

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-469

In re Applications of)
)
STOCKHOLDERS OF CBS INC.)
(Transferor))
)
and)
)
WESTINGHOUSE ELECTRIC)
CORPORATION)
(Transferee))
)
For Transfer of Control of)
CBS, Inc., Licensee of)
WCBS-TV, New York, New York)
WCBS(AM), New York, New York)
WCBS-FM, New York, New York)
KCBS-TV, Los Angeles, California)
KNX(AM), Los Angeles, California)
KCBS-FM, Los Angeles, California)
WBBM-TV, Chicago, Illinois)
WBBM(AM), Chicago, Illinois)
WBBM-FM, Chicago, Illinois)
WGPR-TV, Detroit, Michigan)
WWJ(AM), Detroit, Michigan)
WYST-FM, Detroit, Michigan)
WCCO-TV, Minneapolis, Minnesota)
KCCO-TV, Alexandria, Michigan)
KCCW-TV, Walker, Minnesota)
WCCO-AM, Minneapolis, Minnesota)
WLTE-FM, Minneapolis, Minnesota)
WFRV-TV, Green Bay, Wisconsin)
WJMN-TV, Escanaba, Michigan)
WPRI-TV, Providence, Rhode Island)
WGMP(AM), Philadelphia, Pennsylvania)
WOGL-FM, Philadelphia, Pennsylvania)
KCBS(AM), San Francisco, California)
KRQR-FM, San Francisco, California)
WODS-FM, Boston, Massachusetts)
WARW-FM, Bethesda, Maryland)
KRRW-FM, Dallas, Texas)
KTXQ-FM, Fort Worth, Texas)
KKRW-FM, Houston, Texas)

File Nos. BTC, BTCH, BTCCT-
950803KF through 950803LI

KMOX(AM), St. Louis, Missouri)
KLOU-FM, St. Louis, Missouri)

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1995

Released: November 22, 1995

By the Commission: Chairman Hundt and Commissioners Quello, Barrett, Ness, and Chong
issuing separate statements.

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INTRODUCTION

1. The Commission has before it for consideration the above-captioned applications seeking consent to the transfer of control of CBS Inc. (CBS) from the shareholders of CBS to Westinghouse Electric Corporation (Westinghouse). CBS is a publicly traded media company which operates the CBS Television Network, the CBS Radio Network, and through its other divisions, produces, acquires and distributes broadcast programming throughout the world. It is also the licensee of seven full-service television stations, three "satellite" television stations, thirteen FM radio stations, and eight AM stations. Westinghouse, which is a diversified manufacturer with interests in electrical generating equipment, electronics systems and equipment for defense and civil aviation, office furnishings, and transport temperature control products, is the indirect licensee of, or controls the licensee or permittee of, nine full-service television stations,¹ eight FM radio stations,² and ten AM radio stations.³ Pursuant to the Agreement and Plan of Merger executed by CBS and Westinghouse on August 1, 1995, CBS is to become a wholly-owned subsidiary of Westinghouse. Subject to, inter alia, the approval of at least two-thirds of the CBS shareholders, which was received on November 16, 1995, Westinghouse will acquire CBS for \$81 per share plus six-percent annual interest, calculated from August 31, 1995 to the closing date.

¹ Westinghouse is the indirect licensee of: KPIX-TV, San Francisco, licensed to Group W Broadcasting, Inc. (Group W), a subsidiary of Westinghouse; KDKA-TV, Pittsburgh, WBZ-TV, Boston, and WJZ-TV, Baltimore, licensed to Group W Broadcasting, L.P. (Group W, L.P.), whose sole general partner is Group W. In addition, Westinghouse is the controlling entity of Group W/CBS Television Stations Partners, the permittee of KUSG(TV), St. George, Utah, and the licensee of KYW-TV, Philadelphia, WFOR-TV, Miami, KUTV(TV), Salt Lake City, and KCNC-TV, Denver.

² Those stations are: KPIX-FM, San Francisco, licensed to Group W; KIKK-FM, Houston, licensed to Group W, L.P.; WLLZ-FM, Detroit, and KILT-FM, Houston, licensed to Group W Radio, Inc. (Hou./Wash.), a subsidiary of Westinghouse; WNEW(FM), New York City, and WMMR(FM), Philadelphia, licensed to Group W Radio, Inc. (N.Y.), which is 50.1%-owned by Westinghouse and 49.9%-owned by Group W Radio, Inc. (Hou./Wash.); and KTWV(FM), Los Angeles, and WXRT(FM), Chicago, licensed to Group W Radio, Inc. (L.A.), a subsidiary of Group W Radio, Inc. (N.Y.).

³ Those stations are: KPIX(AM), San Francisco, licensed to Group W; KFWB(AM), Los Angeles, KIKK(AM), Pasadena, Texas, KDKA(AM), Pittsburgh, KYW(AM), Philadelphia, WINS(AM), New York City, WMAQ(AM), Chicago, and WBZ(AM), all licensed to Group W, L.P.; KILT(AM), Houston, licensed to Group W Radio, Inc. (Hou./Wash.), and WSCR(AM), Chicago, licensed to Group W Radio, Inc. (L.A.).

2. As a result of its purchase of the CBS network, including the CBS-owned and -operated television and radio stations, Westinghouse would ultimately own or control 58 broadcast stations. To effectuate its merger with CBS without violating the Commission's local and national ownership rules, which are intended to promote the public interest by limiting concentration and enhancing diversity, Westinghouse requests eighteen temporary or permanent waivers of those rules. Specifically, Westinghouse seeks two temporary waivers of the radio contour-overlap rule, one permanent waiver and one temporary waiver of the television duopoly rule, three permanent and six temporary waivers of the one-to-a-market rule, a temporary waiver of the national television ownership cap and audience reach rule, a temporary waiver of the national radio ownership cap, and three television satellite exemptions to the multiple ownership rules. The greatest number of waivers we have granted a single party to a merger prior to this proceeding is five. See Capital Cities Communications, Inc., 59 RR 2d 451 (1985).

3. Petitions to deny the applications were timely filed by Office of Communication of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Dr. Everett Parker, and other representatives (collectively, UCC), Spectrum Detroit, Inc. (Spectrum), and Alexander J. Serafyn. Duquesne Light Company (Duquesne Light) filed comments. Westinghouse opposed all petitions and comments. Spectrum and Serafyn filed a consolidated reply. On September 20, 1995, UCC requested Commission approval to withdraw its petition. Serafyn and the Ukrainian Congress Committee of America, Inc. (collectively, Ukrainian Congress) on October 20, 1995 jointly filed a petition to revoke or set for hearing all of the broadcast licenses held by CBS. The joint petition requests that the Commission treat the pleading as a petition to deny the renewal application of CBS for station WARW(FM), Bethesda, Maryland (File No. BRH-950612YA), against which the Ukrainian Congress has filed a competing application (File No. BPCT-950901ME). CBS opposed the Ukrainian Congress petition on October 26, 1995, and the Ukrainian Congress replied on November 2, 1995. Although the Ukrainian Congress petition was not filed in the merger proceeding before us, we shall consider it here so that we may resolve any basic character allegations raised against CBS and determine whether the merger may proceed. On November 2, 1995, a late-filed petition to defer action on the merger application was filed by Oleg Nikolyszyn.⁴

⁴ Several letters were also submitted to the Commission in opposition to the CBS-Westinghouse merger, either by individuals, businesses, or organizations. Only some of the letters were timely filed, but we shall, for public interest reasons, consider the merits of the allegations contained in letters submitted in this proceeding. The National PTA submitted a letter in support of UCC's petition. Donald Jackson of the Refuge Foundation in Rochester, New York, opposes the merger because, he alleges, Westinghouse "will not allow a non-lawyer to appear on T.V. to discuss the United States Constitution." The editorial judgment of a licensee is a matter beyond the Commission's "proper area of concern." E.g., Hon. Harley O. Staggers, 25 RR 2d 413, 414 (1972). Therefore, we shall dismiss this opposition

4. As more fully discussed below, we shall grant UCC's request to withdraw its petition. Notwithstanding that action, pursuant to our case law, we shall consider the merits of the

because it fails to raise a prima facie case that Westinghouse is unqualified to be a Commission licensee. J.J. Harrington, the president of International Energy Corporation in Havertown, Pennsylvania, alleges that Westinghouse is "not competent" to assume ownership of CBS because it has "neglected to disclose to the public," via its Securities and Exchange Commission-required documents, that International Energy and others are suing Westinghouse for matters unrelated to its broadcast properties. While it may be true, as International Energy asserts, that an official at the SEC "confirmed" that failure to disclose such information is a violation of SEC rules, there is no evidence that the SEC has determined that Westinghouse has violated SEC rules. In determining character qualifications of broadcast applicants, we shall consider only adjudicated violations of SEC rules. See Paramount Stations Group of Philadelphia Inc., FCC 95-360 at ¶8 (released August 24, 1995). Thus, International Energy has also failed to make a prima facie case that Westinghouse is not fit to be a licensee. For the same reason, we dismiss the opposition of Betty Halperin, of Cerritos, California, who opposes the merger based upon CBS's alleged non-disclosure in SEC filings of suits filed against it in Los Angeles Superior Court by Halperin. We also dismiss Halperin's second ground of opposition, that CBS allegedly "has abused its public trust" by "ordering a national news black-out on these Superior Court cases," because she has failed to furnish extrinsic evidence of such purported news suppression. See, e.g., American Broadcasting Cos., 83 FCC 2d 302, 305 (1980); see also paragraphs 29-30, infra. Simulation Technologies Corporation (STC), composed of workers and investors of Native American, Asian, and Hispanic heritage, filed a late "Protest" against the merger based upon Westinghouse's allegedly ethnically discriminatory conduct toward STC in a business transaction. The Commission has consistently held that it is not the proper forum for resolving a private dispute. E.g., Decatur Telecasting, Inc., 7 FCC Rcd 8622, 8624 (1992); John R. Runner, Receiver, 36 RR 2d 773, 778 (1976); see also Listener's Guild, Inc. v. FCC, 813 F.2d 465, 469 (D.C. Cir. 1987). Accordingly, we dismiss the STC protest. Finally, M. Delphia Block, a resident of Pittsburgh, submitted a letter contesting Westinghouse's acquisition of CBS due to the broadcast on Westinghouse's KDKA(AM) of the Rush Limbaugh show, which, according to Block, "delivers detrimental comments about women." The Commission accepts a licensee's good faith programming judgments, absent a showing that a licensee has followed "either a pattern of prejudice or policy of exclusion" or has consistently failed to respond to problems which, under the circumstances, the licensee could not reasonably or in good faith ignore. Both the First Amendment and Section 326 of the Act forbid us from curbing expression, outside narrowly defined classes of speech, such as indecency, that does not involve "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Fox Television Stations Inc., 8 FCC Rcd 5341, 5354 (1993)(quoting Anti-Defamation League of B'Nai B'rith, 4 FCC 2d 190, 191 (1966), aff'd, 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969)). Thus, Block's allegation, even if true, would not provide grounds for disqualifying Westinghouse as a licensee.

allegations raised by UCC in that petition. For reasons that follow, (1) we find that the UCC petition raises no substantial and material questions of fact so as to preclude grant of the broadcast applications underlying the CBS-Westinghouse merger, (2) we deny the petitions separately filed by Spectrum, Serafyn and Nikolyszyn, (3) we dismiss the comments of Duquesne Light, and (4) we deny the petition to revoke filed by the Ukrainian Congress. For the reasons set forth and to the extent noted below, we shall grant the waivers sought. The temporary waivers shall be granted for a period of twelve months except for waivers of the television duopoly rule for Boston/Providence and the one-to-a-market rule involving the Providence station. Having resolved all allegations directed against CBS and Westinghouse, including those that relate to those applicants' basic qualifications to sell or buy broadcast stations, and finding that the merger is in the public interest, we shall grant the transfer of control of all of the CBS-held licenses, as well as the right to continue operation of WARW(FM), Bethesda, to Westinghouse.

PETITIONS TO DENY/COMMENTS

Standards of Review

5. Section 309(d) of the Communications Act, as implemented by Section 73.3584 of the Commission's Rules for the broadcast service, provides that "[a]ny party in interest may file with the Commission a petition to deny any application. . . ." Preliminarily, such petitions must contain "specific allegations of fact." 47 U.S.C. §309(d)(1). If the facts alleged are specific, the Commission must determine whether those facts, if true, show that grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity.⁵

6. When a petitioner fails to establish a prima facie case, the petition may be denied without a hearing. However, when a petitioner makes such a case and presents a "substantial and material" question of fact, it is entitled to a hearing on its allegations. 47 U.S.C. §309(e).⁶ The Commission is not required to resolve, through a hearing, issues which the Commission finds are neither "substantial" nor "material," regardless of whether the facts

⁵ Prima facie sufficiency means "the degree of evidence necessary to make, not a fully persuasive case, but rather what a reasonable factfinder might view as a persuasive case -- the quantum, in other words, that would induce a trial judge to let a case go the jury even though he himself would (if nothing more were known) find against the plaintiff." Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985)(emphasis in original).

⁶ A "substantial" question of fact is one in which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." Citizens for Jazz on WRVR v. FCC, 775 F.2d at 395. A "material" fact is one the Commission finds relevant in making its public interest determination. Stone v. FCC, 466 F.2d 316, 323 n. 18 (D.C. Cir. 1972) (citing H.R. Rep. No. 1800, 86th Cong., 2d Sess 12 (1960)).

involved are in dispute. Stone v. FCC, 466 F.2d at 323. Where the facts required to resolve a question are not in dispute and the disposition of a petitioner's claims turns not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be drawn from those facts, the Commission need not hold a hearing. Id. If the Commission finds that there are no substantial and material questions of fact and that a grant of the application would be consistent with the public interest, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, disposing of all substantial issues raised by the petition. 47 U.S.C. §309(d)(2).

7. In the case of a transfer or assignment application, determining whether grant of the application would be consistent with the public interest must, under Section 308(b) of the Act, as incorporated by reference into Section 310(d), focus on the "citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station. . . ." 47 U.S.C. §308(b). Citizenship qualifications relate to compliance with the statutory alien voting and ownership benchmarks of Section 310(b) of the Act; financial qualifications relate to the ability to finance the proposed transaction and to operate the stations for three months; and technical qualifications relate to the conformance of the engineering aspects of the stations to Commission rules. Basic character qualifications may, among other things, entail review of the applicant's compliance with the Communications Act and Commission rules, including both programming and non-programming rules. A pattern of behavior involving persistent and unremedied violations of a rule, such as, for example, repeated EEO violations, noncompliance with tower lighting rules, or violations of the indecency restrictions, may raise a question as to the applicants' fitness and would be considered. The "other qualifications" considered include whether the proposed transaction follows the Commission's multiple ownership rules or, if not, whether the waiver sought propounds offsetting benefits to the public interest. The Commission cannot, however, consider whether the public interest, convenience and necessity might be better served by the transfer or assignment of the license to a person other than the proposed transferee or assignee. See 47 U.S.C. §310(d).

8. A petitioner which later seeks to withdraw its petition to deny, either unilaterally or as part of an agreement with the applicant, may do so upon Commission approval. See 47 C.F.R. §73.3588. To obtain such approval, the petitioner, as well as the applicant if the request is premised upon a bilateral agreement, must submit an affidavit stating that no consideration in excess of legitimate and prudent expenses has been paid in exchange for dismissal of the petition. Id. at §73.3588(a). Even where the Commission dismisses the petition to deny, it considers the merits of that petition. Booth American Company, 58 FCC 2d 553, 554 (1976).

9. It is against these standards that we consider the petitions to deny and comments filed in this proceeding. In so doing, we find that none of the petitioners or commenters has raised a substantial or material question of fact warranting designation for a hearing on any matter.

