April 22, 2003

The Honorable Michael K. Powell, Chairman
The Honorable Kathleen Q. Abernathy, Commissioner
The Honorable Kevin Martin, Commissioner
The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: 35% National Ownership Cap

Dear Chairman Powell and Commissioners Abernathy, Martin, Copps and Adelstein:

Each of you and various Commission staff members have graciously met with NASA/NAB about the important issues at stake in this proceeding. Emerging from these discussions are certain specific issues concerning the cap on which we were asked to comment and which call for further clarification. Each issue is plagued by a misconception of the law or of the record in this proceeding. In a series of short briefing papers over the next several days we intend to address these issues, using information already in the file but targeted to respond to the points that you, other Commission personnel, or the networks have highlighted. This letter focuses on the state of the evidentiary record concerning the 35% cap.

The balance of record evidence: By presenting a side-by-side comparison, Attachment A demonstrates that the record evidence in support of retaining the 35% cap is overwhelming, and the network evidence for modifying or eliminating it doesn't adequately counter that evidence. The evidence submitted by NASA, NAB, Cox and others in support of retaining the 35% cap includes two economic studies, an extensive station survey, analyses of the Commission-sponsored study of news quantity and quality and of additional data pertaining to news quality, an analysis of the decline in affiliate preemptions, an analysis of affiliate vs. O&O preemptions, examples of where independently-owned affiliates influenced or tried to influence network programming on grounds of sensitivity to community standards, analyses of affiliate association meeting minutes dealing with network programming issues, a sample listing of affiliate innovations, information on the increasing encroachment on local licensee discretion by network affiliation agreements and other network practices (point made by NASA only), and evidence of network restrictions on affiliate preemptions (Fox imposes a limit on its affiliates of two hours *annually* -- .084%). NASA and NAB also submitted evidence about the growth in network ownership of stations (from 49 in 1996 to 108 today), about the rapidly increasing vertical integration of the networks, about the geographic diffusion of other group owners' headquarters (compared to the networks' concentration in New York and Hollywood), and about the fragile nature of the affiliate bodies' ability even under the 35% cap to influence the networks' programming decisions.

Not only were the affiliates' evidentiary submissions exhaustive, convincing and very largely unrebutted, the network showings were lacking in weight or relevance, were non-existent, or supported the case for retaining the 35% cap. The networks, though failing to provide the information necessary to fully compare preemption records between independently-owned and network-owned and operated stations, submitted very selective preemption information, but that information nonetheless demonstrated that affiliates preempt 40% more frequently than network O&Os. Tellingly, the networks cited *not one instance* of O&O preemptions for reasons of the unsuitability or unsatisfactoriness of the network program for the community served by the licensee. Nor did they provide the historical data requested by NASA and NAB that would show the decline in affiliate preemptions accompanying the increase in network power through station ownership and for other reasons. But, based on these data, NASA/NAB demonstrated a 64% decline since 1994, compared with an earlier study sponsored by the networks. The networks' economist in this proceeding focused almost exclusively on competition and diversity (as opposed to localism which is the principal policy premise for the national cap). Moreover, once their economist eventually turned to the issue of localism, he misdefined it as being equivalent to local ownership or local programming and then dismissed the principle altogether as "trivial." As a consequence, with respect to the national ownership cap the network economist's analyses are almost entirely beside the point.

After acknowledging that the FCC study on program quality should have corrected for size, the network economist urged the FCC simply to ignore marked affiliate superiority in the DuPont Awards because that award is more selective and to focus instead on the RTNDA awards where affiliates do "slightly better" than O&Os. The networks also did not rebut affiliates' superior performance in winning Peabody Awards. When corrected for market size, there is no difference in news quantity between ABC, CBS and NBC's O&Os and the affiliates of those networks. When the aberrant UHF/VHF discrepancy is corrected for in the case of Fox, the difference in hours of news between Fox O&Os and Fox affiliates also disappears -- a point unrebutted by the networks. The networks provided no data on O&O efforts to influence network programming content, no data about the affiliates' role in programming decisions, no data on affiliate or O&O innovations, no data about changes in the market since 1996 that would diminish concerns about localism, and no information about the level of network dominance over affiliates and whether it has increased.

