ATTACHMENT A

May 2, 2003

COMPARISON OF EVIDENCE SUBMITTED ON 35% NATIONAL OWNERSHIP CAP

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
INCENTIVES OF INDEPENDENTLY OWNED STATIONS v. O&Os: *NASA/NAB contend that independently owned affiliates serve their local communities more effectively than O&Os.*[1]	NASA/NAB argue that O&Os are focused on a variety of business ventures – somehow diluting the attention they give to local communities – but that affiliates are focused single-mindedly on local viewers.	NASA/NAB seriously strain credulity by implying that owners of affiliates have no other business interests. (For an illustrative listing of the multiple businesses of three affiliate groups, *see* Attachment B.) Of course, group owners of O&Os and affiliates alike pursue a variety of different business opportunities. That hardly inhibits their ability to be responsive to local communities. In any event, the management of O&Os are no less attuned to the needs of their local communities than the management of affiliates.[2]

1 *See Ex Parte* Letter of Network Affiliated Stations Alliance and National Association of Broadcasters ("NASA/NAB"), dated April 22, 2003, Attachment A, at 1 ("*NASA/NAB Ex Parte*").

2 *See Ex Parte* Letter of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom (the "Joint Commenters"), dated April 21, 2003, at attachment 1 (the "*Joint Commenters Ex Parte*").

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
INCENTIVES OF INDEPENDENTLY OWNED STATIONS v. O&Os (continued)		Networks by necessity must take into account the views of advertisers and viewers in determining what to air. Any programming feedback that networks receive from affiliates, however, may well be tainted by affiliates' economic self-interest, stemming from the tension between affiliates and networks over the division of profits. In contrast, O&Os do not suffer from any conflicts of interest, and they therefore serve as a far more credible source of information about their local communities.[3] Moreover, O&O managers typically play an active role in counseling the networks on programming decisions, particularly during the program development and scheduling process. Affiliates, however, play no role in this process and learn of new programs at the same time as the general public.

3 *See* Attachment 1 to the *Joint Commenters Ex Parte, Red Herring Arguments*, at 3-4.

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
INCENTIVES OF INDEPENDENTLY OWNED STATIONS v. O&Os (continued)	NASA/NAB also allege that the Joint Commenters' economic consultants dismissed the Commission's localism policy as "trivial."	NASA/NAB's claim constitutes a gross misrepresentation of the statement made by Economists Incorporated ("EI"), the Joint Commenters' economic consultants. In fact, EI never called the FCC's localism policy "trivial." Rather, they noted that both O&Os and affiliates preempt network prime time programming only extremely rarely, and that the insignificant difference between the two groups' preemption rates was largely due to higher affiliate preemption rates for paid programming. Thus, EI concluded that affiliate preemptions "clearly do not result in any significant exercise of the power to choose," and that it would be extraordinarily bad public policy "[t]o sacrifice consumer welfare to th[e] trivial end" of making it easier for affiliates to preempt network programming simply for economic reasons.[4]

[4] *See Economic Comments on Media Ownership Issues,* Bruce M. Owen, Michael G. Baumann and Kent W Mikkelsen of Economists Incorporated, February 3, 2003, submitted with the Reply Comments of the Joint Commenters, at 3.

Red Herring	NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap	The Reality
PREEMPTIONS (Affiliates v. O&Os): *NASA/NAB contend that Independently owned affiliates preempt programming more frequently than O&Os.*[5]	NASA/NAB continue to claim that affiliates preempt network programming substantially more often than O&Os.	The Joint Commenters have repeatedly submitted evidence – which has not been rebutted – demonstrating that both O&Os and affiliates preempt network programming only extremely infrequently. Indeed, EI has shown that preemption rates for both groups amount to *less than 1 percent* of prime time programming. Although the average affiliate preempted slightly more hours than the average O&O in 2001, the differential is largely attributable to higher rates of economic preemptions by affiliates (*i.e.*, for paid programming and telethons). Regardless, as EI points out, "*[n]either the average number of hours preempted nor the difference in the averages of the two groups is quantitatively significant.*"[6]

5 *See NASA/NAB Ex Parte*, Attachment A, at 2.

