public affairs programming.

Many of the networks' other arguments are irrelevant to the national TV ownership rule and its role in furthering localism. The argument that multiple ownership of television stations within the *same* local market may increase diversity has no relevance to a television broadcast network's incentives to air uniform programming on network stations in *different* local markets. Similarly, the networks' assertion that many owners of local television stations are not geographically located within the local markets they serve is irrelevant, because the incentives of independent affiliates – wherever their ultimate owners are located – are to serve the needs of the local community, whereas O&Os have conflicting economic incentives. And the antitrust Merger Guidelines, which the networks promote as a panacea, are not designed to further the goals of localism and are, therefore, beside the point.

The record supports the conclusion of Professors Schwartz and Vincent that independent affiliates are likely to preempt network programming more frequently than O&Os. Even the incomplete data submitted by the networks, which alone have access to these data, confirm that affiliates preempt far more often than O&Os. Moreover, a comparison of the networks' submission in this proceeding with an earlier network submission confirms that independent affiliate preemptions have declined significantly (64 percent) since just before the national TV ownership cap was raised from 25 percent to 35 percent. The network data also confirm that networks are increasing pressure on affiliates not to preempt network programs.

To be clear, the benefits of the national TV ownership cap extend well beyond affiliate preemptions of network programs in favor of alternative programs that better serve local interests. NAB and NASA's initial comments document the significant influence affiliates exert over network programming. This influence would be greatly weakened in the absence of a critical mass of independent affiliates, which is protected by the 35 percent cap. The affiliates' influence benefits *all* television viewers, including those served by O&Os. For example, when NBC's affiliates fought long and hard for the right to carry the first Presidential debate in 2000 in place of a baseball play-off game, the network relented, and both affiliates and O&Os were given the opportunity to carry the debate. That the NBC affiliates barely prevailed on this issue and that the Fox affiliates were not given the option to carry the debate live (Fox has station ownership that exceeds 35 percent) demonstrates that with a 35 percent cap, network ownership of stations coupled with their extensive vertical integration since passage of the 1996 Act has reached a "tipping point" in the national network/local affiliate balance of power.

The national TV ownership rule also encourages innovation. In the network/affiliate system, not unlike the federal/state system, independent affiliates function as laboratories for experimentation. Affiliates have pioneered many important innovations, including UHF technology, the local news-magazine format, cable all-news channels and other programming concepts, satellite newsgathering, and various digital television innovations. A single huge station group, managed by a single Chief Executive Officer according to a single nationalized business plan (which, in the case of a network-owned station group, includes production studios, syndication and foreign sales, and cable network businesses), is likely to produce fewer innovations than a variety of independently owned and managed station groups.

The national TV ownership rule not only promotes localism, but also furthers competition in three distinct markets: national advertising, program production, and the emergence of strong networks. The networks' comments do not even address two of these three markets. And as to the programming market, the networks do not refute the basic point, noted in the Commission's Media Ownership Working Group Studies, that networks have an incentive to favor programs they own and to keep those programs on the air longer. Affiliates, with their ability to preempt network programs and influence network programming decisions, provide a healthy counterbalance to this tendency.

The Dual Network Rule. The dual network rule furthers competition, diversity, and localism by: (1) lowering the barriers to the emergence of strong new networks, (2) preventing a further narrowing of the "funnel" through which national television broadcast programming must pass, and (3) preventing networks from further increasing their economic leverage over affiliates. The networks acknowledge that the rationale for the dual network rule is to lower entry barriers and limit the market power of networks, and they do not dispute the continuing relevance of these concerns. Thus, the original rationale for the rule remains valid and justifies its retention.

The networks cite the Viacom/UPN experience as evidence that network mergers may increase programming diversity, because a common owner of multiple networks has an incentive to offer programming that appeals to different audiences. As Viacom itself argued to the Commission, however, the Viacom/UPN merger was quite different from a merger of major television networks. CBS competes directly with other major networks – ABC, NBC, and Fox – whereas UPN competes most directly with WB rather than with CBS.

The Legal Framework. The Commission's current legal position – that the standard for retaining a rule under section 202(h) is no more demanding than the standard for adopting the rule – is correct and supported by the language and structure of section 202(h), judicial interpretations of identical and highly similar language elsewhere in the Communications Act, legislative history, and considerations of policy and common sense. Section 202(h) codifies the Commission's duty to review its regulations and imposes a specific two-year time schedule on the agency. It does not impose a "rigorous deregulatory presumption." The networks contrary arguments are plainly flawed.

TABLE OF CONTENTS

TABLES

FIGURES

ATTACHMENTS

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
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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE NETWORK AFFILIATED STATIONS ALLIANCE

The National Association of Broadcasters ("NAB") and the Network Affiliated Stations Alliance ("NASA") submit these reply comments in connection with the Commission's Notice of Proposed Rulemaking released on September 23, 2002.[1] NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks that serves and represents the American broadcasting industry.[2] NASA is a coalition representing the

[1] *In the Matter of 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,* FCC 02-249, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244 (rel. Sept. 23, 2002) (herein "*NPRM*").

[2] As in NAB and NASA's initial comments, NAB again in these replies takes no position on the dual network rule, the financial interest and syndication rules, and the issues raised in NASA's Petition for Inquiry filed with the Commission on March 8, 2001.

interests of more than 600 local television stations affiliated with the ABC, CBS, and NBC Television Networks.

I. THE 35 PERCENT NATIONAL TELEVISION OWNERSHIP RULE CONTINUES TO SERVE THE PUBLIC INTEREST

A. The National TV Ownership Rule Plays A Critical Role In Furthering Localism

In its Notice of Proposed Rulemaking ("NPRM"), the Commission stated that "the national [TV] ownership rule may have the most direct impact of our rules on attaining localism," and therefore the Commission's evaluation of the rule "will rely heavily on our findings regarding its effectiveness in promoting localism."[3] Indeed, the NPRM addressed the connection between the national TV ownership rule and localism at some length:

> The Commission has said in the past that a national TV ownership rule strengthens localism by creating a class of non-network station owners that can decide whether to preempt network programming in favor of programming that would better serve the needs and interests of that station's community. In *Fox Television*, the court affirmed that localism is a potentially relevant consideration in deciding whether to retain, modify, or eliminate the national TV ownership rule. Given this statement by the court and [the] fact that the national ownership rule may have the most direct impact of our rules on the attainment of localism, our evaluation of the continued need for this rule will rely heavily on our findings regarding its effectiveness in promoting localism.[4]

In their initial comments, NAB and NASA confirmed that the national TV ownership rule furthers localism. In a major economic study, Professors Marius Schwartz and Daniel Vincent concluded that: (1) programming decisions of non-network-owned affiliates are more closely attuned to the interests of local viewers than programming decisions of network-

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[3] *NPRM* ¶ 147.

[4] *Id.* ¶ 147 (footnotes and citations omitted).

owned-and-operated stations ("O&Os"); (2) the national TV ownership rule, in conjunction with the right-to-reject rule, fosters localism by limiting the networks' ability to dictate programming aired on local stations; (3) the national TV ownership rule affects the programming choices of stations; and (4) the national TV ownership rule remains an important instrument for achieving the policy goal of localism.[5] NAB and NASA's comments include empirical evidence from a variety of sources confirming and corroborating the conclusions of the Schwartz and Vincent study.[6]

The comments of Fox Entertainment Group, Inc., Fox Television Stations, Inc., National Broadcasting Company, Telemundo Communications, Group, Inc., and Viacom ("the Joint Network Commenters") give short shrift to localism. The networks' economist, in one short paragraph, equates localism with "local content or local outlets" and then summarily dismisses the entire policy on the ground that "other categories of ideas" are "more central" than local content.[7] This badly mischaracterizes Congress's and the Commission's localism policy, which involves more than just local content. Localism is a rich mix of programming and other endeavors that has grown out of the statutory mandate of section 307(b) of the Communications Act.[8] Localism is furthered when licensees air programs of all kinds that best serve the needs and interests of each individual station's local community and influence network programs to be more in line with community standards. Indeed, localism goes beyond programming and

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[5] A copy of the Schwartz & Vincent study appears as Attachment 1 to NAB/NASA's opening comments (herein "NAB/NASA Comments").

[6] See *id.* at 15-49 & Attachments 2-8.

[7] See Comments of Fox Entertainment Group, *et al.* (herein "Joint Network Comments") Exhibit 3, Statement on Media Ownership Rules, Bruce M. Owen, at 10.

[8] *NPRM* ¶ 147; NAB/NASA Comments, at 49-55.

embraces stations' conscientious efforts to seek out community issues and problems; it includes scheduling issues, public service announcements, and coordinated efforts (both on-air and off-air) to meet community issues, spearhead local campaigns, and advance community goals.

The Joint Network Commenters, unlike their economist, do not contend that localism is an invalid policy, nor do they expressly endorse their economist's overly narrow view of localism. Indeed, in the context of diversity, the Joint Network Commenters emphasize that "all forms of programming contribute (and have long contributed) to viewpoint diversity," and therefore the Commission's inquiry "is not just about news."[9] Despite this recognition, the Joint Network Commenters devote most of their limited discussion of localism to analysis of the quality and quantity of local news programs.[10] And as to this issue, these reply comments show that affiliates outperform O&Os with respect to the *quality* of local news programming and are roughly equal with respect to the *quantity* of local news programming.[11]

The more basic point, however, is that localism is "not just about news," and therefore concerns about localism cannot be answered solely or even principally by considering local news programs. Both Congress and the Commission have recognized that localism is a much broader concept. The Commission has identified the following 14 elements as necessary and desirable to serve the broadcast needs and interests of local communities[12]:

- Opportunities for local self-expression,
- Development and use of local talent,

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[9] Joint Network Comments, at 8.

[10] *Id.* at 35-37.

[11] See *infra* Part I.F.

[12] See FCC Form 303, Attachment A of 1960 Report and Statement of Policy re: Commission En Banc Programming Inquiry (July 29, 1960), reprinted in 25 F.R. 7291.

- Programs for children,
- Religious programs,
- Educational programs,
- Public affairs programs,
- Editorialization by licensees,
- Political broadcasts,
- Agricultural programs,
- News programs,
- Weather and market reports,
- Sports programs,
- Service to minority groups, and
- Entertainment programming.

In order serve the needs and interests of its local community, a local station must exercise its judgment about programming. The Joint Network Commenters never dispute, let alone refute, that networks have a strong economic incentive to air nationally uniform programming and thus are unlikely to preempt their own programs for programs of greater local or national interest or where the network programs may be unsatisfactory, unsuitable, or contrary to the public interest in the communities served by particular O&Os. Similarly, they ignore the abundant evidence that their affiliates' ability to make independent programming choices and to exert a healthy check on networks decreases as the number of O&Os increases. They also ignore evidence that the increase in the cap from 25 percent to 35 percent has significantly tipped the balance of power in favor of the networks.

B. Many Of The Networks' Contentions Are Irrelevant To Localism

Before discussing the points of disagreement set out below, it is important to note that the networks agree with NAB and NASA on some issues, and that other arguments advanced by the networks are simply irrelevant to retention of the national TV ownership rule. In particular:

- One of the Joint Network Commenters' principal arguments is that multiple ownership of television broadcast stations within a local market does not necessarily decrease viewpoint diversity, and may in fact increase it, because "stations managed in common may have greater incentives to appeal separately to distinct segments of the audience with distinct programming."[13] This argument has no application to the national TV ownership rule. As we explained in our opening comments, networks have powerful incentives to air *uniform* programming on all network-affiliated stations *across* the country, even if viewers in a particular local community would be better served by non-network programming.[14] Thus, allowing networks to own more of their affiliated stations nationally can be expected to lead to more uniformity, not more diversity.
- The Joint Network Commenters argue that "the national TV ownership rule does not serve the Commission's localism goal" because "the vast majority of television stations, including those owned by network affiliates, are not owned

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[13] Joint Network Comments, at 31 (quoting *Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3276 (1991)).

[14] See Marius Schwartz and Daniel R. Vincent, *The Television National Ownership Cap and Localism: Reply Comments* at 1 (Feb. 3, 2003) (herein "Schwartz & Vincent Reply"). A copy of the Schwartz & Vincent Reply appears as Attachment 1 to these reply comments.

locally."[15] But, as Professors Schwartz and Vincent explain in their reply comments (a copy of which appears as Attachment 1 to this pleading), "whether a station is locally owned or not is by itself irrelevant."[16] It is not the geographic location of the station owner that matters, but whether the owner's incentives are directed to serving the interests of the local community. As NAB and NASA explained in their opening comments, network owners have a strong incentive to diverge from local interests in order to clear all network programming. "As a result, affiliates – regardless of whether they are owned by corporate groups – will exercise greater flexibility than network O&Os in tailoring their programming to match viewer demands in their individual local markets."[17]

- The networks (and their economist) argue that the Merger Guidelines developed by the Antitrust Division of the Department of Justice and the Federal Trade Commission protect "all of the Commission's policy goals."[18] In an analysis submitted with these reply comments, Professors Schwartz and Vincent explain that the networks' reliance on the Merger Guidelines is unwarranted.[19] The

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[15] Joint Network Comments, at 38.

[16] Schwartz & Vincent Reply, at 2. The Commission's rules do not place a premium on a licensee's residing in the community of license. Rather, they establish the licensee's bedrock obligation to provide a program service attuned to local concerns and issues and require the licensee each quarter to place a summary of how it has performed that obligation into its local public file. 47 C.F.R. § 73.3526(3)(11)(i).

[17] *Ibid.* Furthermore, as shown in Attachment 5, non-network station groups are headquartered in diverse locations throughout the country. CBS and NBC are located in New York; Fox and ABC are in Los Angeles.

[18] Joint Network Comments, at 26.

[19] Schwartz & Vincent Reply, at 5-8 ("The FCC's national television ownership cap . . . targets a policy goal that is not reached by antitrust policy.").

