

May 9, 2003

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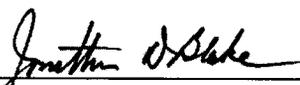
Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

Re: Ex Parte Submission
MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244

Dear Ms. Dortch:

For inclusion in the Commission's media ownership proceeding, enclosed please find a presentation by the Network Affiliated Stations Alliance and the National Association of Broadcasters in response to the Fox, NBC, and Viacom submissions of April 21, 2003 and May 2, 2003, and an accompanying economic statement by Professors Marius Schwartz and Daniel Vincent also in response to the networks' submissions.

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*

Enclosures

**THE JOINT NETWORKS CONTINUE TO
PRESS ARGUMENTS DEVOID OF RECORD SUPPORT**

On April 21, 2003, three of the big four networks, Fox, NBC and Viacom ("Joint Networks"), filed a document entitled "'Red Herring' Arguments – the Unsupported, Ill-Considered and Irrelevant Arguments for Retention of the National TV Ownership Cap After *Fox Television Stations, Inc.*" On May 2, 2003, the Joint Networks made a second *ex parte* filing, essentially reiterating the same points previously made. What is so striking about these documents is the extent to which they themselves are "unsupported, ill-considered and irrelevant."

As demonstrated below and in the attached economic response prepared by Professors Marius Schwartz and Daniel Vincent, the Joint Networks' filings are replete with mischaracterizations, consist largely of bare assertions that are unsupported by evidence in the record (Attachment A to their May 2 filing being the starkest example), and utterly fail to address substantial record evidence demonstrating the opposite of what the Joint Networks contend. Specifically, the Joint Networks:

- mischaracterize the D.C. Circuit's conclusions,
- misstate the findings of the 1984 Report,
- continue to press untenable First Amendment arguments,
- submit selective, incomplete data and ignore unrefuted record evidence,
- make statements on O&O allegiance that support retaining the 35% cap,
- attempt to rebut record evidence of affiliate influence with irrelevant assertions about their preference for dealing with O&Os,
- persist in making assertions regarding local news that are unsubstantiated and contrary to evidence in the record, and
- urge the FCC to sacrifice localism to enhance network profits.

The Joint Networks' submissions are fatally flawed and cannot serve as a basis for a judicially sustainable decision on the ownership cap.

FATAL FLAWS IN THE JOINT NETWORKS' ARGUMENTS

1. The Joint Networks Mischaracterize The D.C. Circuit's Conclusions.

The Joint Networks argue that the D.C. Circuit's decision in the *Fox* case "presents the opponents of elimination of the Cap with an insurmountable hurdle: to provide a justification for a rule which the FCC nearly 20 years ago declared no longer serves the public interest."¹ This statement seriously mischaracterizes the D.C. Circuit opinion, which made quite explicit that the Court's quarrel with the Commission was its failure to *state its reasons* for reaching a different conclusion from the 1984 Report and *not* a belief that it would be difficult for the Commission to do so:

We do not infer from this silence that the agency cannot justify its change of position [T]he Commission would have *to state the reason(s)* for which it believes its contrary views set out in the 1984 Report were incorrect or are inapplicable in light of changed circumstances, *but this is by no means inconceivable; the Report is, after all, now almost 20 years old.* For this reason alone, a remand rather than vacatur is indicated. . . . In sum, we cannot say it is unlikely the Commission will be able to justify a future decision to retain the Rule.²

2. The Joint Networks Misstate The Findings Of The 1984 Report.

The Joint Networks claim that "[i]n 1984, the FCC found that O&Os are no less committed to localism than affiliates"³ This statement is untrue. The 1984 Report made *no* findings about the relative commitment of affiliates and O&Os to localism. In fact, the Report was striking in its failure to address localism – which is why in 1984 its conclusions would not have been a judicially sustainable basis for relaxing or repealing the ownership cap, and why that continues to be true today. The Joint Networks' citation to language in the Report pertaining to diversity and competition does not cure its failure to address localism.

3. The Joint Networks Press First Amendment Arguments That Are Irreconcilable With The *Fox Television* Decision.

In *Fox Television*, the Joint Networks argued that the national television ownership rule violated the First Amendment, because it prevented them from speaking to some of the U.S. television audience. In line with the Commission and NAB/NASA, the D.C. Circuit rejected this argument as unconvincing and contrary to Supreme Court precedent. The Joint Networks now try to argue that the Commission should repeal the national television ownership rule because it favors one type of content over another. This statement is irreconcilable with the D.C. Circuit's characterization of the rule in *Fox Television*. There the Court held that the rule is a content-neutral regulation of industry structure. Just like the ownership regulations at issue in

¹ *Ex Parte* Filing of Fox Entertainment Group *et al.* (herein "Red Herring" Arguments), MB Docket No. 02-277, at 1 (filed April 21, 2003).

² *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (emphasis added).

³ "Red Herring" Arguments, at 2.