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In subsequent days we will address other evidentiary, legal and policy issues that have been identified in our discussions with the Commission and that are inevitably interrelated to the summary of the record evidence set forth above and in Attachment A.

We look forward to a continuing dialogue about these important matters.

Respectfully submitted,

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Enclosure

cc: MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244
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APRIL 22, 2003

COMPARISON OF EVIDENCE SUBMITTED ON 35% NATIONAL OWNERSHIP CAP

Issue	**Favoring the 35% Cap**	**Opposing the 35% Cap**
INCENTIVES OF INDEPENDENTLY OWNED STATIONS v. O&OS: *A first issue is why independently owned affiliates serve their communities more effectively than O&Os.*	NASA/NAB submitted information about the networks' other business objectives: national advertising sales, syndication, program production, foreign sales, cable programming and Internet. Because of these other parent company business objectives, which have expanded since 1996, network O&Os are under pressure to give full clearance of the network-offered programming, regardless of the interests of the licensee's community. The objective of stations owned by non-networks – even large group owners – focuses on providing service that is desired by the local community.	
	NAB/NASA submitted an economic study demonstrating that large group-owners do not have interests aligned with the networks, even though they may own a comparable number of stations, and therefore serve the interests of localism single-mindedly.	Economists Incorporated, the networks' economists, dismissed localism policy as "trivial." It focused only on competition and diversity.
	Hank Price (formerly the general manager of an O&O in Chicago and now the general manager of an independently owned affiliate) stated that O&O "program decisions . . . were made, as a matter of course, by . . . network executives—not local station managers." Network executives told him that he must clear certain programming even when he felt it inappropriate for the local community in its scheduled time period.	

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PREEMPTIONS (Affiliates v. O&Os): *A second issue is whether independently owned affiliates preempt programming more frequently than network O&Os.*	Although limited to primetime programming (the least likely to be preempted), the joint networks' data nonetheless show that affiliates preempt 40% more than O&Os. When statistics for preemptions outside of primetime are taken into account, the differential is even greater.	Economists Incorporated study stated that O&Os and affiliates both preempt a small amount of primetime programming, but EI's data show a 40% differential in favor of affiliates.
	Although limited to basket preemptions, the ABC data show that affiliates preempt 316% more than O&Os in total preemptions and 279% more in primetime preemptions.	ABC showed that some affiliates do not use all of their preemption baskets, which are only a part of all preemptions. ABC data also show that more than 20% of affiliates exceed their preemption baskets.
	Additionally, when ABC's and the joint networks' information is extrapolated (using other network data, provided in 1994 in an unrelated proceeding) to reflect all preemptions, both sets of data confirm NAB/NASA findings concerning overall preemptions.	
	An NAB/NASA survey of affiliate personnel who previously worked for O&Os shows that O&O station managers have less freedom to preempt network programming than affiliate station managers.	

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PREEMPTIONS (Reasons and examples): *Affiliate preemptions are for a variety of reasons and are for good cause.*	An NAB/NASA survey of affiliates provided nearly 1,000 examples of preemptions and showed the variety of reasons that affiliates preempt network programming. More than three-quarters of affiliates report preempting for local news, local emergencies, local sports, and local politics.	
	The networks' categories are so broad as to be meaningless – for example a lighting of a local Christmas tree could be a news preemption (which the networks say they favor) or a religious preemption (which the networks criticize).	The networks presented various charts showing the types of programming that affiliates air in place of preempted network programming.
	Cox submitted a list of examples of preemptions and preemption conflicts when affiliates preempted national programming in favor of programming of higher local interest.	
	As demonstrated in the NAB/NASA survey, affiliates preempt for a large variety of local community needs.	The network preemption charts show that 90% of O&O preemptions are for local news and sports.

