

April 30, 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:

NASA and NAB here address three additional issues that their discussions with you and Commission staff indicate should be addressed before the Commission acts on the 35% national ownership cap issue. The first two items address the sufficiency of the record to demonstrate that the 35% cap remains in the public interest. The third item addresses localism, the most important principle of the Communications Act underlying the 35% cap.

Does the record support the 35% cap, as opposed to a 40% cap or a 45% cap?

First, it is unrealistic and unnecessary to insist that a record be developed that is specifically calibrated to a particular percentage point of concentration. “[I]n drawing a numerical line an agency will ultimately indulge in some inescapable residue of arbitrariness; even if 40% is a highly justifiable pick, no one could expect the Commission to show why it was materially better than 39% or 41%.” *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001). Bright-line tests, like highway speed limits, pollution limits, and power emission or mileage separation requirements, are thus necessarily arbitrary in that limited sense, but not impermissibly so. *Second*, it was Congress that established the specific 35% cap figure as a beacon for the FCC, based on the same considerations that are supported by record evidence in this proceeding. *Third*, as documented in the record and summarized in our April 23 letter, the industry trends since 1996 show that cause for Congress’s concern about network power derived from station ownership has intensified. No post-1996 industry trends have reduced those concerns. Therefore, the case for a 35% cap is stronger today, as demonstrated by the record, than it was when Congress enacted it. *Fourth*, the networks have submitted no evidence showing that the policy underpinnings of the cap can be protected with a higher percentage benchmark. In contrast, the affiliates have shown that network encroachments on local licensee discretion have intensified, and they have demonstrated that 35% is a tipping point with respect to the balance that affiliates supply to network programming decisions. *Fifth*, as NASA has pointed out before, the Project for Excellence in Journalism study and the FCC’s own study of news awards, when corrected for size, show that independently owned affiliates provide better quality news than network O&Os.

In short, as we demonstrated in our April 25 letter, the legal standard and degree of judicial deference for upholding the existing 35% cap is identical to the legal standard and legal deference for modifying or eliminating the cap. Combining this legal reality with a factual record that demonstrates that the 35% cap is more necessary now than it was in 1996 leads to the conclusion that, under the Act and the *Fox* decision, the 35% national ownership cap must be retained.

Whether networks with the highest station ownership must be shown to encroach most on local licensee discretion. There is no basis in the statute or in the Court decision for requiring such a showing. Rules are designed to prevent abuses. That in some cases those with the power to abuse have not yet exercised that power is not a reason to repeal a rule intended to prevent those abuses. It has been only two years since Fox and CBS acquired stations that pushed their penetration above 35%. They made the acquisitions pursuant to requests for temporary divestiture waivers and have retained them under judicial stays. Given these facts, and that the networks realize they are under heightened scrutiny because of the pendency of this proceeding and the NASA Petition, it would be folly for those networks to be too heavy-handed in their dealings with affiliates. Even with these constraints, however, Fox has indeed proved that networks with more weight to throw around can be expected to do so. As shown in this record and in the NASA Petition proceeding, unlike NBC (below the cap), Fox (above the cap) did not give their affiliates the option to carry the 2000 Presidential debate; the Fox affiliates had to carry "Dark Angel," instead. Fox allows affiliates only two hours of preemptions per year (.084%). Fox imposes unlawful restrictions on its affiliates' right-to-reject obligations. Its handling of late afternoon and late evening program slots vis-à-vis its affiliates violates the Commission's option-time rule. And Fox's right under its standard affiliation agreement to force its affiliates to carry on their digital channels every megabit that Fox transmits to them -- even for data and voice services -- or otherwise risk losing their analog affiliation with the Fox network has set a new high-water mark for network aggrandizement of affiliate discretion.¹ (NAB takes no position on the issues raised in NASA's Petition; the Fox Affiliates Association has supported the Petition.) Thus, while it is not necessary to show that only the networks that exceed the cap dominate their affiliates, the record shows that Fox does so to the greatest extent among the four major networks.

Of course, NASA/NAB have also shown industry trends since 1996 that give more power to the networks and that have added greater business interests to the networks' portfolios which additionally divert their O&Os from serving the interests of their local communities. They have shown a decline in preemptions (using both their own and the networks' data), a decline in their ability to restrain the networks' preoccupation with a national

¹ See Letter from Kenneth Ferree, Chief, Media Bureau to Paxson and Univision (Mar. 10, 2003).

programming focus and more network encroachment on local licensee discretion. These were the fears that restrained Congress from increasing the cap beyond 35%. Since those fears have intensified, not lessened, that is compelling reason to hold the line.

How much weight should be given to the principle of localism? Localism matters. Its policy underpinnings are deeply rooted in the wisdom of this country's founders, in the Communications Act from its adoption in 1934, and in Congressional, Commission, and Court actions up to the present day. Yet the networks' economist dismisses the concept as "trivial," and the networks claim that the functions served by localism are best carried out by their conferring with O&O station managers predominately from the nation's largest markets. This claim demonstrates why the principle of localism must not be left to the care of the networks: they just don't get it. A broadcaster who does get it is Hank Price, formerly general manager of an O&O in Chicago and now general manager of the Hearst-Argyle station in Winston-Salem whose testimony is part of the record here. He spoke of the network forcing him as an O&O manager to carry the "Howard Stern Show," which he felt was unsuitable for the public his station served, in contrast to the mandate to serve the local community that he feels as the manager of an independently owned affiliate.

Since its adoption as part of the 1934 Act, Congress has repeatedly confirmed its support of localism. Various cable and satellite carriage rules are powerful examples of the ongoing national commitment to localism. The Courts have also consistently upheld various measures designed to serve localism policies. The Commission does not have the option of writing localism out of the regulatory scheme or ignoring or devaluing its currency; its importance is codified in the Act.

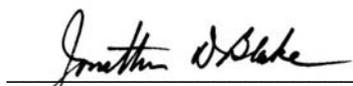
Nor is localism a hot-house flower peculiar to communications policy. Localism is rather the analog of federalism in our political system. Federalism as a political system is not defended or explained on the basis of its economic efficiency. There are three specific respects in which independently-owned local stations serve "federalist" functions; and the record contains un rebutted evidence that they are, in fact, fulfilling these functions and that their ability to continue to do so is in jeopardy. *First*, the interests and tastes of the public vary by locale -- urban, rural; South, East and West; different ethnic and religious backgrounds; etc. Localism means that this locally-based multiplicity of the public's needs should be reflected in programming decisions at the community level, not exclusively at the national level. *Second*, like the states, independently-owned stations are laboratories for program and service experimentation. NASA and NAB's comments listed examples of local licensee innovation. *Third*, independently-owned stations also exercise a checks-and-balances function as against network program decision making, the value of which (in a government context) was so brilliantly articulated in the Federalist Papers (e.g., Federalist Paper No. 51). The record contains extensive evidence of independently-owned stations serving this role and of the threat to

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their being able to continue to do so because of the rise in network power. The 35% national ownership cap is a principal bulwark against this threat.

Respectfully submitted,



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