

the marketplace, rather than regulation, to foster program diversity. Further, the record in this proceeding does not contain evidence that affiliates air programming that is more diverse than programming aired by network-owned stations. Therefore, the Commission cannot affirm its earlier determination regarding program diversity, and it does not find that the cap is necessary to foster program diversity.

388. *Localism*. The Commission's decision in the 1984 *Multiple Ownership Report and Order* did not address whether the national TV ownership rule advances its goal of localism. In the 1998 *Biennial Review Report*, however, the Commission did address its localism goal, declining to modify the national TV ownership restriction in part because affiliates "play a valuable counterbalancing role" to network programming decisions by exercising their independent programming discretion regarding what programs best serve the needs and interests of their local communities. In *Fox Television*, the court stated that, although the Commission had failed to present evidence that the cap in fact promoted localism, localism was a legitimate basis for imposing a national ownership cap.

389. Based on its analysis of the extensive record in this proceeding, the Commission concludes that a national television ownership limit is necessary to promote localism on broadcast television. The evidence suggests, however, that the current 35% cap is not needed to protect localism, and may in fact be hindering public benefits that are expected to follow from an increase in the cap. The Commission concludes that a national cap of 45% fairly balances the competing public interest values affected by this rule. It recognizes that its decision to retain a national ownership cap is contrary to its conclusion in 1984. The Commission reaches this different conclusion principally because it finds that a cap is necessary to protect localism by preserving a balance of power between networks and affiliates, a policy objective that was not considered in the 1984 decision. In this section, the Commission details the localism analysis, and then discusses the modified rule.

390. *Whether a National Cap Promotes Localism*. The Commission examines the effect of a national television cap on the economic incentives for locally responsive programming by television stations. It also considers evidence that a national cap results in behavior by network-affiliated stations that is responsive to

the needs and tastes of a station's local community.

391. *Economic Incentives for Localism*. The affiliates contend that the current national cap is needed to preserve their bargaining power with their networks. The affiliates explain that limiting the national audience that networks can reach through their owned stations promotes a balance of power between networks and their affiliates. The affiliates also claim that the cap is necessary to counteract the networks' strong financial incentive to promote the widest distribution across the nation of network programming irrespective of the tastes of one or more particular local cities. The widest possible distribution of programming, according to the affiliates, increases viewership of network programming, which maximizes network advertising revenues. According to the affiliates, maximum national exposure of programming also improves the likelihood that the program owner will realize additional revenues in the program syndication market. The affiliates contend that as broadcast networks have ownership stakes in a larger percentage of their prime time programming, their incentive to create programs with syndication value—and their incentive to stifle local preemption—increases.

392. The affiliates argue that the incentive of independently-owned affiliates, in contrast to network-owned stations, is to make programming decisions that are more closely aligned with the needs and tastes of their communities of license. A network derives its income from the programming that the network produces (and the syndication revenue the programs might generate) as well as from its local stations. A local station maximizes its income by providing programming desired by its local community irrespective of national programming preferences. Therefore, the programming interests are not always the same.

393. *Evidence of Localism by Affiliate*. The affiliates contend that the national cap is needed to preserve a body of network affiliates not owned by the network that can influence network programming so that it is more suited to the tastes and needs of the affiliates' communities. In support of this argument, the affiliates submitted several examples of the influence independent affiliates can have on network programming:

- When NBC aired a special edition of *Fear Factor*, featuring Playboy bunnies, during halftime of the Superbowl (airing on Fox), affiliates

objected to the network promos, which ran during all hours of the day, and included tag lines such as "who needs football when we've got bunnies?"

- When NBC began a trial program to accept liquor advertisements, so many affiliates opted out of airing the ads due to local concerns that NBC dropped the program.

- CBS had scheduled the *Victoria's Secret Fashion Show* for 8 p.m. The affiliates objected to the early showing and urged that the program be moved to the 10 p.m. time slot. In response, CBS moved the show to 9 P.M., although some affiliates nonetheless preempted the show as having inappropriate content for their service areas.

- Promotional ads for NBC's *Dog Eat Dog* included shots of nude contestants promoting the program's challenges such as "strip football" and "strip golf." When affiliates objected to the explicitness of the promos and their airing at all times of day, NBC agreed to eliminate strip stunts from future episodes.

- *NYPD Blue* was originally designed to include more nudity and graphic language than is currently aired, but after ABC affiliates objected, the amount of nudity and graphic language in the show was reduced. Even so, a number of affiliates initially refused to carry the show.

- Affiliates expressed concerns about the violent and mature content of the series *Kingpin*, which concerns the life of a drug lord. In response, NBC agreed to allow affiliates to review episodes in advance to ensure the content is appropriate for their local communities.

- In 2002, CBS worked with affiliates to reformat its morning news program, *The Early Show*. One key issue of affiliate concern was whether they would be permitted to provide local news content during the two-hour time block used by the program, as they had with CBS' prior show, *CBS This Morning*. Although some local affiliates are permitted to use the blended format with *The Early Show*, CBS has refused to permit other affiliates to move to the blended local-network news program format.

- NBC affiliates objected to NBC's intention to broadcast the 2002 Olympic Games live, which would have preempted the evening news on the west coast. After initially resisting the requests of the west coast affiliates to air a delayed broadcast during prime time, the network conducted a viewer survey. Results of the survey, however, substantiated the affiliates' assertion that west coast viewers preferred to watch the games during prime time, and the networks complied.