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03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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PROMETHEUS RADIO PROJECT, *et al.*,

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, and  
THE UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of an Order  
of the Federal Communications Commission

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**REPLY BRIEF FOR PETITIONERS NETWORK AFFILIATED  
STATIONS ALLIANCE, CBS TELEVISION NETWORK AFFILIATES  
ASSOCIATION, NBC TELEVISION AFFILIATES, AND  
ABC TELEVISION AFFILIATES ASSOCIATION**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Network Affiliated Stations Alliance, CBS Television Network Affiliates Association, NBC Television Affiliates, and ABC Television Affiliates Association (collectively “NASA”) showed in their opening brief that the Commission majority’s decision to raise the national television ownership cap from 35% to 45% of the national television audience is arbitrary and capricious for several distinct but mutually reinforcing reasons.<sup>1</sup> The Commission’s brief not only fails to provide this Court with an adequate response to NASA’s arguments, but for the most part fails to offer *any* response at all. Indeed, the Commission devotes less than three pages of its 100-plus page brief to answering NASA’s arguments concerning the national cap. *See* FCC Br. 96-98.

The FCC’s cursory response utterly fails to refute NASA’s showing that, in deciding to raise the cap to 45%, the Commission majority failed to make a “rational connection between the facts found and the choice made,” failed to “consider . . . important aspect[s] of the problem,” and gave “an explanation for its decision that runs counter to the evidence before the agency.” *MVMA v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted). The Commission’s failure to respond to NASA’s arguments, together with the wholly ineffective and unpersuasive

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<sup>1</sup> The parties joining the Citizen Petitioners’ brief agree with the position taken in this reply brief.

responses offered by Petitioners Fox Entertainment Group, Inc., Fox Television Stations Inc., National Broadcasting Company, Telemundo Communications Group, Inc., and Viacom Inc. (collectively “Fox Petitioners”), compel a remand of the Commission’s decision to increase the cap to 45%.<sup>2</sup>

**I. THE COMMISSION’S DECISION TO RAISE THE NATIONAL TV OWNERSHIP CAP IS ARBITRARY AND CAPRICIOUS**

**A. The Commission Fails To Respond To NASA’s Argument Concerning The Majority’s Arbitrary Treatment Of The Preemption Evidence**

NASA submitted extensive and undisputed evidence, based on a survey of hundreds of network affiliates, that (1) affiliate preemptions declined by more than 30% between 1991 and 2001, and (2) the decline was particularly rapid after the cap was raised from 25% to 35% in 1996. Specifically, NASA’s evidence shows that affiliates preempted nearly 49 hours of network programming in 1993, 46.4 hours in 1995 (the year before the cap was raised), but only 37.47 hours in 1997 and 33.27 hours in 2001. *See* NASA Br. 23.

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<sup>2</sup> The Commission may have concluded that NASA’s challenge to a 45% cap is likely to be resolved by legislation. On July 23, 2003, the House, by a lopsided vote of 400-21, passed an appropriations bill that would have the effect of maintaining the cap at 35%. 149 Cong. Rec. H7369 (daily ed.). On September 16, 2003, the Senate passed a resolution that would have a similar effect. 149 Cong. Rec. S11519 (daily ed.). On November 25, 2003, House and Senate conferees agreed to include a provision in the omnibus appropriations bill that would set the cap at 39%. 149 Cong. Rec. H12315 (daily ed.). As of the filing of this brief, however, none of these provisions has been enacted into law.

The Commission majority acknowledged this evidence, but declined to rely on it for the stated reason that it “does not control for other possible causes of the decline in affiliate preemptions.” JA0255 (¶559). The majority did, however, rely on evidence submitted by the networks showing that in a single year (2001), and counting only preemptions in primetime (when preemptions are *least* likely to occur), affiliates of networks that have exceeded the 35% cap (CBS and Fox) preempted as often as affiliates of networks that have not exceeded the 35% cap (ABC and NBC). The majority “principally” relied on this evidence to support an increase in the cap. *Id.* In doing so, however, the majority candidly acknowledged that it would have given “more weight” to the affiliates’ argument that raising the cap from 25% to 35% led to the decrease in affiliate preemptions “if the data had shown preemption rates on network-owned stations remaining steady, while the affiliate preemptions declined sharply after 1996.” JA0256 (¶560).

NASA’s opening brief explains that the majority’s treatment of the preemption evidence is arbitrary and capricious on several grounds:

- *First*, the majority’s reason for rejecting the affiliates’ preemption evidence – that it fails to control for other possible factors that may affect preemptions – applies equally – indeed even more strongly – to the network preemption evidence on which the majority “principally” relied. NASA Br. 28-29.

