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Angela J. Campbell
Associate Director
Citizens Communications Center Project
Christopher R. Day
J. Steven Farr
Fellows

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December 21, 2000

VIA HAND DELIVERY

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte Communications*: DA 00-2246
Fox Television Stations, Inc.'s Request to File Confidential
Financial Information Concerning the Operations of the New York Post
File Nos. BALCT-20000918ABB-ABD; BALCT-20000918ABF-ABS;
BALCT-20000918ABU-ABZ; BALCT-20000918ACA-ACE

Dear Mr. Stewart:

The Office of Communication, Inc. of the United Church of Christ, Academy of Latino Leaders in Action, Black Citizens for a Fair Media, Center for Media Education, Consumer Federation of America, Consumers Union, New York Metropolitan Association of the United Church of Christ, Rainbow/PUSH Coalition, and Valley Community Access Television ("Petitioners"), through undersigned counsel, hereby file a legal analysis in further support of their December 13, 2000, written objection¹ to the request of Fox Television Stations, Inc. ("Fox") to file confidential financial information concerning the *New York Post's* operations.²

¹ See Letter to Roy J. Stewart, Chief, Mass Media Bureau from Christopher R. Day and Angela J. Campbell (dated December 13, 2000).

² See Letter to Roy J. Stewart, Chief, Mass Media Bureau from William S. Reyner, Jr. (dated December 13, 2000) (hereinafter "*Reyner Letter*").

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In its December 13, 2000, letter, Fox's counsel again reiterates Fox and News Corporation's position that the addition of WWOR-TV to the existing *New York Post*/WNYW-TV media combination is permissible under Fox's "permanent waiver" of the Newspaper/Broadcast Cross-Ownership Rule ("Rule") and that "no further Commission action" is required to allow the acquisition of WWOR-TV.³ However, in the next paragraph of Fox's December 13, 2000, letter, Fox's counsel states that News Corporation and Fox wish to provide confidential financial materials for the *New York Post* "in order to facilitate the Commission's review of this matter."⁴ Nonetheless, Fox and News Corporation do not provide this information. Instead, Fox and News Corporation state that this information will only be submitted subsequent to a Commission determination that confidential treatment will be given to "any and all financial information submitted to the Commission with respect to the *New York Post*." (emphasis added).⁵

Petitioners oppose Fox and News Corporation's request on a number of grounds. In its Application, Fox stated that the acquisition of WWOR-TV, in addition to its existing combination of the *New York Post* and WNYW-TV "requires no Commission action at this time."⁶ Fox's December 13, 2000, letter also restates this assertion.⁷ Petitioners do not agree with News Corporation's assertion.⁸ However, unless Fox and News Corporation explicitly acknowledge the need for a waiver and in fact seek one, the Commission should reject Fox's

³ *Id.* at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Fox Television Stations, Inc. Application for Assignment of Licenses of KBHK-TV, KCOP-TV, KMOL-TV, KMSP-TV, KPTV (TV), KTVX(TV), KUTP(TV), WWOR-TV, WUTB(TV), and WRBW(TV)* File Nos. BALCT-20000918ABB-ABD; BALCT-20000918ABF-ABS; BALCT-20000918ABU-ABZ; BALCT-20000918ACA-ACE, Ex. No. 4, Sec. No. 3, Question No. 6.a. at 19 (hereinafter "*Fox App.*").

⁷ *See Reyner Letter* at 2. Indeed, in its Joint Opposition, Fox explicitly states that it is *not* requesting an additional permanent waiver of the Newspaper/Broadcast Cross-Ownership Rule. *Opp.* at 31, n. 71.

⁸ As explained in the Petition to Deny and the Petitioner's Joint Reply, Fox's previous waiver of the Rule was based on the unique circumstances facing the *New York Post* in 1993, and is limited to the specific facts in that case. *See Petition to Deny* at 7-9; *Reply to Joint Opposition of Fox and Chris-Craft* at 11-13.

"voluntary" request to provide additional financial information, and proceed solely on the basis of the information that is currently in the record of this proceeding.