UCC's Petition to Deny

10. UCC petitioned to deny the applications, arguing that the proposed merger necessitates numerous rule waivers which pose a "significant detriment" to diversity. Specifically, UCC opposed Westinghouse's requests for temporary, eighteen-month waiver of the national television ownership cap, the television duopoly rule for the merged entity's Boston/Providence combination, and the one-to-a-market rule in six markets.⁷

11. UCC also argued that Westinghouse's record regarding children's educational programming called its fitness as a licensee into question. While acknowledging that there is currently no mandated quantity of children's programming, UCC measured that amount of programming broadcast by five of the Westinghouse television stations⁸ against the three-hour-per-week "core programming" standard proposed by the Commission in its pending rule making proceeding. See Notice of Proposed Rule Making in MM Docket No. 93-46 (NPRM), 10 FCC Rcd 6308 (1995).⁹ According to UCC, the average per week amount of core children's educational programming actually aired never exceeded three hours per week, except in six quarters.

12. In response, Westinghouse argued that its waiver requests, necessary in order to permit consummation of the merger, "are completely consistent with existing and long-standing Commission practice and precedent." With respect to the children's programming-related allegations, Westinghouse asserted that notwithstanding UCC's conclusions, which were predicated upon only a proposed standard, all Westinghouse television stations are in "full compliance" with the Children's Television Act (CTA) as currently implemented by the Commission. Westinghouse stated that during the period analyzed by UCC, license renewal applications were filed for four of the five Westinghouse stations, three of which, KDKA-TV, WBZ-TV, and KPIX-TV, were granted by the Commission. The renewal application

⁷ For a detailed discussion of UCC's allegations relating to Westinghouse's waiver requests, see paragraphs 64, 83, and 93, infra.

⁸ Westinghouse is the ultimate licensee or controlling entity of the licensee of eight television stations and the controlling entity of the permittee of one television station. However, three of the operating television stations, KCNC-TV, Denver, WTVJ-TV, Miami, and KUTV-TV, Salt Lake City, were only recently acquired by a Westinghouse-controlled entity, Group W/CBS Television Stations Partners, on September 10, 1995, subsequent to the September 8, 1995 date for filing petitions to deny the merger application now before us.

⁹ It appears that UCC relies on the standards for "core" programming as provided in the Commission's recent NPRM. There, it was proposed that to qualify as children's programming, a program must: be specifically designed to meet the educational and informational needs of children ages 16 and under; specify the educational objective and target audience in writing in the station file; be of substantial length; be regularly scheduled; and be aired between 6:00 a.m. and 11:00 p.m. NPRM, 10 FCC Rcd at 6323-31.

for the fourth station, KYW-TV, is, according to Westinghouse, pending due to an unrelated petition to deny. Westinghouse's fifth television station, WJZ-TV, Baltimore, filed its most recent renewal application in May 1991, prior to implementation of the CTA. All five stations, asserted Westinghouse, presently "endeavor" to schedule at least two hours per week of educational and informational programming for children.

13. On September 20, 1995, in partial response to the UCC petition, Westinghouse announced plans to voluntarily increase the amount of children's programming provided by the CBS television network and aired on its owned and operated stations. A copy of the Westinghouse public announcement is attached to Westinghouse's opposition. Under the voluntary proposal, by fall 1996, Westinghouse will double network children's programming from the one hour now broadcast on the CBS network to two hours, and will add a third hour by the beginning of the fall 1997 season. Westinghouse states that these programs will be "specifically designed to serve the educational and informational needs of children," and will be broadcast after 7:00 a.m. to ensure that "it will be accessible to the greatest number of young viewers." This "initiative," according to the Westinghouse announcement, will run for three years, through the end of the 1998-1999 season, after which "its effectiveness will be thoroughly evaluated by Westinghouse." With respect to its owned and operated stations, including those to be acquired from CBS through the proposed merger, Westinghouse states in its opposition that it plans to voluntarily program a total of at least three hours of children's programming, including network and other programming, by the fall of 1996.

14. Also on September 20, 1995, UCC requested dismissal of its petition, based upon Westinghouse's "voluntary commitment" to broadcast children's programming contained in its opposition and its public announcement. In light of those representations, argued UCC, the public interest will be well served by grant of the application. The affidavits required under Section 73.3588 of the Commission's Rules have been submitted. Accordingly, we shall dismiss UCC's petition, but consistent with our precedent, we will consider the merits of its allegations against the applications to insure that the public interest will be served by grant of these applications. Booth American Company, 58 FCC 2d 553, 554 (1976). Similarly, while we acknowledge the voluntary proposal by Westinghouse to increase the amount of children's programming on the CBS network and on its owned and operated stations, we do not condition our approval of this transaction upon implementation of this proposal.

15. In this case, the issue at the core of the UCC petition's fitness allegations is the adequacy of Westinghouse's compliance with the CTA. UCC has suggested that we measure Westinghouse's performance against the standard of three hours of core children's educational programming proposed in our NPRM.¹⁰ As acknowledged by both parties, however, there is no express quantitative Commission standard or an express processing

¹⁰ The quantitative standard cited by UCC is one of several proposals set forth in NPRM, 10 FCC Rcd 6308.

guideline as to what constitutes an adequate amount of programming for compliance with the CTA, 47 U.S.C. §303b, or the Commission's Rule implementing that statute, 47 C.F.R. §73.671. See NPRM, 10 FCC Rcd at 6314-15. Currently, our rules state that a broadcaster must air "some" standard-length children's programming in order to fulfill its obligations under the CTA. See Memorandum Opinion and Order in MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 5093, 5100-01 (1991); see also Notice of Inquiry in MM Docket No. 93-48, 8 FCC Rcd 1841, 1842 (1993). For this reason, we cannot apply the standard proposed by UCC to determine Westinghouse's compliance with the CTA.

16. In the transfer context here, we need not determine whether Westinghouse's performance at each of its owned and operated stations was, in fact, sufficient fully to comply with the CTA. The question before the Commission is whether the extent of Westinghouse's children's programming reflects a pattern of behavior involving such persistent and unremedied violations of the CTA as to call into question Westinghouse's basic fitness to be a licensee.

17. We cannot conclude that petitioners have established a prima facie case of such a pattern of violation. As Westinghouse points out, we have renewed the licenses of three of its five owned and operated stations since the effective date of the CTA.¹¹ To the extent that UCC has also raised allegations regarding post-renewal conduct, we conclude that those allegations are appropriately considered at renewal. See Section 103 of CTA, 47 U.S.C §303b. Nothing in this record establishes a clear pattern of violation of the CTA that would warrant earlier consideration. For this reason, we conclude that Westinghouse possesses the qualifications to be a licensee.

18. In addition to the above, we acknowledge the voluntary commitment made by Westinghouse to increase the amount of educational and informational children's programming aired on the CBS network. This commitment is voluntary and we find that Westinghouse's efforts to increase the amount of children's educational and informational programming broadcast are in the public interest.

19. UCC's contentions with respect to Westinghouse's specific requests for temporary and permanent waiver of various ownership limits contained in our rules shall be addressed separately in the discussion of those waivers below. Each of Westinghouse's requests shall

¹¹ The renewal applications of four of Westinghouse's five television stations that are the subject of UCC's petition, KDKA-TV (BRCT-940331KI), KPIX-TV (BRCT-930802KH), WBZ-TV (BRCT-931130KT), and KYW-TV (BRCT-940331KH), were filed after the effective date of the CTA. Three of those renewal applications were granted: KDKA-TV, on July 29, 1994; KPIX-TV, on April 18, 1994; and WBZ-TV, on April 21, 1994. The fourth, for KYW-TV, is pending due to an unrelated petition to deny. The renewal application for the fifth Westinghouse television referred to in the UCC petition, WJZ-TV (BRCT-910531KF), was filed prior to the CTA's effective date.

be evaluated against Commission standards established for waiver of the particular rule implicated and with due consideration of UCC's specific allegations.

Spectrum, Serafyn and Nikolyszyn Petitions to Deny

20. Spectrum and Serafyn separately assert that the Commission should deny or defer action on the merger or, in the alternative, approve the merger expressly conditioned upon the outcome of their consolidated court appeals of the Commission's recent approval of CBS's acquisition of WGPR-TV, Detroit.¹² See WGPR, Inc., 10 FCC Rcd 8140 (1995). Nikolyszyn, in his late-filed petition, also requests deferral of action on the merger, but argues that, alternatively, "in order to prevent unjust enrichment and irreparable harm," the Commission should require CBS to place into escrow the monetary value of the economic benefits to be paid to departing CBS executives upon consummation of the merger. Those "certain key individuals," whose names and designated compensation Nikolyszyn states were retrieved from a CBS proxy statement, "were and are responsible," according to Nikolyszyn, for the conduct alleged in the several petitions filed against CBS. Therefore, Nikolyszyn concludes, the monies paid to those CBS executives would have to be collected in the event the merger were required to be unwound as a result of a court of appeals judgment in favor of the petitioners in the WGPR-TV proceeding or a Commission decision in favor of the Ukrainian Congress's petition to revoke.¹³ Placing the monies in escrow pending Commission or court resolution of the allegations, Nikolyszyn contends, is the only means for maintaining the "status quo" of all interested parties and from preventing irreparable harm and unjust enrichment.

21. In the earlier WGPR-TV proceeding, Spectrum opposed the CBS application predicated primarily upon the allegation that CBS had assumed premature control of WGPR-TV through the local marketing agreement it had entered into with then-licensee WGPR, Inc. concurrently with the execution of the purchase and sale agreement for the station. Spectrum, a Michigan corporation owned by seven African-American individuals, also argued that the WGPR-TV application should have been designated for hearing to determine whether the public interest would be served by the sale of the minority-owned television

¹² Nikolyszyn, a Ukrainian-American resident of the WPRI-TV viewing area, petitioned to deny CBS's application for the purchase of WPRI-TV, Providence, Rhode Island (File No. BALCT-950315KE), raising allegations nearly identical to those made by Serafyn in the then-pending WGPR-TV proceeding. Accordingly, the staff conditioned approval of the WPRI-TV application upon resolution of the petition to deny the WGPR-TV application. In WGPR, Inc., the Commission noted that its findings with respect to Serafyn's petition would "apply with equal force" to Nikolyszyn's petition, and, in that order, removed the condition placed upon the WPRI-TV grant. 10 FCC Rcd at 8146 n.16, 8149.

¹³ The allegations in the Ukrainian Congress petition to revoke are discussed in paragraphs 36-41, infra.

station to CBS. The objections of Ukrainian-American citizens Serafyn and Nikolyszyn to the CBS application were based upon their assertion that CBS was not qualified to be a Commission licensee because it distorted a news report relating to Ukrainians in an October 1994 episode of "60 Minutes." Serafyn also alleged more generally that CBS's programming is not in the public interest. The Commission denied the Spectrum, Serafyn, and Nikolyszyn petitions in WGPR, Inc. and granted the assignment application. The three petitioners appealed the Commission decision to the United States Court of Appeals for the District of Columbia Circuit. Case Nos. 95-1385, 95-1440, 95-1443.

22. Neither the Communications Act nor any Commission rule or policy mandates the maintenance of the status quo pending a judicial appeal of its order. Evans v. FCC, 113 F.2d 166, 169 (1940); Pinelands, Inc., 7 FCC Rcd 6058, 6061 (1992). Absent unresolved issues of an applicant's basic qualifications, the Commission does not ordinarily defer action in a transfer proceeding involving that applicant. See, e.g., Pinelands, Inc., 7 FCC Rcd at n.11; Boise Valley Broadcasters, Inc., 53 FCC 2d 823, 824-25 (1975). The Commission, in WGPR, Inc., 10 FCC Rcd 8140, denied the control and news distortion allegations raised by Spectrum, Serafyn, and Nikolyszyn and found CBS to be a qualified licensee. Thus, having fully resolved all qualifications issues in the WGPR proceeding, the Commission need not defer action here. Further, we note that our action in the CBS-Westinghouse merger does not prejudice Spectrum, Serafyn and Nikolyszyn in that our grant of the WGPR-TV application is subject to Section 402(h) of the Act. That statutory provision states that in the event the court renders a decision reversing the Commission order, it will remand the case to the Commission to carry out the court's judgment. 47 U.S.C. §402(h). Accordingly, Spectrum, Serafyn and Nikolyszyn are not precluded from any legal redress accorded them in their appeals of our decision in WGPR, Inc. Indeed, all applicants, including CBS and Westinghouse, bear all potential costs in consummating a Commission-approved transaction that is later reversed by the Court of Appeals. E.g., Teleprompter Corp., 87 FCC 2d 531, 575 (1981), stay denied, 50 RR 2d 125 (1981), aff'd on recon., 89 FCC 2d 417 (1982); see also Pacifica Foundation, 24 FCC 2d 816, 817-18 (1970)(applicants on notice that they are proceeding at their own risk pending judicial review).

23. Whether unwinding the merger requires redemption by CBS of monies paid out to its executives at the time of the merger is a matter to be resolved by CBS and Westinghouse, and not by the Commission. Moreover, if CBS were found to be unqualified to hold its licenses due to the conduct of its executives, the ultimate sanction by the Commission would be revocation of licenses, not garnishment of the executives' benefits received upon closing of the merger. Thus, the petitioners have not demonstrated the irreparable harm that will ensue from the payment of CBS executives at the time of the merger. We find no justification for holding those executives' benefits in escrow pending final resolution of the Spectrum, Serafyn, Nikolyszyn and Ukrainian Congress petitions. In light of the conditions inherent in any court-appealed Commission order, we also find no basis for deferring action here or for expressly conditioning any action in this proceeding upon the ultimate judgment of the court. We remind Westinghouse that it proceeds at its own risk vis-a-vis WGPR-TV, Detroit.

24. In addition to the WGPR-TV-related allegations, Serafyn points to Section III of the application, which asks the transferee to certify whether "sufficient net liquid assets are on hand or are available from committed resources to consummate the transaction and operate the facilities for three months." Rather than respond "Yes" or "No" to that item, as requested by Section III, Westinghouse indicated in its Exhibit 7 that of the \$5.4 billion purchase price, two banks had each committed to lend \$1 billion and had "agreed to arrange the remainder of the financing." Westinghouse added that it "expects to have received firm commitments for the balance of the financing by mid-September." Serafyn contends that as of September 1, 1995, when he filed his petition, Westinghouse had not amended its application to show that it has sufficient financing to consummate the transaction. Additionally, Serafyn asserts that Westinghouse's Exhibit 7 failed to address the second part of the Section III question, that is, whether it will have sufficient funds to operate the facilities for three months.

25. On September 14, 1995, Westinghouse amended its application, affirmatively certifying that it has sufficient net liquid assets on hand or available from committed resources to consummate the merger and to operate the facilities for three months. Attached to the amendment is a copy of the 86-page credit agreement executed by Westinghouse and a consortium of 50 banks. Nevertheless, quoting from the recitals of the Credit Agreement, Serafyn concludes, in his response to the Westinghouse financial amendment, that the bank loans are to be utilized only "to finance the merger, to pay related fees and expenses, to refinance certain indebtedness of Westinghouse and CBS and for general corporate purposes." Thus, according to Serafyn, although the credit agreement provides sufficient funds to purchase the CBS stations, satisfying the first portion of the financial certification, it makes no allotment for the cost of operations, leaving unanswered the second portion of the certification. Further, Serafyn looks to Westinghouse's most recent quarterly financial statement filed with the Securities and Exchange Commission, Form 10-Q, and contends that the company is "deeply in debt," thereby placing "into question" its ability to operate the CBS stations.

