

Before the
Federal Communications Commission
Washington D.C. 20554

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| In the matter of |) | |
| |) | |
| 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 |) | MB Docket No. 02-277 |
| |) | |
| Cross-Ownership of Broadcast Stations and Newspapers |) | MM Docket No. 01-235 |
| |) | |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets |) | MM Docket No. 01-317 |
| |) | |
| Definition of Radio Markets |) | MM Docket No. 00-244 |

**MOTION THAT THE COMMISSION DISREGARD CERTAIN PORTIONS OF
NETWORK SUBMISSIONS BECAUSE OF THEIR FAILURE TO PROVIDE
SUPPORTING DATA OR THAT IT DRAW INFERENCES AGAINST THE
NETWORKS BECAUSE OF THIS FAILURE**

Two of the most hotly contested issues in this proceeding as it relates to the 35% cap are (1) the preemption experiences of independently affiliated stations versus those of network O&Os and (2) the comparison of the quantity of local news presented by affiliates as opposed to O&Os. Of course, there are some 10 other issues where the affiliates have presented evidence that is largely or totally unanswered by the networks.¹ The networks’ strategy seems to be to focus on these two issues and to hope that the other 10 will be overlooked. But even as to these two, the networks’ submissions are fatally flawed. In an apparent effort to ameliorate these defects, the networks have made four last-minute filings – April 21 and May 3, 12, and 22 – that rely on studies the underlying data for which they have refused to disclose to the Commission or

¹ See Letter from NASA/NAB to Chairman Powell and Commissioners (April 22, 2003).

the public. The Network Affiliated Stations Alliance (“NASA”) and the National Association of Broadcasters (“NAB”) submit that for reasons of fairness and to protect the integrity of the record, the Commission should either disregard the networks’ assertions with respect to these matters or reach reasonable, adverse conclusions against the networks on account of their refusal to disclose this information.

I.

Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom (“Joint Networks”), in connection with Economists Incorporated (“EI”), have made filings in this proceeding that contain assertions about preemption rates by O&Os versus affiliates and address some of NAB/NASA’s evidence that affiliate preemptions have declined over time.² The record strongly suggests that these assertions are based on selective, unrepresentative data and do not reflect overall preemption rates or trends. Given the circumstances here – where one side is in sole possession of highly relevant, nonproprietary data and refuses to place it in the record despite a request by the other side and the Commission’s encouragement to do so – fairness, common sense, and the necessity of a reliable record dictate that the agency should presume that

² 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&Os Compared to Affiliates* (filed January 2, 2003); Reply Comments of Fox Entertainment Group, *et al.*, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, at 32-33, EI *Economic Comments on Media Ownership Issues*, at 2-3 (filed February 3, 2003); *Ex Parte* Filing of Fox Entertainment Group, *et al.*, MB Docket No. 02-277 (“Red Herring Arguments - the Unsupported, Ill-Considered and Irrelevant Arguments for Retention of the National TV Ownership Cap After *Fox Television Stations, Inc.*”), at 6-9, EI *Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, at 9-12, 18-21 (filed April 21, 2003); *Ex Parte* Filing of Fox Entertainment Group, *et al.*, MB Docket No. 02-277 (“Red Herring Redux - More Unsupported, Ill-Considered and Irrelevant Arguments for Retention of the National Television Ownership Cap”), at 3-10 (filed May 2, 2003); *Ex Parte* Filing of Fox Entertainment Group, *et al.*, MB Docket No. 02-277 (“The Localism Red Herring”), at 3-5 (filed May 22, 2003).

the Joint Networks have not made public the additional preemption data they possess because that information would favor retention of the national television ownership cap. At the least, the Commission should simply disregard those portions of the networks' arguments that rely on these undisclosed data. The portions of the network submissions that should be ignored or as to which negative inferences should be drawn are listed on Attachment A to this motion.

The Commission's Notice of Proposed Rulemaking in this proceeding stated that preemption data are directly relevant to whether the national ownership cap serves localism.³ More than four and a half months ago the Commission specifically "encourag[ed]" the networks to put into the record certain preemption data that NAB/NASA requested that the Commission collect.⁴ Since then, the Joint Networks have never disputed that the requested data, which would show the preemption rates of O&Os versus affiliates and changes in preemption patterns since 1996, would be an important measure of the national television ownership rule's ability to serve localism. At the same time, however, and without articulating any reason not to do so, the Joint Networks have refused to disclose almost any preemption data. They have persevered in this obstinacy notwithstanding that there is nothing proprietary about the data, they alone possess the data, and they continue up to the twelfth hour to advance arguments that these data would rebut.

³ *2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, ¶ 147-154 (rel. Sept. 23, 2002).

⁴ *See 2002 Biennial Regulatory Review*, Order, DA 02-3611, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (rel. Dec. 31, 2002). Specifically, NAB and NASA had asked the Commission to obtain information from the networks with respect to the amount of network programming preempted or otherwise not cleared by affiliates and O&Os in the top 25 markets in the years 2001 and 1991.

