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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)	)	
	)	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
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	)	

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REPLY TO JOINT OPPOSITION OF FOX AND CHRIS-CRAFT

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SUMMARY

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") hereby submit their reply to the Joint Opposition filed by Fox Television Stations, Inc. ("Fox") and Chris-Craft Industries, Inc. ("CCI").

As a threshold issue, Fox continues to insist that there have been no material changes in its ownership structure since 1995, when the Commission concluded that Fox was qualified to remain a licensee despite alien ownership in excess of the statutory benchmark, and refuses to provide full information concerning the ownership structure under which Fox and its ultimate corporate parent, News Corp., propose to acquire the CCI broadcast licenses and assets. Yet, it is clear from the Opposition that Fox will hold the broadcast licenses, while the broadcast assets will be held by "Newco," a subsidiary of Fox Entertainment Group, Inc. ("FEG"), which is indirectly controlled by News Corp. This arrangement, coupled with the "Station Operation Agreement," appears to give FEG *de facto* control over the licenses. This degree of alien influence is prohibited under Section 310(b)(4) of the Communications Act, absent a determination, after searching analysis, that such alien ownership is in the public interest. In addition, this arrangement violates the Commission policy barring transfer of "bare" licenses.

Fox also continues to insist, contrary to both the plain language of the Daily Newspaper/Broadcast Cross-Ownership Rule and precedent, that the waiver granted in 1993 to

allow joint ownership of the *New York Post* and WNYW extends to cover the acquisition of WWOR, another New York City VHF television station. This analysis ignores the fact that the prior waiver was based on unique circumstances, including the need to save the bankrupt *Post*, which are no longer present today. In the alternative, Fox concedes that it cannot qualify for a waiver under the first three criteria under the Rule, which would require a showing of inability to sell the station or newspaper at all or except at an artificially depressed price, or inability of the New York City market to support separate ownership of WWOR and the *Post*. But Fox claims a waiver is nonetheless warranted because its acquisition would not harm diversity or competition. This claim is patently false. Grant of a waiver would diminish both competition and diversity by reducing the number of independently owned television stations and concentrating power in the hands of Fox. The presence of other media, such as national newspapers, is irrelevant to the waiver analysis and, in any case, Fox grossly overstates the contribution that such media make to enhance viewpoint diversity in the New York City metropolitan area. Thus, Fox and CCI have failed to satisfy the heavy burden of showing that a second permanent waiver, or even an interim waiver, would serve the public interest.

Fox argues that proposed duopolies in Los Angeles, New York, and Phoenix meet the "bright-line" test established by the Duopoly Rule. This analysis, however, ignores the Commission's duty to apply rules in a way that achieves their underlying purposes and that the Commission specifically retains authority to scrutinize cases presenting "new or novel" issues. The proposed Phoenix duopoly presents a novel issue because of the "over-inclusive" nature of the Phoenix DMA, and the fact that many Phoenix residents cannot receive the broadcast signals of several of the television stations that are included in the Phoenix DMA. In Los Angeles and

New York, the proposed duopolies also present new and novel issues because they would result in the first same-city VHF duopolies in the country. Not only would the creation of VHF duopolies in Los Angeles and New York substantially reduce diversity in those cities, it would also directly contravene the express intent of Congress that such VHF-VHF duopolies only be created in "compelling circumstances."

With regard to the national ownership limit, Fox and CCI merely reiterate their claim that since others have received twelve-month waivers of the national ownership cap in the past, Fox should as well. This ignores the magnitude of the proposed transaction and the effect that it would have on broadcast diversity in the U.S. during that twelve-month period. In addition, Fox has not provided any indication of how it intends to comply with the national ownership limit or why it needs twelve months to comply. Furthermore, Fox continues to refuse to commit to reducing its ownership to the maximum thirty-five percent (35%) required by law.

Fox and CCI argue that Petitioners' claim that the acquisition could spell the demise of the United Paramount Network ("UPN") is inadequately supported. Fox, however, is the only one that knows what it plans to do with the UPN affiliates that it is acquiring. The Opposition does not disclose Fox's plans, even though Fox officials have been quoted in the trade press making conflicting statements about the future of the CCI stations' UPN affiliation. Under these circumstances, the Commission has an obligation to determine what Fox's plans are and whether they are consistent with the public interest in viewpoint and program diversity.

Rather than acknowledge the tremendous impact of this transaction on competition and diversity, Fox continues to frame its applications as a minor transaction with limited effects. Grant of the applications, however, would require waiver of no fewer than three of the

Commission's most important broadcast ownership rules. In addition, although the law is clear that the applicants bear the heavy burden of justifying any waivers, Fox improperly attempts to shift the burden to Petitioners.

In sum, grant of the applications would be *prima facie* inconsistent with the public interest because it would violate the alien ownership provisions of Section 310(b)(4) of the Communications Act; as well as Part 73.3555(d) (Daily Newspaper/Broadcast Cross-Ownership Rule), Part 73.5555(b) (Duopoly Rule), and Part 73.5555(e) (National Television Ownership Rule) of the Commission's Rules. In addition, the applications are inconsistent with the Commission's policy of promoting diversity through multiple broadcast networks.

Because the pleadings raise substantial and material questions of fact, the Commission must designate the applications for hearing. Even if the Commission were to conclude that no substantial and material questions of fact are in dispute, the record in this case is insufficient to support the finding required under Section 309(d)(2) of the Communications Act that the grant of the applications would serve the public interest. Therefore, the applications should be dismissed, denied or, in the alternative, designated for hearing.

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REPLY TO JOINT OPPOSITION OF FOX AND CHRIS-CRAFT

On November 9, 2000, 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. and United Television, Inc. (collectively "Chris-Craft" or "CCI") and Fox Television Stations, Inc. ("Fox") filed a Joint Opposition to the Petition to Deny filed by 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"). Petitioners, by their attorneys and pursuant to Part 1.45 of the Commission's Rules, hereby file their Reply to the Joint Opposition.

I. Fox's Proposal to Divide CCI Stations' Assets and Licenses and Place Assets under Alien Control Requires the Commission to a Conduct Public Interest Investigation Under Section 310(b)(4)

In its Opposition, Fox asserts that the ownership structure of Fox Television Stations, Inc. ("FTS") mirrors the structure the Commission approved as an alien-owned corporation in 1995 and that therefore Fox has no obligation to disclose ownership information for any other corporate entity in its license transfer application.[1] But Fox's claim is misleading. The ownership structure of FTS is not the issue. At issue instead is whether CCI can, consistent with the Communications Act and Commission policy, transfer the bare licenses of its stations to FTS while transferring the broadcast assets to a different, alien-controlled corporation.

A. The Ownership Structure Fox Proposes Requires Public Interest Determination of New, Alien-Controlled Subsidiary

As Exhibit D to Fox's Opposition make clear, even though ownership of the FTS subsidiary is functionally the same as it was when the Commission approved it in 1995, Fox proposes to create a new subsidiary under different controlling shareholders than those who control FTS.[2] Specifically, Fox proposes that FTS hold only the bare licenses of the CCI stations

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[1] *See generally*, Joint Opposition of FTS and Chris-Craft, at 45-50 (filed Nov. 9, 2000) [hereinafter Opp.].

[2] *Compare* Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition" *with* Opp. Ex. D, "Structure Approved in 1998 Following *Pro Forma* Reorganization" *and* Opp. Ex. D, "Structure

while the broadcast assets of the CCI stations would be held by "Newco," a brand new subsidiary of a wholly owned alien corporation.[3] Pursuant to Fox's "Stations Operating Agreement," Newco will have *de facto* control over operation of the acquired stations.[4] Accordingly, Fox must provide the Commission with ownership information for the chain of corporations that will own and control the broadcast assets so that the Commission may make an informed examination as required by Section 310(b)(4) to determine whether the public interest would be served by approving Fox's application.[5]

1. Fox's Proposed Ownership Structure is Materially Different from the Structure Commission Previously Approved

Even a cursory glance at the corporate organization charts included in Exhibit D of Fox and CCI's Joint Opposition clearly shows that the organizational structure of News Corp., as approved in 1995 and as reorganized in 1998, is materially different from the post-acquisition organizational structure proposed here. Fox proposes to place the broadcast assets from the CCI stations into Newco, which is a wholly owned subsidiary of Fox Entertainment Group, Inc. ("FEG"). FEG is indirectly majority owned by News Corp., a foreign corporation.[6] Fox proposes to place the broadcast licenses from CCI into FTS, which is a wholly owned subsidiary

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Approved in 1995."

[3]Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition."

[4]Fox App., Ex. No. 1 at 2.

[5]47 U.S.C. § 310(b)(4) (1994).

[6]Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition." News Corp., an Australian corporation, indirectly owns 85.25% of FEG, while public shareholders hold 14.75%. *Id.*

of Fox Television Holdings ("FTH").[7] FEG (and, indirectly, News Corp.) also owns nearly all the equity in FTH.[8]

In 1995,[9] the Commission determined that FTH—and its subsidiary FTS—was a foreign-owned corporation in excess of the 25% benchmark for alien ownership established in Section 310(b)(4).[10] Despite the fact that then, as now, News Corp. indirectly owned more than 99% of FTH's equity while Rupert Murdoch owned less than 1% of the equity,[11] after careful consideration the Commission found that Murdoch, a U.S. citizen, had *de facto* and *de jure* control of FTH (and therefore FTS) in part because his voting interest in FTH was 76%, while FEG (and, indirectly, News Corp.) had a voting interest of 24%.[12] Thus, in large part because Murdoch had voting control of FTS, the Commission found that "in the *unique circumstances of this case*, the statutory interest does not outweigh the equities favoring FTS' *current* ownership

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[7]*Id.*

[8]*Id.*

[9]In *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995) [hereinafter *Fox I*], the Commission examined the ownership structures of Twentieth Holdings Corp. (now known as FEG) and its wholly owned subsidiary, Fox Television Stations, Inc., (now known as FTH). *Id.* In its 1998 *pro forma* reorganization, however, Fox shuffled the ownership interests of these downstream News Corp. subsidiaries and created a new Fox Television Stations, Inc. subsidiary. *See infra* Part I.B. (detailing the 1998 *pro forma* reorganization). As a result of that reorganization, the ownership relationships examined in *Fox I* roughly mirror the current ownership relationships of the existing FEG, FTH and FTS entities as Fox presents them in the ownership structure it proposes in order to accomplish the CCI acquisition. Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition."