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PREEMPTIONS (Unsuitability of network programming): *It is particularly noteworthy that O&Os don't preempt network programming on grounds of its unsuitability for local communities.*	NAB/NASA's survey of nearly 1,000 preemptions included examples of affiliate preemptions of network programming found to be unsuitable for local viewers. Additionally, affiliates reported preempting network programming to present programming that was more important to local viewers – such as the President's address on Iraq instead of a sitcom, or a local political debate or election coverage instead of regular programming. The joint networks' preemption tables confirm that O&Os never preempt network programming for reasons of unsuitability for the local community.	[No evidence of a single O&O preemption on grounds of sensitivity to local community standards.]
PREEMPTIONS (Trends): *As network dominance has increased, due to greater station ownership and more vertical integration, affiliate preemptions have decreased. This is another reason to retain the 35% cap.*	NAB/NASA provided the FCC with a survey of affiliates showing that average hours of preemption have declined since 1991, most markedly since the cap was raised in 1996. Comparing the limited preemption data provided by the networks in this proceeding against the preemption data they submitted in 1994, affiliate preemptions are shown to have declined 64% since 1994. Cox submitted evidence that affiliates preempt half as much network programming as they did five to ten years ago.	[No contrary evidence provided in record.]

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PREEMPTIONS (Trends) (cont'd)	In the NAB/NASA survey of affiliates, 68% of affiliates reported that they had experienced pressure not to preempt network programming. Of those, more than 60% reported increasing pressure from the network not to preempt network programming. Specific examples reported by NAB/NASA include the networks counting right-to-reject preemptions (protected from contractual restraint by FCC rule) against the contractually limited preemption basket. Additional examples show networks pressuring affiliates to clear network programming instead of preempting to broadcast political debates. NASA provided evidence of increased restrictions in affiliation agreements constraining affiliates' ability to exercise their rights protected by Commission rules to preempt programming in order to serve their communities' interest. NASA listed specific examples of network pressure to restrict preemptions that are protected under the FCC's right-to-reject rule. Cox submitted similar evidence. NASA pointed out that the Fox affiliate basket permits two hours of preemptions per year (.084% of Fox Network schedule).	

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NETWORK ENCROACHMENT ON LOCAL STATION TIME: *Meanwhile, networks have increasingly encroached on affiliate programming.*	NASA provided evidence of significant network overruns of network programming into local time, demonstrating that network use their programming to maximize their economic interests at the expense of local station programming.	[No contrary evidence provided in record.]
LOCAL NEWS (Quality): *The evidence on whether O&Os deliver better quality local news than affiliates, as adjudged by awards, turns out to show the reverse; affiliate local news performance exceeds O&Os' performance. This is additional evidence of how the 35% cap serves localism.*	The networks, NAB, and NASA all agree that the FCC's study is flawed for its failure to hold market size constant.	FCC's Media Ownership Working Group study found that network owned stations produced better quality local news, based on the number of awards received.
	Using the FCC's Media Ownership Working Group study and correcting for flaws, NAB/NASA demonstrated that affiliates outperform O&Os in awards for news and public affairs programming.	Economists Incorporated simply dismissed as selective the DuPont awards that the FCC study used, and then focusing only on RTNDA awards, found that affiliates win slightly more awards than O&Os.
	NASA/NAB showed that, taken as a whole, the DuPont and RTNDA awards show affiliate news to rank higher in quality.	
	NAB/NASA supplemented the initial evidence with analyses of the Peabody awards, which also showed that affiliates significantly outperform O&Os in local news quality.	

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LOCAL NEWS (Quality): (cont'd)	NASA points out that the Project for Excellence in Journalism undertook a five-year review of local news broadcasts. The study was the largest ever examination of the quality of local news broadcasts. The study found that "affiliates produce higher quality newscasts than network owned and operated stations – also by a large margin."	
LOCAL NEWS (Quantity): *Network O&Os do not produce more local news than independently owned affiliates.*	The networks, NAB, and NASA all agree that this study was fatally flawed for its failure to hold constant for market size. When corrected for market size, the FCC's Media Ownership Working Group study demonstrates that there is no difference in quantity of news and public affairs programming as between ABC, CBS and NBC O&Os and their affiliates. The data for Fox should be excluded because there was no correction for the fact that 72% of Fox O&Os are VHF stations and less than 18% of Fox affiliates are VHF stations. When this very large discrepancy is corrected for, there is no difference in the quantity of Fox O&O and affiliate news.	FCC's Media Ownership Working Group study found that network O&Os produced more local news and public affairs programming than affiliates.