The Joint Networks' empirically based preemption analyses submitted in this proceeding are exceptionally narrow. They consist entirely of (1) Study G – a three-page analysis of 2001 primetime preemption prepared by EI;⁵ (2) an EI chart of the same 2001 data separated by network and showing the national audience reach of each network and the primetime preemption rate for that network;⁶ and (3) a statement by EI arguing that its 1995 preemption study cannot meaningfully be compared to Study G.⁷ None of these studies discloses the underlying data, making it impossible for the Commission or the public to independently analyze and verify the results. Similarly, Disney provided only preemption data that had already been submitted to the Commission, that included only preemptions meeting the contractually limited “basket,” and that covered only 2001.⁸

The gravamen of the Joint Networks' arguments, both in their comments and *ex parte* filings, is that their analyses of the 2001 primetime preemption data can and should serve as a sufficient basis from which to conclude that the national television ownership rule does not further localism. In the Joint Networks and EI's view, because Study G concludes that affiliates and O&Os preempted “less than one percent of prime-time programming” during that year – 9.5 and 6.8 hours of primetime programming respectively – the difference between O&O and

⁵ Study G, *Preemption by O&Os Compared to Affiliates*.

⁶ *Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, at 18-19.

⁷ *Id.* at 19-21.

⁸ Comments of the Walt Disney Company, MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, Exhibit G (filed Jan. 2, 2003). A tabulation of Disney's submission shows that affiliates preempt 279% more than O&Os in primetime, 420% more for sports, and 316% more for all “basket” preemptions.

affiliate preemption behavior is “of little policy consequence.”⁹ *It should be noted, of course, that these data refer only to primetime and still show affiliates preempting 40% more than O&Os.*

Neither the Joint Networks nor EI have made any attempt to address the affiliate preemption data submitted by NAB/NASA or for that matter the data submitted by Disney. For example, Table 1 of NAB/NASA’s initial comments, which listed average hours per year of affiliate preemptions, showed that affiliates preempted on average 33.27 hours of network programming in 2001. (NASA/NAB cannot make comparisons with network O&O preemptions because that information is available only to the networks.) It is apparent from a comparison of NAB/NASA’s data and the Joint Networks’ data that more than two-thirds of all affiliate preemptions in 2001 were during non-primetime hours, which were outside the scope of EI’s analysis.¹⁰ A comparison of non-primetime preemptions between affiliates and O&Os would be more informative than a comparison of primetime preemption data because networks place their best programming in primetime slots and are most insistent that affiliates carry that programming. During primetime, there are fewer preemptions across the board and less variation between affiliates and O&Os than is case during non-primetime. Unless and until the networks reveal more than selective information from their preemption files, neither NAB/NASA, the Commission, nor the public will have a complete understanding of the preemption practices of O&Os.

⁹ Study G, *Preemption by O&Os Compared to Affiliates*.

¹⁰ The Joint Networks included Fox data. NASA/NAB did not because Fox is not a member of NASA.

It is also striking that neither the Joint Networks nor EI offer any explanation of their decision to analyze only primetime preemptions as part of the study, their decision to examine preemptions only for one year, and their decision to specifically examine only primetime preemptions only for 2001. To all appearances, the data for other time periods are within the networks' possession, easily accessed, and pose no competitive or proprietary concerns if released. To all appearances, there is no principled basis to limit the study to 2001 primetime data. NAB/NASA submitted substantial evidence showing that affiliate preemptions have been driven down over time and across the board as network ownership increased, clearly giving the Joint Networks an incentive to rebut this point with evidence of their own if any evidence favored their position. Notably, they have offered no positive evidence, instead choosing to critique only the suitability of comparing EI's 1994 data and the data EI submitted here.¹¹

Because the Joint Networks' data could rebut NAB/NASA's evidence if that evidence were wrong, and because the Joint Networks have chosen to disclose only selective data, it is clear that the networks possess highly relevant, nonproprietary data about O&O preemptions rates over time and during non-primetime hours that they are refusing to make public because the data would favor retention of the national television ownership rule. Accordingly, the Commission should conclude that affiliates preempt significantly more than O&Os, and affiliate preemptions have declined markedly over time, as networks have used their increased leverage to insist on clearance of network programming.

¹¹ *Affiliate Clearance, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, at 20.

II.

The Joint Networks have been similarly insistent in advocating the superiority of O&O local news versus independently owned affiliates' local news in terms of *quantity*.¹² In terms of *quality*, as measured by awards – a measure chosen by the FCC staff – independently owned affiliates clearly and substantially surpass the O&Os. The networks seemingly no longer contest this point.¹³

The Commission specifically sought comment on these issues,¹⁴ and it produced a study on television news. On February 3, 2003, NASA/NAB showed that the Fox data are so aberrational that they should be excluded. A primary cause of the Fox aberration, but far from the only important cause, is the VHF/UHF disparity for Fox O&Os and affiliates. Fox O&Os are 72% VHF stations, while Fox affiliates are only 18% VHF stations; in contrast, the proportion of VHF stations among ABC, CBS and NBC O&Os is much higher and is comparable to the proportion of VHF affiliates for these networks' affiliates. NAB/NASA also described other substantial differences between Fox O&Os and affiliates and between Fox affiliates and other affiliates both of which support the exclusion of Fox. Significantly, NASA/NAB demonstrated, and the networks have never disputed, that the data for the three major networks and their affiliates reveal no difference in quantity of local news.