[10]*Fox I*, 10 FCC Rcd at 8456, ¶ 6.

[11]*Id.* In its Opposition, Fox states that Murdoch holds $760,000 in equity and FEG holds the remainder. Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition."

[12]*Fox Television Stations, Inc.*, 11 FCC Rcd 5714, 5725, ¶ 27 (1995) [hereinafter *Fox II*].

structure."[13] The Commission further stated that "FTS as *presently structured* may, consistent with the public interest, acquire additional broadcast stations (up to the allowable maximum set forth in our ownership rules . . .)."[14] Thus, the Commission expressly limited its finding to the corporate structure that existed in 1995.

Fox asserts that the *Fox II* decision allows Fox to complete later acquisitions because FTS' ownership structure remains the same. However, Fox's applications cannot be approved without further investigation because the ownership structure Fox proposes for accomplishing the CCI acquisition introduces a new, alien-controlled corporate entity.

2. Fox's Proposed Licenses/Assets Split Gives Alien-Controlled Corporation Control of CCI's stations

The proposed structure creates an entirely new FEG subsidiary, Newco, to be the holding company for the broadcast assets of the CCI stations.[15] Newco would be indirectly majority-owned by News Corp.[16] Thus, the structure here places ownership of the station licenses and broadcast assets into two different corporate entities under the control of different owners: Fox Entertainment Group, Inc., a wholly-owned subsidiary of News Corp., and its unknown directors and officers are to control Newco and its broadcast assets, while Murdoch is to control FTS and its station licenses.

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[13] *Id.* (emphasis added).

[14] *Fox II*, 11 FCC Rcd at 5728, ¶ 34 (emphasis added).

[15] Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition."

[16] Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition." News Corp. would indirectly hold a 85.25% interest and public shareholders would hold the remaining 14.75% interest. *Id.*

Newco's control of the broadcast assets of the CCI stations raises the inference that Newco will also control the licenses because the licenses are unusable without the assets. Further, Fox's "Stations Operating Agreement" clearly illustrates that Newco will have *de facto* control over the stations' operations. Notwithstanding Fox's claim that Newco's operation is subject to FTS' control, the agreement states that:

> Newco shall perform the day-to-day operations of the Stations, including, without limitation, providing the following services: (a) preparation of the initial budget presentations for the Stations for FTS's review, modification, and approval; (b) purchasing equipment consistent with the budgets; (c) entering into and administering programming contracts; and (d) employment of personnel. All expenses and capital costs incurred in operating the Stations shall be paid by Newco and all advertising and other receipts collected in operating the Stations shall be retained by Newco.[17]

Traditionally, the Commission has found that control of a station lies with the entity that incurs expenses, retains receipts, administers contracts, and employs personnel.[18] Thus, while the station operating agreement pays lip service to the concept that FTS will control the CCI stations to be acquired, in reality Newco will control the stations. And because Newco is indirectly majority owned by News Corp., a foreign corporation, Fox's proposed ownership structure would place *de facto* control of the CCI stations under a foreign corporation.

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[17]Fox App., Ex. No. 1 at 2.

[18]*See, e.g., Roy M. Speer*, 11 FCC Rcd 18,393, 18,414, ¶ 53 (1996) (finding that while there is "no formula for evaluating whether a party is in *de facto*, or actual, control . . . whether a new entity has obtained the right to determine the basic operating policies of the station, that is, to affect decisions concerning the personnel, programming, or finances of the station," is determinative).

3. Creation of Alien-Controlled Subsidiary Requires Commission to Make Public Interest Determination

Because under the proposed structure, Newco would have *de facto* control over the CCI stations, the Commission cannot approve the assignment without making a special public interest determination under Section 310(b)(4).[19] Exceeding the Section 310(b)(4) benchmark triggers a "searching analysis of the circumstances of each case" to determine whether such alien control is in the public interest.[20] Because the acquisition as structured may give an alien corporation control over the station licenses as well as the broadcast assets, Fox must supply the ownership information necessary for the Commission to make a fully informed public interest determination under Section 310(b)(4).[21]

B. Fox Violates Commission Policy Barring Transfer of Bare Licenses

Not only does the proposed transaction require investigation under Section 310(b)(4), but long-standing Commission policy prohibits license transfers where "[t]he pending assignment contemplates little more than the sale of a naked license."[22] Fox's proposal to divide the CCI

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[19]Section 310(b)(4) states that no broadcast station license shall be granted "to any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."

[20]*Fox I*, 10 FCC Rcd at 8472, ¶ 44.

[21]An applicant must notify the FCC that its ownership structure may exceed foreign ownership and, absent that notification and approval by the FCC, the applicant may not exceed the benchmark. *Fox I*, 10 FCC Rcd at 8474-75, ¶¶ 46-47.

[22]*Radio KDAN, Inc.*, 11 FCC 2d 934, 935 (1968). *See also, American Music Radio,* 10 FCC Rcd 8769, 8769, ¶ 6 (1995) (citing Commission policy barring transfer of bare licenses); *FM Broadcasters of Douglas County,* 10 FCC Rcd 10,429, 10,431, ¶ 15 (1995) (same).

stations' licenses and broadcast assets between two completely different corporate entities under completely separate ownership and control violates this policy.

Fox cites the 1995 *BBC License Subsidiary* order and a 1998 letter from William S. Reyner, Jr. to the Commission Secretary in support of its proposed license/assets split.[23] However, neither provides any precedent for Fox's proposed structure at issue here. In *BBC License Subsidiary*, the assets and license of a station were held by a parent corporation and its subsidiary, respectively, and the parent corporation leased the assets to the subsidiary. Thus, the assets and licenses were held in the same chain of corporate ownership and control.[24]

Likewise, the Reyner notification letter provides no support for Fox's proposal here. On July 27, 1998, Fox filed a *pro forma* transfer application stating that it was being filed for "the sole purpose of assigning the assets (including all FCC licenses)" from the old Fox Television Stations, Inc. subsidiary, now FTH, to a newly formed subsidiary also named FTS.[25] This application, granted August 26, 1998, was uncontested and resulted in no Commission or Bureau decision explaining the rationale for granting it.[26]

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[23]Opp. at 48 n.108 (citing *Applications of BBC License Subsidiary*, 10 FCC Rcd 7926, 7926 n.1 (1995); Letter from William S. Reyner, Jr. to Magalie Roman Salas, Commission Secretary (filed Sept. 30, 1998), attached *infra* as Exhibit B.

[24]*BBC License Subsidiary*, 10 FCC Rcd at 7926 n.1.

[25]*Fox Television Stations, Inc. Application for Consent to Pro Forma Assignment of Licenses*, File Nos. BALCT-980727, LE, KM-KU (filed July 27, 1998).

[26]*See Mass Media Bureau Broadcast Actions*, Report No. 44317 (rel. Sept. 1, 1998).

The broadcast asset and license split between the newly created FTH and the new FTS, however, was not part of the application.[27] This apparently occurred "as part of the consummation" of the *pro forma* changes. To carry out this component of the transaction, Fox merely notified the Commission in a letter, dated September 30, 1998, that purported to "supplement" the aforementioned application, which had already been approved on August 26, 1998.[28] Accordingly, it appears that the broadcast asset/license split occurred in the absence of any application to or formal action by the Commission. Thus, even if it presented similar circumstances, the bare fact that Fox sent a letter notifying the Commission and the Commission did not take explicit action against the subsequent asset/license split can hardly be said to provide a precedent.[29]

In addition, the circumstances of the 1998 *pro forma* transfer are significantly different than those presented here. Even after the *pro forma* transfer, the separated assets and licenses remained under the same chain of corporate ownership and control.[30] In contrast, Fox's proposed acquisition of the CCI stations would place the assets and licenses of those stations into two different entities that are in completely separate chains of corporate ownership and control—one

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[27]*See Fox Television Stations, Inc. Application for Consent to Pro Forma Assignment of Licenses*, File Nos. BALCT-980727, LE, KM-KU (filed July 27, 1998).

[28]Letter from William S. Reyner, Jr. to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Sept. 30, 1998); attached *infra* as Exhibit B.

[29]Nor does the fact that the Commission approved Fox's acquisition of a Dallas, TX television station, Opp. at 50, have any relevance. Again, since this acquisition was uncontested and was granted by Public Notice, there is no indication that the Commission even considered, much less approved, the split of the Fox licenses and assets.

[30]Opp. Ex. D, "Structure Approved in 1998 Following *Pro Forma* Reorganization."

controlled by News Corp. and its unknown directors and officers and the other controlled by Murdoch.[31] Such a division is unprecedented and in violation of Commission policy. Thus, because Fox proposes to transfer bare licenses and because Fox's ownership structure establishes a new, alien-controlled corporate entity, the Commission must carefully examine and reject Fox's proposed ownership structure.

II. Fox Fails to Make Requisite Showing to Support Waiver of Daily Newspaper/Broadcast Cross-Ownership Rule Necessary to Allow Fox to Own *New York Post*, WNYW, and WWOR.

In its Opposition, Fox states that it is not requesting an additional permanent waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule.[32] Nevertheless, Fox submits that the record developed in 1993, as supplemented by this Application, makes the requisite showing under the fourth "catch-all" waiver criterion.[33] Fox merely recites the *Post's* earlier financial woes which led to the Commission's grant of a waiver for the *Post*-WNYW combination in 1993 and alleges that those 1993 facts should be applied to the current situation.[34] The *Post's* 1993 financial situation, however, is not at issue in this case. The issue is whether, *based on current conditions*, Fox qualifies for a waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule for its purchase of WWOR in conjunction with its ownership of the *Post*. Fox has not made any showing, based on the current financial situation of the *Post*, WNYW, or WWOR that any entity is financially troubled. In addition, Fox has not shown that another buyer is not available for

[31]Opp. Ex. D, "Proposed Structure for Chris-Craft Acquisition."