- *Second*, the majority failed to account for the undisputed evidence that preemptions by CBS and NBC affiliates (networks whose audience reach has grown to exceed 25%) have declined much more significantly than preemptions by ABC affiliates (the only major network whose audience reach has remained below 25%). *Id.* at 29-30.
- *Third*, – and perhaps most striking of all – the majority stated that it would have viewed the issue differently if preemption data from the networks had showed O&O preemptions holding steady after 1996, but then proceeded to decide the issue in the networks’ favor – even though the networks alone had access to the missing O&O preemption data and refused to disclose it despite having been told by the Commission that they were expected to do so. *Id.* at 30-31.

Incredibly, the Commission’s 100-plus page brief offers *no* response at all to NASA’s first and second arguments. Since any one of these arguments alone is sufficient to require a remand, the Commission’s silence effectively concedes this case to NASA.

The Commission’s cursory discussion of NASA’s third argument is effectively no response at all. The Commission does not deny that the majority would have viewed the matter differently if the missing data had shown steady O&O preemptions after 1996. (Nor could it – the majority expressly said so. *See* JA0255-56 (¶560).)

Nor does the Commission dispute that (1) the networks have *exclusive* access to this

vital information, (2) NASA asked the Commission to order the networks to place the O&O preemption data in the record, (3) the Commission stated in no uncertain terms that it “expect[ed] and encourage[d]” them to do so, and (4) the networks, rather than disclosing the evidence, withheld it.

The Commission’s conclusory statement, p. 97, that the majority “refused to disregard the evidence that was before it” and instead gave it “the appropriate weight in light of all circumstances” completely fails to come to grips with NASA’s argument. NASA’s point is precisely that the Commission gave the networks’ preemption evidence *inappropriate* weight in the light of all the circumstances. When an agency recognizes that a particular piece of evidence is highly significant – indeed, quite possibly outcome-determinative – and that evidence is exclusively within the control of one party to the proceeding, which has been told that it is expected to supply the evidence but has refused to do so – it is arbitrary and capricious for the agency to note the importance of the missing evidence and then decide the issue in favor of the withholding party. *See generally National Lime Ass’n v. EPA*, 627 F.2d 416, 433-34 (D.C. Cir. 1980) (noting that court was “candidly troubled by the industry’s failure to respond . . . to the Agency’s invitation to submit data” and stating that “[w]e cannot help but wonder if the industry’s failure to supply such data means that the data available or obtained would not be favorable to the industry’s position”); *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1304-05 (9th Cir. 1993) (agency acted arbitrarily and

capriciously in relying on another agency’s opinion after it “selectively withheld” relevant information).<sup>3</sup>

The Fox Petitioners also fail to rebut NASA’s arguments concerning the preemption data. They do not deny that their 2001 preemption data fails to correct for factors other than station ownership. (Rather than forthrightly admitting this, the Fox Petitioners, p. 41, “leav[e] aside whether [it] is so.”) The Fox Petitioners simply assert, without explanation, that an argument that the networks’ partial 2001 preemption data may have been skewed by factors other than station ownership “is different from and vastly weaker than” an argument that the affiliates’ comprehensive 1991-2001 preemption data may have been affected by factors other than station ownership. *Id.* This is an assertion, not an argument; and it is plainly false. There is no doubt that the reason the majority gave for disregarding the affiliates’ preemption

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<sup>3</sup> The Fox Petitioners have never denied that the O&O preemption data is available only to them. In a carefully-worded statement, p. 41, they assert that NASA “wrongly assumes that the networks had the missing information readily available.” There is no evidence that the information could not have been produced or that it would have been difficult to compile. The networks have produced more comprehensive preemption data when it served their purposes. *See, e.g., Ex Parte* Notice of News Corp., DA01-1264, at 2 (June 14, 2002) (citing 240-page plus printout of Fox affiliate preemptions); *Ex Parte* Presentation of Walt Disney Company, DA01-1264, Attachment, (June 12, 2002) (ABC preemptions between 2001 and 2002); Comments of Fox Broadcasting Company, DA01-1264, at 16-17 (July 23, 2001) (examples of Fox affiliate preemptions between 1997-2000); Comments of the National Broadcasting Company, DA01-1264, at iii, 14 (July 23, 2001) (1999-2000 NBC preemption statistics); Comments of Viacom Inc., DA01-1264, at 26 (July 23, 2001) (2000 CBS preemption statistics). Given the high stakes in this proceeding, there can be no real doubt that the Fox Petitioners would have produced the data on this central issue if it had helped their case.

data (failure to correct for other possibly relevant factors) applies with full force to the networks' preemption data on which the majority "principally" relied.