6 *See id.*; *see also Preemption By O&Os Compared to Affiliates*, EI Economic Study G, submitted with the Opening Comments of the Joint Commenters, at 1-2.

Red Herring	NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap	The Reality
PREEMPTIONS (Reasons and examples): *NASA/NAB contend that only affiliates preempt network programming for good cause.*[7]	NASA/NAB implicitly allege that only affiliates preempt network programming to meet local community needs.	The Joint Commenters have emphasized that O&Os do not hesitate to preempt the network feed to cover vitally important local and national breaking news events.[8] Moreover, despite their allegation, NASA/NAB acknowledge the data showing that O&Os preempt the network feed for local news programming.[9]

7 *See NASA/NAB Ex Parte*, Attachment A, at 3.

8 *See* Opening Comments of the Joint Commenters, at 40 & n.133.

9 *See NASA/NAB Ex Parte*, Attachment A, at 3.

<u>Red Herring</u>	**<u>NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap</u>**	**<u>The Reality</u>**
<u>PREEMPTIONS (Unsuitability of network programming)</u>: *NASA/NAB contend that only affiliates play a role in preventing unsuitable programming from airing in local communities.*[10]	NASA/NAB attempt to portray affiliates as playing a unique role in ensuring that unsuitable programming does not air in local communities. As evidence, they claim that only affiliates preempt the network for reasons of unsuitability.	It is not surprising that O&Os rarely preempt programming on unsuitability grounds since O&O managers are active participants when the networks discuss new program development and plan their schedules. In contrast, affiliates play no role in this process. Equally important, it bears repeating that affiliates hardly ever preempt on unsuitability grounds, either. Total affiliate preemptions for *all* reasons amounted to less than 1 percent of prime time programming in 2001, and the vast majority of those preemptions were for economic reasons.[11]

[10] *See id.*, at 4.

[11] As the Joint Commenters have pointed out, the networks go out of their way to produce programming that appeals to the widest possible audience. Networks risk severe economic consequences if they air unsuitable programming that drives away viewers. Indeed, a network that airs programming despite the concerns of its O&O managers risks a double financial hit – it endangers the ultimate success of its network schedule as well as diminishing the return on the substantial investment in its O&Os. Thus, the lack of preemption by O&Os on unsuitability grounds is in no way a reflection of O&Os' commitment to ensuring that viewers are not exposed to unsuitable programming. *See* Attachment 2 to the *Joint Commenters Ex Parte, Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, at 11-12.

<u>**Red Herring**</u>	<u>**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**</u>	<u>**The Reality**</u>
<u>PREEMPTIONS (Trends)</u>: *NASA/NAB contend that the growth in the size of O&O groups has led to a decrease in preemption rates by affiliates.*[12]	NASA/NAB argue that as network O&O groups have gotten larger, particularly in the last nine years, there has been a decline in affiliate preemption rates.	NASA/NAB ignore EI's analysis, which specifically disproves NASA/NAB's contention. Contrary to NASA/NAB's hypothesis, affiliates of the networks with the largest O&O groups (in terms of audience reach) do *not* preempt less than affiliates of networks with smaller O&O groups. In fact, in 2001, affiliates of FOX and CBS (the networks whose O&Os had the greatest audience reach, 41% and 40%, respectively) preempted as much or more prime time programming than affiliates of the other two networks, ABC and NBC (whose O&Os had audience reaches of 24% and 27%, respectively).[13] NASA/NAB attempt to support their hypothesis by showing a decline in preemption rates since 1996. In fact, NASA/NAB have not offered any credible evidence demonstrating that affiliate preemption rates have in fact declined at all since the time period prior to 1996.

12 *See NASA/NAB Ex Parte*, Attachment A, at 4.

13 *See* Attachment 1 to the *Joint Commenters Ex Parte*, at 8-9; *see also* Attachment 2 to the *Joint Commenters Ex Parte*, at 18-19.