Merger Guidelines, like the antitrust laws on which they are based, are concerned only with competition and have nothing to do with localism. When the networks argue that the Merger Guidelines are sufficient to implement "all of the Commission's policy goals," they discuss only competition and diversity and conveniently overlook localism, which is based on a statutory mandate that the Commission is not free to ignore.[20] Indeed, their economist does not even argue that the Merger Guidelines implement the Commission's localism policy. Instead, the economist mischaracterizes the Commission's localism policy and then dismisses it as a bad policy.[21]

On other points, the networks actually agree with NASA and NAB:

- The networks agree with NAB and NASA that all forms of programming, not just local news programming, should be considered in determining whether the Commission's rules advance its policy goals. Thus, NAB and NASA's initial comments explain that "the Commission's localism policy is not and should not be limited to local news programming, but extends to programs of all kinds responsive to community tastes and needs."[22] The networks, in discussing viewpoint diversity, agree that "the Commission should take this opportunity to conclude that all forms of programming contribute (and have long contributed)" and therefore "viewpoint diversity is not just about news."[23]

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[20] Joint Network Comments, at 26-29.

[21] Joint Network Comments, Exhibit 3, Statement on Media Ownership Rules, Bruce M. Owen, at 10.

[22] NAB/NASA Comments, at 45.

[23] Joint Network Comments, at 8.

- As to local news, the networks agree with NAB and NASA that data concerning the quality and quantity of programming must be adjusted to account for the size of the local market because stations in larger markets generally have more news programs. As our initial comments explain: "[T]elevision broadcast stations in larger markets tend to air more hours of local news programming than do television stations in smaller markets," and "the networks own a disproportionate number of stations in large markets."[24] The networks' economists agree "that market size is a significant factor in explaining television stations' news output."[25] Once the data are corrected for market size, moreover, NAB and NASA and the networks agree that affiliates have outperformed O&Os significantly according to one measure of quality (Dupont Awards) and slightly according to another measure (RTNDA Awards). In these reply comments, NAB and NASA also demonstrate that affiliates have significantly outperformed O&Os in winning prestigious Peabody Awards.[26]

C. With The National Ownership Cap At 35 Percent, Localism Is Vulnerable – Any Further Increase In The Cap Would Put Localism In Serious Jeopardy

In 1996, both houses of Congress rejected a proposal by the networks to increase the cap to 50 percent, and the Senate narrowly rejected an amendment that would have maintained the cap at 25 percent.[27] Members who voted against the 50 percent proposal

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[24] NAB/NASA Comments, at 46.

[25] Joint Network Comments, Exhibit H, News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations, at 3.

[26] See *infra* Part I.F.1-2.

[27] 141 Cong. Rec. 11,15333 (1995) (50 percent cap); 141 Cong. Rec. 16,22060 (1995) (50 percent cap); 141 Cong. Rec. 11,15671 (1995) (25 percent cap).

expressed “fear that this increase would be detrimental to our local stations and the idea of local control.”[28] A Senator with long experience in broadcast television stated that if the networks were permitted to own stations reaching 50 percent of the national audience, “[t]he networks will kick the dickens out of an affiliate if the affiliates do not toe the line.”[29]

Experience to date with the 35 percent cap confirms that Congress was correct to conclude that raising the cap above 35 percent would place local stations in serious danger of becoming mere “passive conduits for network transmissions from New York.”[30] Even at 35 percent, the effectiveness of the national TV ownership rule as a means of furthering localism is seriously threatened. The repeal of the financial interest and syndication rules, the ability of networks to own duopolies like other licensees, the networks’ embrace of programming ventures from studios to syndication and foreign sales, and their expansion into cable and Internet content businesses have strengthened the networks’ hand and given them strong incentives to override local licensee interests. These trends when combined with greater station ownership have, as Congress feared, put the statutory interests of localism in serious jeopardy.

First, while affiliates continue to preempt more frequently than O&Os, the average number of preemptions by affiliates has dropped significantly since 1996. As shown by the NAB/NASA survey, the average hours of preemption per year by network affiliates decreased by 24 percent from 1995 to 2001, from 46.40 hours to 33.27 hours. And a comparison of studies performed by the networks’ own economists show a decline in affiliates’ preemptions

[28] 141 Cong. Rec. 16,22059 (1995) (statement of Rep. Hall).

[29] 141 Cong. Rec. 11,5667 (1995) (statement of Sen. Helms); 142 Cong. Rec. 2,2232 (1996) (statement of Sen. Hollings) (50 percent cap “would be embarrassing for anybody to stand on the floor and ask for.”).

[30] H.R. Rep. No. 104-204, at 221 (1995).

of 64 percent over a somewhat larger period of time. NAB and NASA's survey of affiliated stations also demonstrated an increase in network pressure to prevent affiliate preemptions.

Second, increasing the cap from 25 percent to 35 percent resulted in a significant shift in the balance of power between networks and affiliates. This shift has been reflected in increasingly insistent network demands that affiliates accept extremely limited "baskets" of allowable preemptions and face severe financial penalties, or even loss of affiliation, if they exceed those baskets. Even within the baskets, the networks exert pressure on affiliates not to preempt. The shift in the balance of power is further shown by other network encroachments on affiliates, which were described in our initial comments. [31]

Third, the evidence shows that as network ownership of stations increases, their affiliates have less influence over network programming. The first Presidential debate, between then-Governor Bush and then-Vice President Gore, provides a stark illustration of the fact that a 35 percent cap is already pushing the limits. After the NBC affiliates vigorously protested NBC's decision to air Game One of the American League Playoff Series rather than the debate, they were able, though just barely, to pressure the network into giving them (and the O&Os) the option of carrying the debate. But Fox did not give its affiliates the same option. Instead, Fox insisted that its affiliates and O&Os air its sci-fi series *Dark Angel*, and neither Fox affiliates nor Fox O&Os had the opportunity to carry a program of clearly greater national importance instead of the network program.[32] The different outcomes at the two networks may be due to the fact

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[31] See NAB/NASA Comments, at 39-45. NAB takes no position on the controversy concerning network affiliation agreements, which NASA has raised separately with the Commission in a Petition for Inquiry filed on March 8, 2001, and in Early Comments and Motion for Declaratory Ruling filed on June 22, 2001 (DA 01-1264).

[32] Ultimately, after Fox's decision was criticized by the Commission and others, Fox agreed to let its stations air the debate at 11:00 p.m., a two-hour delay for East Coast viewers. While the (continued…)

that NBC owns stations covering only 31.6 percent of the nation's viewers, whereas Fox now exceeds the 35 percent cap under a conditional waiver, owning stations that serve 37.8 percent of the nation's viewers.

Fourth, the 35 percent cap actually permits networks to own stations that account for considerably more than 35 percent of national advertising revenue. Networks tend to buy television stations in large markets, which account for a disproportionate share of advertising revenues. For example, beginning with the largest market and working down the list, O&Os that reach 35 percent of national television viewers account for 45 percent of advertising revenues.[33] Stations that reach 45 percent of national television viewers account for 56 percent of advertising revenues.[34] Since networks are less likely to listen to an affiliate if it accounts for a relatively small share of advertising revenue, the 35 percent number understates the actual degree of network control and overstates the degree of affiliate influence.

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affiliates (but not the O&Os) clearly had the right to preempt the Fox program pursuant to the Commission's right-to-reject rule, Fox has used every bit of its leverage to discourage *all* preemptions – whether or not protected by the right-to-reject rule – through restrictive contractual provisions permitting preemptions only under very limited circumstances and through a provision permitting it to terminate the entire affiliation agreement on 30 days notice if an affiliate even indicates it intends to make a preemption – or if Fox for whatever reason believes more than two "unauthorized" preemptions will occur in a year.

[33] See Attachment 4, showing broadcast advertising revenues by market.

[34] *Id.* The breakdown based on each network's actual ownership is as follows:

Table 1: Audience Reach Versus Share Ad Revenue

Network	Audience Reach (w/ UHF discount)	Audience Reach (w/o UHF discount)	Advertising Revenue Reach (w/o UHF discount)
Fox	37.8%	44.4%	54.46%
Viacom	39.9%	45.2%	53.05%
General Electric	31.6%	36.5%	45.91%
Walt Disney	23.6%	23.8%	30.53%

Fifth, the top markets provide the majority of advertising revenue. The networks therefore have the economic incentive to design their national programming to suit the preferences of the larger urban markets. As the following table reveals, the 400 network broadcasting stations in the smallest 110 markets barely have the economic clout of New York City.

Table 2: Percentage Of Broadcast Advertising Revenues In Top Markets

Market	Percent Network O&O	Broadcasting Local Advertising Revenues	
		Cumulative (in 000s)	Percent of Total
1 – 10	70%	$8,276,750	39.27%
1 – 20	50%	$9,337,843	44.31%
1 – 30	39.2%	$11,356,426	53.88%
1 – 50	28.5%	$16,166,150	76.70%
1 – 100	15.8%	$19,206,750	91.13%
100 – 210	0.5%	$1,869,050	8.87%
New York	100%	$1,721500	8.17%

Permitting the networks to acquire more stations in the top 50 or 100 markets would quickly leave broadcasting stations in smaller markets powerless to oppose the broadcast networks.

The affiliates' influence over network programming is already on tenuous ground with the cap at 35 percent and would be lost if the cap were increased above 35 percent. Our initial comments set forth numerous examples of affiliates association board calls that focused on content issues. While the affiliates association boards all discuss network program content, it is notable that Fox affiliates have been able to influence network decisions to a far lesser extent than affiliates of the other major networks. In short, the delicate balance of affiliate influence is at a tipping point at 35 percent, as evidenced by the reduced number of affiliate preemptions since 1996, other network incursions into affiliate programming discretion, and the impaired ability of Fox affiliates to engage on program issues with their network, which already exceeds the 35 percent cap through a waiver.

D. The Benefits Of Localism Extend Well Beyond Preemptions

As we demonstrate below, the record in this proceeding confirms that independent affiliates preempt more frequently than O&Os.[35] Before turning to that evidence, however, it is important to recognize that actual preemptions are only the tip of the iceberg. Independent affiliates further localism in many ways. For example, they (1) provide information and coverage with respect to local events; (2) serve as an outlet for public service announcements and charity telethons; (3) spearhead local campaigns or fundraisers designed to benefit the local community; (4) carry public affairs programming of particular local interest; and (5) more fundamentally, assure that the programming aired on the station serves the particular needs and interests of local viewers and is not offensive to or unsuitable for local tastes. While O&Os also serve their local communities in many of these respects, their ability to do so is circumscribed by the competing national programming and other business interests of their network owners.[36] As a result, independently owned affiliates make a unique and vital contribution to localism that O&Os do not.

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[35] See *infra* Part I.E.

[36] Schwartz & Vincent Reply, at 2 ("A network is a supplier of a national programming schedule, and its advertising income is heavily dependent on obtaining widespread and synchronized airing of its schedule. It therefore will have strong incentives to ensure that its owned stations adhere to its schedule even in some cases where, from the standpoint of serving the local markets, it would be preferable to let those stations air other programs.").

1. Independently Owned Affiliates Influence Network Program Decisions By Representing Community Viewpoints

Preemption statistics alone fail to reflect the influence that affiliates exert over network programming short of preempting it. This influence goes to the tone, language, video depictions, themes, promotional announcements ("promos"), and scheduling of network programming. Our initial comments provide numerous examples of that influence and document the high percentage of affiliate association board meetings where the content of network programs was discussed.[37] This influence also is exercised by individual affiliates making their views known, one-on-one, to the networks. But it is the aggregated voices of many independently owned affiliates that successfully influence national networks to adjust their programming to reflect the needs and sensitivities of local audiences.

The regulatory foundation for this affiliate influence is the Commission's right-to-reject rule and the 35 percent national TV ownership cap.[38] These rules work in concert to preserve a critical mass of affiliates capable of influencing network programming decisions driven by objectives beyond the needs of local television viewers. Without the right-to-reject rule, nothing would prevent the networks from ignoring affiliate feedback about program decisions and using their leverage to mandate full clearance of network programs, without exception. Without the 35 percent cap, the affiliates would lack critical mass, even if they retained a meaningful right to reject – if the networks capture more of the largest television markets through ownership, they increasingly will be able to adopt a "take-it-or-leave-it"

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[37] NAB/NASA Comments, at 28-31.

[38] See NAB/NASA Comments, Attachment 1, Schwartz & Vincent Study, at 1.

approach about their programming content.[39] Because the networks strongly desire widespread clearance of network programming, the threat of preemption by a critical mass of affiliates in markets across the country – particularly by those in the more lucrative markets that would be the first network acquisition targets if the cap were raised – drives the networks to be responsive to affiliate input. Without both the critical mass of independent affiliates and the power to preempt, the network incentive to respond to affiliate concerns about network programming choices would disappear.

Accordingly, an exclusive focus on affiliate preemptions does not adequately reflect the degree to which independently owned affiliates serve localism because it fails to take into account instances where affiliates influence network programming decisions and other relevant factors. This is particularly true where the networks face potential preemptions pursuant to the first prong of the right-to-reject rule[40] – where an affiliate believes that network material is unsatisfactory, unsuitable, or contrary to the public interest. The network data do not report a single instance of an O&O preempting for this reason.[41]

However, independently owned affiliates do preempt programs that they believe are unsuitable in the communities that they have the responsibility to serve:

- KYTV in Springfield, Missouri, preempted a January 6, 2003, episode of NBC's *Fear Factor*, which airs at 7:00 p.m. Central Time, that involved contestants

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[39] As shown in Attachment 4, if the networks controlled stations that reached 50 percent of television households located in the largest markets in the country, they would control 61.78 percent of national advertising revenues. In addition, the networks' ultimate weapon of disaffiliation would be strengthened if the dual network rule were eliminated, as urged by the networks, because the disaffiliated station would have fewer options to turn to if it did disaffiliate.