To the extent the argument is "weaker" on one side than the other, it is the networks that come up short. As NASA explained, pp. 28-29, (and as the Fox Petitioners do not deny), partial preemption data for a single year are more likely to be influenced by temporary phenomena – such as a particularly unpopular network program lineup, or a particularly objectionable program, along the lines of Fox's controversial 2001 offering of *Temptation Island* – than a more robust data set covering all preemptions for a full decade. The Commission's "patently inconsistent" treatment of similar evidence is a paradigm of arbitrary and capricious decisionmaking. See NASA Br. 29 (quoting *South Shore Hosp. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002)).<sup>4</sup>

**B. The Commission Fails To Respond To NASA's Argument Concerning The Effect Of Raising The Cap On "Collective Negotiation" By Affiliates**

As NASA explained in its opening brief, pp. 33-36, the Commission unanimously determined that affiliates promote localism in two primary ways:

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<sup>4</sup> The Fox Petitioners' transparently inadequate response to NASA's second argument, p. 41 n.50, concerning the more rapid decline in preemptions by affiliates of CBS and NBC, is that preemption by ABC affiliates decreased from 1996 to 1999. The Fox Petitioners fail to mention that in 2000 and 2001 preemptions by ABC affiliates substantially *increased* over 1999, returning to roughly 1997 levels. NASA Br. 27. NASA's point is that the *pattern* of preemptions by ABC affiliates (ups and downs, netting out to "essentially . . . steady") differs from the downward pattern of preemptions for CBS and NBC affiliates. The Commission simply ignored this evidence.

(1) preemption of network programming by an individual station owner to provide programming better suited to the local community, and (2) collective negotiation to influence the programming that the networks provide. In determining the appropriate level of the cap, the majority examined only evidence concerning preemptions and the quality and quantity of local news. By failing to analyze the effect of raising the cap on collective negotiation – one of the Commission’s two primary “localism objectives” – the Commission engaged in arbitrary and capricious decisionmaking. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) (remand required when “agency has not considered all relevant factors”). Once again, the Commission’s brief effectively concedes a critical point by failing to address it at all.

**C. The Commission Fails To Respond To NASA’s Argument Concerning The Quality And Quantity Of Local News Programs**

NASA’s opening brief, pp. 37-40, shows that the majority’s treatment of the evidence concerning the quality of local news and public affairs programs is arbitrary and capricious because the study on which the majority relied fails to correct for market size, and when this correction is made – a correction that even the networks agreed is necessary – the results are exactly *reversed*: the quality of affiliates’ local news exceeds that of network O&Os. NASA also explained, pp. 40-41, that the majority’s treatment of the evidence concerning the quantity of local news is flawed because (1) it establishes a cap that applies to all networks on the basis of the behavior of a

single, atypical network (Fox), and (2) the largest markets – those that will be affected by raising the cap to 45% – show no significant differences between O&Os and affiliates in the quantity of local news and public affairs programming. The Commission at least offers a response to these arguments, albeit a brief one, but it is patently inadequate.

1. As to news quality, all the Commission can muster is an assertion, p. 98, that “a second study examined the awards received in the top ten and top 50 markets and concluded that there was no ‘discernible difference’ between network-owned stations and affiliates on this score.” This is disingenuous. The “second study,” prepared by the networks’ own economists, JA0258 (¶570), *agreed* with the affiliates that the data should be corrected for market size and did not dispute that, when the correction is made, affiliates outperform O&Os as measured by Peabody awards, Dupont awards, and RTNDA awards. The networks’ only argument in the “second study” was that the Commission should disregard all awards except the RTNDA awards on the ground that RTNDA awards are the most numerous. *See* JA4523 (Network Comments); JA5286 (Network May 2, 2003, *Ex Parte*). This argument is absurd on its face – it is equivalent to arguing that Pulitzer prizes are an invalid measure of newspaper quality because they are reserved for journalism of the very highest quality and are therefore harder to win than other awards. The networks were driven to make this argument because, while affiliates outperform O&Os as measured by all three awards, only the performance difference in RTNDA awards can be

explained away as “statistically insignificant.” The Commission itself plainly did not agree with the networks that it should consider only RTNDA awards, because it expressly considered and relied on the evidence concerning DuPont awards. *See* JA0261 (¶576).