If Fox is requesting a new waiver of the Rule, or if the Commission determines that a new waiver or an extension of the existing waiver is required for this transaction, then the additional financial information must be filed as part of the application. To obtain a new waiver of the Rule, Fox must show: (1) an inability to sell the broadcast station or newspaper, (2) an inability to sell the broadcast station or newspaper without accepting an artificially depressed price, (3) an inability of a locality to support separate ownership of the enterprises, or (4) that an application of the Rule disserves the Rule's twin purposes of diversity of viewpoints and economic competition.⁹ Thus, if News Corporation is in fact seeking a waiver of the Rule, the financial condition of the New York Post is clearly at issue and that information must be made available to the public.

As a preliminary issue, it is important to note that Fox and News Corporation have not complied with the Commission's Rules in seeking confidential treatment of the *New York Post's* financial information. Although Fox and News Corporation request confidential treatment pursuant to Part 0.459 of the Commission's Rules, they have not met the prerequisites of that section, which require that a person seeking confidential treatment submit copies of those material along with its request.¹⁰ The Commission cannot make a determination of whether confidential treatment is warranted unless it can look at the materials.¹¹ Fox and News Corporations's request that the Commission grant confidential treatment to materials that it has not had the opportunity to examine clearly does not comply with the procedural requirements of Part 0.459. Moreover, Part 0.459(b) lists nine types of information needed to support a request for confidential treatment. Fox and News Corporation have also failed to comply with this requirement. For example, Part 0.450(b)(1) requires "[i]dentification of the *specific* information

⁹ See Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046, 1074, 1085 (1975), *recon. denied*, 53 FCC 2d 589 (1975), *aff'd sub nom.*, *FCC v. Nat'l Citizens Comm'n for Broadcasting*, 436 U.S. 775 (1978); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5348 (citing the four factor test for waivers of the Newspaper/Broadcast Cross-Ownership Rule).

¹⁰ 47 C.F.R. § 0.459(a).

¹¹ The confidentiality of the information is protected while the Commission makes this determination, because the rules require the Commission to treat the information as confidential "until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted." 47 CFR § 0.459(d)(1).

for which confidential treatment is sought." Fox and News Corporation seek confidential treatment for "any and all financial information" and fail to specify the types of information they seek to have kept confidential.

Although applicants may request limited confidential treatment under Section 0.459 of the Commission's Rules, most information submitted in Title III licensing proceedings is made publicly available.¹² In particular, the Commission has made information publicly available where "a party [has] placed its financial condition at issue in the Commission proceeding."¹³ Fox and News Corporation claim that, pursuant to *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) ("*Critical Mass*"), the Commission should treat the information as confidential. The *Critical Mass* standard, however, is only applicable in a voluntary disclosure situation.¹⁴ In a situation where a party must disclose information, as Fox must do in this proceeding to obtain a new waiver, it is not correct to call the submission "voluntary." Moreover, if Commission staff orally requested or suggested that Fox and News Corporation submit this information in order to facilitate a waiver of the Rule, it could also not be considered voluntary.

Where the submission of information is not voluntary, the Court held the two-prong test enunciated in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) is still applicable.¹⁵ Under the *National Parks* test, information can only be classified as confidential under FOIA Exception 4 if disclosure of the information is likely: "(1) to impair the Government's ability to obtain information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770.

¹² *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24838 at ¶ 34 (1998); see also 47 C.F.R. § 0.451(a) and § 0.453(a)(2)(I)(G) (making broadcast applications and related files routinely available to the public).

¹³ *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd at 24822, ¶ 8; see also *Kannapolis Television Company WCCB-TV, Inc.*, 80 FCC 2d 307, 308 (1980) ("In particular, the Commission has determined that inspection of the financial reports will be permitted when a party places its financial condition in issue in a Commission proceeding."). Footnote 4 of the *Reyner Letter* cites two prior Commission cases as support for its contention that financial information can be withheld in the instant case. It is important to note, however, that neither case involves a broadcast license application. See *Reyner Letter*, n.4.

¹⁴ 975 F.2d at 879.

¹⁵ *Id.*

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With regard to the first prong of the test, receipt and disclosure of the information is unlikely to impair the Commission's ability to obtain this information in the future because this information must be provided for the Commission to make a reasoned decision whether to grant a waiver of the type sought here.