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
PREEMPTIONS (Trends) (continued)		EI has demonstrated that NASA/NAB's conclusion – based on an "apples-to-oranges" comparison of data compiled by the networks in 1994 to data submitted by the Joint Commenters in 2003 – "is at best misleading."[14] The 1994 data included only four weeks, which EI determined to be not representative of the rest of the year. In contrast, the 2003 data included the entire calendar year. "[C]omparing a 4-week average to a 52-week average can lead to erroneous conclusions, and in this case, it does."[15]
	NASA/NAB also contend that networks pressure affiliates not to preempt network programming.[16]	As EI explains, preemptions, which can be highly profitable to a particular affiliate, are very damaging to the network and other non-preempting affiliates. An individual affiliate may find that it is more profitable to preempt a particular network show and replace it with other programming.[17] In doing so,

14 *See* Attachment 1 to the *Joint Commenters Ex Parte,* at 7.

15 *See id*.

16 *See NASA/NAB Ex Parte*, Attachment A, at 5.

17 An affiliate can almost always make more money by preempting an individual network program than by clearing it, because substituting other programming for network offerings allows the affiliate to sell all commercial availabilities for its own account, while receiving the benefit of "audience flows" from the network

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PREEMPTIONS (Trends) (continued)		however, the affiliate reduces the network's total audience reach (for the preempted program) and so reduces the value of the network advertising that can be offered. "The station's private profit calculation whether to clear or preempt a particular show does not take into account the economic loss that preemption imposes on other network affiliates and on the network."[18] EI suggests that this situation is an example of the classic "free rider" problem, analogous to the fast food outlet that attracts customers using the reputation built by the franchisor and other franchisees but offers products or services of a lower quality.[19] While the networks seek to combat this problem, they must do so within the limits of the FCC's network affiliation rules. Given the constrains of these rules, networks must ensure that the profitability to stations of

programming immediately preceding it. *See* Opening Comments of the Joint Commenters, at 40, n.132.

18 *See* Attachment 2 to the *Joint Commenters Ex Parte*, at 10.

19 *See id*.

20 *See id*., at 18-21.

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
PREEMPTIONS (Trends) (continued)		clearing network programming is so high that preemption is unattractive and, as EI has demonstrated, preemption is in fact an exceedingly rare event.[20]
	NASA/NAB also make a variety of claims relating to the network-affiliate relationship (*e.g.*, program overruns).[21]	These claims are irrelevant to the media ownership proceeding. They should be considered, if at all, in a separate proceeding and should not be linked in any way to the media ownership proceeding.[22] For a direct rebuttal of NASA/NAB's groundless attacks on network behavior, please refer to the comments filed by each of the networks in response to NASA's petition for inquiry.[23] In any event, to the degree that NASA/NAB contend that network pressure impedes affiliates' unilateral, economically motivated business decisions, EI has explained how the affiliate free-rider problem – if unchecked – would damage free, over-the-air television.

[21] *See NASA/NAB Ex Parte*, Attachment A, at 6.

[22] *See Comment Sought on "Petition for Inquiry Into Network Practices" Filed by Network Affiliated Stations Alliance*, Public Notice, DA 01-1264 (rel. May 22, 2001).

[23] *See In Re Petition for Inquiry Into Network Practices,* DA 01-1264, Comments of Fox Broadcasting Company, Inc., Comments of National Broadcasting Company, Inc. and Comments of Viacom Inc., all filed July 23, 2001.

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
LOCAL NEWS (Quantity): *NASA/NAB contend that O&Os do not produce more hours of local news than affiliates.*[24]	NASA/NAB criticize the irrefutable evidence demonstrating that O&Os produce significantly more hours of local news per week than affiliates.	The data clearly shows that, controlling for other relevant factors, the average O&O produces *37 percent more* local news per week than the average affiliate.[25] In fact, the differential between the average amount of local news offered by O&Os and that provided by affiliates increases as markets get smaller. In DMAs outside the top 25 markets, O&Os provide *more than nine hours* of additional news local news per week, compared to affiliates.[26] Yet in order to support their contention that there is no difference in news quantity, NASA/NAB have simply excluded the FOX O&Os and affiliates from the data. As the Joint Commenters have shown, however, there is no justification for this exclusion.[27]

24 *See NASA/NAB Ex Parte*, Attachment A, at 7.

25 *See News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations*, EI Economic Study H, submitted with the Opening Comments of the Joint Commenters, at 10.