The only way the “second study” can support the majority’s decision is if the evidence concerning DuPont awards is disregarded. But the Commission’s own decision forecloses that possibility, and the Commission’s lawyers may not make an argument that the Commission itself rejected. *See Port Norris Express Co. v. ICC*, 757 F.2d 58, 63 (3d Cir. 1985) (internal quotations omitted) (“The reasoned basis for the agency’s action must be provided by the agency in the administrative proceedings. We may not accept appellate counsel’s post hoc rationalizations for agency action.”).<sup>5</sup>

The Fox Petitioners, pp. 42-43, accuse NASA of “massaging” the data to correct for market size, failing to note that they have gone on record expressly agreeing that such “massaging” is not only entirely appropriate but necessary to produce valid results. *See* NASA Br. 39 n.25 (citing Network Comments acknowledging agreement); Network Comments, Economic Study H, at 3 (“Both the

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<sup>5</sup> While citing and relying on the evidence concerning DuPont and RTNDA awards, the majority, without any explanation, ignored the undisputed evidence in the record concerning Peabody awards, which are widely considered to be the most prestigious television awards of all and which heavily favor affiliates. *See* NASA Br. 38. This was yet another example of arbitrary and capricious decisionmaking. *See State Farm*, 463 U.S. at 43 (agency decision is arbitrary and capricious if its explanation “runs counter to the evidence before [it]”).

NAB/NASA paper and the EI regression results presented below confirm that market size is a significant factor in explaining news output.”). The Fox Petitioners’ only other argument is a reiteration of the assertion, dealt with above, that RTNDA awards should be the sole measure of quality.

In short, the majority offered no reason for refusing to consider market size, a factor that both the networks and the affiliates agree must be considered. When that adjustment is made the undisputed evidence shows that affiliates air better local news than O&Os. The majority’s treatment of the news quality evidence is thus a textbook example of arbitrary and capricious agency decisionmaking that clearly requires a remand. *See State Farm*, 463 U.S. at 43 (agency’s decision is arbitrary and capricious if it “runs counter to the evidence”).

2. As to the quantity of local news, the Commission merely asserts, p. 97, without explanation or argument, that the Commission’s decision to include Fox stations was “reasonable.” NASA’s argument, pp. 40-41, is that it is unreasonable to include the Fox stations when doing so results in a rule that applies not just to Fox but to all the networks – particularly when there is evidence that Fox is an atypical network (*e.g.*, because its affiliates include a large number of relatively weak UHF stations that are unable to offer large amounts of local news programming). In addition, it was unreasonable of the majority to rely on the evidence concerning news quantity as a basis for increasing the cap to 45% when the record shows that in the largest markets – precisely those markets in which the networks are likely to acquire

additional stations – there is *no* significant difference in the quantity of news produced by O&Os and affiliates. Accordingly, the evidence shows that increasing the cap to 45% will have no positive impact on news quantity. *Id.* at 41.

The Fox Petitioners’ analysis of local news quantity, p. 43, (all two sentences of it), is equally unpersuasive. Notably, the Fox Petitioners do not dispute that any difference in news quantity that may exist between affiliates and O&Os is attributable solely to Fox stations. Instead, the Fox Petitioners’ argument boils down to the one-line assertion that it would be “absurd” to exclude Fox stations from the analysis. The Fox Petitioners, like the Commission, do not offer even a sliver of analysis to back up their assertion. Most significantly, the Fox Petitioners, p. 40, offer no response to NASA’s argument that it was nonsensical for the Commission majority to completely rework a generally applicable regulation – binding on all television networks – based on the idiosyncrasies of a single atypical network.<sup>6</sup>

#### **D. The Commission Fails To Respond To NASA’s Other Arguments**

NASA’s opening brief identifies a substantial body of record evidence that increasing the cap beyond 35% will harm localism, including:

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<sup>6</sup> The Fox Petitioners assert, p. 43, that it is “unclear how an equal showing [on news quantity] helps NASA.” NASA’s point is that the Commission majority relied on allegedly *superior* O&O news quantity as a reason for increasing the cap. *See* JA0234, 0260-61 (¶¶501, 575-77). The record does not support that determination, and therefore the Commission majority’s decision to increase the cap must be vacated.

- evidence, acknowledged by the Commission elsewhere in its opinion, *see* JA0251 (¶545), that the networks have imposed increasingly onerous contractual limitations on affiliate preemptions since the cap was raised from 25% to 35%. NASA Br. 35-42;
- evidence that more than 60% of affiliates have not only experienced pressure from networks not to preempt (a finding the Commission cited, JA0254 (¶557)) but have experienced *increased* pressure in recent years (a finding from the same survey the Commission unaccountably ignored). NASA Br. 21, 42;
- evidence that the affiliates' ability to influence network programming decisions has been weakened as network station ownership has climbed above 25%. *Id.* at 34-35, 42-43;
- evidence that allowing networks to own stations reaching 45 percent of the national viewing audience will allow networks to capture more than 50% of total television advertising revenues. *Id.* at 43; and
- the absence of even a single example in the record of an O&O preempting a network programming on the ground that it is unsuitable under local community standards. *Id.* at 44.

The Commission's brief simply ignores all this evidence, once again effectively conceding the point to NASA.

