

April 25, 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:

In this letter NASA and NAB summarize the record on two additional issues, essentially legal in nature, that are critical to the proper resolution of the 35% national ownership cap aspect of this proceeding. It is extremely important first to understand the hurdle, set by the Congress and interpreted by the Court, for upholding the 35% cap and second to determine whether a heavier burden is required to retain the cap than to modify or eliminate it. These two issues go to the core of the decision before the Commission and have been widely mischaracterized and misunderstood.

What is the hurdle, as set by Congress and interpreted by the Court, for retaining the 35% cap? Congress specified the 35% cap in the 1996 Act. It is the *only* ownership benchmark adopted by Congress, and it was adopted *only* after intense and careful debate. Congress also specified the grounds (described below) that the Commission should consider in determining whether to retain, modify or eliminate the 35% cap. In reviewing the 1996 statute, the Court refused to vacate the 35% cap because “the probability that the Commission will be able to justify retaining the [35% cap] Rule is sufficiently high” to make that remedy inappropriate. The Court concluded: “in sum, we cannot say it is unlikely the Commission will be able to justify a future decision to retain the Rule.” *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002). Accordingly, it was not the 35% cap that the Court found to be insufficient; it was, instead the Commission’s one paragraph explanation for its retaining the 35% cap -- an explanation that was based on the Commission’s understanding that the 1996 Act obligated it merely to report its recommendation to Congress, not to reach a decision that had to meet judicial review standards. Far too much has been inferred about how difficult it will be to satisfy the *Fox* Court’s judicial standard of review, when in fact the earlier Commission decision did not even make that effort and when the Court itself commented that on remand the Commission was likely to be able to meet that standard.

Is there a higher legal burden for retaining the cap than for modifying it? A decision to modify or repeal the cap is subject to precisely the same public interest standard and judicial review standard as apply to a decision to keep the cap at 35%. It must be based on the same record and both decisional options (to retain the cap or to modify or repeal it) entail predicting which regimen will serve the public interest going forward based on the record

evidence submitted here. Both options would also be entitled to the same degree of judicial deference.

The 1996 Act directed the Commission to determine biennially whether the cap, along with many other Commission rules, should be retained, modified or eliminated. This Commission itself has said that it is, therefore, obligated to determine “whether, in the light of the current competitive environment, [the cap] continues to be necessary to achieve its [public interest] aims.” *2002 Biennial Regulatory Review*, FCC 02-342, at 8, n. 32. This obligation is given more specific meaning in three different respects.

- First, the *Fox* Court said that these public interest aims include whether the cap furthers “diversity” and “localism.” 280 F.3d at 1042.
- Second, this Commission has concluded that the term “necessary,” as used in a parallel context, does not impose a public interest standard “more stringent than the ‘plain public interest standard’ found in other parts of the Communications Act.” *2002 Biennial Regulatory Review*, at 10.
- Third, unlike some of the other rules covered by the Congressionally-imposed biennial review process, the 35% national cap rule is primarily based on localism concerns, not competitive concerns.

Therefore, taking these three points into account, it would have to be shown that competitive developments since 1996 have vitiated the localism rationale that primarily underlay the 35% cap specified by Congress. And then it would have to be affirmatively shown that a more relaxed cap or no cap at all would be justified under the established public interest standard, which especially in the case of the 35% cap must consider the impact on localism of such a step. As demonstrated in our April 22 and 23 letters, the record would not support either of these conclusions.

Moreover, a Commission decision to eliminate or modify the rule, as well as the Commission’s choice among various possible modifications, is subject to the same public interest standard, including the component of localism, that is the touchstone for deciding whether to retain the 35% cap. Furthermore, the Commission’s “standard obligation to provide a reasoned basis for [its] decisions” (*2002 Biennial Regulatory Review*, at 13) would require it to justify one course of action over another, and there is no basis for suggesting that the various options would be subject to different review standards or entitled to different levels of judicial deference.