26. Serafyn's allegation regarding the sufficiency of the \$7.5 billion credit agreement between the 50-bank consortium and Westinghouse is without merit. He cites no provision in the credit agreement, and we discern none, which precludes Westinghouse from utilizing the loan proceeds to finance the \$5.4 billion merger and to operate the stations for at least three months. Indeed, Section 5.13 of the credit agreement provides that Westinghouse may borrow up to five million dollars on a term loan basis "to finance the merger and to pay related fees and expenses" and up to an additional \$2.5 million on a revolving credit basis "to refinance the existing bank debt of Westinghouse . . . and CBS, to finance the Merger, to pay related fees and expenses and for general corporate purposes" Further, Section 1.1 of the credit agreement states that the revolving credit loans mature on the seventh anniversary of the merger, providing Westinghouse with a working capital line of credit well beyond the three-month operation period contemplated by the financial qualifications requirement. Finally, with respect to Serafyn's contention that the merger with CBS will over-leverage Westinghouse so as to affect its ability to operate the CBS stations, we

emphasize that the Commission generally refrains from interfering with a company's capital structure or from questioning a lending institution's determination that the merged entity will be financially able to repay the loans. See MMM Holdings, Inc., 4 FCC Rcd 6838, 6842 (CCB, MMB), aff'd on review, 4 FCC Rcd 8243 (1989); Macfadden Acquisition Corp., 104 FCC 2d 545, 567 (1986); Tender Offers and Proxy Contests, 59 RR 2d 1536, 1568 n.144 (1986).

Duquesne Light Comments

27. Duquesne Light submits comments stating that Commission approval of the merger should be "appropriately" conditioned so as to "insure" that Westinghouse's control of the news division of the CBS network does not lead to "slanted information or misinformation" which may result in direct or indirect detriment to competitors to, as well as users of, Westinghouse's non-broadcast products and service. Duquesne Light suggests that such a condition is necessitated by Westinghouse's status as a "conglomerate," which, according to Duquesne Light, "at times has adverse interests against the subjects of its broadcast coverage." As an example, Duquesne Light cites Westinghouse's pending litigation with Duquesne Light and other utility companies in connection with Westinghouse's steam generators and alleges that it has been subject to "adverse" and "grossly unbalanced" news coverage by Westinghouse's KDKA-TV, Pittsburgh. Television station KDKA-TV, according to Duquesne Light, has omitted coverage of the power company's "newsworthy activities, including its contributions to charitable, educational, environmental and community causes." Duquesne Light contends that it contacted the chief executive officer of the broadcasting unit of Westinghouse, Westinghouse Broadcasting Company, proposing to meet to review the alleged unbalanced broadcast coverage and potential conflicts, but was "rebuffed." Westinghouse, asserts Duquesne Light, should be required to provide "precise commitments" to insulate its broadcast news coverage from all influence by the non-broadcast units of Westinghouse, and this commitment should be made a condition of Commission grant of the merger.

28. Duquesne Light alleges, in essence, that Westinghouse (1) has engaged in the suppression and slanting of news at its KDKA(TV), (2) has elevated its private interests above those of the public, and (3) may continue these activities in the future as the controlling entity of CBS. In addressing these allegations, we note that the Commission does not attempt to direct licensees in the selection or presentation of specific material. Rather, the Commission endeavors to balance the licensee's obligation to operate in the public interest with the licensee's editorial judgment. KMAP, Inc., 72 FCC 2d 241, 244 (1979). Accordingly, the Commission will investigate allegations of news suppression and slanting only where they are supported by "substantial extrinsic evidence" that the licensee has deliberately suppressed or altered a news report. See, e.g., American Broadcasting Cos., 83 FCC 2d 302, 305 (1980); Mrs. J. R. Paul, 26 FCC 2d 591-92 (1969). "Extrinsic evidence" is that evidence outside the broadcast itself and includes written or oral instructions from station management, outtakes, or evidence of bribery. Hunger in America, 20 FCC 2d 143, 151 (1969). In weighing such evidence, the Commission focuses on evidence of actual intent

of the licensee to suppress or distort a news report, not on whether, in the absence of intent to distort, the true facts of the incident are different from those presented. Here, Duquesne Light has failed to meet its burden of pleading in that it proffers no extrinsic evidence to support its allegations. Even were we to rely upon the August 15, 1995 letter sent by Duquesne Light to Westinghouse regarding the issues raised in its comments in this proceeding, the statements contained therein do not constitute extrinsic evidence. At most, Duquesne Light's complaints to Westinghouse about its news coverage of a mid-summer 1995 power outage in Pittsburgh and its failure to provide positive news coverage about Duquesne Light are disputes as to the truth of an event, see Hunger in America, 20 FCC 2d at 150-51, or "embellishments concerning peripheral aspects" of news reports or "attempts at window dressing which concerned the manner of presenting the news." WPIX, Inc., 68 FCC 2d 381, 385-86 (1978)(emphasis in original). Thus, no further inquiry is warranted on the issue of whether Westinghouse deliberately suppressed or slanted news reports relating to Duquesne Light.

29. Because the news-suppression and -slanting allegations are the predicate upon which Duquesne Light contends Westinghouse improperly elevated its private interest above that of the public, we also dismiss its second allegation. Moreover, we note that the Commission will not intervene in a licensee's allegedly improper use of its station unless the conflict of interest leads to practices that pose "substantial risk" of serious harm to listeners or viewers: Elimination of Unnecessary Broadcast Regulation, 57 RR 2d 913, 921 (1985). Practices other than those constituting antitrust violations, the Commission has stated, "are unlikely to have serious harmful effect." Id. Duquesne Light has not alleged such violations. We cannot find, therefore, that Westinghouse's alleged litigation-based conflict of interest, standing alone, presents any substantial risk of harm to its listeners or viewers.

30. Finally, as to Duquesne Light's concern regarding Westinghouse's future conduct as the owner of the CBS network, we observe that no petitioner, including Duquesne Light in its comments, has raised a substantial and material question of fact that Westinghouse is not qualified to be a Commission licensee. However, Westinghouse, in its response to Duquesne Light, indicates that it has long "maintained a policy of non-involvement in the news-gathering and reporting operations of subsidiaries holding licenses to television and radio stations." Thus, we decline Duquesne Light's suggestion that we condition our approval of the merger upon Westinghouse's commitment to insulate its broadcast and news coverage from any influence by its non-broadcast divisions. Accordingly, we find that Duquesne Light's comments raise no substantial and material question of fact that Westinghouse is not qualified to be a Commission licensee.

WARW(FM) RENEWAL APPLICATION/PETITION TO REVOKE

Procedure

31. On September 1, 1995, the Ukrainian Congress filed a competing application against CBS's WARW(FM), Bethesda, Maryland (File No. BPCT-950901ME), and requests that we

treat the petition to revoke that it jointly filed with Serafyn as a petition to deny the WARW(FM) renewal application (File No. BRH-950612YA). Generally, where there are pending both a transfer/assignment application and a renewal application involving the same broadcast station, the Commission refrains from acting on the transfer/assignment application commencing on the date the station's renewal application must be filed, that is, four months prior to the license expiration date. In the event no petitions or objections are filed against the renewal application, the staff may grant the renewal, if it finds that the public interest warrants such action, and may proceed to act upon the transfer/assignment application. In cases where a competing application is filed against the renewal application, the pending transfer/assignment application is generally held in abeyance until the comparative proceeding between the incumbent and challenger is completed. See, e.g., Kaye-Smith Enterprises, 90 FCC 2d 105, 112 (1982). There are two exceptions to this practice. First, where the renewal applicant seeking to sell its station has been challenged by a competing applicant and is in bankruptcy, e.g., Arthur A. Cirilli, Trustee in Bankruptcy, 2 FCC 2d 692, 693 (1966), or its station has been silent or dark for a long period of time, e.g., Northwest Broadcasters, Inc., 3 FCC 2d 571 (1966), the Commission has determined that the public interest is better served by comparing the qualifications of the proposed buyer and the challenger, the two parties intending to operate the station. Under such circumstances, the pending renewal application is retained in hearing and will be granted in the event the assignee prevails in hearing and will be denied in the event the competing applicant prevails. See Northwest Broadcasters, 3 FCC 2d at 573.

32. Second, where the renewal applicant for a single station has been challenged by a competing applicant, is the licensee of several broadcast stations, and seeks to sell all of its stations to a third party, the Commission has determined that the public interest is better served by acting upon the transfer application if such action can be taken without prejudice to the competing applicant. In American Broadcasting Cos., Inc. (ABC-ITT Merger), 7 FCC 2d 245 (1966), recon. denied, 9 FCC 2d 546 (1967), the applicants sought Commission approval for their proposed merger, a transaction which involved the transfer of ABC's seventeen broadcast stations to ITT.¹⁴ The renewal application of one of those stations, WABC(AM), New York City, was pending and subject to a competing application by Hubbard Broadcasting, Inc. (Hubbard), which had also filed a petition to deny the merger. Hubbard's petition did not oppose the merger as a whole, but did oppose transfer of WABC(AM), arguing that ABC had no license capable of being assigned and that the transfer would deprive Hubbard of a comparative hearing against a pre-merger ABC. The Commission rejected Hubbard's contentions, stating that while ABC did not have a license it was entitled to transfer, it did have the right, under former Section 307(d) (now Section 307(c)), to continue operation of WABC(AM) until action upon its license renewal application. "[T]hat much," the Commission added, "is assignable." ABC-ITT Merger, 7 FCC 2d at 261 (citing Stevens Broadcasting, Inc., 3 RR 2d 840, 843-44 (1964), aff'd on other grounds sub nom. Parr v. FCC, 344 F.2d 539 (D.C. Cir. 1965)). And because there

¹⁴ The ABC-ITT transaction was not consummated.

were no outstanding questions related to ABC's basic qualifications, the Commission held that "this situation is not analogous to those in which the Commission first resolves a challenge to the licensee's qualifications before acting on an application for assignment." Id. As to Hubbard's right to a comparative hearing against ABC, the Commission concluded that even if WABC(AM) had been severed from the merger, Hubbard would still not be afforded a comparison with ABC as then constituted, "since all other properties and activities of ABC would have become merged with ITT." Id. Only by holding up the entire merger, the Commission noted, could Hubbard's request be satisfied. "We find no warrant for deferring our acting upon the merger proposal and for consequent deferral of the public benefits we have found it would bring, in order to preserve the status quo of ABC as the licensee." Id. Finally, the Commission emphasized that Hubbard's Ashbacker and procedural and substantive rights would not be impaired because approval of the merger was expressly made without determination of, or prejudice to, any of the issues involved in the comparative hearing. Id.

33. The procedural posture of the parties in ABC-ITT Merger mirrors that found before us: an application to transfer numerous broadcast stations is pending; a renewal application for one of the transferor's stations is pending; and a competing application filed against that transferor's renewal application is pending. However, in this case, unlike in the ABC-ITT case, the competing applicant, the Ukrainian Congress, has raised basic qualifications issues against the transferor CBS in a petition to deny. Ordinarily, where the competing applicant files such a petition to deny, it is dismissed in the hearing designation order as a prematurely filed motion to enlarge issues, a pleading which does not properly lie at the pre-designation stage. See Revised Processing of Broadcast Applications, 72 FCC 2d 202, 213-15 (1979). Because consideration of the Ukrainian Congress petition could, if resolved in CBS's favor, clear CBS of all basic qualifications issues and permit action on the merger application, we shall address the allegations raised in that petition in this proceeding. We may then proceed to apply the procedure utilized in ABC-ITT Merger. But we shall take this action, in part, because of the express willingness of both Westinghouse and CBS that we do so, as detailed in their uncontested, procedure-based pleading of September 29, 1995. Westinghouse, as a result, will assume the consequences associated with succeeding to the place of the current owners of CBS in the renewal application.

34. We believe that this procedural route is consistent with several statutory and policy interests, each designed to promote the public interest. First, if CBS is found to be basically qualified, it will be free to transfer the licenses of its broadcast stations, except for WARW(FM); as to WARW(FM), CBS may transfer only its rights under Section 307(c) of the Act. Second, CBS will have been made accountable for its conduct and performance, as scrutinized by the Commission in response to the petitions that have been filed in the merger proceeding and the petition filed by the Ukrainian Congress in the renewal proceeding. See, e.g., Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964) (resolution of outstanding questions concerning the seller's qualifications is a condition precedent to consideration of a transfer application). Third, the competing application against only one of the 31 CBS-owned and operated broadcast stations will not compel delay of the merger. Fourth, the

Ukrainian Congress will not be deprived of its rights under Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1946), to a comparative hearing. And the public's right to comment will not be vitiated in that the 30-day comment period for both the transfer and renewal applications have run in due course.¹⁵ Finally, this procedure is consistent with the Commission's policy, enunciated in Questions Concerning Basic Qualifications of Broadcast Applicants, 28 RR 2d 705 (1973), that transfers of stations be held in abeyance pending resolution of basic qualifications matters in the renewal proceeding involving the stations sought to be transferred. In Pinelands, Inc., 7 FCC Rcd 6058, 6061 n.11 (1992), the Commission reiterated that transfer applications were to be deferred "only where issues of basic qualifications remained unresolved by the Commission."

35. As for future application of this procedure where the pendency of a transfer application overlaps with the renewal period of one of the stations involved in a multiple-station transfer, we shall employ it so long as there remain no basic qualifications issues against the transferor and transferee that cannot be resolved in acting on the transfer and so long as both the transferor and transferee indicate in the record their express willingness to abide by such a procedure. Where the transfer application is first filed, a potential competing applicant or other party contemplating raising basic qualifications issues in one of the transferor's renewal proceedings should raise such issues in the transfer proceeding. These parties cannot claim lack of notice, because notification of both transfers and renewals are required under Commission Rules. See 47 C.F.R. §73.3580. Where a first-filed transfer application spans the commencement of the renewal period, which begins four months prior to the license expiration date, the Commission shall entertain late-filed petitions in the transfer proceeding if it can be demonstrated that the facts upon which the allegations are based have only recently occurred or been made known to the petitioner or the petitioner only recently decided to file a competing application.¹⁶ Because basic qualifications issues do not constitute comparative criteria in a comparative hearing, see Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1229-1232 (1986), no comparative advantage is lost to competing applicants by requiring that they allege such issues in the transfer proceeding. Such a procedure will inure to the benefit of the public interest by facilitating multiple-station transfers while preserving the right of the public to comment on proposed transactions and the right of a competing applicant to a comparative hearing.

¹⁵ The 30-day public comment period for the merger proceeding terminated on September 8, 1995, and the 30-day public comment period for the renewal proceeding terminated on September 1, 1995.

¹⁶ Of course, the deadline for filing such petitions in the transfer/assignment proceeding cannot extend beyond the date upon which petitions to deny in the renewal proceeding are due, that is, 30 days prior to the expiration of the license.

Ukrainian Congress Petition to Revoke/Deny

36. The Ukrainian Congress petition stems, as did those of Serafyn and Nikolyszyn, from the October 1994 broadcast of "The Ugly Face of Freedom," an episode of "60 Minutes" which allegedly disparaged Ukrainians.¹⁷ In response to that program, according to the Ukrainian Congress, the Ukrainian-American Community Network (UCAN) urged Ukrainian-Americans in the Washington, D.C. area to write letters of complaint to WUSA-TV, the CBS affiliate in that market, while the Ukrainian National Information Service (UNIS) urged Ukrainian-Americans nationwide to write such letters to their CBS affiliates. The Ukrainian Congress asserts that on February 8, 1995, the director of UCAN, Larissa Fontana, visited WUSA-TV, Washington, D.C., to view the public inspection file. Station WUSA-TV is licensed to The Detroit News Inc. and is not a CBS owned and operated station. In her declaration, Fontana states that she found no letters in the file concerning the "60 Minutes" segment. Approximately two weeks later, on February 20, 1995, UCAN filed a complaint with the Commission, alleging that WUSA-TV had violated the Commission's rules governing public inspection files. In a September 11, 1995 letter to the Commission, WUSA-TV acknowledged that it had not properly maintained its public inspection file, but asserted that it had "fully complied with the spirit" of the rule by forwarding all letters it received concerning CBS network programming directly to CBS in New York City. Attached to the WUSA-TV letter to the Commission was a July 17, 1995 memorandum from Ray Faiola, the director of Audience Services at CBS Broadcast Group, stating that letters forwarded to CBS in New York were reviewed by CBS News "and have been sent to long-term storage." The Faiola memorandum noted that it was attaching a "copy of the text of the response which my office sent to viewers who wrote in about this segment."