Finally, the Commission's brief makes no effort to defend the three reasons the Commission majority gave (in three paragraphs of a 683-paragraph decision) for increasing the cap to 45%. Instead, the Commission's lawyers, p. 103, simply reiterate the Commission's statement that "[t]he record does not . . . help [to] identify with any precision the point at which a network audience reach would be so large that affiliate bargaining power would be substantially undermined," and assert that the majority's selection of a 45% cap was a "reasonable" exercise of its authority. The Commission's brief misses the point. An agency's exercise of authority is reasonable only if the agency's explanation for its action is reasonable. As this Court has explained,

We cannot allow expertise to shield an irrational decision-making process. Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.

*Natural Res. Def. Council v. EPA*, 790 F.2d 289, 298 (3d Cir. 1986) (internal quotations, citation and ellipses omitted). Here, the majority's three reasons do not make sense, and therefore the decision to increase the cap to 45% must be vacated.

## II. THE COMMISSION PROPERLY DETERMINED THAT A NATIONAL TV OWNERSHIP CAP IS NECESSARY TO FURTHER LOCALISM

The Fox Petitioners argue that the Commission should have eliminated the national cap entirely, or raised it even higher than 45%. Not a single member of the Commission agreed with this position. Moreover, Congress has never voted for a cap as high as 45%, let alone an even higher cap. The Fox Petitioners' arguments for overturning the Commission's unanimous determination are wholly unpersuasive.

The Fox Petitioners do not dispute the validity of the Commission's reaffirmation of the importance of localism as a federal telecommunications policy. Nor do they dispute that localism, as well as competition and diversity, may serve as a justification for the national cap. *See Fox Television Stations v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002) (“[T]he public interest has historically embraced . . . localism . . . and nothing in [the 1996 Act] signals a departure from that historic scope.”). Instead, the Fox Petitioners confine themselves to arguing about whether the cap is “necessary,” as that term is used in Section 202(h), to achieve the goals of the federal localism policy.<sup>7</sup>

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<sup>7</sup> The Fox Petitioners' contention, pp. 18-19, that Section 202(h) requires a showing of “absolute” necessity, above and beyond the showing that was required to support promulgation of the rule in the first instance is plainly incorrect for the reasons set forth in the Commission's brief. *See* FCC Br. 23-28.

**A. The Record Fully Supports The Commission’s Determination That The Cap Is Necessary To Further Localism**

The Commission unanimously found that the national TV ownership cap furthers localism in two ways: “by collective negotiation to influence the programming that the networks provide and by preemption by an individual station owner to provide programming better suited to its community.” JA0251 (¶546). The Fox Petitioners’ assertion, pp. 25-30, that there is no evidentiary support for these findings is incorrect.

As to collective negotiation, the Fox Petitioners complain, p. 28, that the Commission “pointed only to anecdotal evidence” to support its determination that affiliates influence network programming. But it is well established that agency decisions may be justified on the basis of anecdotal evidence. *See, e.g., Syracuse Peace Council v. FCC*, 867 F.2d 654, 664 (D.C. Cir. 1989). In this case, moreover, the record is replete with examples of situations in which the affiliates have influenced the networks. *See* JA0248-50 (¶543) (citing 10 examples, chosen from among many in the record, including affiliate objections to an 8:00 p.m. time slot for the *Victoria’s Secret Fashion Show*, promotional ads for the program *Dog Eat Dog* involving “strip football” and “strip golf,” and network plans to accept liquor advertisements). The Commission was entirely justified in concluding that “[t]hese numerous instances of the collective influence brought to bear by affiliates on network programming

decisions . . . represent empirical evidence that affiliates collectively serve as an important counterweight to network programming decisions.” JA0253 (¶541).

The Fox Petitioners’ only other complaint, p. 28, is that the Commission made “no effort” to compare this anecdotal evidence to “evidence concerning O&Os ability to influence network programming.” This complaint is easily answered: The Commission did not discuss such evidence for the simple reason that there is no such evidence. The Fox Petitioners do not cite even one example of O&Os influencing network programming in ways that promote localism, and to NASA’s knowledge the record contains no such examples. The Fox Petitioners assert, p. 29, that O&Os “have far greater ability than do affiliates to influence network programming,” because if O&O management is concerned about a program it suggests that the network “will lose money on both the network side and the station side.” The simple and conclusive response to this argument is that O&Os may or may not have the *ability* to influence network programming, but there is no evidence in the record that O&Os actually *exercise* whatever influence they may possess to influence program content in ways that promote localism.<sup>8</sup>

In short, the record shows that affiliates, but not O&Os, actually influence network programming in ways that promote localism. The Fox Petitioners are simply

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<sup>8</sup> Moreover, the Fox Petitioners’ argument confirms the Commission’s point that affiliates focus on the interests of the local community they serve, while O&Os focus on “the network side,” *i.e.*, the network’s financial interests.

wrong to assert that the record does not support the Commission's unanimous determination on this point. *See Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1234 (D.C. Cir. 1999) (parties cannot complain about missing data if they had access to the data and failed to place it in the record).