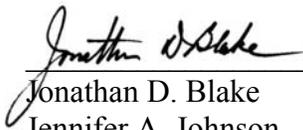
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The above legal analysis is so important that it is elaborated in more detail in Attachment C hereto. This analysis demonstrates that a Commission decision to modify the cap to 40% or 45% or eliminate it must be justified by the evidence on the record. That record was summarized in NASA and NAB's letter of April 22, and it was shown to support retention of the 35% cap.

Respectfully submitted,



Jonathan D. Blake
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004
202-662-6000



Henry L. Baumann
Executive Vice President for
Law & Regulatory Policy
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
202-429-5300

Wade H. Hargrove
BROOKS PIERCE MCLENDON
HUMPHREY & LEONARD
P.O. Box 1800
Raleigh, NC 27602
919-839-0300

*Counsel for the Network Affiliated
Stations Alliance*

Enclosure

cc: MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244
Susan Eid, Esq.
Marsha MacBride, Esq.
Stacy Robinson, Esq.
Catherine Bohigian, Esq.
Jordan Goldstein, Esq.
Johanna Mikes, Esq.
John Rogovin, Esq.
Mr. Kenneth Ferree
Mr. Paul Gallant
Mania Baghdadi
Linda Senecal
Qualex International

**THE COMMISSION’S BURDEN IS THE SAME WHETHER IT
RETAINS OR MODIFIES THE NATIONAL TELEVISION OWNERSHIP RULE**

Section 202(h) of the Telecommunications Act of 1996 directs the Commission to review biennially certain ownership rules, to “determine whether [they] are necessary in the public interest as the result of competition,” and to “repeal or modify any regulation it determines to be no longer in the public interest.” The text of Section 202(h), the D.C. Circuit’s decision in *Fox Television*,¹ and the Commission’s recent report interpreting Section 202(h)’s analog, Section 11 of the Communications Act,² all point to the conclusion that Congress intended to impose the same burden on the Commission, whether it retains or modifies the national television ownership rule.

As explained more fully below:

- Section 202(h) does not impose an especially heavy burden on the Commission if it decides to retain the 35 percent ownership rule in its current form. The rule should be retained if the Commission determines that it remains in the public interest because it continues to promote diversity, localism, and/or competition. Modification or elimination is required only if the Commission determines that the rule’s public-interest usefulness has been vitiated by competitive changes in the marketplace.
- The Commission must make a determination about the rule’s public-interest vitality as a condition of retaining, modifying, or eliminating the cap. Such a determination is subject to judicial review, regardless of whether the Commission concludes that the rule remains in the public interest.
- If the Commission concludes that modification or elimination of the cap is required by competitive changes, the choice between elimination or modification, as well as the choice among various possible modifications, must conform to the public interest standard – including considerations of localism, diversity, and

¹ *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

² See *In re The 2002 Biennial Regulatory Review*, FCC 02-342, GC Docket No. 02-390, at 8 n. 32 [hereafter *2002 Biennial Regulatory Review*].

competition – and will be subject to review under the arbitrary and capricious standard.

I. A Decision To Retain The National Television Ownership Rule Is Not Subject To An Elevated Standard Of Review

Section 202(h), like Section 11 of the Communications Act, does not impose a public interest standard “more stringent than the ‘plain public interest standard’ found in other parts of the Communications Act.”³ As the Commission recently explained in persuasive detail, when Congress used the phrase “necessary in the public interest” in a biennial review provision, it “did not intend that [the Commission] apply a different standard from that required for the Commission to adopt a rule in the first instance.”⁴

Furthermore, the D.C. Circuit has held that the Commission may decide to retain a rule on the basis of “diversity” or “localism,” which have long been integral components of the public interest standard as applied by the Commission.⁵ Consequently, the national television ownership rule should be retained if the Commission determines that it continues to serve the public interest by promoting localism, diversity, or competition in today’s television marketplace. The Commission should modify or eliminate the rule only if it determine that, as a result of competitive changes in the marketplace, the rule is no longer in the public interest.