NBC v. U.S., the rule is perfectly consistent with the First Amendment if not based upon any owner's political, economic, or social views. As Professors Schwartz and Vincent explain, the national television ownership rule encourages responsiveness to local tastes, without regard to what those local tastes might be.⁴

4. The Joint Networks Again Submit Selective Data And Ignore Unrefuted Evidence In The Record.

The Joint Networks and their economists, Economists Incorporated ("EI"), now submit four data points purporting to show that affiliates of the networks with the greatest national reach (CBS and Fox) preempted more in prime time in 2001 than affiliates of the other networks (ABC and NBC). The Joint Networks argue that this is evidence that increased network ownership does not diminish preemptions because "[i]f in fact there was a correlation between an increase in the Cap and preemption rates, the number of hours preempted would be expected to correlate inversely with the size of the audience reach of a network's group of O&Os."⁵ This statement is a gross oversimplification because the precise preemption rates for each network also are affected by the other attributes of the network – attributes that the Joint Networks do not even purport to control for. As Schwartz and Vincent explain:

A simple snapshot as represented by the figure on EI p. 19 does not identify whether the differences in preemption rates are better explained by the network-specific feature EI chose to illustrate (that is, station ownership) or by other equally-plausible differences across networks, such as differences in the current popularity of programming schedules, in the maturity of the networks, or in the stringency of their contracts with affiliates as regards allowable preemptions.⁶

For example, while NBC is one of the most restrictive networks in terms of preemptions, CBS historically has allowed affiliates greater discretion to preempt network programming.⁷ CBS was the last network to impose preemption baskets and it brought its standard affiliation agreement into conformance with the requirements of the right-to-reject rule, after NASA pointed out the inconsistencies between the agreement and the rule. A famous quote from Mel Karmazin portrayed CBS as "sucking less" than the other networks when it came to affiliate relations. But this restraint in the area of preemptions *relative* to some other networks

⁴ Marius Schwartz & Daniel Vincent, *Response to April 21 and May 2, 2003 Filings by Fox, NBC, and Viacom* (herein "Schwartz & Vincent"), at 4 (May 6, 2003) (footnotes omitted) (Copy of the Schwartz & Vincent statement is provided as an Attachment to this filing).

⁵ "Red Herring" Arguments, at 8.

⁶ Schwartz & Vincent, at 6.

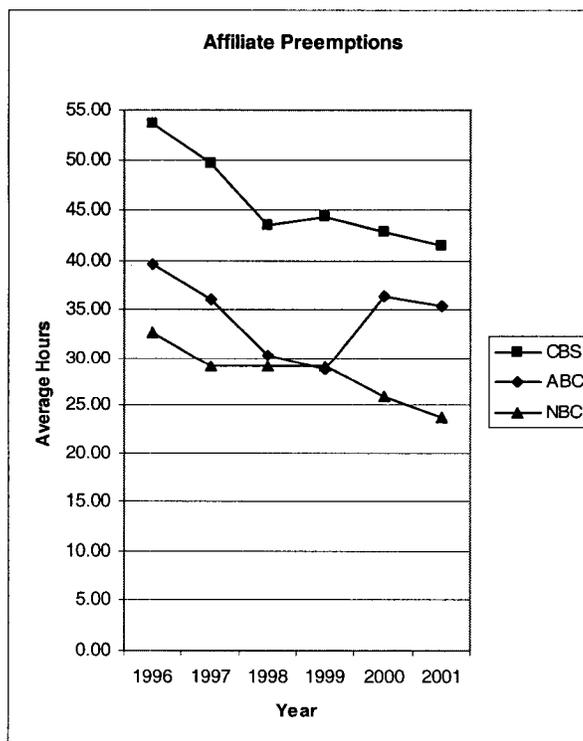
⁷ Because the Fox Television Affiliates Association is not a member of NASA, the NAB/NASA survey did not include Fox affiliates. Given Fox's minuscule two-hour per week preemption basket and restrictive preemption practices, however, the Fox results are highly suspect. While the content of Fox's programs in 2001, such as the controversial *Temptation Island*, could account for a higher than usual amount of preemptions that year, NAB/NASA would need to review the underlying data and the data over time (which NAB/NASA requested but the Joint Networks refuse to provide) to do a proper analysis.

does not mean that CBS's acquisitions have not impacted localism nor does it rebut the *unrefuted record evidence* that as network ownership has expanded, localism as measured by many metrics – preemption rates as compared to those before the cap was raised to 35%, the ability of affiliates to influence network programming decisions, the overall reduction in the number of independent affiliates (as opposed to O&Os) serving local markets – has suffered.

As one illustration of this point, NAB/NASA have examined the preemption data of ABC, CBS, and NBC affiliates since the cap was increased from 25% to 35%, as reported in the survey NAB/NASA conducted for this proceeding.⁸ Affiliates of the ABC network, which has remained below 25% O&O penetration, reported preemption hours that fluctuated up and down over time. By comparison, preemptions by affiliates of the NBC and CBS networks, whose acquisitions after 1996 have given them significantly higher O&O penetration, generally trend downward over the period since the cap was raised to 35%.