37. UCAN, according to the Ukrainian Congress, asked leading Ukrainian-American newspapers to publish notices "seeking anyone who may have received a response from CBS." Additionally, maintains the Ukrainian Congress, national Ukrainian organizations were contacted to determine if they or their members had received a response from CBS. Despite these "widely published" notices, concludes the Ukrainian Congress, "not a single person could be found who had received a response from CBS." The Ukrainian Congress has appended to its petition the letters of dozens of Ukrainian-Americans who assert that they

¹⁷ The Ukrainian Congress, in its reply, adds that CBS's "most recent action," of airing on "60 Minutes" a film clip of Julie Andrews allegedly baring her breasts, represents a "separate and independent basis for the revocation of its licenses." A complaint with respect to this incident filed by an unrelated party is currently pending before the Commission. However, even were we to find that CBS's conduct violated the Commission's indecency rules and warranted a Notice of Apparent Liability, such a one-time infraction would not raise a substantial and material question of fact concerning CBS's basic qualifications as a licensee. See, e.g., Beasley FM Acquisition Corp., 9 FCC Rcd 7112, 7114 (1994). Accordingly, this new allegation does not bar grant of the applications now before us.

wrote letters to CBS but did not receive a response. Consequently, the Ukrainian Congress contends that the Faiola memorandum and accompanying response letter constitute a "fraud." As evidence of fraud, the Ukrainian Congress points to a spelling and a grammar error in the CBS response letter, a fact that "makes the letter suspicious" and demonstrates that the letter was never sent. CBS and WUSA-TV, adds the Ukrainian Congress, "have conspired" to misrepresent material facts to the Commission and in knowingly submitting a fraudulent document as evidence in a Commission proceeding, CBS and WUSA-TV have "jeopardized their qualifications as Commission licensees."

38. In response to the Ukrainian Congress's allegations, CBS acknowledges that Faiola erred in informing its affiliate WUSA-TV that CBS had responded to letters of complaint pertaining to the "60 Minutes" program. Faiola, according to his declaration, drafted a form response letter in November 1994, the month following the broadcast of the "60 Minutes" program and forwarded the draft to then-CBS news vice-president Joe Peyronnin for his approval. A copy of Faiola's November 17, 1994 memorandum to Peyronnin and the draft letter are attached to CBS's opposition. The draft letter was approved, states Faiola, and he directed his staff to categorize the approximately 16,000 letters relating to the "60 Minutes" segment on Ukrainians. According to Faiola, that task was expected to take several months. Faiola's staff of ten, he states, handles approximately one-half million pieces of mail each year.

39. In July 1995, when WUSA-TV contacted Faiola via telephone about CBS's response letter, Faiola indicated that reply letters had been dispatched. "At the time," according to Faiola, "my belief was that the responses had in fact gone out." He followed the telephone conversation with a memorandum to WUSA-TV, the one submitted to the Commission by WUSA-TV and cited by the Ukrainian Congress, and "reflexively," attached the draft copy of the response letter instead of the edited version. Faiola states that he does not recall whether WUSA-TV mentioned that the request was related to an FCC inquiry or legal proceeding. In mid-September 1995, when contacted by CBS's attorney in connection with an inquiry from WUSA-TV, Faiola declares that he indicated that the CBS response letter "would have been sent to approximately 25 percent of the persons who had written to CBS about the broadcast." However, Faiola states, he did not attempt to verify whether that percentage was correct or whether the letter had been sent at all. While Faiola maintains that his statements were made in good faith, "I now recognize," he adds in his declaration, "that my failure to do so was careless and negligent." Not until October 23, 1995, when Faiola was asked by CBS counsel to furnish an affidavit in connection with the Ukrainian Congress petition did Faiola realize that he had never instructed his staff to send the CBS form letter. "The responsibility for this lapse -- which I can only attribute to forgetfulness, the passage of time, and preoccupation with budgetary matters and other CBS programs to which there had been a strong public reaction -- is entirely mine," according to the Faiola affidavit.

40. The focus of our concern in this proceeding is not the conduct of WUSA-TV, which is an affiliate of CBS and not a station under CBS's operation and control. The allegations

against the licensee of WUSA-TV, The Detroit News, Inc., will be addressed in the context of UCAN's public inspection file complaint. As for the conduct of CBS, it is alleged by the Ukrainian Congress, in essence, that CBS engaged in misrepresentation to the Commission. Misrepresentation is composed of two elements: a material false statement made to the Commission and an intent to make such a statement. See Pinelands, Inc., 7 FCC Rcd at 6065; Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Even were we to accept as true that CBS did not respond to the letters of complaint pertaining to the "60 Minutes" broadcast, nowhere is it alleged that CBS represented to the Commission that it would do so. CBS's representations on this matter were made to its affiliate WUSA-TV, not to the Commission. Thus, the Ukrainian Congress has failed to make a prima facie case in that it provides no evidence on the first element, that CBS made a false statement to the Commission. As to whether CBS "conspired" with WUSA-TV to misrepresent facts to the Commission, the Ukrainian Congress has provided no evidence that CBS intended to convey false information to the Commission through its affiliate. Indeed, there is no evidence that CBS had any knowledge that its Washington, D.C. affiliate would include the CBS memorandum or response letter in communications to the Commission. In his uncontroverted declaration,¹⁸ Faiola states that he was unaware that WUSA-TV's inquiry to him about the CBS response letters had any connection with the FCC. And while Faiola concedes he was negligent in providing erroneous information to WUSA-TV, such conduct does not rise to the level of intent to deceive. Submitting erroneous information through carelessness, Weigel Broadcasting Co., 2 FCC 2d 1206 (1987), inadvertence, Radio Station WABZ, Inc., 90 FCC 2d 818, 827 (1982), aff'd sub nom. Victor Broadcasting, Inc. v. FCC, 722 F.2d 756 (D.C. Cir. 1983), or even gross negligence, Publix Television Corp., 36 FCC 1215 (1964), does not constitute misrepresentation. Finally, CBS had no apparent motive to misrepresent its actions because it has no obligation under the Communications Act or Commission rules to respond to viewer mail. See WMOZ, Inc., 36 FCC 202, 209 (1964)(motive always an issue in misrepresentation cases). Accordingly, we deny the petition to revoke/deny filed by the Ukrainian Congress.

41. Having resolved the basic qualifications issues raised against CBS in its favor, no such issues pose an impediment to the transfer to Westinghouse of the CBS broadcast licenses and

¹⁸ In its reply, the Ukrainian Congress speculates about the veracity of Faiola's declaration and argues, citing Beaumont Branch of the NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988), that the Commission has the responsibility to inquire into CBS's "sketchy and contradictory" statements pertaining to a "material question of fact." The Ukrainian Congress's allegations with regard to Faiola's declaration fail to meet the threshold requirements of Section 309(d) of the Act because they are not supported by an affidavit from a person with personal knowledge thereof and because they represent only "ultimate, conclusory facts or more general allegations based on information and belief." Bilingual Bicultural Coalition v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978)(quoting S. Rep. No. 630, 86th Cong 1st Sess 3 (1959)). Accordingly, the declaration submitted by Faiola remains the only properly supported evidence in the record as to his actions and intent.

the right to operate WARW(FM). We shall grant CBS leave to amend its renewal application for WARW(FM) to substitute Westinghouse as the applicant.

MULTIPLE OWNERSHIP MATTERS

42. Economic competition and diversity are the dual objectives underlying our multiple ownership rules. With respect to the local level, we recently reiterated our concern regarding the potential for anticompetitive behavior by owners of multiple broadcast stations where their stations serve the same market, where that market is concentrated, and where their proposed new combinations would substantially increase concentration in that market. See Review of the Commission's Regulations Governing Television Broadcasting, 10 FCC Rcd 3524, 3569-70 (1995)(citing S.M. Besen and L.J. Johnson, Regulation of Media Ownership by the Federal Communications Commission: An Assessment, Rand Publication #R-3206-MF (December 1984)). The Commission's diversity goal is grounded in a concept borrowed from First Amendment theory, that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." See, e.g., Multiple Ownership (Broadcast-Newspaper Cross-Ownership) - Second Report and Order in Docket No. 1811, 50 FCC 2d 1046, on recon., 53 FCC 2d 589 (1975), aff'd sub nom. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978)(quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). Our local ownership rules are particularly important in furthering this diversity goal. At the local level, therefore, the Commission has generally restricted ownership through the radio contour-overlap rule, the television duopoly rule, the one-to-a-market rule, the newspaper-broadcast cross-ownership rule, and the cable-television broadcast cross ownership rule. At the national level, the Commission has acknowledged that the likelihood of undue concentration of economic power and diversity is more attenuated than at the local level due to the burgeoning growth of the mass media and the attenuated relevance of nationwide diversity to an individual member of the listening or viewing public. See Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 17, par 4, p.37 (1984). Nevertheless, the Commission has established national numerical ownership limits for both radio and television, as well as an audience reach cap for television, in an attempt to balance the "demonstrable benefits of group ownership" and the "substantial" expansion by the networks. Multiple Ownership of AM, FM and Television Broadcast Stations on recon., 100 FCC 2d 74, 87-88 (1985).

43. In order to effectuate its merger with CBS without violating the Commission's local and national multiple ownership rules, Westinghouse seeks eighteen separate waivers of those rules. Specifically, Westinghouse seeks two temporary waivers of the radio contour-overlap rule, one permanent waiver and one temporary waiver of the television duopoly rule, three permanent and six temporary waivers of the one-to-a-market rule, a temporary waiver of the national television ownership cap and audience reach rule, a temporary waiver of the national radio ownership cap, and three television satellite exemptions to the multiple ownership rules. It is established that a general rule, deemed valid because its overall objectives are in the public interest, may not serve the public interest if extended to any applicant where doing

so will not "undermine the policy, served by the rule, that has been adjudged in the public interest." WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Waivers, in the view of the WAIT Radio court, provide a "limited safety valve" to general rules. Id. at 1159. Accordingly, the Commission has developed detailed standards for permanent waiver of its one-to-a-market rule, its television duopoly rule, and the television satellite exemption to the multiple ownership rules. While similarly detailed standards have not been adopted for the radio duopoly rule or the national television and radio ownership rules, in considering previous requests to waive these rules the Commission has balanced competing public interest concerns on a case-by-case basis and has sought to insure that the underlying policy objectives of those rules, i.e., diversity and economic competition, are not undermined by grant thereof.

44. Commission assessment of a temporary rule waiver relies on the same factors contained in permanent waiver standards, although different weight may be accorded those factors and the factors themselves may be analyzed in the context that the proposed combination is of limited duration rather than permanent. The duration of each waiver is determined based on the facts presented in each individual case. Where mergers or transfers of multiple stations are involved, in general we believe that the benefits derived from such transactions support grant of a reasonable waiver period to effectuate the merger and permit time to come into compliance with our rules. Specifically, facilitating a merger or multiple-station transaction by waiving our multiple ownership rules for a temporary period, particularly in a case like this where the conflicts are incidental to the much larger merger, will promote commerce, encourage investment in the broadcast industry, and allow for the free transferability of broadcast licenses.

45. Westinghouse seeks consent to acquire the broadcast stations owned and operated by CBS, which also owns the CBS television network. To accommodate this transaction, Westinghouse requests a period of eighteen months for each of its temporary waivers, arguing that we have, in the past, granted eighteen-month waivers of our other multiple ownership rules to allow for the orderly divestiture of stations necessitated by a merger. See, e.g., Stauffer Communications, Inc., 10 FCC Rcd 5165 (1995)(television-newspaper cross-ownership rule); Viacom Inc., 9 FCC Rcd 1577 (1994)(one-to-a-market rule); Midwest Communications, Inc., 7 FCC Rcd 159 (1991)(national radio ownership rule). In so doing, we stated that a "forced" sale could "unnecessarily restrict" the value of the stations to be divested and could "artificially limit" the range of potential buyers to only those with immediate access to the capital needed for such purchases, thereby precluding acquisition by local groups or minority-owned or -controlled entities. Stauffer Communications, 10 FCC Rcd at 5166; Viacom, 9 FCC Rcd at 1579; Midwest Communications, 7 FCC Rcd at 160.

46. There is no indication that prevailing market conditions are such that requiring disposal of a broadcast station in twelve months would result in a "forced" sale. Indeed, today's

economic climate appears to be robust.¹⁹ Thus, we believe that a temporary waiver of twelve months from the date of consummation of a merger or other multiple-station transaction provides the assignee or transferee with ample time to locate potential purchasers and to negotiate purchase agreements for the stations to be divested. Consistent with our ad hoc approach, however, we will consider any factors in a particular case which might support an increase or decrease in the twelve-month waiver period.

Radio contour overlap ("duopoly") rule waivers

47. The radio contour overlap rule, Section 73.3555(a), generally proscribes the common ownership of more than one AM or more than one FM radio station with overlapping principal community contours. However, in radio markets with 15 or more commercial radio stations, a party may own up to two AM and two FM commercial stations, so long as the combination does not result in a total audience share of more than 25 percent. See 47 C.F.R. §73.3555(a)(1)(ii). Applicants seeking combinations of more than one same-service radio station in such a market must furnish an engineering exhibit indicating: the principal community contours of the stations to be commonly owned, which together constitute the relevant radio market for purposes of the radio local ownership rules; the number of commercial radio stations whose principal community contours intersect the principal community contours of the stations to be jointly owned; and the combined audience share of the stations to be commonly owned. Id.; see also FCC Form 314 and 315, Section II, Item 7.

48. The merger of Westinghouse and CBS will result in the ownership of more than one same-service radio station in eight radio markets, six of which, according to the engineering exhibit provided by the applicants, comport with both the numerical ownership cap of two AM and two FM stations and the combined 25-percent audience share cap for the co-owned stations. The six markets in which the proposed ownership complies with the radio contour-overlap rule each have 15 or more commercial radio stations. They are: New York (133

¹⁹ See, e.g., McClellan, "TVB Sees Ad Growth in '95," Broadcasting & Cable, Oct. 2, 1995, at 36; "What's Going On," Broadcasting & Cable, Sept. 18, 1995, at 19; Zier, "Stations Sales Encore in '94," Broadcasting & Cable, Feb. 27, 1995, at 32; Schonfeld & Associates, "Advertising Ratios and Budgets" (1995). Advertising expenditures, the standard for gauging the health of the broadcasting industry, have increased dramatically for both television and radio for the years between 1993 and 1994 and are projected to continue through 1996. Specifically, based upon data prepared for Advertising Age by McCann-Erickson Worldwide, ad expenditures for the year 1994 grew 11.1% for television and 11.3% for radio over 1993. A 16.6% increase in television ad expenditures and a 19% increase in radio ad expenditures are forecast for 1995. See Schonfeld & Associates, "Advertising Ratios and Budgets" (1995). The Television Bureau of Advertising predicts network television advertising to increase by 9 to 11% in 1996. See McClellan, "TVB Sees Ad Growth in 1995," Broadcasting & Cable, Oct. 2, 1995, at 36.

radio stations), where CBS's WCBS(AM) and WCBS-FM, along with Westinghouse's WINS(AM) and WNEW(FM), garner a 13.8% audience share; Los Angeles (136 radio stations), where CBS's KNX(AM) and KCBS-FM, along with Westinghouse's KFWB(AM) and KTWV(FM), garner an 11.1% share; Philadelphia (74 radio stations), where CBS's WGMP(AM) and WOGL-FM, along with Westinghouse's KYW(AM) and WMMR(FM), garner an 18.8% share; San Francisco (131 radio stations), where CBS's KCBS(AM) and KRQR-FM, along with Westinghouse's KPIX(AM) and KPIX(FM), garner a 9.5% share; Dallas/Fort Worth (44 radio stations), where CBS's KTXQ-FM and KRRW(FM) garner a 5.4% share; and Detroit (50 radio stations), where CBS's WWJ(AM) and WYST-FM, along with Westinghouse's WLLZ(FM), garner a 10.2% share.²⁰

Chicago and Houston

49. In the remaining two markets, Chicago and Houston, each of which comprise more than 15 radio stations, the merged entity will own in excess of the numerical cap: three AM and two FM stations in Chicago, and two AM and three FM stations in Houston. We note that Westinghouse also seeks temporary waiver of our one-to-a-market rule in the Chicago market so it may own a VHF television station in addition to the five radio stations. See paragraphs 74-87, *infra*. The Chicago radio stations include CBS's WBBM(AM) and WBBM-FM and Westinghouse's WMAQ(AM), WSCR(AM), and WXRT(FM), while the Houston stations include CBS's KKRW-FM and Westinghouse's KILT(AM), KIKK(AM), KILT-FM, and KIKK-FM. Westinghouse seeks an 18-month, temporary waiver of Section 73.3555(a) for each of these two markets so that it may undertake divestitures "in an orderly fashion as promptly as possible." However, Westinghouse also explicitly seeks to reserve the right not to divest should the underlying regulatory restrictions be modified so as to permit its continued ownership of some or all of these stations.