The Fox Petitioners' challenge to the Commission's preemption rationale falls apart the moment it is subjected to scrutiny. The Commission relied on the networks' own preemption evidence which, despite the networks' best efforts to "spin" the data through partial and selective disclosure, showed that in 2001 the average affiliate preempted 9.5 hours of primetime network programming while the average O&O preempted only 6.8 hours. JA0252 (¶548). In an effort to neutralize their own evidence, the Fox Petitioners assert, p. 26, that of the 9.5 hours of affiliate primetime preemptions, only three minutes were attributable to affiliates' determinations that primetime network programming was "unsuited to local tastes," *i.e.*, substantively objectionable. The remainder, the Fox Petitioners contend, pp. 7, 27, resulted from affiliate preemptions of "less popular network programming" for "breaking local news, public affairs, and sports programming" and "infomercials, telethons, entertainment, and paid religious shows." On this basis, the Fox Petitioners assert, p. 27, that "[i]nsofar as relevant to its localism rationale, the true preemption disparity (involving network programming preempted as unsuited to local tastes) is not 2.7 hours per station per year, but less than three minutes per station per year."

Because the networks refused to release the underlying data, there is no way to confirm the Fox Petitioners' assertions.<sup>9</sup> Ultimately, it does not matter, however, because Fox Petitioners' argument rests on an invalid concept of localism. Localism as defined by the Commission is the federal policy of "ensuring that local television and radio stations are responsive to the needs and interests of their local communities." JA0060 (¶74). This broad policy encompasses selection of any non-network program that better serves local tastes and interests. Thus, preempting *Temptation Island* because its content is unsuitable for the local community is one aspect of localism, but so is preempting network programming because the alternate programming – such as a local college basketball game, a muscular dystrophy telethon, a religious show, or breaking local news – is, in the station's opinion, "of greater local or national importance." 47 C.F.R. §73.658(e)(2). Try as they may, the Fox Petitioners cannot redefine localism. Nor can they revise their own preemption evidence to minimize the disparity between affiliate and O&O preemptions.<sup>10</sup>

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<sup>9</sup> At a minimum, the networks' carefully selected evidence is skewed in favor of the networks. The networks report only on preemptions in primetime, the period of the broadcasting day when preemptions are least likely to occur. NASA's evidence shows that, when *all* affiliate preemptions for 2001 are counted, affiliates preempted an average of 33.27 hours, not 9.5 hours. The disparity between affiliates and O&Os when *all* preemptions are counted almost certainly is much larger than is suggested by the networks' primetime-only data.

<sup>10</sup> The Fox Petitioners' assertion, p. 28, that O&O's "trounce" affiliates in "localism-enhancing preemptions" – by which the Fox Petitioners mean preemptions for breaking local news – is too clever by half. For support, the Fox Petitioners claim, p. 27, that in 2001 the average O&O preempted 6.2 hours of network programming for breaking local news while the average affiliate preempted 5.1 hours. But that

## **B. The Networks' Attacks On The Commission's Localism Policy Are Baseless**

The Fox Petitioners' assertion, pp. 30-34, that the Commission's preemption and collective negotiation rationales are "incoherent" amounts to nothing more than disagreement with the localism policy adopted by Congress and the Commission and an illegitimate effort unilaterally to re-define that policy.

As to preemptions, the Fox Petitioners, pp. 30-31, accuse the Commission of "overlook[ing] that networks and affiliates stand in a business relationship in which networks in effect 'buy' affiliates' clearance with cash compensation, advertising time, and other value." The Fox Petitioners assert that "[t]his transfer of value eliminates the effect of any disparity between local and national incentives," such that "affiliates' incentives to shield their viewers from network programming unsuited to local tastes are no stronger than those of O&Os." This argument is quite misleading. *First*, it is utterly inconsistent with the evidence in the record – including evidence submitted by the networks themselves – that affiliates in fact preempt more frequently than O&Os, something that would not happen if the disparity between local and national

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statistic is not the least bit surprising given that O&Os are concentrated in large markets (like New York) that generate a lot of breaking local news, whereas affiliates are concentrated in smaller markets that generate much less. *See* JA5414-15 (Network Ownership and Audience Reach Chart). Indeed, given the relatively small spread separating O&Os and affiliates even by the networks' (unverified and unverifiable) count, there is every reason to believe that if the data were corrected for market size, so that apples were being compared with apples, affiliates would outperform O&Os with respect to breaking-local-news preemptions as well.

incentives had been eliminated as the Fox Petitioners claim. It is the Fox Petitioners' theory, not the Commission's, that is "incoherent" – because it is contrary to the facts.