[40] 47 C.F.R. § 73.658(e)(1).

[41] Joint Network Comments, Study G, Preemption by O&Os compared to affiliates, at 3.

eating horse rectums because it found the material inappropriate for its community;[42]

- WRAZ-TV in Raleigh, North Carolina, chose to stop airing *Temptation Island* after Fox revealed that one of the participating couples had a child because "WRAZ will not support a program that could potentially break up the parents of a young child";
- WFAA-TV in Dallas, Texas, did not carry the entire first season of *NYPD Blue* because it found the material and language inappropriate for programming scheduled to air at 9:00 p.m. in that community; [43] and
- KNDX in Bismarck, North Dakota, refused to clear the Fox network's broadcast of the movie *Scream*, which is targeted to young viewers, because of its graphic and disturbing portrayal of teenage murders. Although this programming may be acceptable for audiences in Hollywood, KNDX felt that it was not suitable for the young viewers of Bismarck.

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[42] Jeff Arnold, '*Fear Factor' Fans Boo Preemption*, SPRINGFIELD NEWS-LEADER, Jan. 7, 2003, at 1C. KYTV's President and General Manager, Michael Scott, told counsel for NASA that the station had received numerous telephone calls, emails and letters from viewers with respect to the station's decision to preempt *Fear Factor*, and "the overwhelming number of responses have been positive." Scott estimates that about 70 percent of the viewers that have contacted the station praised the station's decision.

It should be noted that NBC's new standard affiliation agreement would have precluded KYTV from preempting this episode of *Fear Factor* under the right-to-reject rule because it states that affiliates may not reject material as "unsatisfactory, unsuitable or otherwise contrary to the public interest" unless there is "a substantial difference in the relevant program's style and content and the style and content of other NBC Programs previously broadcast by Station." KYTV had carried earlier episodes of *Fear Factor*, and therefore its preemption would not have met this condition.

[43] After strong and consistent pressure from the network, WFAA-TV agreed to carry *NYPD Blue* in its second season, but the complaints and concerns of WFAA-TV and other affiliates resulted in a reduction in the nudity and graphic language used in the program.

Affiliate influence on network programming sometimes succeeds and sometimes does not. Nevertheless, it is a fact that local affiliates impose a check on the impulse of some network program producers to push the envelope of taste beyond what is acceptable to the affiliates' viewers because local affiliates retain the right to preempt network programming under these circumstances. This influence, although very significant, is not revealed by preemption studies and is seldom, if ever, exercised by O&Os. This influence is not easy to quantify because hopefully on an ongoing basis it deters the networks' Hollywood programmers that wish to push the envelope of taste and suitability and beneficially influences network program decisions.

2. Affiliate Reactions To Particular Network Program Decisions Affect Both Current And Future Network Decisions

The events surrounding a January 6, 2003, episode of NBC's *Fear Factor* featuring contestants eating horse rectums illustrate some of the ways in which affiliates exercise a localism role that is a counterweight to the tendency in Hollywood and New York to reach for sensationalism with insufficient regard for local community standards.[44] Before airing this episode of the program, NBC ran an explicit promo dwelling on the rectum-eating content of the program. This promo raised widespread controversy, resulting in a petition to stop the airing of the program and to encourage members of the public to boycott NBC.[45] As soon as it became aware of the content of the promo and the upcoming program, the NBC Television Affiliates

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[44] *Fear Factor* had been a target of concern by the NBC affiliates on earlier occasions, specifically when NBC scheduled and heavily promoted a special *Fear Factor* opposite the half time coverage of the 2002 Super Bowl – a program that featured Playboy Bunnies. See Adam Liptak, *Growing Rowdier, TV Reality Shows Are Attracting Suits*, NEW YORK TIMES, Jan. 7, 2003, at A1.

[45] See Petition Against NBC *Fear Factor at* http://www.equinefriends.com/classieds/guestbook.php (last visited Jan. 31, 2003). The petition contained more than 3,500 signatures.

Association Board contacted NBC to express its concern about (1) the content of the program, (2) the explicitness of the promo, and (3) NBC's decision to run the promo during the Saturday morning children's programming block. Individual affiliates, many of whom had received numerous complaints from viewers, complained directly to the network as well.

After affiliates expressed their strong concerns, NBC discontinued running the promo in children's programs and toned down its content, removing the explicit reference to "rectum." After debating the issue internally, NBC ran the episode as planned and, as noted above, at least one affiliate (KYTV in Springfield, Missouri) preempted the program. While other affiliates aired the episode (which many concluded was less objectionable than the promo in question), this incident resulted in a series of discussions between the NBC Television Affiliates Association Board and executives at NBC, both before and after the episode aired, with respect to the content and scheduling of the network's programs and promos and the need to be more responsive to local concerns in the future.

This past fall, the CBS affiliates raised concerns about the timing of that network's airing of the *Victoria's Secret Fashion Show,* which the network originally planned to air at 8:00 p.m. Because many CBS affiliates felt the program was inappropriate for the 8:00 p.m. time slot, the CBS Television Network Affiliates Association Board advocated rescheduling the program for 10:00 p.m. Ultimately, this pressure led the network to reschedule the program to a later time period (for 9:00 p.m.), though not as late as affiliates had urged. In addition, some affiliates preempted the show because they felt it was inappropriate content for their service areas.

Such exchanges between the networks and independently owned affiliates, which occur frequently, not only serve as a constraint with respect to the particular issue at hand (in the above examples, by resulting in a less explicit promo aired at more appropriate times, and the rescheduling of a mature program to a later hour), but also lead the network to consider local perspectives and exercise more restraint in future decisions. This influence and restraint survive only because the 35 percent cap requires the networks to rely on affiliates to distribute their programming to a substantial portion of viewers and because those affiliates retain the right to preempt programming in the public interest. If the networks owned more of their affiliates, the effectiveness and the beneficial consequences of these restraints would be lost.

The impact of affiliate input on future programming decisions is demonstrated by NBC's approach to its new program *Kingpin*, which chronicles the life of a drug lord and may raise issues of taste and suitability for local communities. Because affiliates frequently raise concerns about the appropriateness of particularly raw content for local communities, NBC raised the violent and mature content of this program with affiliates well before the program was scheduled to air and agreed to permit affiliates to preview episodes of the program in order to assure that the program is suitable for local viewers. Similarly, when NBC announced a commitment to carry hard liquor ads under new guidelines last year, although it did not provide a great deal of notice to its affiliates, it did provide for station opt-outs, which many affiliates chose to exercise. Eventually, NBC dropped the idea altogether. Again, Fox serves as an example of what will happen if affiliate influence becomes diminished through network ownership beyond 35 percent. The Fox affiliates objected to an episode of *Boston Public*, a show airing at 8:00 p.m./7:00 p.m. Central, that involved a high school girl exchanging oral sex for a fellow male student's resignation from a student council election.[46] Even after the Fox

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[46] This program was the subject of a petition signed by more than 20,000 parents who objected to its content.

Television Affiliates Association complained to a network programming executive that this story line was inappropriate for many local affiliate audiences – particularly during this early viewing hour – the network refused to make any changes.

NBC was open to the viewpoints expressed by independent affiliates about *Fear Factor, Kingpin,* and hard liquor ads; it was less so about the Presidential debate/baseball play-off and West Coast Olympics coverage/local evening news[47] issues, but affiliates today retain enough influence to have an impact on these important decisions. The point is that the public, as well as the networks themselves, benefit from the checks a strong body of independent affiliates exercises on network programming decisions. These checks occur when affiliates believe the network has crossed a line with particular program decisions, and they continue to affect the networks as they make decisions on a going-forward basis. O&Os do not, and cannot be expected to, exercise that function. Retention of the 35 percent cap is necessary to preserve affiliate checks and balances that moderate network programming decisions.

3. Affiliates Protect The Ability Of Both Affiliates And O&Os To Substitute Programming Of Greater Local Or National Importance

Affiliates influence network decisions to afford viewers access to programming of greater local or national importance – an influence based in the affiliates' ultimate right to preempt under the first prong of the right-to-reject rule.[48] For example, after the NBC affiliates persuaded the network to offer carriage of the 2000 Presidential debate, an uninformed observer looking only at the carriage data for the NBC O&Os and independently owned NBC affiliates

[47] Details of the NBC affiliate and network interactions concerning airing of the 2000 Olympics during the West Coast's early evening local news time slot can be found on pages 30-31 of our initial comments.

[48] 47 C.F.R. § 73.658(e)(2).

would conclude that they behaved similarly; *i.e.*, a similar percentage of O&Os and affiliates carried the debate. Yet, without the role of the independent affiliates, O&Os never would have had that option.

Similarly, an outside observer would note no difference between NBC O&Os and NBC affiliates on the West Coast in their carriage of the early evening local news during the late summer of 2000.[49] But both groups would have preempted their local early evening newscasts to carry NBC's live coverage of the Olympics but for the intervention of the independently owned affiliates.[50] As a result of that intervention, both O&Os and affiliates were able to carry Olympic coverage in prime time on a delayed basis *and* satisfy local preferences by carrying their regular early evening, local newscasts. In this case, a comparative analysis of O&O and affiliate broadcast schedules would mask the localism function served by independent affiliates, *a function that benefited communities served by O&Os as well as independent affiliates*.

4. Affiliates Enhance Local Programming Service In Other Ways Not Captured By Preemption Statistics

Another way independent affiliates serve localism objectives that is not revealed by focusing only on preemptions is illustrated by affiliates' role in preserving the so-called "blended" or "co-op" format of CBS's *The Early Show*. Independent affiliates have fought hard to retain a format that allows local stations to insert substantial amounts of their own local news content. CBS has sought to eliminate this format option and has made significant progress in doing so. Affiliate efforts in this case promote localism by preserving a format geared towards greater local responsiveness, but their influence is not captured by preemption statistics – the

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[49] NAB/NASA Comments, at 30-31.

[50] *Id.*

format would not appear as a preemption on a preemption survey or in the networks' prime-time preemption statistics.

The Early Show example further illustrates that programs responsive to the particular interests of local viewers frequently can be expected to garner higher ratings than less-appropriate network programming. The networks denigrate local stations' deviations from network schedules that generate revenues, such as paid telethons and religious programs,[51] local sports coverage, and coverage of local civic events such as parades and festivals. The use of more extensive local station news inserts in *The Early Show* often attracts substantially larger audiences (and therefore higher advertising revenues) than carriage of the full *The Early Show* program. That does not undercut the benefits to localism, as the networks suggest. Instead, it indicates that the benefits of localism are being achieved. Because the programming is more responsive to the needs of local communities, viewers watch it. Programming decisions need not be uneconomic to serve localism and promote the public interest. Indeed, as Professors Schwartz and Vincent explain, it is the differing economic incentives of affiliates as compared to networks that make them better attuned to local interests.[52]

5. Independently Owned Affiliates Serve As Laboratories For Experimentation And Innovation

There is another way in which preemption statistics fail to fully measure the contributions independently owned affiliated stations make to localism. If most television stations were owned by the networks, their creativity in serving their local communities would

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[51] Charity telethons and religious programs are examples of programming that often is not locally-produced but that serves local needs and interests. Syndicated documentaries are another example. Stations may pool resources to produce programming from the state capital or Washington, D.C. Strictly speaking, these are not "local" programs.

[52] NAB/NASA Comments, Attachment 1, Schwartz & Vincent Study, at 7-8.

be circumscribed by the interests of their parent networks and those networks' other media businesses. But independently owned affiliates are not similarly circumscribed. If an affiliate has a program idea that suits its audience but would not necessarily fit the network's current business plan, the affiliate can try it out. If the idea succeeds, affiliates in other markets – and possibly the networks and their O&Os – eventually may adopt those ideas. The existence of vital, independently owned affiliates thus protects viewers from a closed programming mentality and provides a fertile environment for experimentation and innovation.

Localism in the television broadcast system is the equivalent of federalism in our governmental structure. As with federalism, the television broadcast system consists of overlapping "jurisdictions": the networks target the concerns of a national audience like the federal government; the local affiliates address the needs of local communities like the states. As the Supreme Court has recognized, our federal system brings many benefits.[53] Key among these benefits is the experimentation and innovation that occurs in the local areas. The following are some of the innovations that affiliates have brought to our broadcast system:

- Affiliates were instrumental in the development of satellite newsgathering. When Stanley S. Hubbard's CONUS 1, the first satellite newsgathering truck, was inducted into the Newseum's collection in 2001, the museum noted the importance of satellite newsgathering: "For the first time in broadcast history,

[53] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 82 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (Brandeis, J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.").

local television stations were no longer dependent on their networks for covering and presenting national news stories."[54]

- Westinghouse Broadcast Corporation (Group W) pioneered the local magazine news format with *Evening Magazine* (later *PM Magazine*). Under the show's format, local stations produced segments that were fed into a national pool of stories. Each local show used a local host and drew its content from locally produced segments and the national segment pool. The format eventually spread to other dayparts and is now the progenitor of a great deal of local and national programming.
- Affiliates were instrumental in the launching of local all-news cable channels, sometimes in conjunction with local cable operators. Allbritton launched Washington, D.C.'s News Channel 8 in 1991. The Ohio News Network was created by the Dispatch Broadcasting Group. Belo brought the Texas Cable News channel to Texas residents. Hearst-Argyle partnered with the local cable provider to launch New England Cable News in 1992.
- Local stations in upstate New York innovatively linked stations so that resources could be shared. And independent affiliates united to form state networks in various states such as Florida, Texas, and Kentucky to cover state government activities and other statewide news.

[54] Press Release, Newseum, Newseum Acquires Historic Satellite Newsgathering Vehicle *at* http://www.newseum.org/newseum/pressroom/releases/hubbard.htm (last modified March 19, 2001).