50. In support of its requests for waiver, Westinghouse asserts that Chicago and Houston are large radio markets in which competitive conditions will not be adversely affected during the waiver period. Westinghouse points first to the combined audience shares of its combinations in the respective markets, 16.6 percent in Chicago and 13.4 percent in Houston, asserting that they fall "well below" the 25-percent standard established in Section 73.3555(a), the contour-overlap rule. Further, Westinghouse contends that both markets are well served by other media outlets. In Chicago, Westinghouse supplies data indicating that the merged entity's five radio stations will operate in the Chicago Nielsen Television Metro Area where there are 91 commercial and 33 non-commercial radio stations licensed to 101 separate owners. The Chicago market, the third largest in the nation, according to

²⁰ The number of radio stations specified for each of these markets was gleaned from Exhibit 4 of Westinghouse's application. The numbers, according to Westinghouse, are based upon the number of commercial radio stations whose principal community contours intersect or whose transmitters are located within the principal community contours of the radio stations to be commonly owned by Westinghouse.

Westinghouse, has 17 television stations licensed to communities within the DMA that are licensed to as many separate owners. Cable television penetration is 56.2 percent of total households. There are 24 daily and "many" weekly newspapers serving various portions of the market, according to Westinghouse. In Houston, Westinghouse states that the merged entity's five radio stations will operate in the Houston Nielsen Television Metro Area, which enjoys 57 radio stations, 48 commercial and nine non-commercial, licensed to 43 separate owners. As the eleventh largest television market, Houston has 14 television stations licensed to 14 separate owners²¹ and a cable penetration rate of 53.2 percent. Nine daily newspapers, as well as several weeklies, serve segments of the market. Finally, Westinghouse represents that the eighteen-month waiver period will enable it to divest in an "orderly" manner and to seek minority buyers for the stations.

51. We are persuaded that grant of the requested waivers of Section 73.3555(a) in Chicago and Houston would serve the public interest and would not undermine the diversity and competition objectives of the radio contour-overlap rule. Specifically, we find that the limited duration of these waivers as well as the highly diverse and competitive nature of the two markets involved²² limits any adverse impact on our viewpoint diversity and economic competition goals. Under these conditions, the public interest benefits of this merger overall, as well as those inherent in facilitating the transferability of broadcast stations and avoiding unwarranted "forced sales" in multi-station merger transactions weigh in favor of grant.

52. As to the duration of the waiver, we believe that a temporary waiver of the local radio ownership rule for the Chicago and Houston markets for a period of twelve months, rather than the eighteen months requested by Westinghouse, should, for the reasons we noted earlier, provide sufficient time to divest the necessary stations in an orderly manner. We acknowledge that Westinghouse has pledged that it will attempt to find minority buyers for those stations, an objective we have accommodated in granting past temporary waivers of this rule. E.g., MLGAL Partners, L.P., 10 FCC Rcd 5653, 5654 (1995). Accordingly, in the event Westinghouse is unable to fulfill that pledge within the twelve-month waiver period granted here, we shall entertain a request for a short extension of time where it has identified and entered into a sales agreement with a minority purchaser that requires additional time to obtain needed financing. Such requests should be sufficiently documented.

²¹ These television stations are licensed to communities located within the Houston DMA.

²² We recognize that not every listener in the Chicago or Houston market will have access to all of the stations included in the market because of the way we count stations. See paragraph 47, supra. Nonetheless, it is clear that very substantial alternative radio service will be available to all listeners affected by the temporary common ownership of stations which Westinghouse seeks in Chicago and Houston.

TV duopoly rule waivers

53. Section 73.3555(b) of the Commission's Rules, the television duopoly rule, generally prohibits the common ownership of television stations whose Grade B contours overlap. Absent waiver, Westinghouse's acquisition of CBS stations would result in two violations of this rule: in New York/Philadelphia, where the Grade B contour of CBS's WCBS-TV, Channel 2, New York, overlaps with the Grade B contour of Westinghouse's KYW-TV, Channel 3, Philadelphia; and in Boston/Providence, where the Grade A contour of CBS's WPRI-TV, Channel 12, Providence, Rhode Island, overlaps with the Grade A contour of Westinghouse's WBZ-TV, Channel 4, Boston. Westinghouse requests a permanent waiver of the duopoly rule for its New York/Philadelphia combination and a temporary, eighteen-month waiver of the duopoly rule for its Providence/Boston combination. We note that Westinghouse also seeks temporary waivers of the one-to-a-market rule in the New York City and Philadelphia markets. See paragraphs 74-87, *infra*.

54. In adopting the duopoly rule's fixed standard of prohibiting overlap of Grade B service contours, the Commission acknowledged the need for "flexibility" in that rule's application, noting that waivers should be granted where rigid conformance to the rule would be "inappropriate." Multiple Ownership of Standard, FM and Television Broadcast Stations (Multiple Ownership), 45 FCC 1476, 1476 n.1, recon. granted in part, 3 RR 2d 1554 (1964). To that end, the Commission has developed a set of factors to be considered when evaluating an applicant's request for waiver of the duopoly rule, whether on a permanent or temporary basis. See Telemundo Group, Inc., Debtor in Possession, 10 FCC Rcd 1104, 1106 (1994). Those factors include: the extent of the overlap, the number of media voices available in the overlap area, the distinctness of the respective markets, and the concentration of economic power resulting from the combination. See, e.g., Iowa State University Broadcasting Corporation, 9 FCC Rcd 481, 487-88 (1993), aff'd sub nom. Iowans for WOI-TV, Inc. v. FCC, 50 F.3d 1096 (D.C. Cir. 1995); H&C Communications, Inc., 9 FCC Rcd 144, 146 (1993). After weighing these factors, the Commission considers any public interest benefits proposed by the applicant to determine whether, in light of the overlap, the benefits outweigh any detriment which may occur from grant of the waiver. See Iowa State University, 9 FCC Rcd at 487-88. As with any waiver, it will only be granted if the Commission concludes that the waiver is in the public interest. It is against this standard that we will evaluate Westinghouse's requests for a permanent waiver for its New York/Philadelphia combination and for a temporary waiver for its Boston/Providence combination.

New York/Philadelphia

55. In seeking permanent waiver of its New York/Philadelphia television combination, Westinghouse contends that its request accords with prior Commission cases involving the New York and Philadelphia television markets. Westinghouse notes that in one such recent case, Station Partners, FCC 95-304 (released July 24, 1995), the Commission emphasized the "unique nature of the Philadelphia/New York City duopoly," finding that the geographical

juxtaposition of the two markets and the need to maintain equal competitive footing with owners of stations in both markets justified permanent waiver of the duopoly rule. Westinghouse also contends that because the overlap of the two stations involves their Grade B, and not their Grade A, contours, its combination would be in accord with the Commission's proposal in a pending rule making, Review of the Commission's Rules Governing Television Ownership, 10 FCC Rcd 3524, 3574 (1995). In that proceeding, the Commission proposed, inter alia, that the duopoly rule be relaxed so as to decrease the prohibited contour overlap from a Grade B to a Grade A standard.

56. According to Westinghouse's engineering exhibit, the overlap area created by the intersecting Grade B contours of WCBS-TV and KYW-TV encompasses 8,294 square kilometers and 2.76 million persons. The overlap, therefore, represents 35 percent of the area and 14.8 percent of the population of the Grade B contour of WCBS-TV, and 25 percent of the area and 28.5 percent of the population of the Grade B contour of KYW-TV. This overlap, Westinghouse asserts, citing Capital Cities Communications, Inc., 59 RR 2d 451 (1985), is "within the range" of those in previous New York/Philadelphia waiver cases. Also, as with prior New York/Philadelphia waivers granted, contends Westinghouse, there are a significant number of competitive television services available to viewers in the proposed WCBS-TV/KYW-TV overlap area. Excluding the merged entity's stations, a total of 23 commercial and 11 non-commercial full-service television stations serve all or part of the overlap area with a Grade B or better signal. All portions of the overlap area receive at least sixteen of these 34 stations' signals and some areas receive up to a maximum of 23. Moreover, Westinghouse notes that the Commission has repeatedly acknowledged the separateness and highly competitive nature of the New York and Philadelphia markets, in Station Partners, FCC 95-304 at ¶100; Taft Broadcasting Partners Limited Partnership, 7 FCC Rcd 2854, 2855 (1992); Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324, 325 (1985), recon. denied sub nom. Press Broadcasting Co., 3 FCC Rcd 6640 (1988), aff'd sub nom. Office of Communications of United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990); and Capital Cities, 59 RR 2d at 465.

57. As to public interest benefits flowing from the combination, Westinghouse states that in its operation of KYW-TV, Philadelphia, it has undertaken substantial efforts to serve the needs of its audience in Pennsylvania, New Jersey and Delaware. With respect to CBS's WCBS-TV, Westinghouse represents that it will continue to serve the needs of New Jersey viewers by maintaining a facility in Secaucus, by retaining a correspondent and engineering unit and crew dedicated to New Jersey, and by periodically announcing on-air the address and telephone number of the New Jersey office. Further, within one year of its acquisition of that station, Westinghouse pledges that it will introduce an additional six and one-half hours per week of locally originated news programming, for a total of 26½ hours of such programming per week. The increase, according to Westinghouse, will include a concomitant augmentation in coverage of matters of particular interest to viewers in New Jersey and in Connecticut. Westinghouse also represents that it will establish a news bureau in Trenton, New Jersey within one year of the acquisition of WCBS-TV, so as to better serve the needs of both WCBS-TV and its own KYW-TV, via computer links, in their coverage of

events from New Jersey's capital. The Trenton news bureau will be staffed by at least two full-time employees, including an experienced journalist as bureau chief. Finally, Westinghouse states that within one year of acquiring WCBS-TV it will tie WCBS-TV into its KYW-TV microwave transmission network, which currently provides live remote broadcasts from the New Jersey communities of Cherry Hill, Trenton, Atlantic City and Woodstown, as well as repeater links for mobile electronic news-gathering equipment. For these reasons, Westinghouse concludes, citing Station Partners, FCC 95-304 at ¶13, the benefits realized from waiving the duopoly rule outweigh any detrimental effects caused by the signal overlap.

58. Preliminarily, we emphasize, as we have in the past, that applicants are not entitled to the benefits of policies or rules modifications not yet adopted. Beaufort County Broadcasting Co. v. FCC, 787 F.2d 645, 649 n.2 (D.C. Cir. 1986). Our decision in this case, therefore, relies on application of existing waiver criteria and in no way portends the outcome of the pending rule making proceeding relating to the television duopoly rule. Applying the traditional waiver factors here, we observe that the percentage of population within the Grade B service area of WCBS-TV and KYW-TV, 14.8 percent and 28.5 percent, respectively, and residing in the overlap area is slightly greater than that present in other New York/Philadelphia waiver cases. See, e.g., Paramount Stations Group of Philadelphia Inc., FCC 95-360 at ¶12 (released August 24, 1995)(overlap area represents 8% of the population located within the Grade B contour of the New York station and 19% of that within the Grade B contour of the Philadelphia station); Station Partners, FCC 95-304 at ¶2 (overlap area represents 10.9% of the population located within the Grade B contour of the New York station and 23.8% of that within the Grade B contour of the Philadelphia station); and Capital Cities, 59 RR 2d at 461 n.17 (overlap area represents 12.4% of the population located within the Grade B contour of the New York station and 24.7% of that within the Grade B contour of the Philadelphia station). However, as we did in those cases, we find that the overlap here is not so large as to require a finding that the New York and Philadelphia stations "serve substantially the same area." E.g., Paramount Stations, FCC 95-360 at ¶16 (quoting WTAR Radio-TV Corp., 31 FCC 2d 812, recon denied, FCC 70-1251 (released December 7, 1970)). This finding is particularly justified in light of our recent characterization of the New York and Philadelphia markets as "unique," that is, that their geographical proximity "renders unavoidable a conflict with the Commission's duopoly rule for any applicant seeking to own and operate television stations in both of these markets." Paramount Stations, FCC 95-360 at ¶19; see also Station Partners, FCC 95-304 at ¶12.

59. Diversity and competition would not significantly be adversely affected by the WCBS-TV/KYW-TV combination. Viewers in the resulting overlap area will have available at least 16 and as many as 34 other television Grade B or better signals, as many or more than have been available to those viewers residing in the overlap area of other New York/Philadelphia combinations. See, e.g., Station Partners, FCC 95-304 at ¶10 (33 television signals available in overlap area); Taft Broadcasting, 7 FCC Rcd at 2855 (34 television signals available in overlap area). As to the separateness of the markets, the Commission recently reaffirmed its earlier finding that the New York television market, the nation's largest, and the Philadelphia

television market, the nation's fourth largest, are distinct, each with its own "unique service needs. . . ." Paramount Stations, FCC 95-360 at ¶17 (citing Taft Broadcasting, 7 FCC Rcd at 2855). Accordingly, we do not believe that common ownership of WCBS-TV and KYW-TV will result in an undue concentration of economic power.

60. Moreover, programming commitments are public interest benefits which the Commission has found tilt the balance in favor of granting a duopoly waiver. H&C Communications, 9 FCC Rcd at 146. In cases involving permanent waiver of the rule for the New York/Philadelphia markets, we look to expanded service in the form of enhanced programming and an increased physical presence in New Jersey and Delaware, see, e.g., Capital Cities Communications, 59 RR 2d at 464-65, or compelling circumstances, such as financial difficulties, Taft Broadcasting, 7 FCC Rcd at 2585, or bankruptcy, Channel 33, Inc., 4 FCC Rcd 7674. Here, Westinghouse essentially pledges to increase by nearly one-third the amount of locally originated news programming broadcast on WCBS-TV, to establish a news bureau in New Jersey's capital, and to link WCBS-TV to a network of New Jersey-based transmission facilities for live remote broadcasts. We also note that Westinghouse, in partial response to UCC's petition to deny, has made a voluntary commitment to augment the amount of children's programming broadcast over the CBS network and its owned and operated stations. Given the uniqueness of the New York/Philadelphia markets, including the competitive parity interest cited in Paramount Stations, FCC 95-360 at ¶19, and in Station Partners, FCC 95-304 at ¶12, as well as Westinghouse's showings with respect to our traditional duopoly waiver factors discussed above, we find that the programming and physical presence commitments weigh in favor of permanently waiving the duopoly rule in this case. Accordingly, we find that grant of the duopoly waiver is in the public interest.

Boston/Providence

61. The Grade A contours of Westinghouse's WBZ-TV, Channel 4, Boston, and CBS's WPRI-TV, Channel 12, Providence, overlap such that, absent waiver, common ownership of these stations would violate the television duopoly rule. Westinghouse represents that it intends to come into compliance with the rule "and will undertake divestitures in an orderly fashion as promptly as possible."²³ Accordingly, Westinghouse requests a temporary, eighteen-month waiver of Section 73.3555(b).

62. Applying the several factors utilized in assessing a request for waiver, we observe at the outset that the proximity of the two communities of license results in the substantial overlap of the Grade B contours, as well as that of the Grade A contours. As indicated by

²³ Westinghouse qualifies this representation by noting that it "reserves the right not to undertake divestitures" should the underlying regulatory restrictions be modified through legislative or regulatory action so as to permit the retention of some or all of the Westinghouse-CBS stations.