[32]Opp. at 31-32 n.71.

[33]*Id.*

[34]*Id.* at 21-25.

either entity. Therefore, the application for assignment of WWOR should be dismissed or designated for hearing.

A. Fox's Existing Waiver Does Not Allow Purchase of WWOR While Retaining Control of *New York Post.*

The Daily Newspaper/Broadcast Cross-Ownership Rule states in no uncertain terms that "no license for a . . . TV broadcast station shall be granted to any party . . . if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in the Grade A contour of a TV station . . . encompassing the entire community in which such a newspaper is published."[35] The *Post* is a daily newspaper and WWOR is a broadcast television station within the definition of the statute. Therefore, Fox cannot acquire WWOR absent a waiver of the Rule.

Although Fox continues to analogize the current situation to the Commission's 1993 grant of a permanent waiver for Fox to own the *Post* and WNYW, the highly unusual circumstances which led to the grant of that waiver do not continue to exist today.[36] In 1993, the *Post* was bankrupt and its sale to Fox was necessary to preserve its very existence. In addition, that situation only involved the combination of one television station and a daily newspaper rather than the proposed combination of two VHF television stations and a daily newspaper.

Moreover, Fox twists reality when it asserts that its existing waiver of the Rule would be undermined if the Commission does not allow Fox to add WWOR to its existing daily

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[35]47 C.F.R. § 73.3555(d)(3) (1999).

[36]Opp. at 23 and 31-32 n.71.

newspaper/VHF television station combination.[37] The waiver granted seven years ago to allow Fox to own the *Post* and WNYW was limited to "Murdoch and News Corp., as controlling entities of both WNYW and, possibly, the *Post*."[38] It did not include a provision for Fox coupling its ownership of the newspaper with any additional television stations. Further, Fox cannot support an argument that, as in 1993, the Commission's refusal to grant it a waiver of the Rule will cause the *Post* to cease to exist.[39] Fox has not and cannot show that the *Post* is in a precarious financial situation and near bankruptcy, as it was seven years ago. In fact, according to News Corp., the *Post*'s circulation recently rose for the tenth consecutive six-month period, "a feat unequaled by any other major title in North America."[40]

Under the existing waiver, Fox may continue its current ownership of both WNYW and the *Post*. Contrary to Fox's contentions, nothing in the Commission's rules or regulations affects News Corp.'s current ownership of these major New York media sources.[41] It is only Fox's

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[37]*Id.* at 23.

[38]*Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5353, ¶ 52 (1993), *aff'd sub nom., Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995).

[39]In remarking upon the 1993 waiver in its Opposition, Fox makes seemingly inconsistent assertions that, on the one hand, "[o]ther than News Corp., no potential purchaser came before the Bankruptcy Court to propose any interim plan to save the *New York Post*." Opp. at 24. However, Fox later states that "the Commission made no finding that News Corp. was the only purchaser." Opp. at 31 n.71.

[40]News Corporation Global Statistics, *at* http://www.newscorp.com/report99/news2.html (last visited Nov. 16, 2000).

[41]Furthermore, Fox's contention that "in adopting the new television duopoly rules, the Commission recognized that creation of a duopoly of this type would not harm diversity" mischaracterizes the Commission's intentions. Opp. at 27. In fact, the Commission did not envision the creation of a VHF-VHF-daily newspaper ownership combination when it adopted the new rules. *See, infra* at Part III(B).

insatiable desire to add WWOR to its media empire in violation of the Commission's rules that potentially threatens Fox's continued ownership of the *Post*.

B. Fox Does Not Qualify for Second Permanent Waiver of Daily Newspaper/Broadcast Cross-Ownership Rule

To maintain its ownership of the *Post* and WNYW and to also acquire WWOR, Fox must receive a new waiver of the Rule. Fox stated that it is not seeking a waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule under the first three waiver criteria articulated by the Commission.[42] This leaves the fourth waiver criterion as the only option under which Fox may qualify for the grant of a waiver. This "catch-all" criterion states that a waiver may be applied in a circumstance where the application of the Daily Newspaper/Broadcast Cross-Ownership Rule disserves the Rule's twin purposes of diversity of viewpoint and economic competition.[43] Fox thus argues that "adding WWOR to the WNYW/*Post* combination would have *no adverse effect on diversity and competition* in the New York television market."[44] However, in neither its Application to the Commission nor its Opposition to the Petition to Deny,

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[42]Opp. at 31 n.71. The first three criteria are: (1) an inability to sell the broadcast station or newspaper, (2) an inability to sell the broadcast station or newspaper except at an artificially depressed price, or (3) an inability of the locality to support separate ownership of the broadcast station and newspaper. *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* Second Report and Order, 50 FCC 2d 1046, 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).

[43]*Id.*; Under the fourth category, the Commission has "specified that if it could be shown, 'for whatever reason,' that the purposes of the rule would be better served by the proposed ownership pattern, waiver would then be warranted." *Fox Television Stations*, 8 FCC Rcd 5341, 5348, ¶ 39 (quoting *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1042 (D.C. Cir. 1986).

[44]Opp. at 31 (emphasis added).

has Fox been able to offer adequate support for its contention that the purpose of the Rule would be disserved by applying it in this new situation.

There is no getting around the fact that if Fox were permitted to acquire WWOR, it would eliminate WWOR as a strong independent voice and would give Fox a substantially greater voice in the affairs of New York and a larger share of the New York media market. As the Commission stated in the *1998 Biennial Review*, "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination."[45]

Fox nonetheless claims that diversity is not harmed due to the variety of other media outlets in the New York City area.[46] But these outlets are irrelevant to a determination of the diversity and economic competition of a market in the context of the Daily Newspaper/Broadcast Cross-Ownership Rule. The Rule itself only addresses instances of a party owning a daily newspaper and the license for an AM, FM, or television broadcast station.[47] It does not include direct broadcast satellite services, cable television systems, weekly and monthly magazines, or the Internet – all of which Fox refers to in its Application and cites to again in its Opposition.[48]

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[45] *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Dkt. No. 98-35, 15 FCC 11,058, 11,100 at ¶ 80 (rel. June 20, 2000) [hereinafter *1998 Biennial Regulatory Review*] (citing *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* Second Report and Order, 50 FCC 2d at 1079-80).

[46] Fox App., Ex. No. 4 at 30-31 (citing DBS services and national weekly newspapers); Opp. at 30 n.69 (citing *The Wall Street Journal* and *USA Today* as examples of newspapers that are "published" within the New York market area).

[47] 47 C.F.R. § 73.3555(d).

[48] Opp. at 35, n.77-78 (citing Fox App., Ex. No. 4 at 26, 29-32).

The Commission is correct to focus only on daily newspapers and broadcast stations. As it notes in the *1998 Biennial Report*:

> over 98% of Americans own a TV set. [N]ewspapers are available to anyone for a nominal charge. DBS, MMDS, and the Internet, however, are available only to those who both purchase or rent equipment and . . . subscribe to a service, the monthly fees for which services are typically several times the cost of a newspaper subscription.[49]

Furthermore, as it stated in that same report, the Commission is "most concerned with viewpoint diversity at the local level. This is because '[m]onopolization on the means of mass communication in a locality assures the monopolist control of information received by the public and based upon which it makes elective, economic, and other choices.'"[50] The Commission went on to stress the unique role broadcast media and daily newspapers play in local viewpoint diversity, pointing out that "the fact remains that broadcast services, in particular broadcast television, and newspapers have been and continue to be the dominant sources of local news and public affairs information in any given market."[51]

Thus, the Commission should reject Fox's argument that sufficient diversity and competition remain because daily newspapers like *USA Today* and *The Wall Street Journal* are

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[49] *1998 Biennial Regulatory Review*, 15 FCC Rcd at 11,106-07, ¶ 90.

[50] *1998 Biennial Regulatory Review,* 15 FCC Rcd at 11,105-06, ¶ 89 (citing *Review of the Commission's Regulations Governing Television Broadcasting,* Further Notice of Proposed Rule Making, MM Dkt. Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3559 (1995)).

[51] *1998 Biennial Regulatory Review*, 15 FCC Rcd at 11,106, ¶ 89. In addition, while Fox mentions the Internet as a source of local news, a recent study indicates that the Internet does not provide an adequate, additional source of local news and information to communities. *See Children's Partnership, Online Content for Low-income and Underserved Americans: The Digital Divide's New Frontier*, at 4 (Mar. 2000).

printed within the New York DMA.[52] Both publications have a national focus and provide little or no local news coverage. As a matter of fact, *USA Today*'s editorial offices are located in Arlington, Virginia, not New York.[53] Clearly, these publications should not be included in the determination of diversity or competition in New York.

Not only does Fox try to include media that are irrelevant in examining the diversity and competition within the New York market, but it also overlooks the tremendous consolidation that has been characteristic of the media industry there since Fox was granted its existing waiver in 1993. For example, Fox argues that the New York media market is even more competitive now than seven years ago.[54] Yet an examination of New York's Arbitron Radio Metro market[55] reveals that in 1993, thirty-seven (37) different entities owned the fifty-two (52) operating commercial stations, but, at present, only thirty-four (34) different entities own the seventy-four (74) operating commercial stations.[56]

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[52]Opp. at 30 n.69

[53]*USA Today* is located at 1000 Wilson Boulevard, Arlington, Virginia 22209. *USA Today* editorial column; *also available at* http://www.usatoday.com/leadpage/credit/credit.htm (last visited Nov. 16, 2000).

[54]Opp. at 22, 25, 28.

[55]Fox and CCI utilize the geographic area delineated by the Nielsen New York DMA to define the New York metropolitan radio market. Due to the more limited reach of most radio signals, Petitioners submit that the New York Arbitron Radio Metro market area provides a superior geographical benchmark for determining radio stations that actually serve the New York City metropolitan area.