Affiliate Preemptions

Year	ABC	CBS	NBC
1996	39.59	53.65	32.61
1997	36.01	49.61	29.18
1998	30.21	43.54	29.04
1999	28.82	44.31	29.12
2000	36.45	42.78	25.87
2001	35.39	41.54	23.62



⁸ See Comments of the National Association of Broadcasters and the Network Affiliated Stations Alliance (herein "NAB/NASA Comments"), MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (filed January 2, 2003). Because the Fox affiliates are not members of NASA, the data do not include Fox. The NAB/NASA data reflects all preemptions, not just those in prime time.

The Joint Networks' late-filed submission of four data points, based on prime time-only preemptions in a single year, fails to address the substantial record evidence – further substantiated by the analysis above – demonstrating that affiliate preemptions have been driven down over time, with a marked decrease after the cap was raised to 35%.⁹ Given that their submissions show that data on this issue is readily accessible to the networks, the Commission must conclude that the Joint Networks cannot refute the NAB/NASA findings that preemptions have decreased significantly as network ownership of stations has increased.

In addition, the Joint Networks fail to address another direct harm to localism that results from increased network ownership – a reduction in the number of independent affiliates serving local markets. The Joint Networks have submitted no evidence to show that O&Os preempt anywhere near as much as affiliates. Indeed, each of their submissions has proven the opposite – their comments show affiliates preempting 40% more than O&Os, in prime time¹⁰ and their latest reexamination of the 1994 data shows affiliates preempting *12 times more* than O&Os in prime time.¹¹ The distinction in behavior between affiliates and O&Os is significant. If the networks are permitted to own more stations, fewer stations will possess the ability to exercise or protect their right, under the network/affiliate rules, to reject network programming. It will mean more stations forced to temper actions that would be in the interest of the local community in order to promote the interests of their network parent. The Joint Networks do not dispute this fact – in a position that is outspokenly cavalier, their economists candidly admit that the networks want to own more stations in order to make an end run around “Commission regulations restricting the features of [affiliation] agreements.”¹² EI openly complains that “network contracts with affiliates have long been constrained by various FCC regulations, such as the one that forbids local stations to delegate responsibility for programming decisions.”¹³

It would be error for the Commission to rely on the Joint Networks' submissions to conclude either that O&Os preempt as frequently as affiliates or that affiliate preemptions have not been driven down over time as network ownership has increased. Neither the Commission nor NAB/NASA can fairly evaluate or rely on the validity of the data or the conclusions of the Joint Networks, because their submissions rely on selective data, based only on prime time preemptions in a single year. Plainly, in contrast to NAB/NASA's submissions, the Joint Networks' data does not permit evaluation of differences in preemption rates among time slots or over a period of years. NAB/NASA asked the Commission to require the complete data from the Joint Networks, and the Commission apparently assumed such data would be produced. It was not. Accordingly, the Commission cannot reasonably or properly base a determination in this proceeding on the incomplete submissions of the Joint Networks.

⁹ NAB/NASA Comments, at 16.

¹⁰ Comments of Fox Entertainment Group *et al.*, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, EI Study G, Preemption by O&O's Compared Affiliates, at 3 (filed January 2, 2003); NAB/NASA Reply Comments, at 34-35.

¹¹ Bruce M. Owen *et al.*, *Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules* (herein “EI Study”), MB Docket No. 02-277, at 20 (filed April 21, 2003) (emphasis added).

¹² *Id.* at 1; *see also* “Red Herring” Arguments, at 4 (O&O “allegiance to the network is unclouded”).

¹³ EI Study, at 5.

5. The Joint Networks' Statements On O&O Allegiance Support Retaining The 35% Cap.

The record is replete with evidence demonstrating that affiliates are more responsive to local tastes and needs than O&Os because affiliates have only one directive – to provide programming responsive to the local community – while O&Os have two – to provide programming responsive to the local community and to serve the national programming and advertising interests of their network parents. Where the local and national interests of O&Os conflict, the local interests may be subordinated to the network parent's national advertising and national and international programming interests. The Joint Networks state that O&Os are a better source of local information because “their allegiance to the networks is unclouded by competing economic incentives” – but these so-called “competing incentives” (*i.e.*, to serve the public interest without having to serve the national programming and advertising interests of a network parent) are precisely what make an affiliate more likely to preempt for local interests than a network O&O.¹⁴ As Schwartz and Vincent explain in the attached economic statement:

Indeed, we agree with the Joint Networks that, at times, there will be conflicts of interest between a network and its affiliates. It is precisely this difference in incentives that forms the crux of our argument for why the Cap serves the goal of localism.

Briefly, in building an audience for its programs – and thus, for its local advertisers – an affiliate serves a single master, its local audience. An O&O, on the other hand, serves multiple masters. It must, of course, attempt to encourage broad local viewership but it also must ensure the nationwide broadcast of its network schedule. One of these goals will sometimes be compromised to satisfy the other. A policy goal such as localism, which seeks to ensure greater responsiveness to local tastes, can therefore be advanced by limiting networks' ownership of stations.¹⁵

The direct control that the networks hold over their owned stations and their *unambiguous* expectation that these stations will clear the maximum amount of network programming possible – “since the inability of a network to deliver 100% of the audience is very detrimental to its profitability” – means that O&O station managers will lack the incentives and the power to push back with respect to the great majority of network programming decisions. The Joint Networks make crystal clear that O&Os are viewed as *a part of the national network* “whose allegiance is unambiguous” and not as independent entities free to make programming decisions solely based on local interests.