*Second*, the Fox Petitioners ignore the fact, of which they are well aware, that an important Commission rule (the "Right to Reject Rule"<sup>11</sup>) prohibits affiliates from ceding to networks the right to preempt network programming in favor of other programming that better suits local tastes and needs. In addition, the Fox Petitioners omit the fact that the affiliates have filed a petition with the Commission alleging that the major broadcast networks are exerting their increased leverage over affiliates to impose restrictive "preemption baskets" and other onerous contractual conditions on affiliates that violate the "Right to Reject Rule" and related Commission rules. *See* NASA, *Petition for Inquiry into Network Practices*, DA 01-1264 (March 8, 2001). Furthermore, the networks have, or are, eliminating cash compensation paid to affiliates. "Fox generally pays no compensation to affiliates and in some cases insists on 'reverse compensation,' *i.e.* the station pays the network. NBC and CBS are generally phasing out network compensation over the next several years. ABC is moving in the same direction, albeit thus far more slowly." JA3937 n.9 (Coalition Broadcasters Comments).

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<sup>11</sup> 47 C.F.R. §73.658(e).

In short, the Fox Petitioners' challenge to the Commission's unanimous determination that affiliates are more likely to preempt than O&Os is refuted by the networks' own evidence and ignores Commission rules that prohibit networks from "buying" affiliates' clearance of programs that do not meet local tastes and needs.

Equally baseless is Fox Petitioners' assertion, p. 31, that "[t]he collective-negotiation rationale has no rational connection to localism at all" and, indeed, "harms, not helps localism." That is so, the Fox Petitioners say, because "it permits the local tastes of a minority of the country to trump the local tastes prevailing elsewhere." *Id.* The Fox Petitioners' argument suffers from several flaws. *First*, in many instances in which networks bend to pressure from local affiliates, the networks do not alter programming nationwide to suit the preferences of a vocal minority – for instance, by requiring all affiliates to show the Bush-Gore debate *instead of* the regularly-scheduled baseball game – but, rather, offer their affiliates around the country a programming choice – for instance, to show *either* the debate *or* the game, at each affiliate's option. *See* NASA Br. 34. There is no "tyranny of the minority" in that.

*Second*, the Fox Petitioners are wrong in assuming that localism is a static process. On the contrary, localism calls for a dynamic exchange of ideas between affiliates and networks, as well as among various affiliates. If some affiliates object to a proposed network program and move to convince network executives to alter program content (for instance, to tone down nudity and violence), other affiliates that

disagree can and do push back. If a network, after taking into account the breadth and depth of the affiliates' divergent positions, decides to alter program content, localism is served. Localism is also served if a network, having considered the same factors, decides *not* to alter program content. In either case, local voices have been heard and thoughtfully considered.

Finally, the Fox Petitioners, pp. 31-32, are beating a dead horse in asserting that the national cap violates the First Amendment. The D.C. Circuit summarily rejected the networks' First Amendment arguments in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045-46 (D.C. Cir. 2002). Moreover, as the Commission's brief notes, pp. 27-28, the Supreme Court repeatedly has upheld the Commission's structural ownership rules against First Amendment challenge. See *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 798-802 (1978) ("NCCB") (upholding cross-ownership restriction against First Amendment challenge); *United States v. Storer Broad. Co.*, 351 U.S. 192, 202-05 (1956) (upholding nationwide ownership limit); *NBC v. United States*, 319 U.S. 190, 226-27 (1943) (upholding rules limiting network ownership of stations against First Amendment challenge). In upholding the Commission's rules, the Supreme Court has declared that the "right of free speech does not include . . . the right to use the facilities of radio without a license," and that denial of a station license under the public interest standard "is not a denial of free speech." *NBC*, 319 U.S. at 227. Under the Supreme Court's governing precedents, so long as the Commission's media ownership "regulations are a reasonable means of promoting the public interest

. . . they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.” *NCCB*, 436 U.S. at 802.<sup>12</sup>

### **C. The Networks’ Remaining Arguments Lack Merit**

There is no basis for the Fox Petitioners’ argument, pp. 34-36, that the Commission failed to provide an adequate explanation of the differences between the Order under review and a *1984 Report* issued almost 20 years ago, which decided to phase out a 12-station limit on television ownership over a period of years. JA2329 (*1984 Report* ¶110). When the Commission issued the *1984 Report*, Congress promptly interceded and ordered the Commission not to implement its order.<sup>13</sup> The Commission responded by eliminating the sunset provision and by adopting, in addition to a 12-station ownership limit, a percentage limitation of 25% of all television households nationwide. JA2364, 2370-71 (*1985 Order* ¶¶37, 49, 52). Congress subsequently increased the cap to 35%, and is now contemplating rolling back the Commission’s 45% limit to 39% or 35%, but it has never come close to supporting repeal of the rule. For its part, the Commission has consistently determined (in 1998, 2000, and 2002) that the national TV cap should be retained.

