

the largest group owners—broadcast networks—from serving additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates. Moreover, the Commission believes that a modest relaxation of the cap will help networks compete more effectively with cable and DBS operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks. Balancing these competing interests, the Commission raises the national cap from 35% to 45%.

354. *Background.* Since 1941, the Commission has limited the national ownership reach of television broadcast stations. The Commission has modified the restriction several times to keep pace with the changing marketplace. In 1984, the Commission repealed the rule, concluding that it was not necessary to promote competition or diversity, and instituted a six-year transitional ownership limit of twelve television stations nationwide. On reconsideration, the Commission affirmed its underlying conclusions, but it eliminated the sunset provision out of a concern that repealing the rule would create a disruptive restructuring of the national broadcasting industry. The Commission retained the twelve station limit and, in addition, prohibited an entity from reaching more than 25% of the country's television households through the stations it owned.

355. In 1996, the Commission adopted the current 35% cap in response to the Congress' directive to raise the cap (from 25% to 35%) and to eliminate the rule that an entity could not own more than twelve stations nationwide. The Commission subsequently affirmed the 35% cap as part of its 1998 biennial review of media ownership regulations. In affirming the cap, the Commission reasoned that it would be premature to institute revisions to the national TV ownership limit before fully observing the effects of changes to the local TV ownership rules and the effects of raising the cap from 25% to 35%. The Commission also concluded that the national TV ownership rule helps promote better service to local communities by preserving the power of affiliates to negotiate with the networks and to make independent programming decisions. In addition, the Commission concluded that the national TV ownership rule facilitates competition in the program production market and in the national advertising market.

356. Several broadcast networks challenged the Commission's decision to retain the national TV ownership

rule. In *Fox Television Stations, Inc. v. FCC*, 280 F.2d 1027 (D.C. Cir. 2002), the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission's 1998 decision to retain the rule was arbitrary and capricious, and it remanded the rule for further consideration. The court rejected the Commission's "wait-and-see" approach on the grounds that it was inconsistent with the Commission's statutory mandate to determine on a biennial basis whether its rules are necessary in the public interest. The court also held that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism.

357. With respect to competition, in its *1998 Biennial Review Report*, the Commission provided a study and a table showing that large group owners of television stations had acquired additional stations and increased their audience reach since the 1996 Act's passage. The court was not persuaded by the Commission's evidence that large group owners have undue market power, and it agreed with the networks that the figures alone, absent evidence of an adverse effect on the market, were insufficient to support retention of the rule. The court also found unsupported the Commission's statement in the *1998 Biennial Review Report* that the national cap is necessary to safeguard competition in the national advertising or program production markets. The court concluded that the Commission's analysis of the state of competition in the television industry was incomplete and did not satisfy the requirement under section 202(h) to show that the rule is necessary in the public interest as the result of competition.

358. The court held that diversity and localism are valid public interest goals within the context of broadcast regulation and made it clear that the Commission could determine that the national TV ownership rule was necessary in the public interest under section 202(h) if it served either interest. The court, however, ruled that the Commission had not provided sufficient evidence that either one of these goals was served. The court noted that the Commission, in its *1998 Biennial Review Report*, "mentioned national diversity as a justification for retaining the [national TV ownership rule], but did not elaborate upon the point." The court found the Commission's statement did not explain why the rule is necessary to further national diversity. The court also found that the Commission failed to justify its departure in the 1998 decision from its 1984 decision, in which the

Commission concluded that the national TV ownership restriction should be phased out after six years because: (1) The rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity. In addition, the court held that the Commission did not adequately demonstrate that the rule strengthens the bargaining power of independently-owned affiliates and thereby promotes program diversity, particularly in light of its 1984 conclusion that no evidence suggested that stations that are not group-owned responded better to community needs or spent proportionately more revenue on local programming. However, the court acknowledged the Commission's right to reverse course, provided the reversal is supported by a reasoned analysis. Recognizing that sufficient evidence may exist to justify the national TV ownership rule, the court determined that the appropriate remedy was to remand, rather than to vacate, the rule. The Commission now considers whether the current rule can be justified as necessary to promote competition, diversity or localism.

359. *The Current National TV Ownership Rule Cannot Be Justified.* Under section 202(h), the Commission must evaluate whether the national TV ownership rule continues to be "necessary in the public interest as the result of competition." To make this determination, it considers whether the rule serves the public interest by furthering its policy goals of competition, localism, or diversity. The evidence demonstrates that a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities. However, the evidence also demonstrates that the current cap of 35% is not necessary to preserve that balance.

360. *Competition.* In analyzing whether the current rule is necessary to protect competition, the Commission focuses on whether and to what extent market power exists in any relevant market, and what effect the rule has on the existence and exercise of this market power. In the 1984 decision to eliminate the national ownership cap, the Commission limited its competition analysis to the national television advertising market. In this decision, the Commission expands its competition review to include the national program acquisition market. The national cap affects economic concentration in