¹⁴ It is this distinction between affiliates and O&Os that makes the difference for localism, which is why the information provided at Attachment B to the Joint Networks' May 2, 2003, *ex parte* is entirely irrelevant.

¹⁵ Schwartz & Vincent, at 2.

6. The Joint Networks' Attempt To Rebut Record Evidence Of Affiliate Influence With Assertions About Their Preference For Dealing With O&Os Only Supports The Value Of Independent Affiliates.

NASA and NAB have submitted substantial and un rebutted evidence for the record pertaining to the influence that affiliates exert on network programming decisions, including numerous examples of specific instances where affiliates have brought their influence to bear and data from affiliate association board meetings that substantiate the give-and-take between networks and affiliates with respect to programming issues.¹⁶ *At no point do the Joint Networks address the concrete, real world instances of influence that NASA and NAB have cited – such as the NBC affiliates persuading the network to allow stations to air the 2000 Presidential debate or the CBS affiliates persuading CBS to move the Victoria's Secret Fashion Show to a later time period – nor do they cite any specific instances where their programming decisions have been swayed by O&Os expressing concerns over the content of network programming and its appropriateness for local viewers. Instead of addressing the evidence in the record or submitting new evidence on this point, the networks simply argue that O&Os “from the networks’ perspective, are a far more credible source of information as to consumer tastes, needs and interests” and that “O&O general managers and program directors are every bit as integrated into their local communities as their counterparts at affiliates.”*

NASA and NAB have never argued that O&Os are not “credible” sources of local information or that O&O general managers are less integrated into their local communities. Rather, NASA and NAB have shown that having a critical mass of independently-owned affiliates allows affiliates to exert influence over network programming decisions based on the reactions of local audiences – influence that is grounded in the right to reject network programming (a right that does not apply to O&Os) and that is unclouded by the obligation to serve the national programming interests of a network parent. Therefore, the issue is not whether O&Os are capable of providing information to the network with respect to local tastes or whether the networks prefer to get information from their O&Os because their economic interests are aligned. The issue is whether O&Os have the same incentives and ability to influence network program decisions where they conflict with local interests. The un rebutted evidence in the record shows that they do not.

7. The Joint Networks' Assertions Regarding Local News Are Unsubstantiated And Contrary To Evidence In The Record.

On the issue of local news, the Joint Networks persist in making assertions that are not supported by the record.¹⁷ On local news quality, the Joint Networks urge the Commission simply to ignore the substantial and un rebutted record evidence demonstrating that *affiliates are superior* to O&Os. Because they cannot rebut the showing that affiliates outperform O&Os in terms of the prestigious DuPont and Peabody Awards, the Joint Networks urge the Commission simply to ignore these results and focus exclusively on the RTNDA awards where affiliates perform slightly better. Specifically, the Joint Networks are silent with respect

¹⁶ NAB/NASA Comments, at 27-31; NAB/NASA Reply Comments, at 18-21; *Ex Parte* Letter of the National Association of Broadcasters and the Network Affiliated Stations Alliance, MB Docket No. 02-277 and MM Docket Nos. 02-235, 01-317, 00-244 (filed March 25, 2003).

¹⁷ Schwartz & Vincent, at 3.

to affiliate superiority with respect to the Peabody Awards and urge the Commission not to consider the DuPont Awards because they are more prestigious. This argument is akin to arguing that the Nobel and Pulitzer Prizes are not good indicators of quality because they are prestigious.

Because the Joint Networks have no credible argument to rebut affiliate superiority in local news quality, they instead urge the Commission to focus solely on news quantity, where they claim they do better than affiliates. But this claim also cannot be supported by evidence on the record. First, an analysis of the FCC staff data (when corrected for market size, as the networks concede is necessary) demonstrates that the difference in news hours between O&Os and affiliates *is attributable solely to Fox, and the Joint Networks do not dispute this finding*. Because there is not a statistically significant difference between the hours of local news carried by the affiliates and O&Os of the CBS, NBC, and ABC television networks, there is clearly no basis for concluding that O&Os generally carry more local news than affiliates. Moreover, NASA and NAB have demonstrated that the difference in local news hours between Fox affiliates and O&Os results not from the station's ownership, but from the UHF/VHF differential. For Fox, there is a striking difference between the stations the network owns – 72% of which are VHF – and those that it has affiliated with – 82.3% of which are UHF.¹⁸ *When the data is corrected to take the UHF/VHF differential into account, the disparity in news hours disappears.*

