

ability of an affiliate to preempt in the face of networks' incentives to prevent preemption appears to be a reasonable measure of relative bargaining power between networks and affiliates.

408. The Commission is not persuaded by the affiliates' argument that the 35% cap is needed to protect localism because the most recent national cap increase resulted in fewer affiliate preemptions. The principal deficiency in this argument is that it does not control for other plausible causes of the decline in affiliate preemptions. Although the affiliates suggest that the 1996 increase in the national cap reduced affiliates' bargaining power, the affiliates themselves identify other factors occurring in the same timeframe as the national cap increase that they claim have further eroded affiliate bargaining power. The affiliates assert that the Commission's repeal of its financial interest and syndication rules in the early 1990s gave networks an additional financial incentive (in addition to their incentive to avoid preemption to maximize advertising rates) to discourage affiliate preemption. The affiliates contend that vertical integration, including program ownership and syndication by broadcast networks and the trend toward "repurposing" of network programming on affiliated non-broadcast channels have helped increase the networks' leverage over affiliates. To the extent these additional factors actually enhance network bargaining leverage, they undercut the affiliates' argument that it was specifically the 1996 increase in the national cap that caused affiliates to reduce their preemption of network programming.

409. A more accurate assessment of the impact of the 1996 national cap increase on network-affiliate bargaining leverage could be made if affiliate preemption rates from 1991 through 2001 could be compared to the preemption rates of network-owned stations during that same period. If preemption rates on network-owned stations were similar to affiliate preemption rates over that same period, there might be shown a more certain—and completely different—explanation for the decline. Networks might well have persuaded the Commission that the uniform decline in preemptions by O&Os and affiliates was caused by some plausible reason unrelated to the change in the national cap. On the other hand, if the data had shown preemption rates on network-owned stations remaining steady while affiliate preemptions declined sharply after 1996, then the affiliates' explanation for the decline

(i.e. increase in the national cap) would carry more weight.

410. The foregoing analysis of preemption data excludes consideration of the content of the programming substituted by the local station for the network programming. Other than its interest in promoting market structures that encourage local news production, the Commission seeks to avoid resting broadcast ownership policies on subjective judgments about the public policy value of different types of locally-substituted programming. The Commission agrees with the affiliates that it is enough, for purposes of assessing stations' responsiveness to local communities, that they preempted network programming. The judgment of when to preempt and what to substitute are uniquely within the judgment—and responsibility—of the station.

411. Thus, the Commission reaffirms its conclusion, in the *1998 Biennial Review Report*, that independently-owned affiliates play a valuable role by "counterbalancing" the networks' economic incentive to broadcast their own programming "because they have the right \* \* \* to air instead" programming more responsive to local concerns. But, the evidence suggests that the current limit of 35% is overly restrictive and that the cap may safely be raised and the benefits of wider network station ownership achieved without disturbing either this balance or affiliates' ability to preempt network programming.

412. *Other Effects of the Current 35% Cap.* The Commission, thus far in the R&O, examined two measures of localism—collective affiliate influence on network programming and specific preemption levels by affiliates versus network-owned stations. In this section it considers a third measure—the effect of the national cap on the quantity and quality of local news and public affairs programming. The Commission examines this area because local news and public affairs programming can play an important role in citizen participation in local and state government affairs. Thus it seeks market structures among broadcasters that encourage stations to produce local news and public affairs programming and thereby contribute to an informed citizenry.

413. In its 1984 decision, the Commission compared the quality and diversity of programming by stations owned by group owners—both network and non-network owners—with that of singly owned stations. It concluded that there was no evidence that group owners provided less or lower quality news and public affairs programming

than single owners. The *Fox* court criticized the Commission for failing to explain in the *1998 Biennial Review Report* why it departed from this conclusion. With the decline in the number of individually owned stations, an increase has occurred in the number of stations sharing common ownership. The Commission sought in this biennial review to understand whether the national TV ownership rule, by preserving a class of affiliates, affects localism by comparing the local news and public affairs programming of network owned and operated stations to that of non-network owned affiliates. It discusses the evidence and its conclusions in this summary.

414. *Quantity of local news and public affairs programming.* In the NPRM, the Commission requested evidence regarding any clear relationship between the ownership of stations and the quantity and quality of local news and public affairs programming produced by those stations. A study conducted by Commission staff, MOWG Study No. 7, concluded that network-owned stations produced more local news and public affairs programming than affiliates and received local news excellence awards more frequently than affiliates. Responding to that study, the affiliates submitted a study indicating that many of the results of MOWG Study No. 7 changed when data pertaining to stations belonging to Fox were not used. Another study, submitted by Dr. Michael Baumann of Economists Inc., demonstrates that no defensible reason exists for deleting the Fox station data. Dr. Baumann's study provides analysis purporting to demonstrate that network-owned stations, on average, produce more local news than do affiliates across all-sized markets, with an even greater difference in the amount of news offered by network-owned stations in smaller markets.

415. The results of MOWG Study No. 7 show that network-owned stations air 23% more local news and public affairs programming per week than affiliates (22.8 hours versus 18.5 hours). Only MOWG Study No. 7 examined newspaper-owned affiliates separately from the other affiliates. It showed that, on average, newspaper-owned affiliates provided more hours per week of local news and public affairs (about 22 hours) than did the other affiliates (approximately 15 hours). The study also showed that network O&Os provided the most local news of all (almost 23 hours).

416. In response to MOWG Study No. 7, the affiliates conducted a study that revealed no statistically significant