[56]BIA Publications, Inc., *Investing in Radio 1993* Metro Rank 1 (2d ed. 1993); BIA Research, Inc., *Investing in Radio 2000* Metro Rank 1 (2d ed. 2000); *see infra* Exhibit A, Commercial Radio Station Ownership in New York City: 1993 Versus 2000. Furthermore, the number of viewpoints represented is even smaller, since many stations get their news from the same source.

In sum, to allow Fox to add WWOR to its existing daily newspaper/VHF television station combination would result in a substantial decrease in viewpoint diversity and competition in the New York City metropolitan area. Therefore, the proposed acquisition cannot qualify for a new permanent waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule.

C. Granting Fox An Interim Waiver of Daily Newspaper/Broadcast Cross-Ownership Rule Pending Outcome of Yet-to-Be Initiated Rulemaking Would Be Contrary to Commission's Policy and Harmful to the Public Interest.

In the alternative, Fox argues that if the Commission concludes that Fox's current waiver allowing ownership of the *Post* and WNYW is not applicable to its proposed acquisition of WWOR, the Commission should grant Fox an interim waiver of the Rule pending the Commission's yet-to-be initiated rulemaking proceeding.[57] For the same reasons that Fox should not be granted a permanent waiver, it should also not be granted an interim waiver.[58] Moreover, some additional reasons militate against granting an interim waiver.

Fox suggests that Petitioners are wrong in arguing that the Commission has a general policy against waivers based on the pendency of a rulemaking.[59] Fox's analysis, however, appears to be in error. Indeed, in the *1998 Biennial Regulatory Review Notice of Inquiry* cited by Fox, the Commission reaffirmed its general policy against granting interim waivers.[60] The

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[57]Fox App., Ex. No. 4 at 22-23, Opp. at 32.

[58]*See, e.g., Stockholders of CBS, Inc.*, 11 FCC Rcd 3733, 3755 at ¶ 44 (1995) [hereinafter *CBS I*], *aff'd Sarafyn v. FCC*, 149 F.3d 1213 (1998) ("Commission assessment of temporary rule waivers relies on the same factors contained in permanent waiver standards.").

[59]Opp. at 32.

[60]*1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,*

Commission then recognized that interim waivers may be appropriate in some cases, and it identified the parameters for consideration.[61] However, in the next paragraph, the Commission concluded that "we do not believe it appropriate to provide for the conditional waiver of any of the ownership rules under review in this proceeding solely because of the pendency of this review." [62] Since the Daily Newspaper/Broadcast Cross-Ownership Rule is one of the ownership rules discussed in the *1998 Biennial Review*, this language suggests that a waiver pending review would not be contemplated.

In any case, Fox has not demonstrated that it comes within any of the parameters for interim waivers. Its proposed ownership of two VHF stations and a daily newspaper in New York does not fall within the scope of regulatory changes alluded to by the Commission and would not be consistent with the goals of competition and diversity.[63] Nor does a substantial record exist on which to make a preliminary determination that the Daily Newspaper/Broadcast Cross-Ownership Rule no longer serves the public interest. Indeed, the Commission has not yet even issued the Notice of Proposed Rulemaking. If ever there were a case in which the Commission should not grant an interim waiver, this is most certainly it.

Notice of Inquiry, 13 FCC Rcd 11,276, 11,294 at ¶ 55 (1998). The Commission notes that granting waivers based on pending rulemaking would make enforcement processes unworkable, would subject regulatees to uncertainty, and would incorrectly assume that compliance with the rules was not in the public interest. *Id.*

[61] *Id.* at ¶ 56.

[62] *Id.* at ¶ 57.

[63] Pet. at 16-17.

III. The Proposed Duopolies Are Not in the Public Interest

Fox claims that Petitioners seek to apply standards other than those the Commission established through the Duopoly Rule.[64] But in fact, Petitioners seek only to apply the rule in a way that achieves the results intended by the Commission—that is, to ensure that a minimum of eight independent voices are actually available to viewers after the merger. It may be that the Commission needs to revise the Duopoly Rule on reconsideration to better achieve its intended purposes.[65] But even in the absence of changes on reconsideration, the public interest surely requires that the rule be applied to achieve its underlying purpose of preserving competition and diversity.[66]

Fox further argues that applying the Duopoly Rule as Petitioner suggest would undermine its value as a "bright-line rule."[67] But even though the Commission selected the eight voices/top four-ranked standard instead of a waiver criterion to promote certainty, the Commission nonetheless limited its delegation of authority to the Mass Media Bureau to grant applications satisfying the standard to only those cases presenting "no new or novel issues."[68] Thus, the

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[64]Opp. at 5. The Duopoly Rule is located at 47 C.F.R. § 73.3555(b) (1999).

[65]The Duopoly Rule remains under consideration as the Commission weighs various petitions for reconsideration filed in October 1999. In addition, Commission records indicate that the Commission is receiving *ex parte* communications concerning revision of the Duopoly Rule. As of the date of this reply, the Commission has not yet ruled on these petitions.

[66]Just as the Commission retains the discretion to waive a rule where its application would not serve the purposes of the rule, *see, e.g.*, *Wait Radio v. FCC,* 418 FCC 2d 1153, 1157 (1969), the Commission has discretion to interpret and apply its rules so that they achieve the intended purpose.

[67]Opp. at 5-7, 9.

[68]*Duopoly R&O*, 14 FCC Rcd at 12,933, ¶ 64.

Commission foresaw that new or novel issues would arise and would require careful examination instead of automatic approval by the Bureau. Because Fox's application presents novel issues concerning the application of the Duopoly Rule to the Phoenix, Los Angeles, and New York DMAs, the Commission must carefully examine the proposed duopolies to determine whether they comport with the underlying purpose of the Duopoly Rule and serve the public interest.[69]

A. Creation of Duopoly in Phoenix Violates Intent of Duopoly Rule and is Not in the Public Interest

Application of the Duopoly Rule to the Phoenix DMA presents the new and novel issue of whether to count television stations that are attributed to a DMA even though they are licensed to communities far from the core metropolitan area and have little or no market share. Petitioners and Fox disagree over whether three stations—KPAZ, KUSK, and KPBX—should be counted.

1. KPAZ

Petitioners argue that KPAZ should not be counted as a local independent voice because it fails to garner any recorded market share.[70] Fox asserts that according to the Nielsen July 2000 book, KPAZ garners "a recorded share in the market in at least some day parts," without

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[69]Fox also argues that the Duopoly Rule "is a carefully fashioned . . . rule that permits common ownership of two television stations . . . only when one of the stations is a 'weaker' station." Opp. at 6. However, the stations Fox proposes to acquire are not weak stations. The New York and Los Angeles stations are VHF stations, and VHF stations typically have a larger signal reach, greater cable carriage, higher ratings, and are more profitable. *1998 Biennial Review Report,* 15 FCC Rcd at 11,076-77, 11,078, ¶¶ 32, 35. Further, the UHF station Fox proposes to acquire in Phoenix is not weak—it has a substantial market share. BIA Research, Inc., BIA Financial Network, *Television Market Report 2000,* DMA Rank 17 (3d ed. 2000) [hereinafter *BIA*].

[70]Pet. at 24 (citing *BIA* at DMA Rank 17).

specifying either the share or the relevant day parts.[71] Because this Nielsen data is proprietary, Petitioners cannot verify the validity of Fox's claim. And according to data available to Petitioners, KPAZ has no overall recorded market share.[72] At the very least, therefore, the Commission has an obligation to investigate this matter to determine the true facts before ruling.[73]

Fox also argues that KPAZ's lack of market share should not matter because KPAZ, which provides Christian programming, is a "specialty" voice. Fox cites Commission language recognizing the "valuable contribution to diversity by specialty stations" and observing "that the low ratings generally earned by these stations in no way diminish their role as independent voices." [74] But the language Fox refers to speaks to whether specialty stations should be carried on cable systems. Such a determination has no bearing on whether a broadcast television station should be counted as an independent voice under a common ownership test that measures only the number of over-the-air broadcast stations in a market.[75] Moreover, KPAZ appears to provide

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[71]Opp. at 12.

[72]*BIA* at DMA Rank 17.

[73]*See, e.g., Bilingual Bicultural Coalition Mass Media, Inc., v. FCC,* 595 F.2d 621, 633 (1978) (finding that when a factual uncertainty exists, the Commission should resolve the factual uncertainty by requesting additional information).

[74]Opp. at 12 n.22 (citing *Amendment of Part 76, Subparts A and D of the Commission's Rules and Regulations Relative to Adding a New Definition for 'Specialty Stations' and 'Specialty Format Programming,' and Amending Quathe Appropriate Signal Carriage Rules,* 58 FCC 2d 442, 452 (1976), *recon. denied,* 60 FCC 2d 661 (1976)).

[75]While Petitioners were mistaken in stating in the Petition to Deny that KPAZ is not carried on Cox Cable in the Phoenix metropolitan area, Pet. at 24, the fact that KPAZ is carried on the Phoenix cable systems is not persuasive. Cable penetration in the Phoenix DMA is only 59%. *BIA* at DMA Rank 17. And the Commission has recognized that:

no locally oriented programming, such as local news,[76] which is a characteristic the Commission has identified as key to determining whether a station is a significant voice in a local market.[77] Consequently, it should not count as an independent voice for purposes of the Duopoly Rule.

2. KUSK

Fox asserts that Prescott television station KUSK should be counted as an independent voice because its signal reaches the Phoenix metropolitan area via cable systems and translators.[78] However, the Commission has recognized that taking into account a station's cable carriage is a misleading indicator of local voice diversity.[79] Further, a translator station by definition operates "for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude."[80] Because KUSK is licensed to Prescott, its local programming

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> reliance on a DMA market definition may conceal the extent to which viewers that rely on free-over-the-air television might be harmed from a diversity perspective if the duopoly rule takes no independent account of the extent to which two stations serve the same viewers solely on an over-the-air basis.

Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making, 11 FCC Rcd 21,655, 21,666, ¶ 23 [hereinafter *Second Further NPRM*]. Similarly, whether KUSK is carried via cable to the Phoenix metro area is not persuasive.

[76]*TV Listings, available at* http://tvlistings.zap2it.com (last visited Nov. 13, 2000).