The Joint Networks have not disputed the appropriateness of taking the UHF/VHF differential into account and until the May 2, 2003, filing, they have remained silent with respect to NASA and NAB's analysis, which was submitted on February 3, 2003. But now, the Joint Networks blankly assert that if UHF/VHF status is taken into account, the networks "still have statistically significantly more minutes of news programming than affiliates" – but provide no supporting data, report no specific statistical results, cite no economic analysis, and fail to explain why these purported results differ from those set forth in NASA and NAB's February 3, 2003, reply comments. *This statement is supported by no record evidence and accordingly must be disregarded by the Commission.*

8. The Joint Networks Urge The FCC To Sacrifice Localism To Increase Network Profits.

The latest filings by the Joint Networks once again demonstrate why the 35% ownership cap is critical – the networks believe that the bedrock principle of localism should be subservient to increased network profits. Indeed, the Joint Networks already have eroded localism in a number of respects and even attempt to use this erosion – for example, their success in driving down preemptions over time – to claim that the 35% cap no longer serves this core goal. The adverse impact increased network ownership has had to date shows why the cap should not be relaxed further in contradiction of the statutorily-based principle of localism.

The strategy of the Joint Networks has been to dismiss the role of the 35% cap in preserving localism and focus on the impact of the cap on network profits. Professors Schwartz

¹⁸ This striking disparity is unique among the networks. For CBS, 88.2% of its O&Os and 81.3% of its affiliates are VHF; for NBC 78.6% of its O&Os and 72.2% of its affiliates are VHF; for ABC, 90% of its O&Os and 64.6% of its affiliates are VHF. NAB/NASA Reply Comments, at 53.

and Vincent observe that the network economists “exaggerate the cost” of affiliate independence “and – more importantly – ignore any potential social benefits.”¹⁹ First, Professors Schwartz and Vincent observe that the Joint Networks’ implicit claim in their most recent filings that they need an increase in the cap in order to survive not only is unsubstantiated, but is directly contrary to the Commission’s own findings.

On the cost side, EI argue that the burden of a regulation such as the Cap, renders it “... not possible for broadcast networks to survive in the long term...” A similar gloomy forecast was made in a FCC study in 1991. A more recent FCC study of the broadcast television industry conducted in connection with the current proceeding finds, however, that the broadcast networks continue to thrive. One of the authors of the second study was also an author of the first and candidly acknowledges that the original predictions of the networks’ demise proved to be overstated. EI’s claim that under the Cap “it is not possible for the [broadcast] networks to survive” is backed by no evidence in the record and is at odds with these later findings.²⁰

Second, and more critically, Professors Schwartz and Vincent point out that the analysis submitted by the Joint Networks’ economists entirely devalues localism – to accept their argument would be to abdicate the statutory localism principle underlying our system of television broadcasting.

Turning to the benefit side, EI ignores entirely the Cap’s role in advancing localism. Indeed, one of the authors of the EI study has argued elsewhere in these proceedings that localism is not a valid FCC goal. This stance is reflected in EI’s current response as well. One of the advantages touted from repealing the Cap is that allowing increased station ownership by networks would allow networks to circumvent other regulations that the FCC has seen fit to impose in order to preserve affiliates’ independence. . . .

We have emphasized that these very regulations reflect the policy interest of the FCC in localism. The Cap may well impose a cost on the joint activities of networks and affiliates. A relaxation of the Cap, however, would compromise the policy goal of localism and render irrelevant many of the other regulations the FCC has enacted to advance this goal.²¹

The Joint Networks’ argument that the cap should be raised in order to relieve them from the FCC rules that protect localism, such as the right-to-reject and time option rules,

¹⁹ Schwartz & Vincent, at 3.

²⁰ *Id.* at 3.

²¹ *Id.* at 3-4.

illustrates again why an increase in the ownership cap will have a direct and adverse impact on localism.

* * *

The Joint Networks' latest submissions provide no support for relaxing or eliminating the 35% national television ownership cap. Indeed, they confirm that the cap is even more needed to protect localism than when it was adopted in 1996.

NATIONAL ASSOCIATION OF BROADCASTERS

NETWORK AFFILIATED STATIONS ALLIANCE

Response to April 21 and May 2, 2003 Filings by Fox, NBC, and Viacom

By

Marius Schwartz and Daniel R. Vincent

May 6, 2003

Fox, NBC, and Viacom criticize what they portray as two “red herrings” for retaining the Cap on grounds of localism. In this submission, we respond to points raised by these networks in two submissions filed on April 21, 2003: “ ‘Red Herring’ Arguments – The Unsupported, Ill-Considered and Irrelevant Arguments for Retention of the National TV Ownership Cap After *Fox Television Stations, Inc*” (“Joint Networks”), and a supporting analysis by Bruce M. Owen, Michael G. Baumann and Kent W. Mikkelsen, of Economists Inc., titled “Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules (“EI”). Similar arguments were also presented in a letter from Fox, NBC and Viacom to the FCC on May 2, 2003, “Ex Parte Letter, John Quale, May 2, 2003 (“May 2 Letter”) and an attachment (“Attachment A”).¹