II. The Commission Must Make A Determination About The Rule’s Public-Interest Usefulness And Its Determination Is Subject To Judicial Review Whether It Retains, Modifies, Or Eliminates The Rule

Section 202(h) provides that the Commission “*shall determine*” whether its rules “are necessary in the public interest as a result of competition” and “shall repeal or modify any

³ 2002 Biennial Regulatory Review, at 10.

⁴ *Id.* at 5.

⁵ 280 F.3d at 1042.

regulation it *determines* to be no longer in the public interest.”⁶ By its terms, this statutory language precludes the Commission from repealing or modifying any rule without a “determination” that the rule is no longer in the public interest.⁷ Accordingly, the Commission cannot fail to determine whether a rule remains in the public interest as a result of competition, and it cannot repeal or modify any rule without making such a determination. Instead, the Commission is required to make a determination for each rule – either that the rule remains in the public interest, or that it does not.

As the D.C. Circuit held, a determination regarding whether a particular rule remains necessary in the public interest is final agency action subject to judicial review.⁸ That means, among other things, that the Commission’s action must be based on the evidence in the record, must consider and respond to important issues and alternatives raised by commenters, and must not be arbitrary and capricious.

III. A Decision To Retain The National Television Ownership Rule And A Decision To Modify The Rule Are Subject To The Same Public Interest Standard

The Commission’s decision to retain, eliminate, or modify the rule (as well as its choice among various possible modifications) is subject to the same public interest standard, including its considerations of localism, diversity, and competition strands. Moreover, Congress did not give the Commission unfettered discretion to chose elimination over modification, or to

⁶ (Emphasis added).

⁷ See *American Heritage Dictionary* 509 (3d ed. 1996) (defining “determine” as “To decide or settle . . . conclusively and authoritatively” and “To establish or ascertain definitively, as after consideration, investigation, or calculation”); see also *NLRB v. Radio and Television Broad. Engineers Union*, 364 U.S. 573, 579 (1961) (holding that the words “hear and determine the dispute” “convey not only the idea of hearing but also the idea of *deciding a controversy*”) (emphasis added).

⁸ 280 F.3d at 1038-39.

choose one possible modification over another. Indeed, it would be unconstitutional for Congress to confer decisionmaking authority upon an agency without laying down “an intelligible principle to which the [agency] is directed to conform.”⁹ The required “intelligible principle” in this case is the public interest standard, which governs the Commission’s rulemaking authority generally under the Communications Act.¹⁰ Furthermore, there can be no dispute that the Commission’s “standard obligation to provide a reasoned basis for [its] decisions”¹¹ requires it to justify the choice of one course of action over another.¹² Section 202(h) is thus consistent with the established rule that agency decisions to modify or repeal existing rules must be justified under the same standard that governs agency decisions to promulgate rules.¹³

* * * * *

In light of the standard applicable to the Commission’s Section 202(h) determinations, it is clear that there are circumstances in which a decision to retain the national television ownership rule will in fact be more likely to be sustained than a decision to modify the rule. For example, where the record before the Commission contains conflicting, plausible evidence as to whether the rule continues to further localism, diversity, and/or competition in today’s television marketplace, the Court is likely to defer to the Commission’s choice between two reasonable interpretations of the facts. If the Commission decides that the rule remains in

⁹ *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 472 (2001).

¹⁰ *Id.* at 474 (noting that “we have found an ‘intelligible principle’ in various statutes authorizing regulation in the ‘public interest’”).

¹¹ *2002 Biennial Regulatory Review*, at 13.

¹² See *Fox Television*, 280 F.3d at 1044-45 (finding the Commission’s failure to explain why it changed its view from one report to another rendered its decision arbitrary and capricious).

¹³ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

the public interest and thus should be retained, the Court's task is complete once it concludes that the Commission's view of the evidence is reasonable. But if the Commission concludes on the same record that the rule (1) is no longer in the public interest and (2) should be raised, say, to 45%, both of the Commission's determinations will be subject to review. In this second scenario, the Court will require the Commission to explain why it chose 45% rather than some other modification and also to explain why a record that does not support a 35% rule does support a 45% rule.