- UHF station operations were largely pioneered by non-network-owned stations, not by the networks. The Fox, UPN, WB, Univision, Telemundo, and Pax networks depend on UHF stations for their reach; they could not exist but for the viability of UHF television. The same is true for public television, religious broadcasting, Spanish language broadcasting, and low power stations and translators that bring local service to rural America. ABC, CBS, and NBC, as networks, did not begin acquiring UHF stations until the 1990s.
- Many of the most recent examples of affiliate innovation have occurred in the area of digital television. WISH-TV in Indianapolis, Indiana, and other CBS affiliates in Indiana used their digital capacity to simultaneously multicast four NCAA men's basketball tournament games at a time in 2002. WBNS-TV offered the first true HDTV broadcast including 5.1 digital sound in September 1998. KOMO-TV in Seattle has been offering HDTV newscasts since 1999. WRAL-TV in Raleigh, North Carolina, was one of the first stations to broadcast the local news in digital format. At least one of the affiliates associations was urging its network to offer more digital content for several years, and the network has now begun to do so.
- Affiliates have actively and creatively sought ways to use the extra capacity made available by digital transmission. For example, WRAL-TV is broadcasting a news format on a second digital channel.
- In a major undertaking, 23 independently owned non-network broadcast companies representing 258 stations formed a new company called iBlast in order to explore, research, and develop new business relationships and uses for the

digital spectrum. Other major non-network broadcast companies banded together in a venture called Geocast, which did not succeed. iBlast remains operational and is actively pursuing opportunities in the digital spectrum for the participating stations. If the networks are engaged in exploring such ventures they have not made it known publicly.[55]

- Affiliates develop innovative programming formats. Cox Television, for example, is producing a younger-oriented news program that will average 36 news stories per half-hour. This non-conventional format is intended to appeal to viewers who are not successfully reached by traditional news media – video or print. The program was tested at Cox's flagship station, WSB-TV in Atlanta, Georgia, for a year before being rolled out in other markets this fall.

As these examples demonstrate, affiliates are instrumental in bringing innovations to broadcast television.[56]

6. Affiliates Serve As A Bulwark Against The Nationalized Television Service That Congress Rejected

When Congress established the television table of allotments, it rejected the notion of national television stations and instead developed a system of local licensees directed to serve their local communities.[57] Through their words and their conduct, the networks have made it unequivocally clear that their objective is to assure that all network programming is

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[55] Fox's contract gives it control over all of its affiliates' digital channels, which suppresses innovative projects like these. Also, Fox has announced publicly that it will not use the full 1080i or 720p HDTV format but will deliver its digital programming only in 480i.

[56] The same was true in radio. It was a Westinghouse station, not a network station, that launched the first all-news radio format. And Emmis Communications was responsible for the first all-sports radio station, WFAN in New York, launched in 1987.

[57] NAB/NASA Comments, at 50-51.

accepted and cleared by all affiliates all of the time. While this approach makes economic sense for the networks, it is in tension with Congress's decision to reject a nationalized television service and to pursue localism through its allocation, allotment, and other policies.

The networks view virtually *any* rejection of network programming as suspect. In urging the Commission to cut back on an affiliate's right to reject network programming,

- Viacom has argued that "a single preemption" by an affiliate "limit[s] the audience exposure that the network program can achieve, and thus threaten[s] network advertising revenues";[58]
- Fox has stated that "it must be able to *assure* advertisers that [network] programming will be cleared 'in pattern' by its affiliates";[59] and
- Disney has asserted that "*[e]very time* an affiliate pursues its economic self-interest by refusing to air a network program," it "deprives the network of a truly national audience for its programming, and it thus threatens the [network's] national advertising revenues."[60]

The networks increasingly use restrictive contractual provisions, pressure, and leverage to pursue the goal of "perfect" clearance in their relationships with affiliates, a goal they are free to implement directly with their owned stations. The profitable operation of local television stations, which would call for greater independence to make programming decisions at the local level, is only one of the networks' business objectives – the remainder of which put a

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[58] Comments on the Matter of Petition for Inquiry Into Network Practices by Viacom, Inc., at 22-23 (filed July 23, 2001).

[59] Comments on the Matter of Petition for Inquiry Into Network Practices by Fox Broadcasting Company, at 9-10 (filed July 23, 2001) (emphasis added).

[60] Comments on the Matter of Petition for Inquiry Into Network Practices by The Walt Disney Company, at i (filed July 23, 2001) (emphasis added).

premium on simultaneous, national clearance of all network programs. The difference between independently owned affiliates and O&Os has at times been described by pointing out that while affiliates serve only one master – the television station owner who builds a business on strong local stations, O&Os serve two masters – the network as a local television station owner and the network as a national programming and distribution business. But the division of these interests is not so clear-cut. Indeed, it might be more accurate to say that O&Os have several masters – one that serves the local station interests, a second that serves national advertising interests, a third that serves syndicated programming interests, a fourth that serves foreign sales interests, a fifth that serves cable programming interests, and on and on. *All but one* of these interests pushes O&Os to clear as much of the national network programming schedule as possible, even if alternative programs are better suited to the local community.

Non-network station owners, whether a single station owner in a small town or a large group owner based in a major city, build their businesses on the success of each individual station. They do not run businesses built on the simultaneous national clearance of an entire network program schedule. For this reason, there is a fundamental difference between network station owners and non-network station owners that bears on their ability and incentives to serve localism.

While the networks would like to play down the differences between network and affiliate station owners in this context, they have in other contexts acknowledged the obvious: "the programming incentives of networks and affiliates are *of course* not perfectly aligned."[61] This is borne out in the healthy give-and-take, described above, between networks and

[61] Comments on the Matter of Petition for Inquiry Into Network Practices by The Walt Disney Company, at 23 (filed July 23, 2001) (emphasis added).

independently owned affiliates with respect to program decisions. And it is borne out by the preemption practices of affiliates as compared to O&Os. Although the networks have used a variety of means to reduce affiliate preemptions over the past ten years, affiliates today still preempt network programming more frequently than O&Os.

Because affiliates operate at an arm's length from the network, because their success is driven by the strength of their service to their local communities, because the affiliates' right to reject network programming is protected under the Commission's rules, and because there now are barely enough independent affiliates to influence network decisions that bear on local stations' ability to provide programming responsive to their local communities, independent affiliates serve a unique and vital localism function that is not and cannot be served by O&Os.

E. The Available Data Concerning Preemptions By O&Os And Affiliates Support Retention Of The National Television Ownership Rule

In their initial comments, NASA and NAB submitted an economic study by Professors Schwartz and Vincent explaining why the program decisions of affiliates are more closely attuned to the tastes and needs of local communities than those of O&Os. As a result, the study found, affiliates are likely to preempt network programming more frequently than O&Os. NASA and NAB also submitted extensive data concerning affiliate preemptions, which demonstrate that affiliates do in fact depart from the network schedule to serve the differing interests of their local communities. As expected, these data further demonstrate that as network leverage (through the ownership of more stations and increasing domination of the syndication and program production markets) has increased, affiliate preemptions have decreased significantly.

NASA and NAB do not have access to data concerning O&O preemptions and therefore asked the Commission to obtain such data from the networks. This request was designed to elicit a clear picture of the extent to which: (1) affiliates and O&Os in markets of comparable size deviate from the network schedule and (2) affiliate preemptions have declined over time as the networks have acquired additional television stations – and thus additional leverage – and additional interests in programming businesses that cause them to pressure affiliates into airing network programming in almost all instances. NASA and NAB expected these data to show that:

- affiliates preempt more than O&Os; and
- affiliate preemptions have declined over time, as networks have used their increased leverage to insist on clearance of network programming.

The NAB/NASA request was submitted on November 25, 2002, more than five weeks before the comments deadline and ten weeks before the reply deadline in this proceeding. On December 31, 2002, the Commission denied the request, but encouraged the networks to submit the data voluntarily. In response, the networks have submitted selective and incomplete data designed to minimize the difference between O&O and affiliate preemptions. Notwithstanding these defects, the network data support the conclusions of the Schwartz and Vincent study and confirm NAB and NASA's predictions that affiliates preempt more than O&Os.

1. The Networks Have Presented Selective Data That Nevertheless Confirm That Affiliates Preempt More Than O&Os

Both Disney and the Joint Network Commenters have provided the Commission with selective and incomplete preemption data.[62] The Joint Network Commenters provided data only on the preemptions of *prime-time* programming; Disney provided data only on prime-time and sports preemptions that apply towards ABC's "preemption baskets." These data provide an incomplete picture of affiliates' overall preemption practices. Obviously, the television programming day is significantly longer than the three hours of prime time. Disney's basket data should exclude preemptions made under the right-to-reject rule, although it is unclear from Disney's submission whether all such preemptions in fact are excluded. By reporting only basket data, Disney excludes all preemptions that fall outside this contractually defined concept. As Disney's submission demonstrates, the baskets are subject to exceptions (*e.g.*, a few stations have unlimited sports preemptions), limitations (*e.g.*, some stations do not have baskets), and other attributes that make them an incomplete indicator of affiliate preemption practices. Disney, like the other owners of major networks[63], uses network affiliation agreements to cut back on preemptions under the right-to-reject rule that should not count under the baskets, including: (1) preemptions for programs that are of greater local or national importance or

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[62] The NAB/NASA survey was designed to capture all types of preemptions by assessing "any instance in which your station has chosen to air content of its own choosing instead of content offered by a network." NAB/NASA Comments, at 15. It is unclear from both sets of submissions whether the networks have included all types of preemptions – non-clearance of a network series, carriage of a network series in a different time slot, so-called "one-time-only" preemptions and delays. Additionally, it is not clear from their data how the networks account for preemptions authorized by the right-to-reject rule, which should not fall under the "basket" provisions of network affiliation agreements.

[63] CBS recently amended the language of its standard affiliation agreement to bring it into compliance with the Commission's right-to-reject rule.

(2) preemptions of network programs that are unsatisfactory, unsuitable, or contrary to the public interest.

Moreover, prime-time programming is the programming least likely to be preempted. In a 1995 study filed in the Prime Time Access Rule proceeding, Economists, Inc. ("EI") demonstrated that network prime-time programs were cleared 97.7 percent of the time, while non-prime-time programs were cleared 89.7 percent of the time.[64] Thus, prime-time programs were not cleared 2.3 percent of the time while non-prime-time programs were not cleared 10.3 percent of the time, more than four times as often as prime-time programs.

The NAB/NASA survey found that affiliates averaged more than 33 hours of preemptions in 2001 (including all times of the day).[65] The Joint Network Commenters reported that affiliates preempted, on average, 9.5 hours of prime-time programming in 2001.[66] A tabulation of the data provided in Exhibit G of Disney's comments shows that ABC affiliates preempted, on average, 10.99 hours of prime-time programming in 2001.[67] The NAB/NASA survey thus reveals that the average number of total hours preempted by affiliates is more than 3.5 times the number of prime-time preemptions reported by the Joint Network Commenters and more than 3 times the number of prime-time preemptions reported by the Disney comments.

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[64] *An Economic Analysis of the Prime Time Access Rule*, (herein "EI Prime Time Access Rule Study"), MM Docket No. 94-123, at 84 (March 7, 1995).

[65] NAB/NASA Comments, at 16. Extrapolation of the only network data that was not restricted to prime time or baskets confirms NAB/NASA's findings. In Exhibit H of ABC's comments, the network presented preemption information for the first quarter of 2002 for all times of the day. This summary reported 2623 half-hours of preemptions in the three month time period. This translates to 29.64 average hours of preemption per station on an annual basis. Disney Comments, Exhibit G, 2000-2001 Preemptions. This 30-hour average is consistent with the 33 average hours of preemption in 2001 reported by the NAB/NASA survey.

[66] Joint Network Comments, at 39.

[67] See Disney Comments, Exhibit G, 2000-01/2001 Preemptions.

These differences roughly correspond to the difference that EI found in the rates of prime-time and non-prime-time preemptions. The networks' data, although incomplete, thus support the results of the NAB/NASA study.[68]

The networks' incomplete data also show that affiliates preempt more often than O&Os. According to the Joint Network Commenters, affiliate preemptions are 40 percent greater than O&O preemptions in prime time (9.5 hours versus 6.8 hours). A tabulation of the data in Exhibit G of Disney's comments shows that affiliates preempt 279 percent more network programming than O&Os in prime time (10.99 hours versus 2.9 hours), 420 percent more sports (6.76 hours versus 1.3 hours), and 316 percent more for all "basket" preemptions (17.47 hours versus 4.2 hours).[69] The following tables summarize this information:

Table 3: ABC – Preemptions, 2001

Category	Affiliates (average hours per station)	O&Os (average hours per station)	Affiliates Exceed O&Os
Prime Time	10.99	2.9	279%
Sports	6.76	1.3	420%
Total	17.47	4.2	316%

[68] There are additional problems in the information presented by EI. For example, Table G1 reports "0.0" for political preemptions when stations did, in fact, preempt prime-time programming in 2001 for political events. See*, e.g.*, NAB/NASA Comments, Attachment 2, NAB/NASA Joint Survey of Broadcast Stations Affiliated with ABC, CBS, and NBC, at 76 (October 30, 2001 preemption of *Emeril* and *Three Sisters* for a political debate). Table G1 also reports "0.0" in affiliate content-related preemptions in 2001, which was the year that stations preempted *Temptation Island* because of concerns about its content.

[69] As noted above, some affiliates have unlimited sports baskets. This causes (1) an underreporting of sports and total preemptions, and (2) a divergence in the total hours of basket preemptions as compared to the total of the hours of prime and sports preemptions.