[77]*Duopoly R&O*, 14 FCC Rcd at 12,933, ¶ 66.

[78]Opp. at 11-15. Petitioners demonstrated that KUSK's Grade B contour does not include the Phoenix metropolitan area. Pet. at 23.

[79]*See supra* note 76.

[80]47 C.F.R. § 74.701 (1999).

will address issues relevant to that community instead of Phoenix. Therefore, it is difficult to see how this station contributes to viewpoint diversity in Phoenix.

3. KBPX and KPPX

Fox also argues that Flagstaff-based KBPX, which is owned by Paxson Communications, should be counted because it is assigned to the Phoenix DMA. But as Petitioners demonstrated, KBPX's signal does not reach the Phoenix metropolitan area.[81] In the alternative, Fox argues that the Commission should count KPPX, a station licensed to Tolleson and operated by Paxson under an LMA.[82] However, KPPX should not be counted as a true independent voice because it only has a *de minimis* audience share—a mere 1 share according to Fox.[83] Furthermore, it does not broadcast any original or local programming; instead, it runs paid programming during the day and syndicated programming during early evening and prime time hours.[84] KPPX also lacks

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[81]Pet. at 23 (citing 1 Television & Cable Factbook 2000 No. 68, at A-63, A-75). Even if residents of Phoenix could receive KBPX's signal, KBPX's local programming will be addressing issues of concern to Flagstaff, and would contribute little to local diversity.

[82]Opp. at 13-14. Fox admitted that it neglected to include KPPX on its original application and now seeks to insert KPPX as an additional voice in the Phoenix DMA after the fact. Opp. at 14 n.28.

[83]Opp. at 14.

[84] *Pax TV Listings for KPPX Channel 51, available at* http://www.paxtv.com (last visited Sept. 19, 2000). The Pax network's corporate history states that the network features "off-network runs of popular shows including the CBS hit series *Touched by an Angel; Dr. Quinn, Medicine Woman; and Diagnosis Murder.*" *About Pax Corporate History, available at* http://www.pax.tv/about/ (last visited Sept. 19, 2000). While the corporate history also states that the network runs individual programming, the local Phoenix station's schedule lists only paid programming, television shows that are in syndication, and the above-mentioned "off-network" series. *Id.*; *Pax TV Listings for KPPX Channel 51, available at* http://www.paxtv.com (last visited Sept. 19, 2000).

an original local news program,[85] which is a characteristic the Commission has identified as key to determining whether a station is a significant voice in a local market.[86]

In sum, when the Duopoly Rule is applied so as to count only stations that truly provide an independent voice in the community, it is clear that only seven independent voices would remain after Fox's acquisition of KUTP, and that this would not result in a sufficient level of diverse viewpoints.

B. Allowing New York and Los Angeles VHF-VHF Duopolies Would be Inconsistent with Congressional Intent

Fox's proposal to create VHF-VHF duopolies in the New York and Los Angeles DMAs also presents a new and novel issue because the Commission has not yet considered whether VHF-VHF duopolies serve the public interest. Fox argues that the Duopoly Rule does not prohibit VHF-VHF combinations, and that Petitioners "failed to acknowledge that in the *TV Duopoly Second Further NPRM* the Commission engaged in a lengthy discussion and invited comment on . . . whether UHF and VHF stations should receive different treatment."[87] Although

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[85] Of the ten stations in the Phoenix DMA that have an appreciable market share, only the UPN network KUTP, which News Corp. is seeking to acquire, the Pax network KPPX, and the independent network KASW have no local news program. *TV Listings, available at* http:/tvlistings.zap2it.com (last visited Oct. 1, 2000). While it would be possible for News Corp. to argue that it is not acquiring an independent voice because the UPN station provides no local news programming, the UPN station can be distinguished from the Pax station on the grounds that the UPN station provides original network programming and garners an appreciable market share. In comparison, the Pax station only provides reruns and paid programming, and its market share barely registers.

[86] *Duopoly R&O*, 14 FCC Rcd at 12,933, ¶ 66.

[87] Opp. at 7 (citing *Review of the Commission's Regulations Governing Television Broadcasting,* Second Further Notice of Proposed Rule Making, 11 FCC Rcd at 21,663-68, ¶¶ 14-28, 33-34) [hereinafter *Second Further NPRM*].

Fox is correct that the *Second Further NPRM* invited comment on VHF-VHF combinations, it conveniently omits the part of that discussion where the Commission recognized that

> while the 1996 Act itself is silent on the question, the Conference Report to the Act states that *'[i]t is the intention of the conferees that, if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling circumstances.'* Thus, we seek comment on whether there are particular locations (such as Alaska or Hawaii) where there are such compelling circumstance that the Commission might allow some VHF/VHF combinations for reasons analogous to those cited in support of UHF combinations"[88]

While some commenters did address this point, the Commission did not explicitly decide whether to allow VHF-VHF combinations in its Duopoly *Report and Order*.[89] Thus, Fox's proposal to create VHF-VHF duopolies in New York and Los Angeles must be considered by the Commission as a new and novel issue.

The language of the Conference Report on the 1996 Act clearly shows that Congress intended to allow VHF-VHF mergers only in compelling circumstances. The force of that intention was made clear when the Conference Report was introduced on the floor of the Senate for debate and a number of resolved issues from the Report were passed by unanimous consent. One such resolved issue stated that should the Commission revise its same-market common

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[88] *Id.* at 21,673, ¶ 40 (legislative history citations omitted) (emphasis added).

[89] *Duopoly R&O*, 14 FCC Rcd at 12,929-30, ¶ 55 (noting that some commenters supported VHF/VHF combinations in Hawaii, Alaska, or Puerto Rico and in circumstances involving a failed station or vacant allotment).

ownership rules, "there should be a higher standard on V-V combinations than U-U or U-V combinations."[90]

And as the legislative history makes clear, the mere fact that New York and Los Angeles are large markets does not constitute "compelling circumstances." When Sen. Inouye of Hawaii asked about the Conference Report's language that VHF-VHF mergers not be permitted except in compelling circumstances, Sen. Hollings of South Carolina replied that Hawaii presented a unique situation because the absence of signal interference from adjacent television markets permitted the existence of more VHF signals than would be found in one mainland state. Sen. Hollings explained: "[m]any of our concerns about combinations involving two VHF stations in local markets in the continental United States do not apply to Hawaii."[91] The senators' exchange illustrates that members of Congress did not intend VHF-VHF mergers to occur in the absence of compelling circumstances, like those in the state of Hawaii.

Fox argues that because the New York and Los Angeles DMAs are so large, they will remain diverse even after the proposed VHF-VHF combinations.[92] However, in making its case for diversity in those DMAs, Fox cites irrelevant data concerning the number of radio stations that serve the two markets.[93] The Duopoly Rule counts only the number of television broadcast

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[90]142 Cong. Rec. 2011 (1996).

[91]142 Cong. Rec. 2028-29 (1996).

[92]Opp. at 8.

[93]Opp. at 8 n.11. Assuming, *arguendo*, that radio stations should be taken into account to determine diversity of voices in a market, there has been a rapid consolidation of radio station ownership in recent years in the New York market. *See supra* Part II(A).

stations to determine the level of diversity.[94] Thus, the number of radio stations in the New York and Los Angeles DMAs is immaterial.[95] In addition, Fox ignores the fact that New York and Los Angeles require a multitude of diverse, local television broadcast voices to serve the large, heterogeneous populations of each city.[96]

Accordingly, the proposed VHF-VHF combinations in New York and Los Angeles are contrary to the public interest because they violate Congressional intent and would significantly decrease diversity in the very markets where the need for diversity is greatest.

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[94]The Commission explicitly decided to omit other forms of media from its count of independent voices because "broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans." In addition, the Commission was unable to reach a definitive conclusion as to the extent to which other media served as substitutes for broadcast television. *Duopoly R&O*, 14 FCC Rcd at 12,932-33, ¶¶ 68, 69.

[95]Even if the existence of other media were material, Fox fails to note that it also owns or influences many of the other media. For example, in addition to its television stations and the *New York Post*, Fox owns a television network, and cable channels such as the Fox News Channel, FX, Fox Family Channel, and Fox Sports Channel, which are carried on cable systems serving New York City and Los Angeles. *News Corp. Annual Report 2000, available at* http://www.newscorp.com/report2000/cable_network.html (last visited Oct. 26, 2000). Fox also owns a nearly 50% interest in the company that provides the principal video programming channel guide, as well as the publisher of *TV Guide*. *News Corp. Annual Report 2000, available at* http://www.newscorp.com/mag_and_inserts.html (last visited Oct. 26, 2000).

Further, Fox is seeking to purchase the parent company of DirecTV, a provider of direct broadcast service. "News Corp. Chairman Rupert Murdoch confirmed that 'we would be interested if General Motors decided to do anything' to dispose of its Hughes Electronics," which is the parent company of DirecTV. Steve McClellan, *Murdoch, Malone Swap Stock to Smooth Way for a Tempting Bid for Hughes DBS Service*, Broadcasting & Cable Oct. 2, 2000, at 35.

[96]The populations of New York and Los Angeles contain many racial, ethnic, linguistic, religious, and political groups, all of which may have different viewpoints that should be given the opportunity to be heard or expressed. *Review of the Commission's Regulations Governing Television Broadcasting,* Petition for Reconsideration of UCC, et al., MM Dkt. No. 91-221 at 12 (filed Oct. 18, 1999).

C. A One-Year Waiver for Salt Lake City Would Be Inconsistent With the Public Interest

Fox argues that a one-year waiver of the Duopoly Rule is appropriate for Salt Lake City because that DMA is more competitive than the Honolulu DMA at issue in the six-month waiver the Commission granted to Emmis Communications Corp. earlier this year.[97] Specifically, Fox claims that thirty-nine radio and television stations will remain in Salt Lake City as compared to twenty-seven in Honolulu.[98] However, the Duopoly Rule does not count radio stations in determining the number of voices in a DMA.[99] When only independent television stations are counted, the level of diversity in the two DMAs during the waiver period is remarkably similar.[100]

Not only does the Salt Lake City DMA have a limited number of independent voices, but this acquisition would give Fox a market share of twenty-four percent, compared with a market share of twelve percent for the next highest-rated television station.[101] Thus, during the period of the waiver, Fox would have an enormous amount of control and influence over the programming available to viewers in the Salt Lake City DMA.