“Red Herring #1” is that “affiliates have a special ability to make the network sensitive to the tastes, needs and interests of consumers in local communities.” The Joint Networks argue that, if anything, networks discount the views of affiliates relative to those of O&Os since affiliates have an inherent economic conflict with the network over the distribution of profits.² They add: “Equally important, the FCC should be extremely wary of maintaining a structural ownership rule based on a determination that one group of owners – networks – are for some reason deemed to exercise ‘inferior’ editorial judgment.”³

Red Herring 1 raises two issues, which we address in turn. In Section A below, we stress that the key reason for believing that affiliates are better positioned than O&Os to serve their local markets is not a superior ability to convey information to the network but a stronger incentive and ability to resist the network’s pressure to secure full clearance of its programming. In Section B, we reiterate that public policy to preserve affiliates’ autonomy on programming does *not* rest on a belief that affiliates have superior judgment than O&Os, but on the recognition that – because of the differing economic incentives – affiliates’ *criterion* for selecting programs is likely to more closely track local interests.

“Red Herring #2: ... [is] that network affiliates preempt substantially more programming than O&Os, and thus deserve special accolades for being ‘more committed’ to localism.” The reality, say the Joint Networks, is that “both affiliates and O&Os preempt only a tiny fraction of network prime time programming, and that any difference in preemption rates is due to affiliate preemptions for paid programming.”⁴ The Joint Commenters also dispute that affiliates’ preemptions have declined dramatically since 1994.⁵

¹ Our discussion draws on our two previous submissions to the FCC in this proceeding: Marius Schwartz and Daniel R. Vincent, *The National Television Ownership Cap and Localism*, (“Schwartz and Vincent Comments”) (filed January 2, 2003) and Marius Schwartz and Daniel R. Vincent, *The National Television Ownership Cap and Localism: Reply Comments* (“Schwartz and Vincent Reply Comments”), (filed February 3, 2003).

² See Joint Networks, at 1 and 3; May 2 Letter, Attachment A, at 2.

³ See Joint Networks, at 3; May 2 Letter, at 5.

⁴ See Joint Networks, at 1; May 2 Letter, Attachment A, at 6.

⁵ See Joint Networks, at 6-8; May 2 Letter, Attachment A, at 7-8 .

Section C below refutes the claim that there is no meaningful difference in preemptions by affiliates and O&Os. Section D addresses the decline in preemptions over time.

A. Affiliates Have Stronger Incentives and Ability than O&Os to Focus on Their Local Markets and Preempt Network Programming to Advance Local Interests

The Joint Networks argue that a network will pay less attention to representations made by affiliates than by O&Os about local conditions because the network recognizes that affiliates' incentives often conflict with the network.⁶ In our submissions, we made no claim that affiliates have a superior ability to inform networks about local tastes. Indeed, we agree with the Joint Networks that, at times, there will be conflicts of interest between a network and its affiliates. It is precisely this difference in incentives that forms the crux of our argument for why the Cap serves the goal of localism.

Briefly, in building an audience for its programs – and thus, for its local advertisers – an affiliate serves a single master, its local audience. An O&O, on the other hand, serves multiple masters. It must, of course, attempt to encourage broad local viewership but it also must ensure the nationwide broadcast of its network's schedule. One of these goals will sometimes be compromised to satisfy the other.⁷ A policy goal such as localism, which seeks to ensure greater responsiveness to local tastes, can therefore be advanced by limiting networks' ownership of stations.

Both the Joint Networks and EI seem to agree that networks' and affiliates' interests differ in this manner. For example, the Joint Networks refer to the “competing economic incentives” of affiliates and their networks⁸ and emphasize a network's extremely strong interest in securing maximal geographic coverage for its programming schedule⁹ – an interest that at times will conflict with the interests of affiliates oriented towards their specific local markets. In our first submission, we described the different economic functions of networks and local stations that lead to the differing economic incentives,

⁶ See Joint Networks, at 1.

⁷ In May 2 Letter, Attachment A, at 1, the Joint Networks assert that both O&Os and affiliate owners typically have multiple business interests. The relevant point here is whether any of the various business interests obviously conflict with the viewing interests of the local community. As was pointed out in Schwartz and Vincent Comments (at 1, 3 and 7) and re-iterated in Schwartz and Vincent Reply Comments (at 2), the important difference between networks and non-network group owners is that network interests in nationwide clearance presents (at times) a conflicting interest with the local community, while there is no such obvious conflict in the case of non-network group owners: “A network ... will have strong incentives to ensure that its owned stations adhere to its schedule even in some cases where, from the standpoint of serving individual local markets, it would be preferable to let those stations air other programs. By contrast, a non-network group does not provide its stations with a program lineup, and therefore has less to gain from constraining their programming choices.” Schwartz and Vincent Reply Comments, at 2.

⁸ See Joint Networks, at 4

⁹ *Id.* (Footnote 9).

and noted that an affiliate's preemption of a network show can impose costs on the network and other affiliates.¹⁰ But we also stressed the other side: "At the same time, independent decisions by affiliates advance a policy goal. By ensuring that each station's programming is more closely oriented to its market, autonomous decision making promotes localism."¹¹

EI echo our description of the potential conflict between a network and affiliates.¹² In doing so, however, they exaggerate the cost of this behavior and – more importantly – ignore any potential social benefits.