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CRITICAL MASS OF AFFILIATES NEEDED TO INFLUENCE NETWORK PROGRAMMING TO TAKE ACCOUNT OF LOCAL COMMUNITY STANDARDS: *Affiliates also serve the localism function by restraining network programming to comport with community concern – a role O&Os don't play as effectively.. The 35% cap protects the critical mass of affiliates necessary to perform this role effectively.*	NAB/NASA submitted an economic study showing that the 35% cap limits the ability of networks to control programming on local stations. NAB/NASA provided evidence that 35% represents the tipping point with respect to effective affiliate influence over network programming decisions. For example, Fox, which exceeds the cap, prevented affiliates from broadcasting a Presidential debate instead of Dark Angel. Meanwhile NBC, which is under the cap, was unable to force affiliates to air a baseball game instead of the Presidential debate. NAB/NASA provided strong evidence that the influence on network programming exerted by a critical mass of independently owned affiliates benefits the public served by all broadcasters – affiliates and O&Os. They cited examples where the affiliates succeeded in convincing the networks to heed local community needs (the presidential debate-baseball game conflict and West Coast Olympic broadcasts). O&Os benefited along with affiliates. This would not have been the case but for the role of a substantial number of independently owned affiliates to counterbalance the networks' interest in total clearance of their programs.	[No contrary evidence provided in record.]

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CRITICAL MASS OF AFFILIATES NEEDED TO INFLUENCE NETWORK PROGRAMMING TO TAKE ACCOUNT OF LOCAL COMMUNITY STANDARDS (cont'd)	NAB/NASA provided (i) specific examples of affiliate input into network programming decisions; (ii) examples of significant programming feedback from the affiliate boards to the networks; and (iii) examples of successful affiliate influences on network programming decisions – such as a later time slot for the Victoria Secret Show and the removal of mature audience promos from children's programming. Cox submitted specific examples of affiliates conveying viewer complaints to the networks about network programs and about networks promising not to repeat the offending behavior.	

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CRITICAL MASS OF AFFILIATES NEEDED TO INFLUENCE NETWORK PROGRAMMING TO TAKE ACCOUNT OF LOCAL COMMUNITY STANDARDS (cont'd)	NAB/NASA supplemented its filings (at the Commission's request) with information about affiliate board discussions and actions concerning the quality and content of network-offered programming. The topics addressed by the affiliate boards included: violence and sexual content in programs, preemption of West coast programs local news, racial and ethnic diversity in programming, network preemption of children's programming, preemption of local news by network programs, lack of HDTV programs, network-inserted inducements to switch at the end of broadcast programs to a network-affiliated cable channel, and network support of low-rated programs because they were produced by a network-affiliated company. NAB/NASA's supplement also demonstrated that the affiliate concerns frequently influenced the network programming decisions.	
INNOVATIONS BY AFFILIATES: *Affiliates provide an effective laboratory for experimenting with new program services.*	NAB/NASA listed numerous specific examples of affiliates' innovations in broadcast service.	[No contrary evidence provided in record.]
GEOGRAPHIC LOCATION: *Group ownership is more dispersed than network ownership.*	NAB/NASA provided data showing that group owners are geographically located in various cities across the United States, while the networks are headquartered in New York and Hollywood.	[No contrary evidence provided in record.]

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MARKETPLACE CHANGES SINCE 1996: *Developments since adoption of the cap confirm, rather than undercut, the need for the 35% cap.*	NASA provided evidence of the highly concentrated video production market and its dominance by the networks. The evidence showed that the concentration of the video production market can skew network programming decisions – such as Disney/ABC's decision to broadcast low-rated shows produced by Disney. Independently owned affiliates can help constrain this trend and make the markets function more competitively. The Consumer Federation of America provided statistics on the networks' extensive ownership of prime-time programming and cable programming sources. Station ownership by the big four networks has increased since 1996 from 49 to 108. NAB/NASA provided evidence that O&Os account for a larger share of the advertising market than their audience reach.	Networks show increase in other media voices which addresses the issue of diversity, not localism, though localism is the principal policy rationale for the cap.
OTHER FACTORS	NAB/NASA submitted evidence that networks are hindering television access for charitable organizations, such as the Muscular Dystrophy Association, to both independently owned affiliates and O&Os.	[No contrary evidence provided in record.]
	Cox submitted of showing of affiliate activities in community outreach programs.	[No contrary evidence provided in record.]