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[97]Opp. at 16-17.

[98]Opp. at 17-18.

[99]*Duopoly R&O*, 14 FCC Rcd at 12,935, ¶ 69.

[100]The Salt Lake City and Honolulu DMAs respectively have eight and seven independent television stations with recorded market share. *BIA* at DMA Ranks 36, 71.

[101]*BIA* at DMA Rank 36. In July 2000, both Fox's KSTU (Fox programming) and CCI's KTVX (ABC programming) had a market share of 12, while the NBC station KSL had a market share of 12 and the CBS station KUTV had a market share of 10. *Id.*

Finally, Fox claims that it needs a twelve-month waiver in order to sell one of the Salt Lake City stations because the current economic climate has created a soft market for television stations.[102] Fox presents no evidence in support of it claim of a "soft" market. Moreover, at the recent Fox Entertainment Group annual meeting, News Corp. Chairman Rupert Murdoch said that if the economy remains steady, "Fox expects the market to bounce back, giving the company 'a solid year, if not a boom year,' in 2001."[103] Because market conditions can change rapidly, the length of a waiver should not turn on the vicissitudes of the marketplace. While denial of the Salt Lake City assignment would best serve the public interest, at most, Fox should only receive a six-month waiver, conditioned on the separate operation of the two stations in the Salt Lake City DMA.

IV. Fox Fails to Meet Its Affirmative Burden to Justify One-Year Waiver of National Television Multiple Ownership Rule and Cannot Defend Permanent, Post-Waiver Violation of Rule's National Audience Reach Limit.

Precedent clearly establishes that the applicant for waiver of the National Television Multiple Ownership Rule bears the burden of showing that grant of a waiver is in the public interest.[104] Specifically, the applicant must demonstrate that the requested waiver will not compromise the goals of diversity and economic competition underlying the rule.[105] Fox has

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[102]Opp. at 18.

[103]Steve McClellan, *Murdoch Maneuvers*, Broadcasting & Cable, Nov. 20, 2000, at 50.

[104]*See, e.g.*, *Multimedia, Inc.*, 11 FCC Rcd 4883, 4892, ¶ 27 (1995) (finding that "[w]hen conducting an examination of a national ownership waiver, we place the burden on the applicant to show that its proposal is in the public interest and that a waiver would not adversely affect the goals of diversity and economic competition underlying the multiple ownership rules"); *CBS I*, 11 FCC at 3774, ¶ 90.

[105]*Multimedia, Inc.*, 11 FCC Rcd at 4892, ¶ 27; *CBS I*, 11 FCC Rcd at 3774, ¶ 90.

made no credible effort to provide such a showing. The explanatory exhibit of its application is inadequate to justify any waiver of the National Television Multiple Ownership Rule here, let alone a waiver for a full year. Furthermore, Fox's stated intention to exceed the national ownership cap beyond any waiver period is unprecedented and insupportable.

A. Fox Fails to Justify Twelve-Month Waiver Period.

Commission rules explicitly bar approval of acquisitions when "the owner already exceeds . . . or will, as a result of the acquisition, exceed the audience reach limit."[106] Broadcast transactions that do not comply with the law or Commission rules are, presumptively, inconsistent with the public interest. Therefore, requests to waive those rules must demonstrate the need for such a waiver and justify adverse impacts on the public interest for the requested waiver period.

Fox claims that the Commission typically grants twelve-month waivers of the national ownership limit in multiple station transactions,[107] and erroneously asserts that those precedents alone sufficiently justify the twelve-month waiver sought here. However, previous approval of twelve-month waivers does not amount to a rule that in all cases the national ownership limit will be waived for that duration.[108] Rather, the Commission must weigh "the competing public

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[106] *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, 91-92 n.52. (1985) [hereinafter *Amendment of Section 73.3555*].

[107] Opp. at 19.

[108] *See, e.g., TVX Broadcast Group, Inc.*, 2 FCC Rcd 1534, 1534 (1987) (granting six-month waiver of National Television Multiple Ownership Rule).

interest concerns on a *case-by-case* basis in order to insure that the fundamental objectives of diversity and economic competition are not compromised."[109]

Commission instructions explicitly require a statement of "reasons in support of" requested waivers.[110] Yet to support its request for a twelve-month waiver, Fox merely invokes the Commission's past willingness to grant waivers to allow "a reasonable period" for orderly divestitures following grant of an application.[111] Fox provides no case-specific reasons in support of its waiver request beyond the fact of Fox's non-compliance.[112] Indeed, Fox does not even specify the *number* of television stations to be divested,[113] let alone any of the intricacies of divestiture in particular markets that might require a lengthy waiver period.

In the complete absence of facts regarding what an "orderly divestiture" would entail in this case, it is impossible for the Commission to determine a "reasonable period" for this waiver, and consequently, to determine whether twelve months, on balance, will serve the public interest.

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[109]*Multimedia, Inc.*, 11 FCC Rcd at 4885, ¶ 4 (emphasis added). *See also*, *CBS I*, 11 FCC Rcd at 3755, ¶ 43 (1995); *Maximum Media, Inc.*, 12 FCC Rcd 3391, 3395-97, ¶¶ 10-15 (1997).

[110]FCC 314, Worksheet 3 at 3.

[111]Opp. at 19 (quoting *Shareholders of CBS Corp.*, 15 FCC Rcd 8230, 8236, ¶ 22 (2000) [hereinafter *CBS II*]).

[112]Fox seems to believe that because justifications for the 24-month waiver requested by CBS were "rejected," there is no need to provide any case-specific justification at all for the twelve-month waiver sought here. Opp. at 19 & n.43. Fox argues that a 12-month waiver was granted instead of the requested 24 months because the justifications the applicant provided were unpersuasive. *Id.* However, it is equally plausible that the 12-month waiver, the maximum *ever* approved in this context, *CBS II*, 15 FCC Rcd at 8236, ¶¶ 21, 22, was granted precisely because the justifications offered *were* persuasive.

[113]Review of Fox's Combined Fox/Chris-Craft National Audience Reach Table indicates that Fox's post-acquisition national audience reach could be reduced by the required 5.91% through divestiture of anywhere from two to ten stations. Fox App., Ex. No. 4, Table 4-I.

Therefore, the Commission cannot approve Fox's waiver request without requiring Fox to support the need for and justify the impact of a twelve-month waiver period, including, at a minimum, disclosure of the stations to be divested.

B. Fox's Intent to Permanently Exceed National Audience Reach Limit is Insupportable.

Fox is the only applicant on record to seek approval of a license assignment on one hand while stating its intent to permanently violate the National Television Multiple Ownership Rule on the other.[114] Even before entering into the CCI acquisition, Fox exceeded the national audience reach limit by 0.352%.[115] Because that excess national audience reach was the result of population shifts rather than acquisitions, Fox previously has not been required to divest stations to come into compliance with the National Television Multiple Ownership Rule.[116] That excess

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[114]Fox suggests that Commission approval of its recent same-market LMA conversion, despite a 35.14% national audience reach at that time, provides sufficient precedent to justify the permanent non-compliance here. Opp. at 21 n.46. However, that conversion was not contested, nor did it result in a written opinion. As stated in the Petition to Deny, conversion of a same-market LMA into a duopoly is hardly analogous to the substantial acquisitions here. Pet. at 40 n.147.

According to Commission rules (which are pending reconsideration on this very point), neither same-market LMA's nor duopolies increase the national audience reach calculation. Therefore, as noted in Fox's amendment to the LMA conversion application, the transaction in question had no impact on Fox's national audience reach. *Application for Voluntary Transfer of Control of the License of KDFI-TV*, Minor Amendment to Transferee's Exhibit No. 3, File No. BTCCT-19991116AJN (filed Feb. 2, 2000). In addition, the station to be converted was already attributed to Fox as the broker of the same-market LMA, *Id.*, therefore the conversion did not represent a reduction in diversity or competition in that market for the purposes of the national ownership rule.

[115]Fox App., Ex. No. 4 at 13.

[116]*Amendment of Section 73.3555*, 100 FCC 2d at 91-92, n.52.

audience reach does, however, bar any future acquisitions.[117] Nonetheless, Fox contends not only that the CCI acquisition should be approved, but also that subsequent divestitures need only reduce Fox's national audience reach to its current excess.[118]

Allowing Fox to disregard the statutory limit beyond the divestiture period would amount to grant of an individualized, permanent waiver of the national ownership rule. Such an outcome would necessarily lead to *ad hoc* adjustments of the statutory limit as applied to each owner seeking new acquisitions, undermining the legitimacy of the rule and the rulemaking process. Unless the Commission determines, through an appropriate administrative process, that the national audience reach limit should be revised, all broadcasters seeking acquisitions must be held to the same thirty-five percent limit established by statute and regulation.

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[117]*Id.* Fox argues that Petitioners have mischaracterized the rule. Opp. at 20 n.45. On the contrary, the language of the Commission's Amendment of Section 73.3555, quoted in full by Fox, clarifies that the exception allowed for exceeding the limit due to population shifts is a narrow one. Once an *owner* takes action that results in an excessive audience reach, a population shift becomes irrelevant. If an owner currently in compliance with the cap exceeds the limit at some future time due to population shifts, "it would not be required to divest any of its stations in order to comply with the . . . limit." *Amendment of Section 73.3555*, 100 FCC 2d at 91-92 n.52. However, "such an occurrence would *prevent the group owner from acquiring new stations*." *Id.* (emphasis added). Here, the prohibited acquisition of CCI licenses will result in an audience reach far above the statutory limit across multiple markets and independent of any population shift.

[118]Fox App., Ex. No. 4 at 14-15. As noted in the Petition, Fox's disdain for the rule is well documented. Pet. at 38.

