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March 14, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 Twelfth Street, SW
Washington, DC 20554

Re: Further Response To Amended Application for Assignment of Licenses from Subsidiaries of Chris-Craft Industries, Inc. to Fox Television Stations, Inc., File Nos. BALCT-20000918ABB-ABD; BALCT-20000918ABF-ABS; BALCT-20000918ABU-ABZ; BALCT-20000918ACA-ACE

Filed Pursuant to Protective Order DA 01-528 (rel. Mar. 1, 2001), as supplemented in DA 01-579 (rel. Mar. 5, 2001). Requesting Confidentiality

Dear Ms. Salas:

The Office of Communications, 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 their Further Response to the above referenced Application.

Pursuant to Protective Order DA 01-528, relevant sections dealing with information disclosed in the Confidential Document have been redacted for placement in the Commission's Public Files.

An original and four (4) copies of the Further Response are enclosed. Should you have any questions concerning the Further Response, please do not hesitate to contact the undersigned.

Respectfully submitted,

Christopher R. Day
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of UTV of San Francisco, Inc., KCOP Television, Inc., UTV of San Antonio, Inc., Oregon Television, Inc., UTV of Baltimore, Inc., WWOR-TV, Inc.,UTV of Orlando, Inc. United Television, Inc. (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to Assignment of Licenses for Stations KBHK-TV, San Francisco, CA; KCOP-TV, Los Angeles, CA; KMOL-TV, San Antonio, TX; KPTV-TV, Portland, OR; WUTB-TV, Baltimore, MD; WWOR-TV, Secaucus, NJ; WRBW-TV, Orlando, FL; KMSP-TV, Minneapolis, MN; KTVX-TV, Salt Lake City, UT; KUTP-TV, Phoenix, AZ	)	File Nos. BALCT-20000918ABB, ABC, ABD, ABF, ABK, ABL, ABM, ABN, ABU, ABY, ABG, ABH, ABI, ABJ, ABO, ABP, ABQ, ABR, ABS, ABV, ABW, ABX, ABZ, ACA, ACB, ACC, ACD, ACE

To: The Commission

FURTHER RESPONSE TO AMENDED APPLICATION OF FOX AND CHRIS-CRAFT

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 (collectively "Petitioners"), through undersigned counsel, hereby file their response to Fox Television Stations, Inc. ("Fox") and The News Corporation Limited's ("News Corporation") submission of confidential information regarding the *New York Post* ("*Post*") in support of their application for assignment of WWOR-TV.[1]

This new information does nothing to change the fundamental fact that Fox cannot acquire WWOR-TV unless the Commission were to grant a new waiver of the newspaper-broadcast cross ownership rule. The confidential information does not demonstrate such significant losses that the *Post* would cease to exist if the rules were not waived. Furthermore, any putative threat to the financial health of the *Post* certainly does not outweigh the fact that a waiver will terminate the independent voice of WWOR-TV, a major New York City VHF station. Accordingly, Fox has failed to make the "considerably heavier" showing required by Commission precedent that would justify a permanent waiver allowing combined ownership of the *Post* and two VHF television stations in New York City.[2]

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[1] On January 25, 2001, Fox and News Corporation (collectively "Applicants") filed their second request for confidential treatment of information regarding the financial condition of the *New York Post*. On January 30, 2001, Petitioners filed their second objection to Applicant's request for confidential treatment of the *Post*'s financial materials. Notwithstanding their objection, however, the Petitioners agreed to review the *Post*'s financial materials under the terms of a negotiated Protective Order. Under the terms of the Protective Order and agreement reached by Petitioners and the Applicants, Petitioners would have five business days from the release of the *Post*'s financial information to file a response to the financial information and Fox and News Corporation's request for a further waiver of the Newspaper/Broadcast Cross-Ownership Rule ("Rule") to allow the combined ownership of the *Post*, WNYW and WWOR-TV. The Commission released the Protective Order on March 1, 2001, supplemented on March 5, 2001, and the *Post*'s financial information was released to Petitioners on March 7, 2001. Thus, this response is timely filed pursuant to the terms of the Protective Order and agreement between the Petitioners and Applicants.

[2] *See News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988). *See also* Petition to Deny at 10; Reply to Opposition of Fox Television Stations, Inc. and Chris-Craft Industries, Inc. at 10-11.

I. The *New York Post*'s Financial Information Does Not Provide Evidence of Severe Financial Distress

Although Fox and News Corporation are less than clear as to the relevance of the *Post*'s financial information, it arguably supports their claim that "the 'highly unusual circumstances' (Pet. at 7) present in 1993 continue to exist today and strongly favor preservation of News Corp.'s ownership of the Post,"[3] and that "the Post continues to incur losses."[4] As the Commission's December 21, 2000, letter noted, however, Fox's application did "not contain anything other than general statements, not supported by affidavits, regarding the current financial condition of the *New York Post*."[5] While the confidential information submitted by Fox responds to the Bureau's concern about the lack of any evidence regarding the *Post*'s financial condition, it does not justify granting a waiver.