Table 4: Joint Networks – Prime-Time Preemptions, 2001

Category	Affiliates (average hours per station)	O&Os (average hours per station)	Affiliates Exceed O&Os
Prime Time	9.5	6.8	40%

2. Prior Network Filings Confirm That Affiliate Preemptions Have Been Driven Down Over Time

Only NAB and NASA have provided the Commission with data on preemption practices over time.[70] These data demonstrate that the average hours of preemptions declined significantly during the 1990s and early 2000s, especially after the national television ownership cap was raised in 1996 from 25 percent to 35 percent. Although the networks did not present the Commission with preemption data over time, it is possible to compare their submissions with data they have previously submitted using the same economists. The Joint Network Commenters' study, prepared by EI, reported that affiliates preempted the networks for "less than one percent of prime-time programming" in 2001.[71] Assuming 22 hours per week for prime time, the affiliates preempted 0.83 percent of prime-time programming in 2001. This rate of 0.83 percent of prime-time preemptions can be compared with another study prepared by EI on behalf of ABC, CBS, and NBC that measured clearance rates for network programming in 1994 (*i.e.*, the percentage of network programming accepted and broadcast by the station). In that report, EI reported that 1994 network prime-time programming was not cleared by affiliates and O&Os 2.3 percent of the time.[72] (Although O&Os were included in this study, their inclusion

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[70] NAB/NASA Comments, at 15-16.

[71] Joint Network Comments, at 39.

[72] EI Prime Time Access Rule Study, at 84.

had the effect of reducing the overall non-clearance rate because, as shown above, O&Os preempt less often than affiliates.)

Table 5: Economists, Inc. – Prime-Time Preemptions, 1994 & 2001

Year	Preempted or Not Cleared
1994	2.3%
2001	0.83%

According to the two EI submissions, affiliate preemptions have declined on the order of 64 percent since 1994 (from at least 2.3 percent to 0.83 percent), a finding consistent with the NAB/NASA survey, which showed a decline in affiliates preemptions through the 1990s.

3. Disney's Data On Unused Preemption Baskets Reveal Increasing Network Pressure Against Preemption

Disney has presented information showing that some affiliates do not use all of the preemptions made available under their baskets. Disney's conclusion – that affiliates would not preempt more network programs even if the networks stopped pressuring them not to preempt – is incorrect, for at least three reasons. First, stations often wish to reserve a cushion of preemptions in case it is needed towards the end of a year. Because of the severe consequences of exceeding preemption baskets, an affiliate that used only a portion of its basket likely did so to ensure that it had some basket preemption time available at the end of the year for any appropriate needs. This concern is particularly acute because the networks often attempt – sometimes successfully – to count against the baskets preemptions rightfully protected by the right-to-reject rule.[73] Despite this incentive to hold some preemptions in reserve, Disney's data show that more than 20 percent of stations (39 out of 189) exceeded their preemption baskets.

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[73] See examples *infra* pp. 37-40.

Second, affiliates have shown themselves willing to support a network as it tries out new programming, even if this requires affiliates to sacrifice short-term profits in an effort to build a stronger network. An example of this loyalty was the carriage by the NBC affiliates of the lamentable XFL football league games, which West Coast affiliates could have preempted to carry their regularly scheduled local, early-evening newscasts. Instead, the affiliates supported the network as it tried to launch this programming. In their initial comments, the networks have tried to exploit this loyalty to make an advocate's point.

Third, unused preemptions demonstrate the effectiveness of network pressure not to preempt network programs. The NAB/NASA survey revealed that 68 percent of affiliates have experienced pressure by the networks to not preempt programming, and 61 percent of those have experienced an increase in pressure in recent years.

Table 6: NAB/NASA Survey –
Increased Pressure From Network Not To Preempt Programming

Experienced Pressure from Network to Not Preempt Programming	68%
Pressure Has Increased in Recent Years (Those Reporting Pressure)	61%

This pressure is applied to virtually all preemptions, regardless of whether they are permitted under the "basket" provision of the affiliation agreement. Consequently, preemptions have decreased, as shown by both the NAB/NASA survey and the networks' data discussed in the previous section.

The following examples illustrate the pressure the networks bring to bear to reduce the number of preemptions of network programming:

- WFAA-TV, the Dallas, Texas, ABC affiliate, asked the network for permission to preempt *Monday Night Football*'s half-time show on November 12, 2001 in order to cover a plane crash by American Airlines, which is based in Dallas. The network refused three different options presented by the station. In the end, WFAA-TV decided to use the limited time provided by the network for local advertising spots to present a two-minute news package at the end of the half-time show. Yet ABC permitted two O&Os to preempt the same half-time show to air news covering the same airline crash.[74] Of course, WFAA-TV's proposed preemption should have been permitted under the right-to-reject rule.

- CBS would not permit WTSP-TV, a CBS affiliate in Tampa Bay, Florida, to air a debate between gubernatorial candidates Jeb Bush and Bill McBride. The network refused to permit the affiliate to preempt the season premiere of *48 Hours*. Although WTSP-TV was a cosponsor of the debate, it was not able to air the debate because of the network's intransigence.[75] As this preemption was to provide programming that the station thought was of greater local importance, this preemption should have been permitted under the right-to-reject rule, should not have counted toward the basket, and should not have been subject to approval by CBS.[76]

- When a Raleigh, North Carolina, Fox affiliate refused to air *Who Wants to Marry A Multimillionaire?*, Fox told the station that the preemption would count against

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[74] Michele Greppi, *A(BC's) Tale of Too-different Cities*, ELECTRONIC MEDIA, Nov. 19, 2001, at 8.

[75] Wes Allison, *Local PBS Affiliate Will Air Debate*, ST. PETERSBURG TIMES, Sept. 25, 2002, at 1B.

[76] Although CBS's contract specifically states that preemptions pursuant to the right-to-reject rule are not subject to the "basket" provisions (and, legally, cannot be subject to those provisions), NASA is aware of situations where CBS has – in the first instance – attempted to claim that such preemptions will count against a station's basket.

its preemption basket.[77] The station decided not to carry the show because "we felt it was demeaning to women and made a mockery of the institution of marriage." Although this preemption was based on the station's opinion that the program was unsuitable for airing in its community, Fox counted the preemption against the station's basket.

- When WANE-TV, the CBS affiliate in Fort Wayne, Indiana, told CBS approximately a year-and-a-half ago that it wanted to preempt network programming to air a half-hour, early morning, local news program heavily geared towards the local agricultural community, CBS strongly resisted the preemption and pressured WANE-TV not to run the program as planned. After WANE-TV persisted, CBS took the position that if the affiliate nonetheless preempted, the preemption would count against the station's limited basket even though the program was of greater local importance in the station's opinion and was therefore within the right-to-reject rule. Ultimately, because WANE-TV continued to push back, CBS and WANE-TV reached a "compromise" whereby 50 percent of WANE-TV's preemptions counted against its preemption basket.
- NAB and NASA's initial comments provide additional examples: as noted above, NBC pressured affiliates to broadcast the baseball play-off instead of the first 2000 Presidential debate, Fox required affiliates to air *Dark Angel* instead of the

[77] The standard Fox affiliation contract grants Fox the right to terminate the affiliation if the affiliate "states, either in general or specific terms" or Fox "reasonably concludes" that the station will make three or more "unauthorized" preemptions in a year. Early Comments and Motion for Declaratory Ruling on Petition for Inquiry into Network Practices by NASA, at 18 (filed June 22, 2001).

same debate, CBS pressured affiliates to clear a full two hours of *The Early Show* instead of airing their successful (and higher rated) local morning news, and ABC pressured affiliates to clear *NYPD Blue* even though stations objected to the content.[78]

In short, network pressure not to preempt applies to virtually every preemption, except for breaking news stories. Whether legally protected by the right-to-reject rule or within the baskets, preemptions have decreased over the years as the networks increasingly have been able to impose their will on affiliates. The evidence that network pressure on affiliates to clear all network programming has resulted in fewer preemptions is uncontroverted by the networks. In the light of this evidence, it is quite remarkable that Disney now criticizes the affiliates' use of baskets. The assertion that affiliates do not use the preemptions to which they are entitled is inconsistent with the networks' position that the right-to-reject rule should be eliminated, their argument in comments filed in DA 01-1264 that preemptions threaten their economic viability, and their pressure on affiliates to clear all network programming.

4. The Networks' Comments Demonstrate That Affiliate Preemptions Bring A Variety Of Programming To Local Viewers

a) The networks inconsistently criticize affiliate programming choices

The Joint Network Commenters and Disney appear to accept that affiliate preemptions for news and local sports programming may serve local interests, but they otherwise denigrate the programs that affiliates choose to air in place of preempted programming.[79]

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[78] NAB/NASA Comments, at 21, 24-26.

[79] Although the networks do not criticize affiliate sports preemptions in this proceeding, they have done so elsewhere. *E.g.*, Comments on the Matter Of Petition for Inquiry into Network Practices by Viacom, Inc., at iv (filed July 23, 2001). The networks frequently pressure affiliates (continued…)

According to the Joint Network Commenters, O&Os and affiliates "preempt roughly the same amount of programming . . . for news, political and public affairs programming . . . . The major difference between O&Os and affiliates are the greater affiliate preemptions for *The Billy Graham Crusade*, other paid programming, and telethons."[80] According to Disney, many "affiliates do not clear Disney/ABC's Nightline or Disney/ABC's award-winning children's' [sic] educational and informational programming [and] *all but one of* those affiliates were airing syndicated programming during Nightline's regular time slot."[81] This criticism is inconsistent with the networks' position that the Commission should not, and legally cannot, make regulatory decisions based on the alleged quality the programming offered.[82]

In a striking inconsistency, Disney criticizes its affiliate KMBC in Kansas City, Missouri, for delaying *Nightline* in favor of *Will & Grace*, while the Joint Network Commenters commend *Will & Grace* because it "focus[es] attention on issues concerning sexual orientation

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not to preempt sports programming. The networks have refrained from criticizing sports preemptions in this proceeding. This may be because their data show greater O&O sports preemptions, Joint Network Comments, EI Study G, Preemption by O&Os Compared to Affiliates, at 3, and possibly because broadcasting local sports undeniably serves local viewers' needs.

[80] Joint Network Comments, EI Study G, Preemption by O&Os Compared to Affiliates, at 1-2.

[81] Disney Comments, at 4-5. As discussed in NAB/NASA's opening comments, the networks hardly consider children's programming sacrosanct. When weekend sports programming prevented NBC affiliates from airing regular children's programming, the affiliates sought permission to preempt other network programming in order to meet the rescheduling responsibility. NBC denied the request. NAB/NASA Comments, at 26.

[82] See*, e.g.,* Joint Network Comments, at 9 (arguing that "Commission examination of the content of programming raises troubling First Amendment issues"); *id.* at 50-51 ("[A] focus on news and public affairs programming to the exclusion of other types of programming . . . would inappropriately ignore the powerful impact that entertainment and other types of programming have on Americans' viewpoint formation.").

and [has] furthered public awareness of this important topic."[83] Indeed, several of the stations that delay Nightline do so to air *Will & Grace*.[84]

b) The networks' preemption categories demonstrate the variety of ways that affiliate preemptions serve localism

Both Disney and the Joint Network Commenters present the Commission with analyses of the "type of programming that replaced the network program" when affiliates preempt.[85] Although significantly flawed, these analyses confirm that affiliates preempt network programming for a variety of good reasons.

The EI study lumps preemptions into broad and vague categories that nonetheless serve to illustrate the public-interest benefits of preemptions. When KATU preempted *Norm* and *Two Guys and a Girl* in order to air *The Female Body: Good News About Breast Cancer*, was that a news preemption or a public affairs preemption?[86] When WDBJ preempted CBS soap operas to broadcast President Bush's dedication of a local D-Day memorial, was that a news preemption, a public affairs preemption, or a political preemption?[87] When WKMG broadcast

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[83] Disney Comments, at 5; Joint Network Comments, at 8.

[84] Disney Comments, Exhibit E, Nightline Delay Stations.

[85] Joint Network Comments, EI Study G, Preemption by O&Os Compared to Affiliates; *accord* Disney Comments, Exhibit H, ABC Preemption Summary – 1st Quarter 2002; Exhibit I, December 01 and January 02 Prime Preemption Summary and December or January 02 Sports Preemption Summary; Exhibit J, ABC Prime-Time Preemption Overview – January 01 - December 01. An examination of the type of programming that replaces network programming does not identify those instances when the preemptions were based on the unsuitability of the network program.

[86] NAB/NASA Comments, Attachment 2, NAB/NASA Joint Survey of Broadcast Stations Affiliated with ABC, CBS, and NBC, at 4. Incidentally, this program was part of a series produced by Fisher Broadcasting and aired on the 13 Fisher stations. This further shows the inappropriateness of limiting "localism" to locally produced programs, because *The Female Body: Good News About Breast Cancer* could be characterized as a syndicated program, not a local show.

[87] *Id.* at 57.

the lighting of a local Christmas tree, was that local news or religious programming?[88] When KGUN, KGW, KHBS, KVIA, KXTV, WBTV, WKMG, WGNO, WHAG, WISC, WVLT, WLNE, WSFA, WSOC, WTVF, WUSA, and WISH preempted to provide coverage of local election results, was that a news preemption, a public affairs preemption, or a political preemption?[89] When WKYT broadcast a Christmas chorus special hosted by its anchors in place of *JAG*, was that an entertainment preemption or a religious preemption?[90] And when WMTW broadcast the Patriot's Super Bowl parade instead of *General Hospital*, was that a sports, an entertainment, or a news preemption?[91] However categorized, these preemptions are examples of local affiliates serving local interests. The data provided by Disney are only marginally more detailed and suffer from their own inconsistencies. For example, Billy Graham is sometimes categorized as a telethon[92] and sometimes not.[93] Sometimes religious programming is categorized separately from paid programming[94] and sometimes it is not.[95]

Notwithstanding the flaws in the network data, they demonstrate the breadth of reasons why affiliates preempt network programming. The networks' studies show that affiliates preempt to provide movies, sports, entertainment programming, religious programming, charity

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[88] *Id.* at 54.

[89] *Id.* at 10, 11, 12, 42, 45, 52, 54, 63, 68, 72, 75, 91, 93, 97, 99, 104.