V. Fox's Proposed Acquisition of Eight UPN-Affiliated Stations and the Resulting Impact on Diverse Programming Aimed at Minorities Raises Questions Warranting Further Investigation by Commission to Determine Whether Acquisition is in the Public Interest

As part of its mandate to protect and uphold the public interest, the Commission has long been charged with ensuring diversity in programming, particularly the availability of minority-oriented programming. A 1980 Report by the Commission's Network Inquiry Special Staff recognized that "[m]inority programs will be shown only when the number of networks becomes large . . . . With a small number of networks, only the *most* profitable programs will be shown."[119] The Commission has thus encouraged the creation of new television networks over the years.[120]

Of America's current television networks, the United Paramount Network ("UPN") is among the few that fulfills this diversity mandate through its provision of a significant number of minority-oriented programs.[121] Now, with Fox's proposed acquisition of eight television stations which are UPN affiliates, including those in the top two markets, the status of UPN appears to be uncertain, at best.[122]

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[119]Network Inquiry Special Staff, Federal Communications Commission, *Final Report, New Television Networks: Entry, Jurisdiction, Ownership and Regulation* 37 (1980).

[120]*Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, Notice of Proposed Rule Making, MM Dkt. No. 00-108, 15 FCC Rcd 11,253, 11,264 at ¶ 27 (rel. June 20, 2000) (acknowledging the Commission's "long-standing goal to foster the entry of additional broadcast television networks as a means of promoting diversity").

[121]*See* Pet. at 42-43.

[122]Pet. at 41; Rupert Murdoch has suggested in a trade publication that UPN could be replaced by a Fox network. Steve McClellan, *Fox in the UPN House*, Broadcasting & Cable, Aug. 21, 2000, 4.

Fox states that Petitioners have not presented evidence to show that this transaction would spell the demise of UPN.[123] Petitioners did not present such evidence because they are not privy to Fox's plans. The D.C. Circuit has stated on numerous occasions that "it is fundamentally unfair for the FCC to dismiss a challenge where the challenging party has seriously questioned the validity of a representation and the defending party is the party with access to the relevant information."[124]

Here, only Fox can know what it will do with those stations. It is disingenuous for Fox to state that it "does not presently have any plans to terminate the affiliation agreements of the Chris-Craft UPN affiliates after the consummation of the merger,"[125] because a major media corporation such as Fox surely would not undertake a transaction of this magnitude without some business plan regarding the assets to be purchased. According to Broadcasting & Cable, Rupert Murdoch has said that UPN could be replaced by a second Fox network.[126] In addition, Broadcasting & Cable reports that:

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[123]Opp. at 37-39.

[124]*California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (1985) (quoting *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 265-266 (1973) (calling Commission's decision to dismiss a claim based on petitioners' lack of access to confidential reports "fundamentally unfair")). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 509 (1988) (finding substantial and material questions of fact were raised by petitioners despite the fact that petitioners were not able to assert specific evidence as to a licensee employer's hiring practices because the licensee had "exclusive access to much of the information at issue").

[125]Opp. at 38.

[126]Steve McClellan, *Fox in the UPN House*, Broadcasting & Cable, Aug. 21, 2000, at 4. Notably, the Opposition does not deny that replacing UPN with a second Fox network is a possibility.

> News Corp. President Peter Chernin said [Fox] has many other options for programming the Chris-Craft stations. But at the end of the day, he said, "I don't think we care enormously," whether UPN lives or dies.[127]

However, the most recent Broadcasting & Cable, which was published after the Petition to Deny was filed questioning Fox's commitment to UPN, reports that News Corp. has asked Chris-Craft to renew its station affiliation agreements with UPN and that Fox has an interest in a possible equity stake in UPN.[128]

Given these conflicting reports, the Commission has an obligation to ascertain Fox's plans for UPN and to determine what effect those plans will have on the diversity of viewpoints available to the public. In the instant case, Fox has not presented sufficient facts to enable the Commission to determine whether the acquisition of the CCI stations by Fox would result in the demise of UPN. Accordingly, the Commission must supplement the record in the area by designating the Application for a hearing.

VI. Fox Fails to Meet its Burden of Showing That Grant of its Applications would Serve the Public Interest.

The plain language of the Communications Act is clear. No station license shall be assigned except "upon finding by the Commission that the public interest, convenience, and

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[127] *Id.* at 4, 6. Syndication executives have also raised concerns about the possible harm to economic competition if UPN disappears, stating that the amount of money organizations will have to pay Fox to have their shows put on the air, particularly in New York and Los Angeles, could be "astronomical." Joe Schlosser and Susanne Ault, *The Uncertainty of UPN*, Broadcasting & Cable, Aug. 21, 2000, at 11.

[128] Steve McClellan, *Murdoch Maneuvers*, Broadcasting & Cable, Nov. 20, 2000, at 50.

necessity will be served thereby."[129] Applicants bear the burden of providing the factual basis for the Commission's public interest finding.[130] Applications proposing transactions that violate Commission rules are presumptively inconsistent with the public interest. Such applications can only be granted if the applicants meet the very heavy burden of demonstrating that the public interest is better served by waiving the rule. Fox has failed to meet its burden.

A. Fox's Claim That it Has Satisfied its Burden By Completing Form 314 is Without Merit

Fox suggests that completion of the streamlined Form 314 "'provide[s] a sufficient basis' for approving [its] assignment application[s]."[131] Read in its entirety, however, the language quoted by Fox merely states that completion of the form will "provide a sufficient basis *for determining whether a proposed action is in compliance with the Act, and Commission rules and policies.*"[132] The streamlined process was intended to simplify and facilitate the processing of

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[129]47 U.S.C. § 310(d) (1994). *See also, Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968) (holding that the Commission must articulate a public interest finding and that "[t]he need for articulation of findings requires the decision-making body to focus on the value to be served by its decision and to express the considerations which must be the bases of decision").

[130]*See, e.g., CBS I*, 11 FCC Rcd at 3774, ¶ 90 ("[A]s is true with all waiver requests, an applicant must sustain the burden of demonstrating that any benefits to be achieved by its proposed transaction are in the public interest and that a waiver would not compromise the fundamental policies served by the rule."). *See also, RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (1982) (finding that "applicants . . . have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate"); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5348-49, ¶¶ 39, 40 (1993) (describing the detailed showing required of applicants seeking waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule).

[131]Opp. at 40, n.88 (quoting *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23,056, 23,067, ¶ 22 (1998) [hereinafter *Streamlining Order*]).

[132]*Streamlining Order*, 13 FCC Rcd at 23,067, ¶ 22 (emphasis added).

several thousand applications received each year[133] that *comply with the law and rules.* On their face, the Fox applications do not comply with the law—they violate alien ownership limits and require waivers of at least three different multiple ownership rules.

Consistent with the presumption that applications in violation of the rules are contrary to the public interest, the Commission retained a requirement that applicants seeking waivers justify their request.[134] The dispositive issue here is not whether Fox submitted the required form. It is whether the information provided is sufficient to support a finding that grant of the applications is consistent with the public interest. As discussed above and in the Petition to Deny, it is not.

B. The Commission Cannot, on the Record Before it, Make the Required Affirmative Finding that Grant of Fox's Applications is Consistent with the Public Interest.

Section 309(d) of Act sets forth a three part test for considering petitions to deny. First, the Commission must determine whether petitioners have made a *prima facie* showing that grant of the application would be inconsistent with the public interest, convenience, and necessity.[135]

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[133] *Id.* at 23,068, ¶ 25.

[134] Such a showing need not be a "supplement" or "above and beyond" the requirements of Form 314, as described by Fox. Opp. at 39, 41. It must merely consist of an explanatory exhibit, already required by Form 314. FCC 314 at 7, FCC 314 Worksheet 3 at 3, 5 (stating that applicants must "submit an exhibit stating the reasons in support of an exemption from, or waiver of, the Commission's . . . ownership regulations.").

Fox cites the approval of previous broadcast applications without public interest showings as evidence that such showings are not required. Opp. at 42 & n.93. However, those applications have no precedential value whatsoever. They did not request waivers, were not contested, and did not produce Commission orders. "Reliance on a prior Commission action would be appropriate only where a decision disposing of the prior application plainly considered and found acceptable the pertinent . . . rule interpretation." *Streamlining Order*, 13 FCC Rcd at 23,076, ¶ 42.

[135] 47 U.S.C. §309(d)(1) (1994). *See also, Astroline Communications Company v. FCC*, 857 F.2d 1556, 1570 (1988); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (1985).

Such a showing merely requires presentation of facts that, if assumed to be true, and without reference to opposing evidence, would alter the Commission's public interest calculus.[136] Petitioners meet that test. They have shown that the application violates Section 310(b)(4) of the Communications Act, the Commission's Daily Newspaper/Broadcast Cross-Ownership Rule, the Duopoly Rule, the National Television Multiple Ownership Rule, and would be inconsistent with the Commission's policy of promoting diversity through multiple networks. Thus, grant of the applications would be *prima facie* inconsistent with the public interest.

Second, the Commission must determine "whether 'on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,' 'a substantial and material question of fact is presented.'"[137] Under this part of the test, the Commission must designate an application for hearing "regardless of whether there are disputed fact issues as opposed to a simple need for more information."[138] Here, Petitioners have raised substantial and material questions of fact that are either disputed or unanswered by Fox's Application and Opposition.[139] These questions include:

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[136]*See, e.g., Astroline* 857 F.2d at 1566-67; *Gencom, Inc. v. FCC*, 832 F.2d 171, 180-81 (1987) (citing *U.S. v. FCC*, 652 F.2d 72 (1980)). "'[P]rima facie sufficiency' means the degree of evidence necessary to make not a fully persuasive case, but rather what a reasonable fact finder might view as a persuasive case—the quantum, in other words, that would induce a trial judge to let a case go to the jury even though he himself would (if nothing more were known) find against the plaintiff." *Citizens for Jazz on WRVR, Inc.*, 775 F.2d at 397.

[137]*Id.* at 394 (quoting 47 U.S.C. 309(d)(2)).

[138]*Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (1974).