On the cost side, EI argue that the burden of a regulation such as the Cap, renders it "... not possible for broadcast networks to survive in the long term..."¹³ A similar gloomy forecast was made in a FCC study in 1991.¹⁴ A more recent FCC study of the broadcast television industry conducted in connection with the current proceeding finds, however, that the broadcast networks continue to thrive.¹⁵ One of the authors of the second study was also an author of the first and candidly acknowledges that the original predictions of the networks' demise proved to be overstated. EI's claim that under the Cap "it is not possible for the [broadcast] networks to survive" is backed by no evidence and is at odds with these later findings.

Another alleged cost of the Cap is that affiliates provide less local news programming than do O&Os: "As EI has demonstrated, the average O&O presents 8.5 more hours of local news programming *on a weekly basis* than the average affiliate. ... These numbers alone conclusively demonstrate that O&Os evince a far greater concern for the needs of their local markets than affiliates."¹⁶ We observed in our Reply Comments that, to the extent the FCC may give special weight to local news, the conclusion from available evidence is that affiliates' do *not* perform worse in local news than O&Os.¹⁷ The *amount* of local news coverage across O&Os and affiliates appears similar, with the exception of

¹⁰ See Schwartz and Vincent Comments, at 6-8.

¹¹ *Id.* at 8.

¹² See EI, at 10. They describe affiliates' preemptions as "free riding".

¹³ *Id.* at 6.

¹⁴ See Florence Setzer and Jonathan Levy, *Broadcast Television in a Multichannel Marketplace*, Federal Communications Commission, Office of Plans and Policy Working Paper #26 (June 1991).

¹⁵ Jonathan Levy, Marcelino Ford-Livene, and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, Federal Communications Commission, Office of Plans and Policy Working Paper 37 (September 2002). On p. 309, the authors conclude: "Broadcast television is certainly a survivor, even a vigorous survivor. Although [its] competitive position is likely to erode further, the fact that it is still delivering on a per-network basis audiences roughly five times the size of the largest cable networks suggests that any further decline is likely to be gradual."

¹⁶ See Joint Networks, at 6 (Footnote 12).

¹⁷ See Schwartz and Vincent Reply Comments, at 3-4.

Fox which may present a special case.¹⁸ The *quality* of local news, evaluated by the frequency with which O&Os and affiliates win various industry awards, is, if anything, higher for affiliates.

Turning to the benefit side, EI ignores entirely the Cap's role in advancing localism. Indeed, one of the authors of the EI study has argued elsewhere in these proceedings that localism is not a valid FCC goal.¹⁹ This stance is reflected in EI's current response as well. One of the advantages touted from repealing the Cap is that allowing increased station ownership by networks would allow networks to circumvent other regulations that the FCC has seen fit to impose in order to preserve affiliates' programming independence. EI argue that affiliation agreements resolve the conflict of interest between networks and affiliates "... only imperfectly, especially in combination with Commission regulations restricting the features of such agreements."²⁰ They go on to complain more explicitly that "...network contracts with affiliates have long been constrained by various FCC regulations, such as the one that forbids local stations to delegate responsibility for programming decisions."²¹

We have emphasized that these very regulations reflect the policy interest of the FCC in localism. The Cap may well impose a cost on the joint activities of networks and affiliates. A relaxation of the Cap, however, would compromise the policy goal of localism and render irrelevant many of the other regulations the FCC has enacted to advance that goal.

B. Pursuit of Localism Does Not Imply A Judgment About Content

The Joint Networks contend that a policy such as the Cap that seeks to maintain stations as affiliates instead of O&Os is objectionable on First Amendment grounds because it supposedly hinges on a premise that O&Os/networks make less desirable content choices: "Perhaps most significantly, the FCC should be extremely wary of maintaining a structural ownership rule based on a determination that one group of owners – networks – are for some reason deemed to exercise "inferior" editorial judgment. A regulatory scheme that values or favors one type of content over another is offensive to the First Amendment. NAB/NASA's contention – that regulation is justified because networks are

¹⁸ We understand that NAB/NASA has offered an analysis showing that, when the data is corrected to account for UHF/VHF distinctions, there is no difference in the amount of news programming provided by Fox affiliates and its O&Os.

¹⁹ Dr. Bruce Owen, whose statement was filed with the initial Comments of the Joint Networks, writes: "The Commission's preoccupation with localism is difficult to explain or to justify." Bruce M. Owen, *Statement on Media Ownership Rule*, Exhibit 3 of *Comments of Fox, NBC, and Viacom*, January 3, 2003, at 10.

²⁰ See EI, at 1 and 10.