[90] *Id.* at 73.

[91] *Id.* at 79.

[92] Disney Comments, Exhibit I, December 01 and January 02 Prime Preemption Summary and December or January 02 Sports Preemption Summary.

[93] Disney Comments, Exhibit J, ABC Prime-Time Preemption Overview – January 01 - December 01.

[94] *Id.*

[95] Disney Comments, Exhibit I, December 01 and January 02 Prime Preemption Summary and December or January 02 Sports Preemption Summary.

fundraisers, and coverage of local events – the types of programs that the networks say the Commission should treat as equally important as preemptions for news and public affairs programming when making policy determinations. To the extent that the networks believe that this breadth of preemptions reflects negatively on the affiliates, they misunderstand localism.[96]

c) Other network criticisms of affiliate preemption practices are not well-founded

The Joint Network Commenters criticize all affiliate preemptions except those for local news and sports. (In other proceedings, the networks have criticized local sports preemptions, and they have pressured affiliates not to preempt for sports programming.)[97] The networks' preemption study reveals that O&Os accede to the wishes of the network – fully 90 percent of all O&O preemptions are for local news and sports (6.1 average hours out of 6.8 total average hours).[98] If networks were permitted to own more stations, this pattern of limited preemptions would become even more widespread.

Disney's comments criticize affiliates that delay the broadcast of *Nightline* – a criticism that it made in DA 01-1264. In reply comments filed August 22, 2001, in that docket,

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[96] NAB/NASA emphatically reject what appears to be the networks' implied criticism of preemptions for telethons. The affiliates are exceptionally proud of their efforts to raising money for those in need.

[97] In DA 01-1264, the networks have been quite candid in stating that local affiliates should not have an unfettered ability to reject national network programming in favor of programming even when it is of greater local interest. For example, CBS has argued that although "sports events are often of great interest to television viewers," "once a station has made the economic decision to be a network affiliate," its right to preempt for local sports should not be protected "simply because a sports event . . . is characterized as 'local.'" Comments on the Matter of Petition for Inquiry into Network Practices by Viacom Inc., at iv (filed July 23, 2001) Of course, under the right-to-reject rule, licensees may clearly adjudge them to be of greater local or national importance.

[98] Joint Network Comments, EI Study G, Preemption by O&Os Compared to Affiliates, at 3.

NASA responded to that criticism.[99] The fact is that the networks have been more lenient about preemptions outside of prime time, and ABC airs *Nightline* after affiliates' late-evening, local newscasts. ABC was the last of the three major networks to invade the hours after prime time. It reached accommodations with various affiliates to honor long-term contracts to carry other programming in the *Nightline* time slot and, in most instances, to delay *Nightline*. Now it seeks to score points on the basis of these agreed-to accommodations. Moreover, the great majority of the stations that delay *Nightline* are in the Central and Mountain time zones, and they move it to a time slot that is not any later than it appears regularly on the East and West Coasts.

Disney also criticizes stations that modify ABC's children's programming line-up. Yet it is unclear why Disney believes that its judgment about the appropriate time to air a program is necessarily better than an affiliate's. For example, under Disney's view a local station could not delay weekend children's programming to air it after the morning game times of a popular local soccer league. Disney's data also do not describe other programs in the affiliates' broadcast schedules that would accommodate particular local needs. An affiliate that preempted the network's children's programming might offer its own, locally produced or syndicated, children's programming to ensure that its overall program offerings include a sufficient amount of core children's programming to meet local needs.[100]

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[99] Reply to Network Comments on Petition for Inquiry into Network Practices by NASA, Appendix 1 (filed Aug. 22, 2001).

[100] See *supra* note 81 (NBC's weekend sports programming prevented its affiliates from airing regular children's programming; affiliates sought permission to preempt other network programming in order to meet the rescheduling responsibility; NBC denied the request). NASA Reply to Network Comments, DA 01-1264, at Appendix 1 (Aug. 22, 2001) (WPLG-TV preempted ABC's *Doug* in order to air locally produced children's programming created in conjunction with the Dade County public school system)

In short, the networks' criticisms of affiliate preemption practices plainly reveal their insistence on "in-pattern" clearance[101] of all their programs, regardless of what will best benefit the local community, that is, regardless of the interests of localism.

F. The Evidence Indicates That Affiliates Surpass O&Os In The Quality Of Local News And Public Affairs Programming

It is important to place the evidence concerning the quality and quantity of local news and public affairs programming in their proper perspective. The networks appear to agree with NAB and NASA that the Commission should not be concerned only with local news but rather with programming of all kinds. Local news and public affairs programming is an aspect of localism, but there are other aspects as well. NAB and NASA are not contending that O&Os do a poor job of presenting local news and public affairs programming. Instead, their basic point is that the 35 percent cap should be retained because networks have strong incentives to air uniform programming, even if alternative programming better suits a particular local community. In most cases, NAB and NASA would not expect this interest to drive O&Os to replace local news with network programming. Nevertheless, to the extent that local news broadcasting is relevant to promoting localism, the record strongly suggests that the quality of local news and public affairs programs aired by independent affiliates exceeds that of O&Os.

1. Affiliates Outperform O&Os In Quality Of Local News As Measured By Dupont and Peabody Awards

NAB and NASA have already demonstrated that affiliates outperform O&Os in winning Dupont Silver Baton Awards, a measure chosen by the Commission as representative of

[101] "In-pattern" clearance refers to the airing of programs offered by the networks according to the precise schedule established by the networks (*e.g.,* without delays).

program quality.[102] For the purposes of these reply comments, NAB and NASA also reviewed Peabody Awards since 1991. Peabody Awards, like Dupont Awards, are highly prestigious.[103] The Commission should note the remarkable achievements of smaller independent affiliates, such as KSBW-TV in Salinas, California, WANE-TV in Ft. Wayne, Indiana, and KGAN-TV in Cedar Rapids, Iowa, that won Peabody Awards. But just as with the Dupont Awards, these smaller winners are the exception. Since 1991, 51 percent of Peabody Awards to television broadcast stations have gone to stations in the top 10 markets.[104] As with Dupont Awards, O&Os have significantly *under-performed* independently owned stations in the top 10 markets. Indeed, performance of O&Os as measured by Peabody Awards is even worse than when measured by Dupont Awards.

Table 7: Peabody Awards - Top 10 Markets[105]

	Percentage of Network Stations	Percentage of Awards to Network Stations
O&Os	70 %	36 %
Affiliates	30 %	64 %

[102] See NAB/NASA Comments, at 47.

[103] "Today the George Foster Peabody Awards are often cited as the most prestigious awards in electronic media." See The Peabody Awards *at* http://www.peabody.uga.edu/about/ (last visited Jan. 30, 2003).

[104] Attachment 2 lists Peabody Awards to broadcast stations from 1991 to 2001.

[105] This table includes only ABC, CBS, NBC, and Fox affiliate and O&Os, excluding awards to PBS stations. If, however, one includes the PBS stations, the O&Os perform even worse. They won only 14 percent of all the Peabody Awards to stations in the top 10 markets, even though O&Os account for over 50 percent of those broadcast stations.

Table 8: Dupont Awards - Top 10 Markets[106]

	Percentage of Network Stations	Percentage of Awards to Network Stations
O&O	70 %	54 %
Affiliates	30 %	46 %

The networks and EI attempt to dismiss the Dupont Awards by speculating that "awards made in the past years of the last decade may not be representative of current practices."[107] This is unpersuasive, for several reasons. First, the networks have failed to identify any change in O&O or affiliate practices that would render past awards irrelevant. Second, the data do not show that O&Os have won more awards in very recent years, thus indicating that awards over the last ten years *are* indicative of current practices. It was therefore appropriate for the Commission's Working Group to select a ten-year time period for analyzing local news and public affairs awards – and selecting a shorter time period would not change the results.

The networks also argue that because Dupont Awards are more selective than RTNDA Awards, they are a less reliable measure of news quality. According to the networks, "[b]ecause a larger number of RTNDA awards are given out each year, they likely offer a better measure of news quality than the Dupont-Columbia awards."[108] No doubt, the networks would

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[106] Reproduced from our prior comments. See NAB/NASA Early Submission, at 10.

[107] See Response of Fox, NBC/Telemundo, and Viacom to Early Submission of NAB and NASA, Appendix 1, at 5. (filed Dec. 19, 2002) (herein "Joint Network Response").

[108] Joint Network Response, at 5.

make the same argument as to Peabody Awards, which also are highly selective.[109] These arguments are unpersuasive. The O&Os do not dismiss the Dupont and Peabody Awards when they win one. By the networks' logic, Pulitzer and Nobel prizes are poor indicators of quality because these highly selective honors are awarded to only a few winners. In the end, the best argument the networks can make – that affiliates win only *slightly* more RTNDA Awards – is no argument at all.

2. Holding Constant Market Size And The Type Of Broadcasting Station, There Is No Difference Between The Hours Of Local News Aired By O&Os And Affiliates Of NBC, CBS, ABC, Or Fox

The networks do not dispute that, as between affiliates and O&Os of ABC, CBS, and NBC, there is *no* significant difference in hours of local news programming. The only point of controversy is whether to include Fox stations in the analysis of hours of news programming. The fact is that Fox is different from the other major networks. Fox is a new network, with newly acquired self-selected stations, and the difference in hours of news programming among Fox stations is pronounced.[110] The figure below (reproduced from our Early Submission)[111] led to the conclusion that it was appropriate to exclude the Fox stations.

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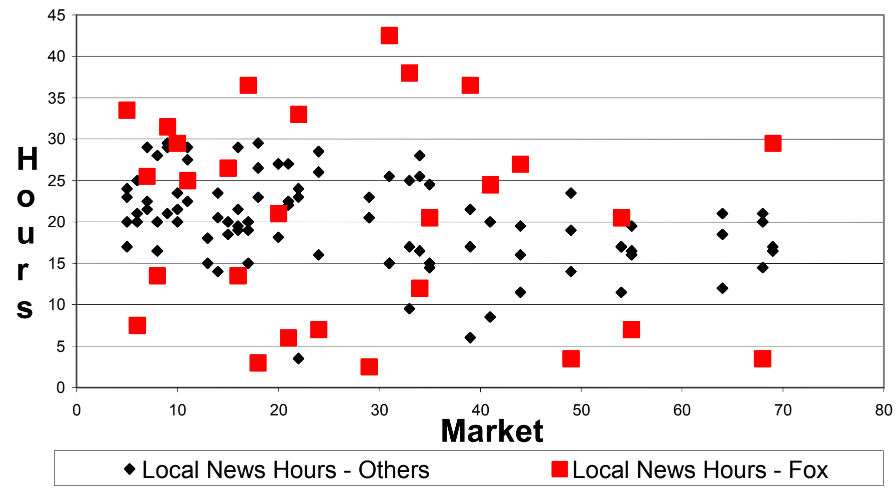
[109] In 2000 and 2002, there were over 150 RTNDA Awards given to 62 broadcast stations. In contrast, the Working Group Study listed only 40 Silver Baton Dupont Awards since 1991, and only 55 Peabody Awards were granted to broadcasting stations during the same period.

[110] The networks seem to dispute the accuracy of the statement that "Fox has acquired many of its stations only recently." Joint Network Response, at 4, n.13. They assert such a statement is "simply false" and has "absolutely no basis in fact," while simultaneously acknowledging Fox has acquired 11 of its 35 full-powered television stations (or 31.4%) in 2001 or 2002.

[111] See NAB/NASA Early Submission, at 5.

Figure 1: ABC, NBC, CBS, and Fox Stations (Hours of Local News)



In response, EI dismisses as "absurd" two decades of economics regarding the "many problems in which the data we have are generated by individuals making choices of belonging to one group or another (*i.e.*, by individual self-selection)."[112] A simple hypothetical reveals the extent of the possible "self-selection" problem created by including Fox. Suppose there are four stations in four different markets; Stations A and B air 20 hours a week of local news programming, whereas Stations C and D air only five hours. An emerging national network decides to purchase Stations A and B, enter into affiliation agreements with Stations C and D, and encourage all stations to air five more hours of local news. The O&Os would increase local news programming to 25 hours, and the affiliates to 10 hours. The network-owned stations would air 2.5 times as much local news as the affiliates. But this is not because the

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[112] G.S. Maddala, *Limited-Dependant and Qualitative Variables in Econometrics*, Cambridge Univ. Press, 1983, p. 257-90.

stations are O&Os. Rather, the correlation flows from self-selection because the new network made the choice of which stations to own.

EI offers no credible reason to ignore the self-selection problem. Instead, EI asserts that it does not take long to replace local news programming with syndicated programming. EI also asserts that Fox's acquisition of stations with strong local news departments is consistent with a preference by Fox for O&Os with strong local news programming. But as the hypothetical above reveals, neither reason justifies ignoring self-selection, let alone labeling the issue "absurd." The fact that the networks have control (once they purchase a station) over the amount of local news aired by the new O&O does not solve the self-selection problem. And the fact that Fox may acquire stations that already have a strong local news presence tells us nothing about whether the Fox-owned station would then increase, hold constant, or reduce the amount of broadcasting directed towards the local community. Ignoring the self-selection problem may bias the results, creating the false impression that independent affiliate stations would air more local news if owned by Fox.

Furthermore, examination of the Fox stations reveals an extraordinary difference between the hours of local news aired by O&Os versus affiliates. As Table 9 shows, if one holds constant only the size of the market, Fox O&Os air significantly more news than Fox affiliates.

Table 9: Fox Local News – Market Rank Constant

(Total Hours of Local News)

	Coefficients	*Standard Error*	*t Stat*	*P-value*
Intercept	12.86	6.02	2.14	0.04
Mkt rank	0.01	0.13	0.05	0.96
O&O	12.16	4.95	2.46	0.02

Dependent Variable: "Local News Hours" – Fox only

This difference is so large – more than 12 hours of local news per week – that when the Fox stations are grouped with the other networks, the Fox stations alone create the false appearance that all O&Os air more local news than affiliates.