Westinghouse's engineering exhibit, the intersection of the Grade B contours of WBZ-TV and WPRI-TV encompasses 16,657 square kilometers and nearly six million persons. This overlap constitutes 67.7 percent of the area and 86.2 percent of the population within WBZ-TV's Grade B contour and 86.3 percent of the area and 93.9 percent of the population within that of WPRI-TV. While this degree of overlap is extraordinary, we note that the Commission has found that the size of the proposed overlap has been of "more critical concern" in cases involving requests for a permanent waiver of our rules and that we are not constrained from granting a temporary waiver where circumstances "will not significantly frustrate the policies underlying the multiple ownership rules." Telemundo Group, Inc., Debtor in Possession, 10 FCC Rcd 1104, 1106 (1994)(quoting Family Television Corp., 59 RR 2d 1344, 1348 (1986)). Moreover, we are compelled to entertain waiver requests as a "safety valve procedure for consideration of an application for exemption based on special circumstances." WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

63. Here, looking to the other factors comprising the Commission's duopoly waiver standard, we believe that the extent of the overlap is not fatal, because grant of a waiver on a temporary basis only, so as to permit consummation of the proposed merger of Westinghouse and CBS, would not result in any long-term or unacceptable short-term adverse consequences for the diversity and economic competition policies the duopoly rule is designed to promote. First, the television markets in which WBZ-TV and WPRI-TV are located are separate. In the Boston DMA, the nation's sixth largest television market, Westinghouse notes that WBZ-TV is one of 19 television stations, 15 of which are commercial. And in the Providence-New Bedford DMA, the nation's forty-sixth largest television market, WPRI-TV is one of six television stations, all of which are commercial. Second, as to the diversity of voices present in the overlap area during the temporary waiver period, Westinghouse's engineering exhibit indicates that viewers in the overlap area are "well-served by a plethora" of other television and media outlets. A total of 34 other full-service television stations, according to Westinghouse, serve all or part of the overlap area with a Grade B or better signal, while a minimum of five other Grade B or better signals serve the entire overlap area and as many as 23 Grade B or better signals serve some portions of the area. With respect to the merger effecting a concentration of economic power in the overlap area, we believe that any potential anti-competitive effects will be diminished by the continued separate operations of the stations, as has been pledged by Westinghouse. We take this pledge of "separate operations" to mean that the two stations will compete in the overlap area and will refrain from engaging in joint sales there. Accordingly, given the public interest benefits of this merger overall, we shall grant a temporary waiver of the duopoly rule.

64. As to the duration of the waiver period, UCC contends that an eighteen-month waiver of the television duopoly rule for the merged entity's Boston/Providence combination "is an inordinate period of time for a clear violation to continue in the television field." Westinghouse, citing Stauffer Communications, Inc., 10 FCC Rcd 5165 (1995), Viacom Inc., 9 FCC Rcd 1577 (1994), Midwest Communications, Inc., 7 FCC Rcd 159 (1991), and Storer Communications, Inc., 59 RR 2d 611 (1988), contends that under existing policy, grant of a temporary, eighteen-month waiver is appropriate in order to permit the orderly

divestiture of one of the television stations. Of those cases, however, we note that only one, Storer Communications, involved a waiver of the television duopoly rule and in that case the overlap was minimal, constituting 3.7 percent of the combined total Grade B service areas of the Toledo and Cleveland stations and 1.7 percent of the total population therein. 59 RR 2d at 614. Utilizing that measure here for comparison purposes, the overlap represents 46 percent of the total Grade B service areas of the Boston and Providence stations and 48 percent of the total population therein.

65. In most of the Commission's past temporary television duopoly cases, a divestiture period of only twelve months has been granted. See, e.g., Telemundo Group, Inc., Debtor in Possession, 10 FCC Rcd 1104; Citadel Communications Company, Ltd., 5 FCC Rcd 3842 (1990); Channel 64 Joint Venture, Debtor in Possession, 3 FCC Rcd 900 (1988); Family Television Corp., 59 RR 2d 1344. Two of those cases involved a degree of overlap commensurate with that present here. See Telemundo Group, Inc., Debtor in Possession, 10 FCC Rcd 1104 (overlap constituted 51% of the area and 91.5% of the population of the Monterey, California station and 50% of the area and 31.3% of the population of the San Jose station); Channel 64 Joint Venture, Debtor in Possession, 3 FCC Rcd 900 (1988)(both television stations located in Cincinnati). The licensees of the acquired stations in both of those cases were in bankruptcy, which posed a more compelling public interest justification for temporary waiver than do the transactional exigencies of the merger of two financially healthy companies. Moreover, the television stations involved in those cases were UHF's, not the more powerful VHF's to be owned by Westinghouse. Further, in Channel 64 Joint Venture, waiver of the rule was needed not because one party was to own or control both television stations, but because one party was to have merely a non-controlling, attributable interest in the licensee of each.

66. The Commission's decisions in Telemundo Group and Channel 64 Joint Venture, therefore, do not provide guidance for our determination here. Westinghouse seeks to wholly own and control both WBZ-TV and WPRI-TV, two powerful, far-reaching VHF television stations, neither of which Westinghouse claims is financially troubled. Additionally, as detailed below, Westinghouse also requests, and we grant, permanent waiver of the one-to-a-market rule for its newly created TV/AM/FM combination in the Boston market and temporary waiver of the one-to-a-market rule for the Providence television station and the Boston AM/FM combination. See paragraphs 70-71, *infra*. Accordingly, we believe that the twelve-month waiver period we might ordinarily afford applicants in a merger context must be limited in this case. Thus, in lieu of the eighteen months sought by Westinghouse, we shall grant Westinghouse a temporary, six-month waiver of the television duopoly rule for its Boston/Providence television combination. We acknowledge that Westinghouse again has pledged that it will attempt to find minority buyers for the station it divests, an objective we have accommodated in granting past temporary waivers of this rule. E.g., Telemundo Group, 10 FCC Rcd 1104. As noted above, see paragraph 52, in the event Westinghouse is unable to fulfill its divestiture pledge within the six-month waiver period granted here, we shall entertain a request for a short extension of time where it has identified

and entered into a sales agreement with a minority purchaser that requires additional time to obtain needed financing. Such requests should be sufficiently documented.

One-to-a-market rule waivers

67. Section 73.3555(c) of the Commission's Rules, the one-to-a-market rule, generally proscribes common ownership of a television and radio station in the same market. In Second Report and Order in MM Docket No. 87-7 (Second Report and Order), 4 FCC Rcd 1741, recon. granted in part (Second Report and Order Recon.), 4 FCC Rcd 6489 (1989), the Commission established three standards for waiver of the rule. First, under the "top 25 markets/30 voices" standard, the Commission presumes that waiver of the rule will serve the public interest in cases involving television and radio station combinations in the top 25 markets, where at least 30 separately owned, operated and controlled broadcast licensees, or "voices," would remain after the proposed combination. Id. at 1751-52. Second, under the "failed station" standard, the Commission presumes that the public interest will also be served in cases involving acquisition of "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time or that are in bankruptcy. Id. at 1752-53. Third, under the more rigorous "case-by-case" standard, the Commission evaluates the waiver request by weighing five factors, as set forth in paragraph 75, below. Requests involving a television station and more than one radio station in the same service in any market must rely on the case-by-case standard pending final resolution of the Commission's one-to-a-market rule. See Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part (Radio Order Recon.), 7 FCC Rcd 6387, 6394 n.40 (1992).

68. A merged Westinghouse-CBS will leave in place an existing CBS one-to-a-market combination in Minneapolis, will create a new one-to-a-market combination in Washington, D.C., and will expand existing CBS one-to-a-market combinations in New York, Los Angeles, Chicago, and Detroit, as well as expand existing Westinghouse one-to-a-market combinations in Boston, Philadelphia, and San Francisco. Westinghouse requests permanent waiver for Minneapolis, Boston and Washington, D.C., where the merged entity will own no more than one of each broadcast service. For those markets, it relies upon the "top 25 markets/30 voices" standard. With respect to the remaining six markets, where Westinghouse will own a television station and more than one same-service radio station, Westinghouse requests that the Commission grant temporary waivers for a period of eighteen months "during which time Westinghouse will come into compliance with the current rule through divestiture, unless it has applied for and received a grant of a permanent waiver." A permanent waiver, Westinghouse adds, will be "unnecessary" if pending legislation seeking to repeal the one-to-a-market rule is adopted. In support of its six temporary waiver requests, Westinghouse relies on the five factors of the "case-by-case" approach, that are employed in evaluating proposed combinations involving more than one same-service radio station.

Boston, Minneapolis, and Washington, D.C.

69. Under the "top 25/30 voices" standard, the Commission stated that not only would it "look favorably" upon waiver requests involving radio and television station combinations in the top 25 markets where at least 30 separately owned, operated and controlled "voices" remain, but that it would be "predisposed to grant" such requests. Second Report and Order, 4 FCC Rcd at 1751. In calculating the number of broadcast stations in a particular market, we include all commercial and non-commercial full-power television station licensees in the relevant television market²⁴ and all operating AM and FM radio stations in the relevant television metropolitan market. Id. The number of "voices" in a given market is evaluated in accordance with the attribution provisions of our local ownership rules, in which persons have a "cognizable" interest in a broadcast station if they serve as an officer, director, partner, or owner of at least five percent of the voting stock of the licensee. Id.; see also id. at 1759 n.87.

70. After consummation of the merger, Westinghouse's WBZ-TV and WBZ(AM), along with CBS's WODS-FM, all in Boston, will be under the common ownership of Westinghouse. To satisfy the top 25/30 voices standard, Westinghouse notes that Boston, the sixth largest television market, has 17 television stations and 69 radio stations. Of these 86 broadcast stations, Westinghouse's exhibit indicates, 73 will be separately owned, operated and controlled subsequent to the merger. Based on the above, we find that Westinghouse satisfies the "top 25/30 voices" presumptive waiver and that grant of a permanent waiver for the Boston market would be in the public interest.

71. In addition, we observe that the Grade A contour of CBS's WPRI-TV, Providence, encompasses entirely the community of license of WBZ-AM and WODS-FM, both licensed to Boston. While WPRI-TV is located in the Providence-New Bedford market and the two radio stations are located in the Boston market, separate and distinct television markets, the one-to-a-market rule remains applicable here because the Commission defines broadcast stations as belonging to the "same market" for purposes of that rule where the Grade A contour of a television station encompasses the entire community of license of a radio station. See 47 C.F.R. §73.3555(c). The relevant market here is the Boston market, where the contours of the Providence and Boston stations overlap. See Pyramid Communications, Inc., 10 FCC Rcd 4272 (1995)(Boston deemed relevant market where Providence television station and Boston radio station shared common director). Boston, as discussed herein, constitutes a top 25 market with well over 30 voices. While this satisfies the presumptive standard for permanent waiver of the one-to-a-market rule, we need not determine whether this

²⁴ Second Report and Order, 4 FCC Rcd at 1751, instructs those applicants seeking waiver to utilize the "Area of Dominant Influence," or ADI, as defined by Arbitron Ratings Company. Because Arbitron no longer updates its ADI lists, we now accept instead the "Designated Market Area," or DMA, as defined by A.C. Nielsen. See Media/Communications Partners Limited Partnership, 10 FCC Rcd 8116, 8116 n.3 (1995).

combination on a permanent basis, in addition to the permanent combination of WBZ-TV/WBZ(AM)/WODS-FM we have granted here, would be in the public interest. That is because Westinghouse, in the context of its request for temporary waiver of the television duopoly rule for Boston/Providence, must divest WPRI-TV, Providence, within six months of consummation of the merger. See paragraph 66, supra. Given the diversity of the Boston market, we believe a temporary waiver would not adversely impact the public interest. Accordingly, consistent with the six-month period granted Westinghouse for divestiture of WPRI-TV, we shall grant Westinghouse a temporary six-month waiver of the one-to-a-market rule with respect to the WPRI-TV, WBZ-AM, and WODS-FM combination.

72. With respect to Minneapolis, no new one-to-a-market combination will be created by the merger. But Westinghouse's assumption of control of the current CBS combination of WCCO-TV, WCCO(AM) and WLTE-FM, all in Minneapolis, necessitates a renewed one-to-a-market request because previously granted waivers do not run with the transfer of stations. Westinghouse demonstrates that the Minneapolis market, the nation's fourteenth largest, contains 21 full-power television stations and 50 radio stations. After the Westinghouse-CBS merger, there will remain 46 separately owned, operated and controlled broadcast stations. Having reviewed the showing submitted by Westinghouse, we find that the waiver request comports with the top 25/30 voices presumptive waiver and that grant of a permanent waiver for the Minneapolis market would be in the public interest.

73. As for Washington, D.C., the merger will result in the common ownership of Westinghouse's WJZ-TV, Baltimore, Maryland, located in the Baltimore television market, as well as CBS's WARW-FM, Bethesda, Maryland, located in the Washington, D.C. market. The Grade A contour of WJZ-TV encompasses the entire community of Bethesda, but the analogous contour for WARW-FM, the 1mV/m contour, does not encompass the entire city of Baltimore. Thus, while the two stations are located in separate markets, the one-to-a-market rule is applicable here in that the Commission defines radio and television stations as belonging to "the same market" where the Grade A contour of the television station encompasses the entire community of license of the radio station. Second Report and Order, 4 FCC Rcd at 1742. Because Bethesda lies within the Washington, D.C. market, evaluation of Westinghouse's waiver request must focus on that market. Accord Pyramid Communications, Inc., 10 FCC Rcd 4272 (1995)(Boston deemed the relevant market where the Grade A contour of a Providence, Rhode Island television station completely encompassed Boston, the community of license of a radio station sharing a common director); but cf. Media/Communications Partners Limited Partnership, 10 FCC Rcd 8116 (strict application of one-to-a-market rule questioned where 2mV/m contour of Detroit clear channel AM radio station completely encompassed Flint, Michigan and Toledo, Ohio, the communities of license of commonly owned television stations). Westinghouse furnished data indicating that Washington, D.C., the nation's seventh largest television market, contains 17 television stations and 62 radio stations. Of these 79 broadcast stations, 59 will remain separately owned, operated and controlled after Westinghouse's acquisition of CBS. Accordingly, we find that Westinghouse meets the top 25/30 voices presumptive waiver

standard²⁵ and that grant of a permanent waiver of the one-to-a-market rule for the Washington, D.C. market would be in the public interest.

New York, Los Angeles, Chicago, Philadelphia, San Francisco and Detroit

74. Westinghouse seeks temporary, eighteen-month waivers of the one-to-a-market rule for its television-radio combinations in New York, Los Angeles, Chicago, Philadelphia, San Francisco and Detroit, all of which qualify as top-25 markets. The Westinghouse-owned combination in each market will yield a television station plus more than one same-service radio station. Specifically, in four of those six markets, New York, Los Angeles, Philadelphia and San Francisco, Westinghouse will own a TV/2 AM/2 FM combination, in Chicago it will own a TV/3 AM/2 FM combination, and in Detroit it will own a TV/AM/2 FM combination. We note that Westinghouse has requested and been granted a permanent waiver of the television duopoly rule for its WCBS-TV, New York City, and KYW-TV, Philadelphia, combination and a temporary, twelve-month waiver of the radio contour-overlap rule in Chicago.

75. In evaluating requests for permanent waiver of such combinations, the Commission utilizes the case-by-case standard, composed of five factors aiding in rendering a public interest determination. See Radio Order Recon., 7 FCC Rcd at 6394 n.40. Those factors are: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. See Second Report and Order, 4 FCC Rcd at 1753-54. The Commission noted, in adopting the case-by-case approach for permanent waivers, that not all of the factors utilized in evaluating a request are relevant in every case. See Second Report and Order Recon., 4 FCC Rcd at 6491. Indeed, where no claim of financial difficulties is made, the fourth of our five-factor analysis, we have indicated that applicants must "specifically demonstrate the public interest benefits of common ownership of stations ordinarily required to be separately owned by the one-to-a-market rule." Great American Television and Radio Co., 4 FCC Rcd 6347, 6349 (1989).