²¹ *Id.* at 5.

poor ‘speakers’ and affiliates are better ‘speakers’ – therefore conflicts with First Amendment principles.”²²

It bears re-iterating that we do not view the Cap as favoring one type of content over another, nor as hinging on a judgment that affiliate managers possess superior editorial judgment than do their counterparts at O&Os. Rather, the key point is that an affiliate uses a different criterion for the choice of programming—its focus is more targeted to the interests of that local market. The Commission has demonstrated its interest in encouraging this greater responsiveness to local tastes, by preserving stations as affiliates and protecting their programming independence. This pursuit of localism is neutral about the type of programming content chosen.²³

C. Affiliates Preempt Network Programming More Frequently than O&Os

The Joint Networks and EI repeat the claim that there is little meaningful difference in preemption rates between O&Os and affiliates. The Joint Networks acknowledge that in 2001, affiliates of the four largest network preempted 40% more frequently than did O&Os, but nevertheless maintain there is “little difference between the behavior of O&Os and the behavior of affiliates when it comes to preempting the network programming feed.”²⁴ EI asserts the differences are “of little policy consequence.”²⁵

To reconcile these views with the data, the parties adopt two arguments. First, the absolute number of affiliate preemptions is portrayed as small, less than one percent of prime-time programming.²⁶ Whether this level goes far enough to satisfy localism is for the Commission to decide; however, it is worth observing that, were affiliates’ preemptions significantly higher, the networks could advance the argument that preemptions impose an unacceptable burden on them.

Second, the networks and EI argue that whatever differences do exist are due to affiliates’ tendency to preempt “for economic reasons”²⁷ or “merely to make more money.”²⁸ Our view is that an interest “to make more money” reflects to a large degree the motives of *every* business in this industry, affiliates as well as networks. What matters for the responsiveness to local tastes is the main *source* of the profits. As we explained in Section A and in our previous submissions, an affiliate’s profit is more closely tied to the success of its programming in its individual local market than is the case for the

²² See Joint Networks, at 5.

²³ See Schwartz and Vincent Reply Comments, at 2-3, where we note explicitly that “localism should not be equated with local news, other local content or, indeed, any particular content.” (p. 3).

²⁴ See Joint Networks, at 6.

²⁵ See EI, at 9 (Footnote 1).

²⁶ *Id.* at 9; see also Joint Networks, at 6.

²⁷ See Joint Networks, at 6.

²⁸ See EI, at 10.

network—whose profit depends on the success of its programming nationally, i.e., in an aggregation of multiple local markets. An implication of this difference is that an affiliate's programming choices are likely to more closely track the preferences of its local viewers than is the case for an O&O.

Furthermore, since our view of the localism goal is content neutral, we find it peculiar that the FCC is being asked to discount some programming choices just because they happen to be more profitable for a local station. Indeed, economists' typical presumption is that, at least as a guiding principle, there is a positive rather than negative association between the programming choices that are likely to be more profitable and those that are more desirable to the local audience.

Finally, it is worth noting that the 1994 data presented by EI to the FCC in 1995 reveals a discrepancy in preemption rates between O&Os and affiliates that is even more stark than the 40% difference found for 2001. For the 1994 data, EI now reports that the preemption rate for affiliates was 2.4% versus 0.2% for O&Os.²⁹

D. Available Data Indicates that Preemptions Have Declined in Recent Years

The Joint Networks and EI also challenge the claim by NAB/NASA that preemption rates by affiliates have declined considerably in recent years. The Joint Networks (pp. 6-8) echoing EI (pp. 20-21), argue that the 1994 data originally presented by EI are not reliable. We certainly agree with the claim that a more full reporting of relative preemption behavior for full years and over time would greatly aid the Commission in coming to a well-informed decision. Only the networks, however, have access to complete data on preemptions. In the absence of a more complete data set, one can only work with the best publicly available information, which is data from the four weeks that EI felt comfortable offering to the FCC at that time as representative of affiliate preemption behavior.³⁰ On this basis, a decline in preemption rates from 2.4% to 0.9% seems to reflect a notable (though, of course, not *statistically significant*)³¹ decline. In addition, the NAB/NASA survey also finds a decline in affiliates' preemptions,³² and we are not aware of any attempt to rebut this finding.

Finally, the Joint Networks and EI argue that, even if affiliate preemptions did decline significantly, such a decline could not be causally attributed to the FCC's raising of the Cap to 35% in 1996. In support of this claim, they present a cross-sectional analysis

²⁹ *Id.* at 20.

³⁰ *An Economic Analysis of the Prime Time Access Rule*, Economists Inc., MM Docket No. 94-123, at 22 (March 7, 1995).

³¹ Any judgment on *statistical* significance would, of course, require more data.

³² See Comments of the National Association of Broadcasters and the Network Affiliated Stations Alliance, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, at 15-16 (filed January 2, 2003).

illustrating that, in 2001, the two networks with the highest preemption rates in prime time also had the largest market reach in station ownership. Again, in the absence of more complete data, this observation is incapable of establishing a link between the extent of station ownership by networks and preemption rates by the remaining affiliates. A simple snapshot as represented by the figure on EI p. 19 does not identify whether the differences in preemption rates are better explained by the network-specific feature EI chose to illustrate (that is, station ownership) or by other equally-plausible differences across networks, such as differences in the current popularity of their programming schedules, in the maturity of the networks, or in the stringency of their contracts with affiliates as regards allowable preemptions.