In fact, there are several compelling reasons why Fox affiliates carry less local news than Fox O&Os. Because Fox is by far the newest of the four major networks, its affiliates have many more competitive disadvantages than do the ABC, CBS, or NBC affiliate bodies or the Fox O&Os. The Fox affiliates have far more than their share of facilities and siting handicaps compared to the Fox O&Os or to independent affiliates of the other networks. For example, the Fox affiliate in the San Diego market operates on a Mexican frequency, and its transmitter is located on the Mexican side of the border, 25 miles from the tower sites for the ABC, CBS, and NBC affiliates in San Diego. In Charlotte, the UHF Fox affiliate has a fraction of the power and only about 60 percent of the height of the UHF NBC affiliate. Accordingly, its coverage is far inferior. Fox affiliates have substantially inferior facilities or sites or both in Tucson, Albany, Cape Girardeau, and Wichita, among others.

Moreover, Fox's affiliates includes various LPTVs – in Youngstown (market 100), Santa Barbara (market 119), Corpus Christi (market 128), Bakersfield (market 130), Topeka (market 138), Columbia-Jefferson City (market 139), Palm Springs (market 161), Alexandria (market 179), Lima (market 194), Bend (market 201), Juneau (market 206), and North Platte (market 209).

But the single largest discrepancy between Fox O&Os and independent Fox affiliates is the proportion of VHF to UHF stations. As shown below, compared to the Fox O&Os and the affiliates of the three other major networks, Fox affiliates are disproportionately UHF stations.

Table 10: Percentage Of VHF Stations By Network[113]

	O&Os	Affiliates
ABC	90.0%	64.6%
CBS	88.2%	81.3%
NBC	78.6%	72.2%
Fox	72.0%	17.7%

As the Commission is aware, VHF stations have a broader geographic reach and a stronger, more consistent broadcasting signal than UHF stations. (It is this disadvantage that underlies the "UHF discount" under the 35 percent cap.) VHF stations with stronger and more consistent broadcasting signals will reach a larger audience, earn more advertising revenues, and have more resources available to enhance their facilities and build a local news presence in their local community. It is entirely understandable, therefore, that VHF stations would air more local news, while UHF stations would air less news, regardless of who owns them.[114]

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[113] See Attachment 3 for a list of all network stations, by market rank, showing affiliation, owner, and whether the station is UHF or VHF.

[114] Two recent examples of CBS-owned UHF stations dropping local news illustrate how difficult it is for many UHF stations to cultivate strong local news programming. In November 2002, the CBS-owned WWJ-TV (channel 62) station in Detroit abandoned its lone half-hour of local news in favor of *Everybody Loves Raymond* reruns. See "*Dennis Swanson: One to watch because: Rising to the challenge is de rigueur for him; his latest charge is to revitalize CBS's struggling owned-and-operated stations group*," ELECTRONIC MEDIA, *available at* 2003 WL 9140204 (Jan. 20, 2003). At the same time, the CBS-owned KEYE station (channel 42) in Austin replaced its weekday noon news broadcast with the game show *Hollywood Squares*. See "*KEYE is saying goodbye to its noon newscast*," Austin American-Statesman, *available at* 2002 WL 101146401 (Nov. 30, 2002). CBS's experience with its KEYE station also shows how hard it is to create a news presence where none previously existed. As reported in the press: "The CBS-owned Austin station has been struggling with news ratings since KEYE switched network affiliations from Fox to CBS in 1995. Before then, the station had no local newscasts." *Id.*

As Figure 2 clearly shows, the variation of hours of news programming by Fox O&Os and affiliates seen in the Commission's Working Group dataset is due to the type of broadcasting station, VHF or UHF, not to whether the station is owned by Fox.

Figure 2: Fox Stations (Hours of Local News)

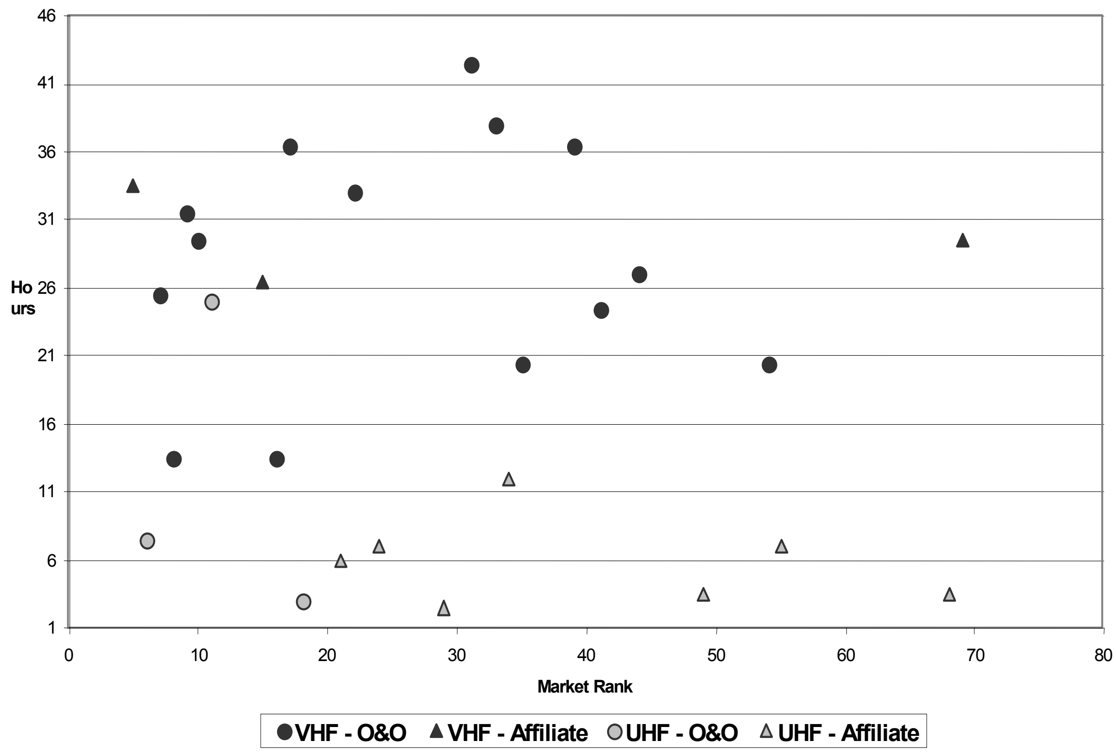

Table 11 reveals that Fox VHF stations air almost 20 hours a week more local news than Fox UHF stations.[115] Once one holds constant the station type, the difference between the hours of local news aired by Fox O&Os and affiliates disappears.[116]

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[115] NBC, CBS, and ABC stations that broadcast a weaker UHF signal similarly air less news than VHF stations (regardless if the station is an O&O or affiliate). However, the difference between VHF and UHF stations is not nearly as pronounced as with Fox stations. On average, NBC, CBS, and ABC VHF stations air roughly 5.6 hours more local news than UHF stations. There remains no significant difference between NBC, CBS, and ABC O&Os and affiliates.

[116] EI submitted its own analysis of the hours of local news aired by network stations, which purports to support the finding of the Commission's Working Group. The Working Group (continued…)

Table 11: Fox Local News – VHF Stations

(Total Hours of Local News)

	Coefficients	*Standard Error*	*t Stat*	*P-value*
Intercept	8.18	4.22	1.94	0.07
Mkt rank	-0.03	0.09	-0.31	0.76
VHF Station	19.83	3.74	5.30	0.00
O&Os	1.33	3.96	0.34	0.74

Dependent Variable: "Local News Hours" – Fox only

G. The Networks' Discussion Of Competition Ignores National Advertising Competition And Their Analysis Of Programming Markets Is Unpersuasive

The NPRM identified two markets in which the national TV ownership rule may further competition: in the national and regional advertising and programming production markets.[117] NAB and NASA's initial comments discuss both issues and also identify a third way in which the national TV ownership rule furthers competition: promoting the emergence of strong, new networks. As to advertising, the comments explain that the availability of national spot advertising as a constraint on network advertising depends on an adequate base of strong, independently owned television stations, which would disappear with even modest increases in network ownership.[118] As to program production, the comments demonstrate that independent affiliates provide a check on the networks' tendency to prefer their own programming.[119] Finally, as to the emergence of new networks, the comments describe how independent affiliates

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placed the data it used in the public domain, permitting NASA and NAB to duplicate and review (and find several significant flaws in) the analysis. In unexplained contrast, EI chose not to place its underlying data in the public record. As a result, NASA and NAB could not undertake any analysis to see if EI's conclusions are similarly flawed (and neither can the Commission).

[117] *NPRM* ¶¶ 144, 140.

[118] NAB/NASA Comments, at 59-63.

[119] NAB/NASA Comments, at 63-64.

differ from O&Os with respect to their willingness to compete with the network for advertising sales, challenge network top management over network programming, and affiliate with a rival network. These differences, the comments show, impose a competitive constraint on the networks by preserving a degree of station mobility that permits the creation of new networks or the emergence of stronger networks from the ranks of current fledgling networks.[120]

The Joint Network Commenters do not address whether the national television ownership rule furthers competition in the national advertising market, a conspicuous omission given that the D.C. Circuit's opinion in *Fox Television* specifically mentioned it as a plausible rationale for retaining the rule[121] and the Commission inquired about it in the NPRM.[122] The Joint Network Commenters also do not address whether the rule furthers the emergence of strong new networks. Their comments on competition are limited to the program production market, and even these limited comments are unpersuasive.

First, the Joint Network Commenters do not refute the basic point (noted in the Commission's Media Ownership Working Group Studies) that networks will be inclined to air the programs they own and to keep those programs on the air longer.[123] Second, their assertion regarding concentration in a "video entertainment programming" market is unsound. The networks rely on an EI study to assert that the purchase of video entertainment programming at

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[120] NAB/NASA Comments, at 57-59.

[121] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-1049, *reh'g granted* 293 F.3d 537 (D. C. Cir. 2002).

[122] *NPRM* ¶ 128.

[123] See Mara Einstein, *The Program Selection Process*, Media Ownership Working Group Study at 24 (2002). See also NAB/NASA Comments, at 32-36 (discussing increased network ownership and control of program producers and the tendency of networks to favor their own programs).

the national level is no more than moderately concentrated. But that study recognizes that if the analysis is limited to television broadcasting networks, generously including WB, Pax, and UPN as competing for the same kind of programming as is developed for the big four networks, the programming market is *highly* concentrated. As is shown by EI in Study E, Table E2, the four major networks account for over 87 percent of programming expenditures by broadcasting networks. The concentration index (HHI) is over 2100, revealing a "highly concentrated" industry under the Merger Guidelines. Finally, the Joint Network Commenters neglect the important point that the major broadcast networks do not compete with the cable networks for mass-audience, prime-time programs; the only avenue of distribution for such programs is the television broadcast networks.[124]

II. THE NETWORKS IGNORE THE RATIONALE FOR THE DUAL NETWORK RULE AND FAIL TO EXPLAIN HOW A MERGER OF TWO MAJOR BROADCASTING NETWORKS WOULD BENEFIT VIEWERS

The NPRM requested comments on whether the dual network rule continues to serve the interests of competition, diversity, and localism. NASA responded that the rule continues to serve all three. (NAB took no position on whether the Commission should retain the current version of the dual network rule.) First, NASA pointed out that the mobility barriers that prompted adoption of the rule still exist. Obtaining sufficient affiliated stations remains a major obstacle to developing a new broadcast network, and networks retain strong market power despite the emergence of new media.[125] As to the specific interests the rule serves, NASA

[124] See NAB/NASA Comments, at 74-75.

[125] The stark difference between Fox stations and stations of the more established major networks illustrates the major obstacle for a new network is finding strong broadcasting stations in the major markets. As an emerging network, Fox used many weaker UHF stations to put together its national network. As indicated *infra* p. 53 and in Attachment 3, more than (continued…)

explained that the rule preserves (1) competition by preventing further consolidation among the big four networks and (2) diversity by preventing further narrowing of the network "funnel" through which national television broadcast programming must pass now that massive industry vertical integration has occurred. The rule continues to benefit localism, NASA reasoned, by preventing network mergers that would increase the networks' economic leverage over affiliates. Finally, NASA explained that the reasons supporting modification of the rule to allow the then-struggling UPN to merge with CBS do not support allowing the merger of two major networks that are already very large, vertically integrated, and financially successful.

The Joint Network Commenters acknowledge that the rationale behind the dual network rule is to lower entry barriers and to limit the market power of a particular network.[126] Having identified the rationale for the rule, they largely ignore it. At no place in their comments do the Joint Network Commenters discuss whether market conditions have changed to the point that the difficulty in obtaining enough strong broadcasting stations as affiliates no longer hampers the emergence of new major networks. Yet, less than two and a half years ago Viacom admitted that UPN's inability to enter into relationships with key stations hurt its ability to compete with the bigger networks.[127] NASA is unaware of any evidence that conditions have changed.

The networks are similarly reticent about their continued market power. NASA's comments point to the big four networks' continuing ability to deliver mass audiences,

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80 percent of Fox affiliates are UHF stations, in contrast to the other major networks, whose affiliates are all mostly stronger VHF stations.

[126] Joint Network Comments, at 44.

