

April 28, 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 recent days NASA and NAB have been responding to certain legal, evidentiary, and policy issues that were identified by you and FCC staff members as being of particular interest in connection with the 35% national ownership cap. Here we address three more of these issues -- the relationship, if any, between the review of the local television ownership rules and of the 35% national ownership cap; the relationship, if any, between the 30% cable cap and the 35% national television cap; and the relationship between the 35% national ownership cap and the Commission's right-to-reject and option-time rules.

The relationship between the local television ownership rules and the 35% national television ownership cap. The networks argue that if the Commission relaxes the local ownership rules, which we believe it should, it must perforce relax the national ownership cap as well. The networks have tried this argument before, and the Court did not buy it. There is no reason the Commission should do so either. In response to the networks' earlier effort to argue this point, the Court said: "the decisions to which the networks point deal with regulations [the local television ownership and radio/television cross-ownership rules] that are not closely related, analytically, to the [ownership cap and therefore] are not inconsistent with the Commission's decision to retain the national ownership cap." *Fox Television Stations v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002). The Court also pointed out that "there is no obvious relationship between relaxation of the local ownership rule -- which now permits a single entity to own two broadcast stations in the same market in some situations . . . -- and retention of the national ownership cap, and the Commission does nothing to suggest there is any non-obvious relationship." *Id.* at 1042.

Indeed, far from supporting relaxation of the national ownership cap, the policies favoring relaxation of the local ownership rules press in the opposite direction. Relaxing the local television and radio/television rules, as well as the television/newspaper rule, will preserve and enhance local service. By contrast, relaxing the national cap will weaken local service for the reasons demonstrated in the record.

The relationship between the 30% cable ownership cap and the 35% national ownership cap. This is another apples-to-oranges comparison engaged in by the networks. In legal grounding, the 30% cable cap is the FCC's, while the 35% national cap is Congress's and the Commission's. In policy grounding, the 30% cable cap has to do with national competition, while the 35% television cap has to do principally with localism. In factual grounding, the 30% cable cap regulates companies that do not exceed 35% national penetration, while the national ownership cap regulates companies which each exceed 97% national penetration (though there are differences between MSO and network penetration). Finally, the *Fox* Court has already dismissed the argument that wither the cable cap, so must go the national television ownership cap, pointing out that (1) the cable rule was reviewed under a tougher First Amendment standard that does not apply to the television ownership cap and (2) by statute, the cable rule must be justified on the basis of competition considerations, while the television ownership cap is supported by a broader array of public policy justifications, including most prominently the Congressionally-mandated commitment to localism.

Relationship of the 35% cap to the right-to-reject and option-time rules. We have been asked whether retaining (and enforcing) the network/affiliate right-to-reject and option-time rules might make it possible to dilute or repeal the 35% cap and, conversely, whether retaining the cap might make it possible to repeal those rules. The basis for the NASA Petition (DA 01-1264), in which NAB does not join, is that the right-to-reject and option-time rules should be complied with. If the Commission wishes to review their appropriateness, it should do so in a rulemaking proceeding, not by refusing to administer rules that are already on the books, though NASA also believes that the rules are based on principles of licensee responsibility that are embedded in the Communications Act and, therefore, not to be lightly swept away by the agency.

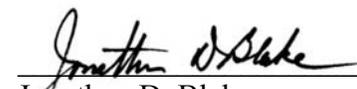
Nor should one or the other be abandoned, for the rules and the cap are mutually complementary. The right-to-reject and option-time rules protect against the networks effectuating dominance over independently-owned stations through onerous affiliation agreement provisions. The cap protects against the networks effectuating dominance through direct ownership of more than a certain number of stations. Relaxation of the cap, while the right-to-reject and option-time rules were retained, would diminish the number of stations across the country dedicated to serving local community needs without being beholden to network parent companies' other business objectives. This would gut the remaining affiliates' ability to curb network programming instincts that can be inconsistent with local community needs. The remaining affiliates would lack the critical mass necessary to exercise a constraint on network programming that is beneficial to the public served by both affiliates and O&Os. Evidence in the record demonstrates this to be the case, and the networks have submitted no evidence to the contrary. Similarly, if the networks could insist that independently-owned stations enter into

affiliation agreements that ceded to the networks virtually all programming discretion, the result would be similar to outright station ownership, and local television service would suffer.

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Like the network arguments we have addressed in our April 22, 23 and 25 letters, there is nothing in the above three arguments that would justify relaxation or repeal of the 35% national ownership cap. They are supported by neither logic, nor law; by neither policy, nor facts.

Respectfully submitted,



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