76. Here, we are confronted with requests for temporary waiver of the one-to-a-market rule by Westinghouse. Requests for temporary waivers, if they will in fact be temporary, are not dictated by a motive to create additional combinations in the six markets, but by the exigencies of acquiring the CBS television network and its 31 owned and operated broadcast stations located throughout the country. The temporary combinations in the six markets,

²⁵ Even were we to focus on the Baltimore market in evaluating the waiver request here, Westinghouse would still meet the presumptive standard because it has demonstrated that Baltimore is the 23rd largest television market, with 49 broadcast stations, 35 of which will remain separately owned, operated and controlled after the merger.

therefore, are necessary to facilitate the merger and will exist only long enough for Westinghouse to implement structural corporate and financial changes for the merged entity and to initiate and complete divestiture of broadcast properties that compelled the need for the waivers. Because the one-to-a-market combinations resulting from the CBS-Westinghouse merger are those which, in the context of a request for permanent waiver, would require application of the five-factor case-by-case approach, we shall be guided by those factors in this case. However, because the waivers sought here are temporary, the weight accorded each factor will vary from that were our analysis based upon a request for permanent waiver. Our primary concern, in the end, is how diversity will be affected in the market involved and the public interest benefits advanced by the applicant to offset any adverse impact on diversity. An applicant need not satisfy all five of the factors in the context of either a temporary or permanent waiver.

77. With respect to the first factor, the potential public service benefits of the temporary combinations, Westinghouse states that in each market the combination will lead to "significant cost savings." For each of the six markets, Westinghouse approximates the savings for 1997 to be: New York, \$9 million; Los Angeles, \$8 million; Chicago, \$4.5 million; Philadelphia, \$1 million; San Francisco, \$4 million; and Detroit, \$1 million. In each case, Westinghouse calculates that the savings will be attributed 70 percent to centralized management, accounting, legal, engineering, human resources and related functions, 15 percent to more centralized station facilities, 10 percent to more centralized purchasing of goods and services, two percent to more centralized telephone and communications services, and three percent to more centralized maintenance operations. The combined "resources and commitment" of Westinghouse and CBS to all six communities, Westinghouse asserts, "will increase their stations' individual strengths and abilities to serve the public." This increase, Westinghouse adds, will "further enhance the overall ability of free-over-the-air television and radio stations to meet their public service obligations in an increasingly competitive media marketplace." Finally, Westinghouse notes that each station in the combination "will now have the benefit of access to the national and international newsgathering capabilities of the CBS network."

78. Second, as to the types of facilities involved, Westinghouse describes all of the stations comprising the temporary combinations as "comparable" to others in the respective markets. In New York, WCBS-TV is a VHF station operating on Channel 2, both WCBS(AM) and WINS(AM), both clear-channel stations, operate at 50 kw, WNEW(FM) operates at 7.8 kw from a 1,220-foot antenna, and WCBS-FM operates at 6.8 kw from a 1,353-foot antenna. In Los Angeles, KCBS-TV is a VHF station operating on Channel 2, KNX(AM) operates at 50 kw, KFWB(AM), a clear-channel station, operates at 5 kw, KCBS-FM operates at 54 kw from a 5,000-foot antenna, and KTWV(FM) operates at 58 kw from a 2,835-foot antenna. In Chicago, WBBM-TV is a VHF station operating on Channel 2, WBBM(AM) and WMAQ(AM), both clear-channel stations, operate at 50 kw, WSCR(AM) operates day-time only at 5 kw, WXRT-FM operates at 6.7 kw from a 1,310-foot antenna, and WBBM-FM operates at 6.2 kw from a 1,174-foot antenna. In Philadelphia, KYW-TV is a VHF station operating on Channel 3, KYW(AM) and WGMP(AM), clear-channel stations, operate at 50

kw, WMMR-FM operates at 18 kw from an 827-foot antenna, and WOGL-FM operates at 12.5 kw from a 1,000-foot antenna. In San Francisco, KPIX-TV is a VHF station operating on channel 5, KCBS(AM), a clear-channel station, operates at 50 kw, KPIX(AM) operates at 10 kw, KRQR-FM operates at 82 kw from a 1,100-foot antenna, and KPIX(FM) operates at only 6.9 kw from a 1,500-foot antenna. Finally, in Detroit, WGPR-TV is a UHF station operating on channel 62, WWJ(AM), a clear-channel station, operates at 5 kw, WLLZ-FM operates at 50 kw from a 462-foot antenna, and WYST-FM operates at 12 kw from an 890-foot antenna.

79. Third, with regard to the number of outlets owned, Westinghouse lists the stations involved in each market's temporary combination. Additionally, Westinghouse provides for each of the six markets the combined audience share of the radio stations it seeks to commonly own. The respective 2 AM/2 FM combinations will have 13.8 percent of the audience share in New York, 11.1 percent in Los Angeles, 18.8 percent in Philadelphia, and 9.5 percent in San Francisco. The 3 AM/2 FM combination in Chicago, will garner 16.6 percent of the audience share there. And the AM/2 FM combination in Detroit will have 10.2 percent of the audience share.

80. Fourth, as to the economic status of the broadcast stations involved in the temporary combinations, Westinghouse notes that none is in financial distress. It asserts, however, citing Great American Television and Radio Co., 4 FCC Rcd 6347, 6349 (1989), that the Commission has previously indicated that this fourth factor is not entitled to substantial weight when a strong showing has been made that the public interest would otherwise be served by grant of a waiver.

81. Fifth, with respect to the competition and diversity in the market during the temporary, eighteen-month period, Westinghouse furnishes data as to the information the Commission has deemed relevant to this factor, including: the number of broadcast outlets in each market, the number of separate owners of those facilities, and the presence of cable and other non-broadcast media.²⁶ In the New York television market, or DMA, there are 126 radio stations (43 AM and 83 FM) owned, operated and controlled by 98 separate owners and 23 television stations licensed to 21 owners. Cable penetration is 65.6 percent, and 36 daily newspapers are published in the market. Los Angeles is served by 82 radio stations (36 AM and 46 FM) operated and controlled by 61 separate owners and by 26 television stations licensed to 26 separate owners. Of the television households in the market, 59.5 percent subscribe to cable television. The area is also served by MMDS, or "wireless cable," facilities and 23 daily newspapers. In the Chicago DMA, 101 separate owners operate and control 124 radio stations (48 AM and 76 FM) and 17 separate owners

²⁶ Westinghouse lists, as specified in Second Report and Order, 4 FCC Rcd at 1751, n.85, the radio stations included in the Nielsen Television Metro Area counties and the television stations located in the DMA. The daily newspapers listed are those published in communities within the DMA.

operate and control 17 television stations. Cable television serves 56.2 percent of the households in the market and MMDS serves some homes. There are also 24 daily newspapers. Philadelphia has 62 radio stations (24 AM and 38 FM) licensed to 52 separate owners and 21 television stations licensed to 19 separate owners. The market has a cable penetration rate of 72.6 percent and MMDS is available in the market. Twenty-five daily newspapers are published in the market. The San Francisco DMA is served by 53 radio stations (14 AM and 39 FM) separately operated and controlled by 40 owners, and by 21 television stations separately operated and controlled by 21 owners. Cable television is subscribed to in 67.8 percent of the households. MMDS systems also serve the DMA and Pacific Telesis has received authority to provide video dialtone service to the area. There are also 17 daily newspapers in the market. Finally, in Detroit 44 separate owners operate 54 radio stations (19 AM and 35 FM) and nine separate owners operate nine television stations. The cable penetration is 63.5 percent, and MMDS service is also available in the market. The market has nine daily newspapers.

82. In conclusion, Westinghouse asserts that grant of its waiver requests will create no undue concentration of ownership or control of the broadcast media in the six markets and will not adversely affect diversity and competition. Allowing it to acquire the CBS stations, Westinghouse contends citing its 70 years of broadcast service, would clearly be in the public interest.

83. In opposition to Westinghouse's assertions, UCC contended in its petition that in four of the six markets involved, New York, Los Angeles, Chicago, and San Francisco, the merger would combine all-news stations, a "clear and substantial detriment," according to UCC, to the principle of diversity, as described in Associated Press v. United States, 326 U.S. 1 (1945). In all six of the markets, UCC contended, there would be "substantial detriments and deficiencies" to the public interest in that all broadcast facilities involved are successful operations which, following the merger, "will be in an even more powerful position." Efficiencies alone, UCC argued, cannot justify waiver of the one-to-a-market rule. Instead, it argued that there "has to be some showing of effect on public service, especially in the programming area." The "boilerplate" offered by Westinghouse, UCC asserted, is the "epitome of vagueness."

84. Evaluating Westinghouse's five-factor showing, we observe with respect to the first factor that Westinghouse predicts it will accrue in 1997 a savings of \$27.5 million in the six markets through consolidation of the stations' functions and physical operations. Westinghouse asserts that these savings will result in general service benefits by increasing the stations' ability to serve the public. In the permanent waiver context, it was the Commission's objective, in formulating this first factor of the case-by-case approach, that licensees would "funnel their cost savings into better program service or technical facilities." Second Report and Order, 4 FCC Rcd at 1753. Efficiencies and cost savings alone are not sufficient to support a finding that a given combination will inure to the public interest. However, given the temporary nature of the waivers sought here and the public interest benefits of this merger, we do not believe that as particularized a showing of cost efficiencies

and service benefits need be supplied, as would be required to support a permanent waiver.

85. As to the second factor, our focus rests upon the potential impact on diversity and competition by the amalgamation of CBS-Westinghouse stations located in the six markets. In all of these markets, the combination will yield a VHF television station and at least one clear-channel AM radio station with far-reaching coverage. As the level of diversity and competition in a market increases, however, "our concern with this aspect of a proposed combination diminishes." Great American Television and Radio, 4 FCC Rcd at 6350. Diversity and competition in the six markets involved here are, indeed, robust. Thus, we must view the number of broadcast outlets to be commonly owned by Westinghouse, the focus of our third factor, against the backdrop of the fifth factor, the nature of the relevant market. Accordingly, listeners in New York, Los Angeles, Chicago, Philadelphia, and San Francisco, the top five markets in the nation, and Detroit, the ninth largest, are served by at least 54 radio stations and as many as 126. More importantly, this substantial number of radio facilities is operated and controlled by a minimum of 40 and as many as 98 separate owners, ensuring a wide diversity of radio voices in each of the six markets. As for television facilities, the viewers in those markets have available the signals of from nine to 26 stations, which are operated and controlled by the same range of separate owners. Further, cable penetration in the markets affected by the combinations range from a low of approximately 56 percent to a high of approximately 72 percent and segments of those markets are served by nine to 36 daily newspapers.

86. As to UCC's contention that diversity will be harmed in four markets where Westinghouse would own the all-news stations, we acknowledge that while such combinations will have some impact upon diversity for the short term, the Commission has ruled, and the Supreme Court has affirmed the consistency of that ruling with the Communications Act and the First Amendment, that the marketplace should be left to determine the program format of broadcast stations. Policy Statement, 60 FCC 2d 858, 863, 866 (1976), recon. denied, 66 FCC 2d 78 (1977), rev'd sub nom., WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), rev'd, 450 U.S. 582 (1981). Thus, the licensees of any of the substantial number of radio stations in each of those four markets that will not be owned by Westinghouse are free to adopt an all-news format or, for that matter, any format that may best compete with that of the Westinghouse stations.

87. In sum, we find that for the limited period necessary for orderly divestiture, the temporary combinations will not severely impair diversity and competition in New York, Los Angeles, Chicago, Philadelphia, San Francisco and Detroit. As for duration of the temporary waivers, as discussed above, see paragraph 46, the exigencies of a merger alone do not justify a temporary waiver of more than twelve months and Westinghouse has provided no compelling reason for extending that period. Accordingly, given the overall benefits of this merger, we shall grant Westinghouse a period of twelve months, rather than the eighteen months requested, to come into compliance with the one-to-a-market rule in New York, Los Angeles, Chicago, Philadelphia, San Francisco and Detroit.

National ownership limit waivers for radio and television

88. Section 73.3555(e) of the Commission's Rules limits nationwide ownership of broadcast stations. With respect to radio stations, a party generally may own no more than 20 AM and 20 FM stations. See 47 C.F.R. §73.3555(e)(1). As for television stations, there is a numerical cap, as well as an audience reach limitation, such that a party generally may own no more than twelve stations having a maximum aggregate national audience reach of 25 percent. See 47 C.F.R. §§73.3555(e)(1)-(2). Reach is calculated by adding the individual reach of each television market in which a station is located. See 47 C.F.R. §73.3555(e)(1)(3)(i). In a market where the television station is a UHF, the audience reach is diminished by one-half. See id.

89. The CBS-Westinghouse merger will result in the common ownership of 17 AM and 21 FM stations, the latter of which comprises Westinghouse's eight FM stations²⁷ and CBS's 13 FM stations.²⁸ Accordingly, Westinghouse requests an eighteen-month waiver of the 20-FM national ownership rule to permit the divestiture of one FM station in Houston.²⁹ The merged entity will also own 16 television stations with an aggregate audience reach of 32.095 percent.³⁰ The television stations, all VHF, except for CBS's WGPR-TV in Detroit, include Westinghouse's nine stations³¹ and CBS's seven stations.³² Westinghouse states that it

²⁷ The eight Westinghouse FM stations are: KPIX-FM, San Francisco; KIKK-FM, Houston; WXRT(FM), Chicago; WLLZ-FM, Detroit; KILT-FM, Houston; WNEW(FM), New York; WMMR(FM), Philadelphia; and KTWV(FM), Los Angeles.

²⁸ CBS's 13 FM stations are: WCBS-FM, New York; KCBS-FM, Los Angeles; WBBM-FM, Chicago; WOGL-FM, Philadelphia; KRQR-FM, San Francisco; WODS-FM, Boston; WARW-FM, Bethesda, Maryland; KRRW(FM), Dallas; KTXQ-FM, Fort Worth; WYST-FM, Detroit; KKRW-FM, Houston; WLTE-FM, Minneapolis; and KLOU-FM, St. Louis.

²⁹ Such a divestiture will also bring Westinghouse into compliance with the radio contour-overlap rule in the Houston market. See paragraphs 49-52, supra.

³⁰ The 16 television stations total includes one television construction permit, which counts toward the national limit. Not included in the television station total are three satellite television stations, which do not count toward the national limit. See 47 C.F.R. §73.3555(e)(3)(ii).

³¹ Westinghouse's nine television stations include its five wholly-owned stations: KPIX, San Francisco; KDKA-TV, Pittsburgh; KYW-TV, Philadelphia; WBZ-TV, Boston; and WJZ-TV, Baltimore. Also included in that total are the four stations licensed to Station Partners, a joint venture between CBS and Westinghouse: KCNC-TV, Denver; WTVJ-TV, Miami; KUTV-TV, Salt Lake City; and KUSG-TV, Saint George, Utah (located in the Salt Lake City market).

"earnestly desires" to retain the 16 television stations and points to the Commission's proposal in the pending rule making proceeding relating to television ownership, Commission Regulations Governing Television Ownership, 10 FCC Rcd 3524, 3566-3569 (1995), as well as pending legislative proposals, to increase and/or eliminate the national numerical limit and to increase the reach limit to at least 35 percent. In the event those proposals are not adopted, however, Westinghouse represents that it is prepared to divest the number of television interests necessary to comply with existing rules. Accordingly, Westinghouse seeks a temporary, eighteen-month waiver of the Commission's twelve-television station cap and 25-percent audience reach restrictions.