26 *See Local News and Public Affairs Programming on Network Owned and Operated Stations Compared to Network Affiliate Stations: A Comparison of the NAB/NASA and EI Results*, prepared by Economists Incorporated and submitted with the *Ex Parte* Letter of the Walt Disney Company, February 13, 2003, at 12.

27 *See* Response of FOX, NBC/Telemundo, and Viacom to Early Submission of NAB and NASA, MB Docket No. 02-277, December 19, 2002, at 2.

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
LOCAL NEWS (Quantity): (continued)		Moreover, without the exclusion, even NASA/NAB must concede that O&Os outperform affiliates with regard to quantity of news programming.[28]
	NASA/NAB first attempted to exclude the FOX O&Os from the data on the basis that the FOX O&Os were outliers, and that FOX purchased stations with already high news output.	As EI demonstrated, mere variability in the data for FOX's O&Os does not justify their exclusion. And EI also pointed out that excluding the FOX O&Os on the grounds that their performance reflected the efforts of prior owners was "absurd."[29]
	More recently, NASA/NAB have argued that the data for the FOX O&Os should be excluded because most of the FOX O&Os are VHF stations while most of the FOX affiliates are UHF stations.	Even if it is true that UHF stations are likely to run less local news than VHF stations, the correct response is to include UHF/VHF status among the factors held constant in the regression, not to exclude Fox from the analysis. This is the correct response because the variable of interest for policy purposes is network ownership, not frequency band. Using either EI's data and models or NASA/NAB's data and model, O&O stations across all four networks still have statistically significantly more minutes of news programming than

28 *See id*.

29 *See id*.

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<u>LOCAL NEWS (Quantity)</u>: (continued)		affiliates when this variable is included. Thus, taking UHF/VHF status into account does not alter the principal result.
<u>LOCAL NEWS (Quality)</u>: *NASA/NAB contend that affiliates deliver higher quality local news than O&Os.*[30]	NASA/NAB argue that affiliates have a higher rate of winning duPont awards than O&Os, and thus that that affiliates deliver higher quality local news.	The Commission has repeatedly recognized that its structural ownership regulations should be content-neutral.[31] Justification of the cap based upon measures of the quality of news programming is anything but content-neutral. In any event, as the Joint Commenters have pointed out, a larger number of RTNDA awards are given out each year, and they therefore represent a better measure of news quality than the duPont awards. Using multiple regression analyses and holding other factors constant, EI demonstrated that there is no statistically significant difference between the number of RTNDA awards earned by affiliates and O&Os. Moreover, the Joint Commenters submitted voluminous evidence documenting the myriad awards that their O&Os have earned in just the last few years.[32]

30 *See NASA/NAB Ex Parte*, Attachment A, at 6.

31 *See* Attachment 1 to the *Joint Commenters Ex Parte*, at 5.

32 *See* News Programming Exhibits, submitted with the Opening Comments of the Joint Commenters.

Red Herring	NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap	The Reality
LOCAL NEWS (Quality) (continued)	NASA/NAB also allege that a study released by the Project for Excellence in Journalism ("PEJ") demonstrates that affiliates produce higher quality newscasts than O&Os.	NASA/NAB ignore EI's rebuttal demonstrating that the PEJ study was fundamentally flawed and "useless as a basis for policy making."[33] Indeed, EI determined that *none of the PEJ study's principal empirical findings is statistically significant.*[34]

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33 *See The Project for Excellence in Journalism's PEJ Study of Ownership and Quality of Newscasts: A Critique,* submitted for the record in MB Docket No. 02-277, March 13, 2003, at 10.

34 *See id.*, at 2.

Red Herring	**NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap**	**The Reality**
CRITICAL MASS OF AFFILIATES NEEDED TO INFLUENCE NETWORK PROGRAMMING TO TAKE ACCOUNT OF LOCAL COMMUNITY STANDARDS: *NASA/NAB contend that the 35% cap is needed to ensure that a critical mass of affiliates will be available to restrain network decision-making.*[35]	NASA/NAB suggest that the 35% cap represents a "tipping point" with respect to affiliate influence over network programming decisions.	NASA/NAB have not presented any credible evidence to explain how the cap is necessary, or why 35% represents a logical number. As the Joint Commenters have shown, affiliates do not play any role in counseling the networks during the program development process. Therefore, the cap has no nexus to programming decisions. Furthermore, even if an ownership cap somehow were an effective and appropriate means to ensure communication of local viewpoints to networks – which it is not – the Commission would need to preserve independent ownership of stations with at most a *de minimus* national audience reach, since the inability of a network to deliver 100% of the audience is very detrimental to its profitability.[36]

[35] *See NASA/NAB Ex Parte*, Attachment A, at 8-10.

