

as well as to the management of affiliates. They claim that managers of O&Os participate during the networks' program development process and provide more credible input than the management of affiliate stations. They also assert that affiliates have an "inherent economic conflict" with the network regarding the distribution of profits, have no influence in the development of new programs, and learn of the new programs at the same time as do advertisers.

401. The Commission agrees that affiliates have an inherent economic conflict with networks. However, the Commission believes that affiliates' economic incentives actually help explain why affiliates regularly raise programming concerns with networks and why affiliates preempt more network programming, on average, than do network-owned stations. In the Commission's view, affiliates' economic incentives to maximize local viewership works to promote localism. In addition, the networks' claim of minimal affiliate influence over programming is overcome by evidence that affiliates regularly raise programming concerns with networks and frequently succeed in altering network programming in ways that protect local interests. These numerous instances of the collective influence brought to bear by affiliates on network programming decisions represent a powerful force for the protection of local viewing interests. They represent empirical evidence that affiliates collectively serve as an important counterweight to network programming decisions by influencing networks to deliver programming responsive to local tastes. In sum, the Commission believes that this affiliate/network dynamic is beneficial to viewers and should be preserved. It concludes that eliminating the cap altogether would shift the balance of power with respect to programming decisions toward the national broadcast networks in a way that would disserve its localism policy.

402. *Appropriate Level of the Cap.* The Commission has found that a national television ownership cap continues to be necessary to promote localism because the record demonstrates that affiliates affect network programming in ways that respond to viewer preferences in affiliates' local communities. In this section, the Commission examines the specific effects of the current 35% cap and whether this particular level achieves its localism objectives.

403. *Preemptions.* Affiliates argue that the networks have limited their ability to preempt network programming in

order to provide programming more geared to local needs and interests, and that these limits have become more formidable as the networks have extended their ownership of stations. Affiliates argue that an increase in the national cap reduces affiliates' ability to resist network pressure not to preempt. The affiliates point to a decline in affiliate preemptions following the 1996 increase in the cap from 25% to 35%. The affiliates' submission indicates that, with respect to all dayparts (as opposed to prime time-only), affiliates preempted, on average, 48 hours per year between 1991 to 1995 and 36 hours per year between 1996 to 2001. It also shows that, in the year 1995, the year before the cap was increased to 35%, there were, on average, 46 hours of programming preempted, but by the year 2001 the average had declined to 33 hours.

404. The networks offer two responses to the affiliates' data. First, the networks submit preemption data that, according to the networks, shows that the 35% cap has no effect on bargaining power between networks and affiliates. The networks contend that if higher levels of network station ownership actually increased networks' leverage over their affiliates, affiliates of the largest network station owners would be expected to preempt less (because of their diminished bargaining power) than affiliates of a network that had significantly less station ownership. The networks' data shows that affiliates of the largest network-owners (CBS and Fox, at 39% and 38% national reach respectively) preempt to an equal or greater extent than do affiliates of ABC, with a national reach of 23%. The networks assert that this data proves that the 35% cap has no effect on bargaining leverage between networks and affiliates.³⁶

405. Second, the networks argue that affiliate preemptions often are not for programming that is of greater public interest, but for syndicated programs.

³⁶ In a motion filed May 28, 2003, NAB/NASA asked the Commission to disregard certain portions of network submissions concerning preemption and local news quantity because the networks have not provided the data underlying those submissions. Alternatively, NAB/NASA asked the Commission to infer that the underlying data would not favor the networks' positions on preemption and news quantity of O&O versus affiliate stations. The portions of the network filings the Commission is asked to disregard include, *inter alia*, EI Study G and Disney Exhibit G, relating to preemptions, and EI Study H, relating to local news quantity. Fox opposed the motion on May 29, 2003. The Commission will afford the record evidence the appropriate weight in light of all circumstances, including the extent to which it believes the underlying data is necessary to make an informed decision about the showing.

The data Disney submits suggests that more affiliates preempted ABC programming in favor of syndicated programming than for local specials. In addition, Disney states that very few half hours of affiliate prime-time preemptions were for news, political, or public affairs programming. Disney's data, however, is countered by the affiliates' survey of affiliated stations, in which respondents reported preempting network programming for: local breaking news (83% of respondents); local news (71% of respondents); local emergencies (70% of respondents); local political programming (74% of respondents); local sports (75% of respondents); religious programming (47% of respondents); "other" programming (e.g., parades, telethons, syndicated programming, movies) (34% of respondents).

406. Apart from contractual restrictions, a majority of affiliates responding to an affiliate survey—68%—report that they have "experienced pressure from [their] network to not preempt programming." The record provides several instances of increased network resistance when affiliates attempted to air programs deemed to be of greater local interest than the network programming. For example, Belo's ABC affiliate in Dallas, the headquarters of American Airlines failed to get the network's permission to preempt the November 12, 2001, Monday Night Football halftime show for local news updates on the American Airlines jet crash in New York that morning.

407. *Discussion.* Although the Commission has concluded that a national cap is needed to balance power between networks and affiliates, the record suggests that maintaining the cap at 35% is not necessary to preserve the balance of bargaining power between networks and affiliates. In reaching this conclusion, the Commission relies principally on the evidence showing that the largest network station owners possess no greater bargaining power—as measured by prime time preemptions—than the smallest network station owner. This evidence is persuasive because it directly compares the extent to which different levels of network ownership of stations actually affect the level of preemption by those networks' affiliates. Implicit in this analysis is an assumption that that data, although not a perfect proxy, is a reliable indicator of relative bargaining power between networks and affiliates. Preemption of network programming by an affiliate has negative consequences to the network, and networks by all accounts seek to avoid preemption by affiliates. So the