With regard to the second prong, Fox and News Corporation fail to show that public access to the *New York Post's* financial information will cause "substantial harm" to News Corporation or its subsidiary, the *New York Post*. While public release of the *New York Post's* financial information may be annoying or inconvenient to Fox and News Corporation, it does not rise to the level of causing "substantial harm" to Applicant. In the 1993 Fox waiver proceeding, specific details of the *New York Post's* financial situation were provided to the Commission and noted in the Order approving the 1993 waiver.¹⁶ If these disclosures did not cause substantial harm in 1993, it is hard to see how the same type of financial disclosures will cause any damage to Fox now. In addition, the equitable balance of any slight inconveniences caused by disclosing the *New York Post's* financial information should be weighed against the viewing public's need to review information and comment on it.

Petitioners believe that not only does precedent support making the information public, but it would assist the Commission in making its waiver determination for the public to have the opportunity to comment on the information. The Commission has already concluded that this proceeding has wide public impact.¹⁷ Members of the public may well come forward with relevant information, such a interest in purchasing the newspaper. Also, without the light of public scrutiny, Fox and News Corporation may be tempted to slant the facts in its favor or omit critical information.

¹⁶ See *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5345 n.11 (1993), *aff'd sub nom.*, *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995). "Since assuming control of the Post on March 29, until mid-May [1993], according to News Corp's Siskind, NYP has provided \$4.224 million, \$2.367 million of which represented working capital. The balance, \$1.857 million, has been applied to underwriting the \$309,600 average weekly losses since the end of March [1993]." *Id.*

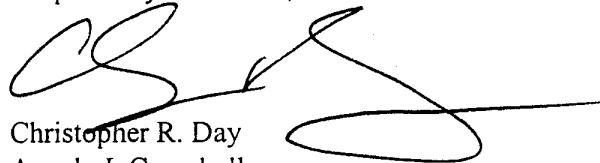
¹⁷ See *Mass Media Bureau Announces "Permit-But-Disclose" Ex Parte Status Accorded to Proceeding Involving Applications Filed By Fox Television Stations, Inc. and Chris-Craft Industries, Inc. for Consent to Transfer Control of Licenses and Authorizations*, DA 00-2246 (rel. Oct. 3, 2000) (stating that "in order to permit a full exchange on the multiple issues under consideration by the Commission, we have concluded that the public interest would best be served by classifying this proceeding as permit-but-disclose under the ex parte rules.").

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Although Petitioners strongly support public disclosure and the opportunity for public comment, at a minimum, the Commission is required to give access to Petitioners pursuant to a protective order.¹⁸ In its 1998 examination of policies for treatment of confidential information, the Commission found that "relevant case law indicates that petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications."¹⁹ Further, if the Commission decides to limit disclosure only pursuant to a protective order, it generally must give Petitioners "at least 30 days from the date the protected material becomes available to file or supplement a petition to deny."²⁰

In sum, the Commission cannot grant Fox and News Corporation's request. It must first determine whether Fox and News Corporation are now seeking a waiver of the Newspaper/Broadcast Cross Ownership Rule based on the current financial situation and cross-subsidization relationship that was established between the *New York Post* and WNYW-TV in 1993. If so, the public ought to have access to that information. If, however, Fox and News Corporation wish to pursue their request for confidential treatment, the Commission should require submission of the information in order to make an informed decision on whether confidential treatment is appropriate. Additionally, even if the Commission determines that confidential treatment is appropriate, it must make the information available to Petitioners and provide an opportunity to supplement the Petition to Deny.

Respectfully submitted,



Christopher R. Day
Angela J. Campbell

Counsel for the Petitioners

¹⁸ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd at 24822, ¶ 8 (1998).

¹⁹ *Id.* at 24838, ¶ 33.

²⁰ *Id.* at 24839, ¶ 34.

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cc: Magalie Roman Salas, Secretary
Chairman William E. Kennard
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Barbara Kreisman, MMB
Clay Pendarvis, MMB
David Roberts, MMB
David Brown, MMB
James R. Bird, OGC
International Transcription Services, Inc.
William S. Reyner, Jr., Esq.
John C. Quale, Esq.
Marvin J. Diamond, Esq.