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<sup>12</sup> During the oral argument in *Fox*, one of the judges commented that, given these precedents, the Fox Petitioners’ First Amendment argument “would appeal [only] to a bold innovative court with a death wish.” Tr. of Oral Arg. at 74.

<sup>13</sup> Second Supplemental Appropriations Act, Pub. L. No. 98-396, §304, 98 Stat. 1369, 1423 (1984).

The *1984 Report* is thus an “outlier” that sharply diverges from both the statements and the actions of the Commission and Congress in the ensuing 20 years.

The Fox Petitioners rely on the D.C. Circuit’s decision in *Fox* to argue that the Commission inadequately explained its rejection of the *1984 Report*, but that court specifically noted that the *1984 Report* is “almost 20 years old” and it is entirely possible that the *1984 Report’s* conclusions are “incorrect” or “inapplicable in the light of changed circumstances.” 280 F.3d at 1048. In the Order under review, the Commission correctly noted that the *1984 Report* gave “very limited consideration to the potential effects of the cap on localism,” and focused instead on “the quality and quantity of news and public affairs programming on group-owned versus individually-owned stations.” JA0263-64 (¶584). In its current decision, the Commission “expanded our ‘localism’ measures to include the important consideration of program selection by local stations.” *Id.*

The Fox Petitioners’ only argument is to assert, p. 35, that the *1984 Report* “address[ed] the balance of power between networks and affiliates.” But as the Commission noted, its current Order properly expands the indices of localism to include program selection. Indeed, the very language the Fox Petitioners quote from the *1984 Report* refutes their argument. The *1984 Report* focused on diversity and competition rather than localism, and on differences between group owners (many of which are *not* networks) and individual owners. JA2292-94 (*1984 Report* ¶¶3-10). Although the Commission considered data concerning the quality and quantity of

local news programming, it did not consider the networks' incentives to air network programming of all kinds, regardless of the tastes and needs of local communities.<sup>14</sup>

Even if the *1984 Report* could be read to have addressed the Commission's current localism policy under a different label, the extensive record assembled in this proceeding demonstrates that any conclusion that independent affiliates do not further localism, as the D.C. Circuit anticipated, was either "incorrect" or, at the very least, is "inapplicable in the light of changed circumstances." *Fox*, 280 F.3d at 1048. Accordingly, the Fox Petitioners are wrong to argue that the Commission's decision to retain the national TV rule, consistent with repeated congressional and agency determinations, must be vacated on the basis of an isolated, 20-year-old agency report.<sup>15</sup>

## CONCLUSION

For the reasons set forth in this brief and NASA's Opening Brief, the Court should GRANT NASA's petition, VACATE the Commission's order insofar as it

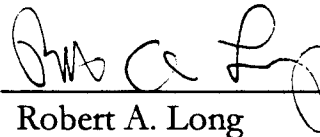
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<sup>14</sup> The Fox Petitioners wrench out of context an isolated statement in the *1984 Report* concerning the likely effect of network ownership on preemptions. This qualified statement (O&O's "presumably" want to obtain the most popular programming) was made in passing, without any supporting evidence or analysis, amid discussion of a very different issue (whether network ownership of additional stations would inhibit the formation of additional part-time networks). *See* JA2324-25 (*1984 Report* ¶199).

<sup>15</sup> The Fox Petitioners' brief states, p. 14 n.21, that Sinclair Broadcast Group is not a member of NASA and does not agree with NASA's brief. NASA is a coalition of the ABC, CBS, and NBC affiliates' associations, which are petitioners along with NASA in this case. The widely-representative boards of all three affiliates' associations, which are elected by the membership, voted without dissent to defend the 35% cap. Stations owned by Sinclair are members of these associations.

increases the national TV ownership rule from 35% to 45%, and REMAND to the Commission for further proceedings. The Court should DENY the Fox Petitioners' petition.

Respectfully submitted,



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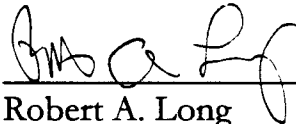
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I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 6699 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Garamond type.



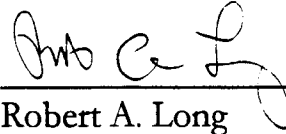
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Pursuant to Third Circuit Rules 28.3(d) and 46.1(e), I certify that I am a member of the bar of this Court.



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