[127] See Comments on the *Dual Network Notice* by Viacom, Inc., at 22 (filed Sept. 1, 2000), quoted in NAB/NASA's opening comments in this proceeding at p. 73, n.159.

significantly greater than any cable network's, and continuing ability to charge healthy advertising rates as evidence that the networks still have, by far, the largest concentration of viewers and television economic power.[128] The Joint Network Commenters, by contrast, note only that their audience shares have eroded with the growing number of national video providers, an assertion that does not begin to convey the full picture.[129]

The primary justification the Joint Network Commenters offer for repeal of the dual network rule is that it would foster innovation. They argue that common ownership of different media outlets creates a powerful economic incentive to differentiate between outlets by offering programming that appeals to different audiences and thereby benefits consumers.[130] They suggest that Viacom's experience with UPN provides strong support for this view because Viacom has denied any intention of turning UPN into a "CBS2," choosing instead to target different demographics.[131]

There are several obvious difficulties with this argument. Chief among them is that the Viacom/UPN example cannot be extrapolated to a situation in which a *network takes over another with which it directly competes*. According to Viacom, CBS and UPN have never competed head-to-head. In the prior dual network proceeding, Viacom stated that "UPN's audience is drawn predominantly from the demographic stratum of young, urban views, [and] it competes most directly with WB, to a lesser extent Fox, and with [certain] national cable networks, . . . [whereas CBS] competes directly with the broad-based, traditional networks

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[128] NAB/NASA Comments, at 74-75.

[129] Joint Network Comments, at 45.

[130] Joint Network Comments, at 47.

[131] Joint Network Comments, at 46.

operated by NBC and ABC."[132] Given these circumstances, there was no significant danger that Viacom's purchase of UPN would reduce diversity or competition.

With the major networks, it is an entirely different story. They compete head-to-head with numerous shows, such as the morning and evening news shows, prime-time entertainment, and national sports. If Viacom were to take over NBC, for example, its incentives would be different from what they were in the case of UPN. In no case would it make economic sense for Viacom to continue to fund two directly competing programs, such as *CBS Evening News* and *NBC Evening News* or *The Tonight Show with Jay Leno* and *Late Show with David Letterman.* One likely scenario might be that Viacom would conclude that the cost-savings of the merger include consolidation. Another might be to use NBC as a vehicle to target a different audience. In either case, the original market would become less competitive, and the public would lose out, for the less competitive market would result in lower output, fewer choices, and less technological progress – *e.g.*, more commercials, less news, fewer cameras, and worse jokes.

Two other points deserve a response. The first is the repeated suggestion by the Joint Network Commenters that broadcasters compete on more or less equal terms with all other media. Indeed, they sum up their dual-network-rule argument by asserting that, with the growth of newspapers, magazines, radio, and Internet sites, "it is hard to imagine a market in less need of protection . . . of competition."[133] This statement is in obvious tension with Viacom's position with respect to the UPN merger, referenced above, that a major network does not really compete with smaller television networks. Under the approach set out in the Merger Guidelines, frequently touted by the Joint Network Commenters as being sufficient for regulation of

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[132] Comments on the *Dual Network Notice* by Viacom, Inc., at 22 (filed Sept. 1, 2000).
[133] Joint Network Comments, at 48-49.

television ownership, the fact that Viacom does not compete with a smaller network *a fortiori* precludes considering the Internet as being part of the relevant market.

The second point pertains to the networks' assertion that the Justice Department's enforcement of the Merger Guidelines would adequately protect the public interest if the dual network rule were repealed.[134] But the fact that the Justice Department, with its exclusive focus on competition, would object does not provide a basis for the Commission to jettison the dual network rule, which promotes diversity and localism, as well as competition. In the Communications Act, Congress charged the Commission, not the Justice Department, to carry out a broader public interest mandate. Until Congress changes that mandate, the Commission may not abdicate its responsibilities to the Justice Department.

III. THE NETWORKS' ANALYSIS OF THE LEGAL STANDARD IS DEFECTIVE

The NPRM requested comments on whether section 202(h) of the Telecommunications Act of 1996 ("1996 Act") requires the Commission to repeal a rule unless it is found indispensable or whether, as the Commission argued before the D.C. Circuit in its rehearing petition in *Fox Television*, section 202(h) permits the Commission to retain a rule if the Commission would be justified under the current circumstances in adopting it in the first instance.[135] The opening comments of NAB and NASA provided a detailed and comprehensive

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[134] As previously noted, the concentration index (HHI) revealed a highly concentrated industry. See *infra* pp. 57. A merger by the third and fourth largest owners (NBC and Fox respectively) would increase the concentration index by over 500 points, and leave a single company with 35 percent of programming expenditures by broadcast networks. A merger of any of the big three networks would be far worse, leaving a dominant broadcasting network with 50 percent of programming expenditures.

[135] *NPRM* ¶ 18.

analysis of the provision.[136] The NAB/NASA comments conclude that the structure of section 202(h), the settled meaning of the same and similar phrases in other portions of the Communications Act, the Conference Report for the 1996 Act, and common sense all converge to support the latter interpretation.[137]

The Joint Network Commenters attached as an exhibit to their comments a document entitled "Statutory Analysis: Legal Standards Governing The FCC's Mass Media Biennial Review Proceedings." They contend this document demonstrates that "proper application of time-honored principles of statutory construction" leads "inescapably" to the conclusion that the word "necessary" in section 202(h) means "required" or "indispensable."[138] Accordingly, they invite the Commission to jettison its considered interpretation of section 202(h) in favor of a view that media ownership regulations may be retained only if they are required or indispensable to serve the public interest.

The Commission should reject the networks' arguments. First, their ordinary-meaning argument misses the mark because (among other defects) it fails to address the obvious and crucial point that the word "necessary" appears in section 202(h) as part of the phrase "necessary in the public interest." That phrase has a settled meaning in the Communications Act and is peculiar to statutory law (as opposed to spoken language). Second, the section of the networks' exhibit purporting to examine the meaning of identical language in other provisions of the same act is untenably myopic. By intentionally inserting the 1996 Act into the Communications Act, Congress made clear that the 1996 Act's provisions are to be construed

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[136] NAB/NASA Comments, at 80-88.

[137] *Id.*

[138] Joint Network Comments, at 5.

with reference to the existing statutory framework. The networks' attempt to harmonize their proposed reading of section 202(h) with judicial interpretations of identical and similar language in other parts of the Communications Act is confined to a single sentence in a single footnote.

The networks' remaining contentions, premised on the presumption against surplusage and the purpose of the 1996 Act, are similarly insubstantial, and their recurrent assertion that section 202(h) establishes a "rigorous deregulatory presumption" is mistaken. None of the Joint Network Commenters' arguments undermine those advanced in NAB and NASA's opening comments. None justify the Commission changing course.

A. The Networks' Ordinary-Meaning Argument Ignores That Section 202(h) Employs A Phrase That Has Settled Meaning Within The Communications Act And Is Peculiar To Statutory Law

Appealing to the familiar principle that legislatures generally intend words in a statute to be given their ordinary meaning, the networks contend that the Commission should treat section 202(h)'s term "necessary" as a synonym for "required" or "indispensable."[139] The networks overlook several key points that make it unreasonable to conclude that Congress intended section 202(h)'s "necessary" to have this meaning. Congress certainly, and quite reasonably, intended "necessary" to be read as part of a phrase that *Congress ordinarily uses* as a guidepost for agency decisionmakers, and that is already familiar to the Commission and the courts. As the Commission recognized in its rehearing petition, the word "necessary" appears in section 202(h) as part of the phrase "necessary in the public interest."[140] That phrase has settled

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[139] Joint Network Comments, Exhibit 1 (A Statutory Analysis: Legal Standard Governing The FCC's Mass Media Biennial Review Proceeding) (herein "Joint Network Commenters' Statutory Analysis"), at 11.

[140] Commission's Petition for Rehearing in *Fox Television Stations Inc. v. FCC*, 280 F.3d 1027 (D.C. Circuit 2002)

meaning in the Communications Act.[141] Section 201(b)'s general grant of rulemaking authority, for example, uses the identical phrase and employs it in the manner the Commission argued that section 202(h) does before the Court of Appeals.[142]

The repetition of the same language within the same act (more on this point later) ordinarily is proof enough that the two provisions should be construed in the same way.[143] In this case, at least three other considerations – all unaddressed by the networks – confirm the correctness of that inference. The first is grammatical. In common, as opposed to legal, usage the word "necessary" typically is followed by the preposition "to" or "for," as in "fresh vegetables are necessary to good nutrition" or "oxygen is necessary for human life."[144] General dictionaries do not list the preposition "in" as a typical partner for "necessary." Indisputably, 202(h)'s command to "determine whether [certain] rules are necessary in the public interest as a result of competition" strikes the ordinary speaker's ear as odd.

In marked contrast, federal statutes commonly employ the phrase "necessary in the public interest."[145] The frequent use of the phrase puts to rest any suggestion that section 202(h) was the product of a scrivener's error. It also suggests that Congress uses the phrase as a term of art whose specialized definition plausibly might not be listed in a nontechnical dictionary. A final consideration unexplained or refuted by the networks is the Conference Report for the 1996 Act. As discussed in NAB and NASA's opening comments, portions of the

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141 See NAB/NASA Comments, at 84.

142 See 47 U.S.C. § 201(b) (providing the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act").

143 See *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

144 Webster's II New College Dictionary 731 (2001).

145 A Westlaw search discloses that the term "necessary in the public interest" appears in 73 provisions of the U.S. Code.

Report corroborate that section 202(h) employs “necessary in the public interest” as a synonym for “meaningful” or “in the public interest.”[146] Nothing put forward by the Joint Network Commenters should convince the Commission otherwise.

B. The Networks Overlook That Section 202(h) Is Part Of The Communications Act And Thus Misapply The Same-Act/Same-Meaning Principle Of Interpretation

The networks’ statutory analysis invokes the principle of giving identical words used in different parts of the same act the same meaning. The networks argue that *AT&T v. Iowa Utility Board* and *GTE Service Corp. v. FCC,* which deal with sections 251(d)(2) and 251(c)(6) of the 1996 Act – two sections that use the term “necessary” in a grammatically conventional way and not as part of the phrase “necessary in the public interest” – support the view that section 202(h) requires the Commission to repeal any rule not found indispensable.[147] NAB and NASA’s opening comments also draw on the same-act/same-meaning principle, but apply it differently. As noted in the preceding section, NAB and NASA submit that the most relevant comparison is between section 202(h) and judicial interpretations of section 201(b) and section 154(i) of the Communications Act – sections that employ the same or similar phrases as section 202(h) and use the same pairing of “necessary” with the preposition “in.”

The Joint Network Commenters argue that the Commission cannot compare 202(h) with provisions of the Communications Act because the 1996 Act was promulgated 60 years after the Communications Act. Presumably, the networks are of the view that the temporal separation between the enactments prevents them from being considered part of the same act. If that indeed is the networks’ unstated rationale, they have again missed a key point. Congress

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[146] See NAB/NASA Comments, at 86-87.

[147] Joint Network Commenters’ Statutory Analysis, at 13.

intentionally inserted the 1996 Act into the Communications Act.[148] That means that the 1996 Act is part of the Communications Act. It follows that Congress intended the 1996 Act's provisions to be construed in light of the existing statutory framework.

Tellingly, the networks consign to a footnote their one-sentence attempt to distinguish their reading of section 202(h) from the relevant Communication Act decisions (decisions of which the Networks have been aware for at least eight months, because the Commission, as well as NAB and NASA, cited them in their *Fox Television* petitions for rehearing). The footnote argues that court decisions interpreting the word "necessary" akin to the Necessary and Proper Clause should be discounted because the context is a grant of Commission authority, rather than a provision aimed at decreasing regulation.[149] If this distinction had mattered to Congress, it would have been easy for it to use different language in section 202(h). Given the language actually enacted, it would be nothing short of astonishing for the Commission to conclude that identical language in sections 201(b) and 202(h) imposes different standards.

C. The Networks' Arguments Premised On The Presumption Against Superfluity And The Purpose Of The 1996 Act Are Insubstantial And Their Assertion That Section 202(h) Imposes A "Rigorous Deregulatory Presumption" Is Mistaken

The networks advance several other arguments in support of their position; none require extended response. In Part II.C. of their statutory analysis, the networks contend that construing section 202(h) to impose the same public-interest standard as that for adopting a rule in the first instance contravenes the principle against interpretations that render statutory

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[148] See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 (1999).

[149] Joint Network Commenters' Statutory Analysis, at 13, n. 61.

provisions inoperative because well-established principles of administrative law already oblige the Commission to reconsider and adjust its rules in light of new developments.[150] They suggest that the Commission can most logically address this "problem" by interpreting section 202(h) as requiring more than mere consistency with the public interest. This entire line of argument verges on nonsense. The interpretative principle invoked by the networks comes into play when one construction of a *statutory provision* would render *another statutory provision* inoperative, superfluous, void, or insignificant,[151] not when Congress codifies background principles of law, which Congress of course is free to do. In any event, Congress did more in section 202(h) than codify the Commission's general duty to monitor its regulations. Section 202(h) imposes a specific time schedule and factfinding requirements on the Commission.

The networks further argue that it would be "illogical, in the extreme," for the Commission to interpret section 202(h) as imposing identical obligations as other provisions of the Communications Act because the 1996 Act was intended to reduce regulation whereas the preamble to the Communications Act states that it was intended to "provide for the regulation." But as the Supreme Court has noted, "vague notions of [the] statute's 'basic purpose' are inadequate to overcome the words of [the statutory] text regarding the specific issue under consideration."[152] As NAB and NASA's opening and reply comments explain, the text of section 202(h) points in one direction – the interpretation advanced by the Commission before the D. C. Circuit.

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[150] Joint Network Commenters' Statutory Analysis, at 13-14.

[151] See*, e.g., Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

[152] *Mertens v. Hewitt Associates*, 508 U.S. 248, 271 (1993).

Because section 202(h), properly understood, requires the Commission to biennially review its ownership rules, determine which no longer meaningfully serve the public interest as a result of competition, and repeal or modify those rules no longer in the public interest, the networks are wrong to suggest that section 202(h) imposes a "rigorous deregulatory presumption." The only "presumption" imposed by section 202(h) is its requirement that the Commission modify or repeal rules that have outlived their public-interest usefulness.

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