Because the *Post* will not be acquired as part of this transaction, it does not fit within the decisional criteria enunciated in *Fox Television Stations*.[6] Moreover, unlike in 1993, it is important to note that the *Post* is not currently involved in bankruptcy proceedings and does not appear to be in danger of serious financial trouble. In fact, News Corporation's own internal financial information for the *Post* shows that annual revenue has

Material Redacted Pursuant to Protective Order, DA 01-528 In addition,

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[3]Joint Opposition of Fox Television Stations, Inc,. and Chris-Craft Industries, Inc. at 23 (filed Nov. 9, 2000); *see also id.* at 31, n. 71 ("The extraordinary circumstances that justified granting News Corp. a permanent waiver in 1993 have not dissipated.").

[4]*Id.* at 25.

[5]*Letter to William S. Reyner from Chief, Mass Media Bureau*, Dec. 21, 2000, at 3.

[6]All previous permanent waivers have been granted in situations in which the media entity to be acquired is in serious financial difficulty. *See infra* at Part II.

News Corporation's financial information also shows that the

Material Redacted Pursuant to Protective Order, DA 01-528

Fox estimates that the *Post* will incur an

.[7] No basis or background information is provided to substantiate this estimate, however. In addition, the estimate provides no explanation for the sudden reversal in financial fortunes for the *Post* in . In fact, the estimate showing financial appears to be, on the record, wholly unsupported by anything more than conjecture from News Corporation executives.

While the *Post* has experienced and may continue to experience losses, this experience is not unique among New York City tabloids.[8] The *New York Daily News*, the *Post*'s closest competitor, lost approximately $17,921,000 in 1998, and has been able to continue as an independent media outlet that is not coupled to a television station.[9] By way of comparison, the *Post* .[10] Moreover, for some

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[7]*See Post Financial Statement.*

[8]Newspapers around the country are struggling this year, and any actual financial losses reported by the *Post* are not unique to them. *See* David Lieberman, *Newspapers struggle as ad sales have 'fallen off a cliff,'* USA TODAY, Mar. 13, 2001, at 6B ("This year is shaping up as possibly the most turbulent since the media recession of 1991 for newspaper publishers.").

[9]*See Daily News, L.P. v. Newspaper & Mail Deliverers' Union of New York*, 1999 U.S. Dist. LEXIS 19024, *11 (S.D. N.Y. 1999).

[10]*See Post Financial Statement.*

owners, such losses may be well be acceptable given the power and influence that comes with editorial control over a daily newspaper.[11]

However, if Fox finds that the losses are too great, there is a simple solution: sell the *Post*. Selling the *Post* would obviate the need for a waiver of the cross-ownership rule and would further diversity of viewpoints. Fox has not alleged, nor could it allege, that it is impossible to sell the *Post*.

II. Fox Does Not Meet the Criteria Laid Out in the 1993 WNYW/*New York Post* Permanent Waiver Decision

The Commission's grant of a waiver of the Newspaper/Broadcast Cross-Ownership Rule pursuant to the fourth "catch-all" criterion in 1993 in *Fox Television Stations, Inc.*,[12] is inapplicable to the present situation. In that case, Fox sought a permanent waiver of the Rule to allow it to reacquire the *Post* because the *Post* was in bankruptcy proceedings and no other willing buyer could be found. The Commission found that a permanent waiver was justified and agreed that the loss of the *Post* would result in the "elimination of an important competitive voice and source of viewpoint" for the New York market.[13] In reaching its decision, the Commission relied mainly on two factors: 1) that there was a risk to the viability of the acquired entity (the *Post*); and 2) that a permanent waiver was an "appropriate accommodation between

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[11]*The New York Times* quotes an editor of *Newsday* as stating that it would not expand its coverage and incur losses "for ego reasons," adding "We are not like the Post and the Daily News, losing millions and in it for the power play." Felicity Barring & Jayson Blair, *Newsday, the L.I. Newspaper, Gathers Its Strength for Another Try at the City*, N. Y. TIMES, Feb. 14, 2001, at A28.

[12]8 FCC Rcd 5341 (1993).

[13]*Fox Television Stations*, 8 FCC Rcd at 5345, ¶ 23. The Commission further stated that the Rule "was not intended to result in the net loss of a media outlet." *Id.* at 5352, ¶ 49.

communications-related policies and bankruptcy-related policies."[14] Neither factor is present in the instant transaction.

1. Fox's Acquisition of WWOR-TV Would Eliminate an Important Competitive Voice and Source of Viewpoint

The Commission has only granted permanent waivers of the newspaper-broadcast cross ownership rules in four cases. As it found in *Kortes Communications, Inc.*, "there may be markets in which allowing waiver of the cross-ownership restriction would be healthy for the maintenance of diversity. This could occur, for example, in markets where a newspaper is failing and the only prospective purchaser is the owner of a local radio station."[15] In *Fox Television Stations*, as in *Kortes Communications* and *Columbia Montour Broadcasting Co.*, the Commission faced a situation in which the purchaser of a failing media entity owned either a newspaper or a broadcast station.[16] In each case, the Commission was actively concerned that failure to grant the waiver would result in the silence of the entity being sought for acquisition.