¹² *E.g.*, *Ex Parte* Filing of Fox Entertainment Group, *et al.*, MB Docket No. 02-277 (“Red Herring Arguments R.I.P.”), at 1-4, *EI The Effect of Controlling for Frequency Band (UHF/VHF) When Comparing the Quantity of Local News and Public Affairs Programming on Television Broadcast Network Owned and Operated Stations Relative to Network Affiliate Stations*, at 1-10 (filed May 12, 2003)

¹³ *See Red Herring Arguments R.I.P.*, at 4 n.14 (stating that the FCC should ignore all news quality evidence).

¹⁴ *2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, ¶ 148.

There the issue rested until May 12, when the Joint Networks filed a new economic study.¹⁵ But like their preemption submissions, the May 12 filing by the network economists is unaccompanied by its supporting data. Neither the Commission, NASA/NAB, nor the public can evaluate the analysis on which the Joint Networks have asked the Commission to rely, nor can they test the networks' conclusions to determine whether they rely on a selective reading of the evidence (as NAB/NASA's independent preemption survey showed with respect to the networks' preemption submissions). As in the case of the preemption assertions made by the networks, the Commission should conclude that the networks chose not to disclose their underlying data because they will validate NASA/NAB's contention that the Fox data are suffused with aberrations that make it improper to lump them together with the data for the other networks. The Joint Networks' arguments listed on Attachment A should therefore be disregarded.

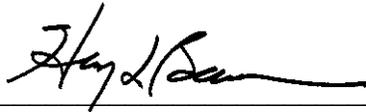
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With the Commission's decision likely return to the courts, the decision must not rely on network arguments that depend on facts and data that the Commission has requested, that the networks have refused to disclose, and that are necessary in order to test the validity of the networks' assertions. As a matter of sound administrative practice, therefore, these assertions

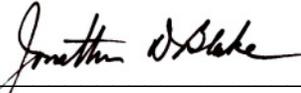
¹⁵ Because of the Commission's extension of the sunshine period, NASA/NAB were able to point out the flaws in this last-minute filing, most prominently (1) that the network economists failed to take into account all the other respects in which Fox affiliates are handicapped but the Fox O&Os are not handicapped and (2) that the Fox O&O and affiliate comparison should not infect or undercut the comparison for the three major, well-established networks, which shows no difference in local news quantity. Letter from NAB/NASA to Chairman Powell and Commissioners (May 27, 2003).

should be disregarded or the Commission should draw negative inferences from the networks' refusal to submit the underlying data.

Respectfully submitted,



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Portions of Network Submissions that the Commission
Should Disregard or Draw Inferences Against

| <u>Filing</u> | <u>Date</u> | <u>Pages</u> |
|--|-------------------|--------------|
| Preemption Rates | | |
| Comments of Fox Entertainment Group, <i>et al.</i> | January 2, 2003 | 39-40 |
| EI Study G, <i>Preemption by O&Os Compared to Affiliates</i> | January 2, 2003 | 1-3 |
| Comments of the Walt Disney Company | January 2, 2003 | 4-7 |
| Comments of the Walt Disney Company, Exhibit G | January 2, 2003 | 1-8 |
| Reply Comments of Fox Entertainment Group, <i>et al.</i> | February 3, 2003 | 32-33 |
| EI <i>Economic Comments on Media Ownership Issues</i> | February 3, 2003 | 2-3 |
| <i>Ex Parte</i> Filing “Red Herring Arguments” | April 21, 2003 | 6-9 |
| EI <i>Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules</i> | April 21, 2003 | 9-12 |
| <i>Ex Parte</i> Filing “Red Herring Redux” (Attachment A) | May 2, 2003 | 3-10 |
| <i>Ex Parte</i> Filing “The Localism Red Herring” | May 22, 2003 | 2-5 |
| Quantity of Local News | | |
| Response to Early Submission of NAB and NASA | December 19, 2002 | 4 |
| Comments of Fox Entertainment Group, <i>et al.</i> | January 2, 2003 | 36-37 |
| EI Study H, <i>News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations</i> | January 2, 2003 | 9-10 |
| Reply Comments of Fox Entertainment Group, <i>et al.</i> | February 3, 2003 | 33-34 |
| EI <i>Economic Comments on Media Ownership Issues</i> | February 3, 2003 | 26-28 |
| <i>Ex Parte</i> Filing “Red Herring Redux” (Attachment A) | May 2, 2003 | 11-12 |
| <i>Ex Parte</i> Filing “Red Herring Arguments R.I.P.” | May 12, 2003 | 1-4 |
| EI <i>The Effect of Controlling for Frequency Band (UHF/VHF) When Comparing the Quantity of Local News and Public Affairs Programming on Television Broadcast Network Owned and Operated Stations Relative to Network Affiliate Stations</i> | May 12, 2003 | 5-10 |