May 15, 2003

The Honorable Michael K. Powell, Chairman
The Honorable Kathleen Q. Abernathy, Commissioner
The Honorable Michael J. Copps, Commissioner
The Honorable Kevin J. Martin, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: 35% National Ownership Cap and the 1984 Report

Dear Mr. Chairman and Commissioners:

In *Fox Television Stations*, the court held that the FCC's 1998 decision to retain the 35% national television ownership cap failed to address "the contrary views . . . expressed in the [FCC's] *1984 Report.*" 280 F.3d 1027, 1043 (2002). The Court pointed out that the Commission might have good reason for not giving weight to the *1984 Report*, but as with the rest of the FCC's 1998 decision, the Court asked for more explanation of the Commission's reasoning. In this letter, NAB and NASA urge that the Commission's decision in this proceeding should find that the *1984 Report* was fatally flawed, does not reflect current circumstances, and therefore presents no impediment to the retention of the 35% national television ownership cap.

The *1984 Report* failed to consider localism. A core failure of the *1984 Report* was the absence of any analysis of the cap's effect on localism. On this basis alone the *1984 Report* would not have withstood judicial scrutiny. The *Fox* Court itself pointed out that, "[i]n the context of the regulation of broadcasting, the public interest has historically embraced . . . localism." *Id.* at 1042 (internal quotation and parenthetical omitted). But in neither the *1984 Report* nor its order on reconsideration does the word localism even appear; much less any analysis of the effect of repealing or relaxing the rule on localism. In this proceeding, however, the Commission is obligated to review the effect on localism of modifying or repealing the rule.

In the *1984 Report*, the Commission concluded that diversity considerations did not warrant a national cap because whether local "views are also disseminated in other local broadcast markets does not affect the diversity to which [the viewer] is exposed." *1984 Report* at 37. Because of the exchange of programming ideas among markets, which

the Commission has acknowledged, this statement is not true with respect to diversity. NAB/NASA Comments at 68-70 (Jan. 2, 2003).

As another example, the *1984 Report* concluded, again in the context of diversity, that the cap was not necessary because networks "do not impose monolithic viewpoints on local media outlets." *1984 Report* at 37. However, the record in this proceeding shows that the networks try to impose a monolithic viewpoint on local programming decisions and that this trend has escalated over the last nine years. In this proceeding, the networks have been quite candid that they believe their interests are best served by 100% in-pattern clearance of all network programming. Today, NASA would point out, the fin/syn rules have been repealed and the networks have vertically integrated and expanded horizontally to a far greater degree than was the case in 1984. As a result, the networks have far more incentives than in 1984 to give priority to business objectives beyond local interests in their programming, clearance, and preemption practices.

The *1984 Report* did not distinguish between the networks and other group owners. The *1984 Report* examined the cap only by examining its effect on group-owned stations as compared to non-group-owned stations. The record evidence in this proceeding, however, demonstrates that the rule has different consequences for network group owners and independent group owners. NAB/NASA have submitted several economic analyses showing that the economic incentives for programming decisions by network-owned stations are significantly different from the incentives for independently owned affiliates. Even the networks, which argued for equal treatment among all group owners in the 1984 proceeding, now concede that the economic incentives of affiliates and O&Os diverge. *See* Economists Incorporated, Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules (Apr. 21, 2003).

The evidence the *Fox* court found lacking is now in the record. In *Fox*, the court noted that the FCC sought to retain the 35% cap because affiliates counterbalance the networks' incentives to clear all programming, but that the *1984 Report* found no evidence that non-group-owned stations were more responsive to local needs. The court stated that this change of position had not been supported by any additional evidence in the record. In this proceeding, however, NAB/NASA have submitted empirical evidence demonstrating unequivocally that affiliates preempt network programming far more frequently than network-owned stations. The networks' submissions, although attempting the minimize the differences, have corroborated this fact. *See* NAB/NASA, The Joint Networks Continue to Press Arguments Devoid of Record Support (May 9, 2003). The record also shows that network O&Os never preempt for reasons of local community standards, that networks have ratcheted up the pressure on affiliates to prevent preemptions, that independent affiliates earn more awards for local news than do O&Os, and that where they have a critical mass, independent affiliates exercise a restraining effect on the nationalized programming decisions of the networks, which are based in New York and Los Angeles.

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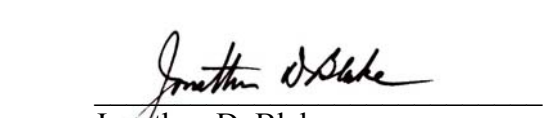
For these reasons, the conclusions of the *1984 Report* impose no restraint on the FCC's retaining the national television ownership cap.

Respectfully submitted,



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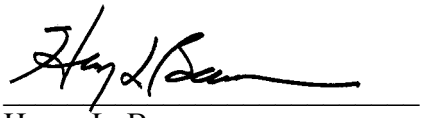

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