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[14]*Id.* at 5349, ¶ 42.

[15]15 FCC Rcd 11846, 11851, ¶ 16 (2000) (quoting, *Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Inquiry*, MM Docket No. 96-197, 11 FCC Rcd 13003, 13009 (1996)).

[16]*See, e.g.*, *Fox Television Stations*, 8 FCC Rcd at 5349, ¶ 43 (finding that absent a waiver the *Post*'s "future is in doubt"); *Kortes Communications*, 15 FCC Rcd at 11852, ¶ 18 ("failure to grant a waiver . . . would likely lead to . . . the loss of a broadcast outlet providing service to the community"); *Columbia Montour Broadcasting Co.*, 13 FCC Rcd 13007, 13013, ¶ 21 ("denial of the requested waiver in this case would likely lead to the failure of WCNR and thus the loss of an AM radio station providing service to its local community."). Similarly, in *Field Communications Corp.*, 65 F.C.C.2d 959 (1977), the Commission approved a cross ownership because the media entity to be acquired was part of a group of UHF stations that needed to "remain together if it [were] to continue to grow." *Id.* at 961. The Commission was interested in encouraging the growth of UHF television and considered such growth an "exigency." *Id.* at 960. Furthermore, because Field had previously owned the television station in question, they were not considered to be forming a "new ownership pattern." *Id.*

Here, the *Post*, even if it were found to be "failing," is already co-owned by a profitable broadcasting station. Grant of the waiver is not necessary to preserve a voice. Indeed, grant of the waiver would result in the loss of WWOR-TV as a separate voice and would undermine diversity.

2. The Unique Bankruptcy Situation Is Not Present in the Instant Case.

Another key factor in granting the 1993 waiver does not exist here because no bankruptcy court is involved in this transaction. In *Fox Television Stations*, the Commission stressed the fact that the bankruptcy court was a significant player in its decision. The Commission wanted to "facilitate the task of the debtor, the creditors and the bankruptcy court."[17] In addition, the Commission further stated that "grant of a permanent waiver will avoid an unnecessary encumbrance on the court's ability to transfer the station to Murdoch if the court concludes that Murdoch is the only viable buyer."[18] In the instant case, the Commission does not have the factual findings of the bankruptcy court to support a finding that the *Post* is not financial viable and that News Corporation is the only potential buyer.

3. The Entity to be Acquired in this Transaction is Not at Risk

In *Fox Television Stations*, the Commission found that the *Post* was at substantial risk of being silenced if News Corporation were not permitted to require it.[19] Here, however, there is no indication that the viability of the entity being acquired, WWOR-TV, is at risk at all. WWOR-TV

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[17]*Fox Television Stations*, 8 FCC Rcd at 5349, ¶ 42.

[18]*Id.* at 5351, ¶ 45.

[19]*Id.* at 5350, ¶ 44.

is not involved in bankruptcy proceedings, and there is no evidence that ownership by Murdoch is "pivotal" to WWOR-TV's survival.[20] In fact, although Fox and Chris-Craft Industries, Inc. have not revealed financial information for WWOR-TV, the available evidence suggests that WWOR-TV is a highly profitable and highly marketable television station.[21] In addition, Fox has presented no evidence that a shortage of potential buyers exists for WWOR-TV.

CONCLUSION

Far from presenting information showing a newspaper on its financial deathbed, the actual financial information provided by News Corporation shows a paper with steadily revenues and losses, a situation vastly different from that present in 1993 when Fox acquired its first permanent waiver to own both the *Post* and WNYW. Thus, the *Post*'s new confidential information actually undermines Fox's claim that the *Post*'s financial situation is largely the same as when the Commission waived the rule in 1993. Moreover, the other factors on which the Commission relied in granting the 1993 waiver – the need to save a failing independent voice, the need to accommodate the bankruptcy court, and the dire financial straits of

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[20]*Id.* (Murdoch's ownership of the *Post* was considered "pivotal" for its survival).

[21]*See* Diane Mermigas, *News Corp. Plays Duopoly Game*, ELECTRONIC MEDIA, Aug. 21, 2000, at 1 ("Although it would rather own WWOR, News Corp. would emerge a winner having to sell the station in what would likely be a fierce biddign war led by Viacom."). *See also BHC Communications, Inc. Reports Second Quarter Net Income Increased to $1.20 Per Share Versus $.47 Per Share Last Year*, PR NEWSWIRE, July 20, 2000, available at LEXIS, News Group File (noting that BHC Communications, Inc., the Chris-Craft subsidiary that holds WWOR-TV's station license, posted second quarter 2000 net income of $27,108,000, "[l]ed again by stations operating in the group's largest markets, New York, Los Angeles and San Francisco").

the entity to be acquired – simply do not apply here. For these reasons, the Commission should deny the application for assignment of the license of WWOR-TV to Fox.

Respectfully submitted,

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March 14, 2001

CERTIFICATE OF SERVICE

I, Jennifer L. Mercer, hereby certify that I have this 14th day of March, 2001, mailed by First Class mail, postage prepaid, a non-public disclosure copy of the "Further Response to Amended Application of Fox and Chris-Craft" to the following:

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