[139]A question of fact is substantial when, "the totality of the evidence, arouses a sufficient doubt on the point that further inquiry is called for." *Citizens for Jazz on WRVR, Inc.*, 775 F.2d at 395. Such a question is material when it is "material to determination of the question whether the public interest, convenience, or necessity would be served by the granting of the application

1. Whether Fox's ownership of the CCI broadcast assets would violate the policy against the transfer of bare licenses, the alien ownership limits in Section 310(b)(4), and the public interest, convenience, and necessity as required by Sections 309 and 310 of the Communications Act.

2. Whether Fox has met its burden of showing that the viewpoint diversity and economic competition purposes of 47 C.F.R. § 73.3555(d)(3) would be better served in the New York market by waiving the rule to permit Fox to acquire WWOR when it already owns WNYW and the *New York Post*.

3. Whether fewer than eight independent voices would actually to be available to the viewing public in Phoenix if assignment of the license for KTUP-TV were granted.

4. Whether compelling circumstances exist to allow the common ownership of two VHF television stations in Los Angeles.

5. Whether compelling circumstances exist to allow the common ownership of two VHF television stations in New York.

6. Whether the sale to Fox of the CCI stations that are affiliates of the competing UPN network, would result in the demise of the UPN network, thus resulting in a loss of program diversity and diminution of competition in the program acquisition market that would not be in the public interest.

In deciding whether to designate an application for hearing, the Commission must consider the cumulative impact of the evidence. It is not sufficient to "analyz[e] each piece of evidence in isolation."[140] Given the large number of substantial and material questions of fact, the Commission must grant the applications for hearing.

Third, the Commission "must make the ultimate determination of whether the facts establish that the 'public interest, convenience, and necessity will be served by the granting [of

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with respect to which such question is raised." *Stone v. FCC*, 466 F.2d 316, 323 n.18 (1972).

[140] *Serafyn v. FCC*, 149 F.3d 1213, 1220 (1998) (remanding Commission's summary denial of petition without a hearing).

the application]."[141] Under Section 309(d)(2), even if a substantial and material question of fact is not presented, "if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience, and necessity]," it must designate the application for a hearing.[142] Thus, Fox's contention that a petition to deny "does not merit review unless" it has raised a substantial and material question of fact[143] is incorrect.

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[141] *Citizens for Jazz on WRVR, Inc.*, 775 F.2d at 344 (quoting 47 U.S.C. 309(a)).

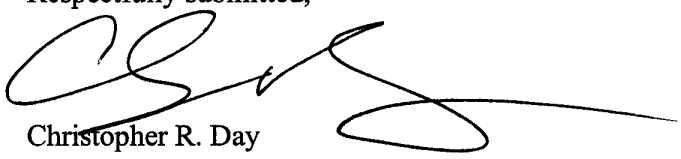
[142] 47 U.S.C. 309(d)(2)-(e) (emphasis added). *See also, Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (1974) (finding that the Communications Act clearly states that "there are two situations in which a hearing is required before the FCC is either empowered or obliged to grant an application").

[143] Opp. at 43. Fox's reliance on the legislative goal of giving the Commission "discretion to avoid time-consuming hearings" as evidence of the substantiality of the "burden imposed by . . . two-pronged standard," *id.*, is misplaced. That reference to Commission discretion is relevant not to the burden on parties to an application, but rather to the limitations on judicial review. *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (1987).

CONCLUSION

Based on the evidence presented, the Commission cannot make an affirmative finding that grant of the applications would serve the public interest. As discussed above, Fox has not met its burden to provide sufficient facts to support the required public interest findings. Under these circumstances, the Commission must either dismiss the applications as incomplete, or it must designate them for hearing to resolve the substantial and material questions of fact at issue and compile an adequate record to ensure that action on the applications is consistent with the public interest.

Respectfully submitted,



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Dated: November 22, 2000

Exhibit A

Commercial Radio Station Ownership in New York City 1993 versus 2000*

1993	Owner	2000
	Alexander Bcstg	WRCR-AM
	AM/FM Inc	WALK-AM WALK-FM WHTZ-FM WKTU-FM WAXQ-FM WTJM-FM WLTW-FM
WALK-AM WALK-FM	American Media Inc	
WBLI-FM	Back-Room Comm	
WHLI-AM WKJY-FM	Barnstable Bcstg Inc	WGSM-AM WHLI-AM WMJC-FM WKJY-FM WBZO-FM WRCN-FM
WYNW-FM	Bcstg Partners Inc	
	Big City Radio	WWXY-FM WWZY-FM WYNY-FM
WBBR-AM	Bloomberg Comm Inc	WBBR-AM
WMXV-FM	Bonneville Intl	
WOR-AM	Buckley Bcstg	WOR-AM
WABC-AM WPLJ-FM	Capital Cities/ABC	WABC-AM WPLJ-FM
WCBS-AM WCBS-FM	CBS Inc	
	Cox Radio Inc	WHFM-FM WKHL-FM WBWB-FM WBLI-FM
WFAS-AM WFAS-FM	CRB Bcstg Corp	
WSNW-AM	Douglas Bcstg	
WQHT-FM	Emmis Radio Bcstg	WQHT-FM WRKS-FM WQCD-FM
WFME-FM	Family Stations Inc	WFME-FM
WEVD-AM	Forward	WEVD-AM
WGSN-AM WCTC-AM WNJC-FM WMGQ-FM	Greater Media	WCTC-AM WMGQ-FM
WRTN-FM	Hudson	WVOX-AM WRTN-FM
WFAN-AM WZRC-AM WXRK-FM	Infinity Bcstg Corp	WFAN-AM WCBS-AM WINS-AM WXRK-FM WCBS-FM WNEW-FM
WLIB-AM WBLS-FM	Inner City Bcstg	WLIB-AM WBLS-FM
WORE-FM	Jarad Bcstg Co	WLIR-FM WDRE-FM

* Source: Investing in Radio 1993, BIA Publications, Inc. (2d ed. 1993); Investing in Radio 2000, BIA Research, Inc. (2d ed. 2000).

WBAB-FM	Liberty Bcstg Corp	
	Long Is Multi-Media	WLUX-AM
WHTZ-FM	Malrite Comm Group	
	Mariana Bcstg Inc	WGHT-AM
	Mega Comm Inc	WKDM-AM
WCAA-FM	Multicultural Bcstg	WPAT-AM WNSW-AM WZRC-AM
	Nassau Bcstg Ptrs	WFAS-AM WJLK-FM WFAS-FM WFAF-FM
WWRL-AM	National Black Ntwk	
	New Jersey Bcstg	WWTR-AM
WQEW-AM WQXR-FM	New York Times Co	WQEW-AM WQXR-FM
WNCE-FM	Newco Holdings	
WDHA-FM	Northern NJ Radio	WMTR-AM WDHA-FM
	One-On-One	WJWR-AM
	Pamal	WLNA-AM WHUD-FM
WPAT-AM WPAT-FM	Park Comm Inc	
	Polnet Comm Ltd	WRKL-AM
WHLO-FM	Radio Terrace LP	
	Radio Unica	WJDM-AM WWRU-AM
WWRV-AM	Radio Vision	WWRV-AM
	Salem Comm Corp	WMCA-AM WWDJ-AM
WSKQ-AM WSKQ-FM	Spanish Bcstg System	WPAT-FM WSKQ-FM
WADO-AM	Spanish Radio Ntwk/Hispanic Bcstg	WADO-AM WCAA-FM
WRCN-FM	Starr, Gary et al	
WRKS-FM	Summit Comm Group	
WQCD-FM	Tribune Bcstg Co	
WKDM-AM	United Bcstg Co	
	Unity Bcstg	WWRL-AM
	Universal Bcstg	WVNJ-AM
WINS-AM WNEW-FM	Westinghouse Bcstg	
WNEW-FM	Westinghouse Bcstg	

1993
37 Owners
52 Stations

2000
34 Owners
74 Stations

* Source: Investing in Radio 1993, BIA Publications, Inc. (2d ed. 1993); Investing in Radio 2000, BIA Research, Inc. (2d ed. 2000).

EXHIBIT B

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September 30, 1998

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Re: Fox Television Stations, Inc.
File Nos. BALCT-980727KM through KU
and BALCT-980727LE
BALTT-980727KV through LD

Dear Ms. Salas:

On behalf of Fox Television Stations, Inc., we hereby supplement the above-referenced application to advise the Commission of a clarification concerning the transactions contemplated in this application.

The Commission granted authority on August 26, 1998 for the assignment of the licenses specified in the above-referenced applications from the existing licensee (Fox Television Holdings, Inc. ("Holdings"), previously known as Fox Television Stations, Inc.) to a new wholly-owned subsidiary to be called "Fox Television Stations, Inc." As part of the consummation of those assignments, Holdings has determined not to assign any assets to Fox Television Stations, Inc. other than the station licenses.

As the direct parent of the assignee, Holdings will retain ultimate control of the stations. At the closing, an Assignment and Use Agreement will be entered into which will provide that the control over the licenses and the other related assets involved in the operation of the stations will not be separated; Holdings will manage and direct the day-to-day operations of the stations and operate the stations in compliance with the applicable rules and regulations of the Commission; Holdings will employ all of the employees who are necessary for the operation of the stations; all revenues received from the operation of the stations shall be for the benefit of Holdings and all expenses and capital costs incurred in operating the stations shall be the responsibility of Holdings; and Holdings shall

not receive any compensation from the Assignee for the services provided by Holdings.

A copy of the Assignment and Use Agreement will be provided to the Commission when the required ownership reports are filed reflecting consummation of the proposed transactions.

If there are any questions concerning the matters discussed herein, please do not hesitate to contact the undersigned.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: _____
William S. Reyner, Jr.
Mace J. Rosenstein

Attorneys for Fox Television Stations, Inc.

WSR/csj
cc: Clay Pendarvis
Molly Fitzgerald

CERTIFICATE OF SERVICE

I, Angela J. Campbell, hereby certify that I have this 22nd day of November, 2000, mailed by First Class mail, postage prepaid, a copy of the "Reply to Joint Opposition of Fox and Chris-Craft" to the following:

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