[36] *See* Attachment 1 to the *Joint Commenters Ex Parte*, at 4, n.9.

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INNOVATIONS BY AFFILIATES: *NASA/NAB implicitly contend that affiliates do a better job of providing innovations in broadcast service.*[37]	NASA/NAB suggest that O&Os are not equally committed to new and innovative services.	First and foremost, the networks have always been at the forefront of embracing and spearheading technological innovation in the broadcast service, whether in color television or the transition to digital television. The very existence of the 35% cap does, however, inhibit the potential economic efficiencies available to group owners. In particular, the cap artificially raises the cost of operating television stations and limits the return that networks can realize on their programming and technology investments. In effect, the ownership rule drives network owners to divert more of their resources away from free, over-the-air television and toward alternative means of distributing program content, such as subscription-based cable channels.[38] Elimination of the cap, therefore, would only serve to enhance all group owners' ability to provide innovative new broadcast services.

37 *See NASA/NAB Ex Parte*, Attachment A, at 10.

38 *See* Opening Comments of the Joint Commenters, at 43.

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<u>GEOGRAPHIC LOCATION</u>: *NASA/NAB contend that the wider geographic dispersal of affiliate group ownership, in comparison to O&O group ownership, signifies a deeper to localism commitment by affiliates.*[39]	NASA/NAB argue that affiliate group owners maintain headquarters in various cities across the United States, but that the O&O groups are all headquartered in either New York or Hollywood.	NASA/NAB utterly fail to explain how the location of an owner's headquarters office in one large city versus another large city bears any relationship whatsoever to localism. In fact, the Joint Commenters have repeatedly explained that they rely on local managers to make programming decisions at all of their stations. These local managers, who live in the communities in which they work, are particularly knowledgeable about local tastes, needs and interests. There is absolutely no reason to believe that O&O managers are any less responsive to local communities than affiliate managers – many of whom also work in cities far removed from their group's headquarters in Atlanta, Chicago or Dallas.[40]

39 *See NASA/NAB Ex Parte*, Attachment A, at 10.

40 *See* Opening Comments of the Joint Commenters, at 38.

<u>Red Herring</u>	**<u>NASA/NAB's Unsupported, Ill-Considered and Irrelevant "Evidence" for Retention of the 35% Ownership Cap</u>**	**<u>The Reality</u>**
<u>MARKETPLACE CHANGES SINCE 1996</u>: *NASA/NAB contend that developments since adoption of the 35% cap confirm the need for a restrictive ownership rule.*	NASA/NAB allege that the networks dominate the media marketplace, and that the market for video production remains highly concentrated.	The evidence in this proceeding overwhelmingly demonstrates the incredible competitive breadth of the modern media marketplace. The marketplace today bears no resemblance to the media world that existed 60 years ago. Even in the last seven years, since the cap was raised to 35%, there has been tremendous growth both in the number and variety of media outlets available to consumers. An ever-increasing array of new technologies – especially the Internet – has revolutionized the way people access media today.[41] This incredible array of outlets provides a wide variety of local content to viewers in markets across the country.[42]

41 *See* Opening Comments of the Joint Commenters, at 10-26.

42 *See, e.g.*, *Counting Outlets and Owners in Milwaukee: An Illustrative Example,* EI Economic Study H, submitted with the Opening Comments of the Joint Commenters.

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MARKETPLACE CHANGES SINCE 1996 (continued)		The sheer number and variety of outlets suggests what economic analysis has confirmed: the media marketplace is *not* highly concentrated, and no single owner or group of owners dominates this vastly competitive field.[43]

43 *See Concentration Among National Purchasers of Video Entertainment Programming*, EI Economic Study E, submitted with the Opening Comments of the Joint Commenters, at 7.