90. In waiving the national ownership cap in Midwest Communications, 7 FCC Rcd 159, 160 (1991), the Commission acknowledged that no specific criteria have been established for assessing waiver of our national ownership rules. However, as 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 id. (citing WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969)). Underlying the national ownership rules are the Commission's traditional policy objectives of promoting viewpoint diversity and preventing economic concentration. Report and Order in Gen. Docket No. 83-1009, 100 FCC 2d 17 (1984), on recon., 100 FCC 2d 74 (1985). Diversity, the Commission has acknowledged, must be balanced with other competing policy objectives, including the public interest benefits that we have acknowledged may flow from the common ownership of multiple stations nationwide. Report and Order on recon., 100 FCC 2d at 81.

91. Thus, in crafting the 12-station rule for television, an increase from the seven-station cap formerly in place, the Commission noted that it was balancing the need for a presumptive rule equating ownership diversity at the national level against "the demonstrable benefits of group ownership." Id. at 81-82. The Commission also found that undue economic concentration by networks in the national and regional advertising markets, as well as in the program acquisition market, would not be effected by the ownership of twelve, rather than seven, television stations. Id. at 84-87. As for the 25-percent audience reach limitation, its objective was to attenuate the "alleged detrimental impact of network expansion" by precluding "substantial" expansion by the networks, which, the Commission noted, generally acquire owned and operated stations in highly populated areas. Id. at 87-88. In adopting the 20-station limitation for the radio service in lieu of the former twelve-station cap, the Commission similarly found that "a substantial increase in the national radio ownership rules can be permitted without any threat to viewpoint diversity or competition in the broadcasting industry." Memorandum Opinion and Order and FNPRM in MM Docket No. 91-140, 7 FCC Rcd 6387, 6390 (1992). Diversity at the national level is not of critical

³²CBS's television stations include: WCBS-TV, New York; KCBS-TV, Los Angeles; WBBM-TV, Chicago; WGPR-TV, Detroit; WCCO-TV, Minneapolis; WPRI-TV, Providence; and WFRV-TV, Green Bay.

concern, the Commission has stated, because the "most important idea markets are local." Report and Order, 100 FCC 2d at 37. "For an individual member of the audience," the Commission added, "the richness of ideas to which he is exposed turns on how many diverse views are available within his local broadcast market." Id.

92. To support its request for temporary waiver, Westinghouse argues that the competitive situation in individual markets will not be adversely affected during the term of the temporary waiver period. Moreover, Westinghouse asserts that an eighteen-month period would be consistent with Commission precedent regarding national ownership limits and is "particularly appropriate and reasonable, should television station divestitures be necessary and with respect to the excess Houston FM station." Such divestitures, adds Westinghouse, would involve substantial transactions, and sufficient time should be allowed for such divestitures to proceed on an orderly basis.

93. In its petition to deny, UCC contended that the duration of the waiver period for ownership of the sixteen television stations should be shorter than the eighteen months requested by Westinghouse. UCC argued that the eighteen-month waiver period granted in Midwest Communications involved the national ownership of radio stations, whose license terms are seven years, and not the national ownership of television stations, whose license terms are five years. Waiver of this "important multiple ownership regulation for so long a period," UCC calculated, constitutes 30-percent of a television station's license term, "a clear detriment to the public interest."

94. We find that Westinghouse's request for temporary waiver of the national ownership rule for both radio and television will not vitiate the diversity and competition objectives underlying the rule. In a nation of approximately 6,500 licensed FM radio stations and of approximately 1,200 licensed commercial television stations, Westinghouse's ability to adversely impact diversity with its 21 radio stations and its 16 television stations garnering a 32-percent audience reach is unlikely for the short term. As for competition concerns, the potential for detrimental effect upon competitiveness of the markets for delivered video programming, advertising or video program production is remote in light of the temporary nature of the waiver.

95. With respect to duration of the waivers, Westinghouse has requested eighteen months, but we believe, as discussed in paragraph 46, above, that a period of twelve months is appropriate to accommodate the merger with CBS. Accordingly, we shall grant Westinghouse a period of twelve months to come into compliance with both the national radio and television ownership rules. As discussed in the context of the radio contour-overlap rule for Houston, Westinghouse has proposed to divest a radio station in that market to a minority purchaser. Westinghouse's sale of a Houston FM radio station would bring it into compliance with both the radio contour-overlap rule and the national radio ownership rule. Therefore, as we stated above, in granting a temporary, twelve-month waiver of the radio-contour overlap rule, in the event Westinghouse is unable to fulfill its pledge to divest the Houston FM radio station to a minority within the twelve-month waiver period granted

here, we shall entertain a request for a short extension of time so long as Westinghouse is able to satisfy the Commission that it has found a potential minority purchaser and that purchaser requires additional time to obtain the necessary capital to finance the acquisition. Such requests, as we have noted, should be sufficiently documented.

Continued television satellite exemptions

96. Note 5 to Section 73.3555 of the Commission's Rules exempts from application of the multiple ownership rules those television stations that are "satellite" operations. A satellite television station is a full-power broadcast station which is authorized to retransmit all or part of the programming of a commonly owned parent station. Westinghouse seeks to acquire from CBS three satellite television stations: WJMN-TV, Escanaba, Michigan, which operates as a satellite of WFRV-TV, Green Bay, Wisconsin; and KCCO-TV, Alexandria, Minnesota, and KCCW-TV, Walker, Minnesota, both of which operate as satellites of WCCO-TV, Minneapolis, Minnesota.

97. In Television Satellite Stations Review of Policy and Rules, 6 FCC Rcd 4212, 4215 (1991), on reconsideration Second Further Notice of Proposed Rule Making in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991), on further reconsideration Review of the Commission's Regulations Governing Television Broadcasting, 10 FCC Rcd 3524 (1995), the Commission established the requirement that all applicants seeking to transfer or assign satellite stations justify continued satellite status by demonstrating compliance with the three-part "presumptive" satellite exemption standard applicable to new satellite stations. Alternatively, applicants may demonstrate that there exist "other compelling circumstances" to warrant continued satellite authorization. The presumptive satellite exemption is met if three public interest criteria are satisfied. They are: (1) no city-grade overlap between the parent and the satellite; (2) service to an "underserved" area by the satellite station; and (3) no alternative operator ready and able to construct or to purchase and operate the satellite as a full-service station. See Television Satellite Stations Review of Policy and Rules (Television Satellite Stations), 6 FCC Rcd at 4212. Westinghouse requests continued satellite exemption status for the three stations, asserting that they presumptively qualify under the Commission's three-part standard.

98. As to the first criterion, Westinghouse's engineering exhibit indicates that there is no overlap of the city-grade contours of the parent stations with those of their satellite stations. Second, Westinghouse states that each satellite station is deemed to provide service to underserved areas under the "transmission test." That test defines an area as underserved if a satellite community of license has authorized to it two or fewer full-power stations. Here, according to Westinghouse, which relies upon the 1995 Television Factbook, KCCW-TV, Walker, Minnesota, and WJMN-TV, Escanaba, Michigan, are the only full-power television stations licensed to those communities. As for KCCO-TV, Alexandria, Minnesota, Westinghouse states that there is only one other full-power television station licensed to that community, KSAX-TV, which serves as a satellite of KSTP-TV, Minneapolis.

99. Third, Westinghouse asserts that "it is highly unlikely" that an alternative buyer willing to operate the satellite stations on a full-service basis would be available. In support of this conclusion, Westinghouse submits an August 23, 1995 opinion letter from Jack Harvey, of nationally recognized media broker Blackburn & Company. Harvey states that "it is extremely unlikely -- and for all practical purposes impossible -- to find a buyer who is qualified financially and operationally who would be interested in buying any one of these [three] stations for the purpose of operating it on a free-standing full-service basis." To that end, Harvey looks to the communities of license of each of the satellite stations, Escanaba, Alexandria, and Walker, and notes that none would rank in the top 200 television market list were full-service stations to be established there. Harvey adds that "there is virtually no demand" for single-station purchases of stand-alone stations in markets ranked 175 and higher, despite the fact that general demand for local television stations is greater today than at any other period during the last five years.

100. As to the potential for stand-alone status of the specific satellite stations involved in this case, Harvey states that WJMN-TV, Escanaba, has been operated as a satellite since its inauguration in 1969. According to Harvey's appended letter of August 6, 1991, when he earlier evaluated the three CBS satellite stations, the geographical juxtaposition of Escanaba, equidistant from the centers of the Green Bay and Marquette television markets, accounts for the lack of feasibility in operating an Escanaba station as a full-service facility. The WJMN-TV tower, Harvey notes, is located approximately 30 miles north of Escanaba in order to reach as much of the Marquette market as possible while maintaining a city-grade signal to Escanaba, as required by Commission rules. Relocating the antenna to the south would allow WJMN-TV to cover much of the Green Bay market, but, states Harvey, it could not succeed there as a third independent station. Other markets approximately the size of Green Bay support only one independent station, notes Harvey, several of which are "financially marginal."

101. With respect to the stand-alone potential for the satellite stations of WCCO-TV, Minneapolis, Harvey states that KCCW-TV, Walker, has been a satellite since 1964, when the station commenced operation, while KCCO-TV, Alexandria, became a satellite in 1987, when no qualified purchaser willing to continue full-service operation of the station could be found. At that time, the station was assigned to the licensee of WCCO-TV, Minneapolis. See Central Minnesota Television, Inc., 2 FCC Rcd 6730 (1987). After 1987, Arbitron eliminated Alexandria as an Area of Dominant Influence (ADI), and Nielsen does not designate it as a Designated Market Area (DMA). Harvey concludes that KCCO-TV could not be operated profitably as a stand-alone station, not even with KCCW-TV as its satellite. The prospects of finding a purchaser willing to operate KCCW-TV as a full-service station, adds Harvey, "are even more remote," given Walker's population of 950 and its satellite-only history.

102. We find that Westinghouse has satisfied the presumptive standard's three criteria. Accordingly, we shall grant continued satellite status to WJMN-TV, Escanaba, KCCW-TV, Walker, and KCCO-TV, Alexandria.

Cumulative effect of the multiple waivers

103. As UCC contended, Westinghouse seeks an unprecedented number of waivers of our multiple ownership rules in order to consummate its merger with CBS. By contrast, in Capital Cities Communications, Inc., 59 RR 2d 451, the applicant divested a number of stations that did not conform with our rules prior to filing its applications for Commission approval. As a result, in that case the number of waivers requested, while unprecedented at that time, was only five. We have analyzed Westinghouse's requests for waiver individually and found, in each instance, that when viewed in light of the circumstances of the relevant local market and Westinghouse's public interest commitments, in each case the public interest is served by grant of a waiver. We must also consider, however, whether the extraordinary number and extent of the ownership waivers sought, taken as a whole, diminish diversity on a cumulative basis to an extent that would render approval of the underlying transaction contrary to the public interest.

104. Our diversity of ownership rules ensure that our overall system of licensing serves the public interest by fostering competition in the broadcast station marketplace and facilitating "the widest possible dissemination of information from diverse and antagonistic sources." See, e.g., Multiple Ownership (Broadcast-Newspaper Cross-Ownership) - Second Report and Order in Docket No. 1811, 50 FCC Rcd 1046. In determining whether this transaction is in the public interest despite the diminution of overall diversity, we weigh the impact on competition and diversity against other aspects of the transaction that promote the public interest.

105. We conclude that this transaction is in the public interest despite the diminution in diversity that results from the totality of the waivers we grant today. In addition to the locally significant programming commitments and pledges to attempt to divest to minority buyers that Westinghouse has made, the transaction as a whole also will likely result in a strengthened CBS Network, which will allow that network to continue programming in the public interest. For example, Westinghouse has voluntarily pledged to increase the amount of children's educational and informational programming aired on all of the Westinghouse-CBS owned and operated stations and on the CBS network. By including its network programming, the public interest benefits from this increased programming are distributed nationwide, throughout CBS's affiliate network. This is a public interest benefit.

Recusal of Westinghouse directors

106. Three of Westinghouse's outside directors, William H. Gray III, Richard M. Morrow, and David K.P. Li, also hold seats on the boards of companies with broadcast holdings, which, if attributed to these Westinghouse directors, would implicate the Commission's multiple ownership rules. See Attribution of Ownership Interests, 97 FCC 2d 997, 1025 (1984). Specifically, Westinghouse director Gray is a director of The Prudential Insurance Company of America (Prudential), whose wholly owned subsidiary, Prudential Investment Corporation, holds 10.88 percent of the voting stock of American Publishing Co.,

the publisher of the Chicago daily newspaper The Chicago Sun Times. Because The Chicago Sun Times is published in the same community to which are licensed a television station and five radio stations that will be owned by Westinghouse, Gray's positional interests on the boards of both Westinghouse and Prudential implicate the broadcast-newspaper cross-ownership rule, Section 73.3555(d).

107. Westinghouse director Morrow sits on the board of First Chicago Corporation (First Chicago), whose wholly owned subsidiary, First Capital Corporation of Chicago, holds an uninsulated limited partnership interest in Central States Network, L.P., the licensee of four AM and five FM radio stations. If attributed to Morrow, the four AM stations would, in combination with the seventeen AM stations attributed to Morrow through Westinghouse, exceed the twenty-AM radio station limitation of Section 73.3555(e). Similarly, the five FM stations, when added to Westinghouse's 21, would further exceed the twenty-FM radio station limitation. See paragraph 89, supra. Moreover, the community of license of one of the FM stations, WROE(FM), Neenah-Menasha, Wisconsin, is encompassed by the Grade A contour of WFRV-TV, Green Bay, thereby implicating the Commission's one-to-a-market rule, Section 73.3555(c). First Capital also holds 49.5 percent of the voting stock of Mariner Broadcasters, Inc., the licensee of WBEE(AM), Harvey, Illinois, located in the Chicago market. Attribution of that radio station to Morrow would add to the five-station radio combination in the Chicago market attributable to him via his seat on the Westinghouse board, in further violation of the radio contour overlap rule, and would add to the one-to-a-market combination there also attributable to him through Westinghouse. See paragraph 74, supra. Further, Morrow also sits on the board of First National Bank of Chicago, another First Chicago unit, which holds in its capacity as trustee 10.4 percent of the voting stock of Seaway Communications, Inc., the indirect licensee of two full-service television stations, WVII(TV), Bangor, Maine, and WJFW-TV, Rhinelander, Wisconsin. Attribution of those two television stations to Morrow would expand the national television ownership of sixteen already attributed to him through his director position at Westinghouse and would also result in a violation of the television duopoly rule in that the Grade B contour of the Rhinelander television station overlaps with that of Westinghouse's WFRV-TV, Green Bay.

108. Finally, Westinghouse director Li is also a director of Dow Jones & Company, Inc. (Dow Jones), the publisher of The Wall Street Journal. Attribution to Li of that newspaper, however, does not violate the broadcast-newspaper cross-ownership rule, because The Wall Street Journal is a nationally circulated newspaper and is, therefore, not subject to the rule. See Evening News Association, 59 RR 2d 1054, 1055 (1986). However, Dow Jones is a general partner of ITT-Dow Jones Television, which has pending before the Commission an application to acquire WNYC-TV, New York City. Upon consummation of that transaction, Li's attributable interest in WNYC-TV would violate the television duopoly rule because its Grade B contour overlaps with those of Westinghouse's WCBS-TV, New York City, and KYW-TV, Philadelphia.

109. On behalf of these three directors, Westinghouse seeks relief from attribution of non-Westinghouse broadcast interests pursuant to Note 2(h), which provides that the officers and

directors of a parent company of a broadcast licensee with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary "unless the duties and responsibilities" of the officer or director involved are "wholly unrelated to the broadcast licensee" 47 C.F.R. §73.3555, Note 2(h). Here, neither Westinghouse nor the three directors describe their duties, but each of Gray and Morrow, according to Westinghouse, has "advised" Westinghouse that he will not "participate in the consideration or discussion of any matter relating to the holding of" any non-Westinghouse broadcast station. Li, Westinghouse states, will abide by the same recusal with respect to Dow Jones upon the consummation of the CBS-Westinghouse merger.

110. The Commission has recognized director recusal from a multi-faceted corporation's television and/or radio businesses as the basis for relieving directors of the company from attribution. See, e.g., Craig O. McCaw, 9 FCC Rcd 5836, 5915-16 (1984); Viacom, Inc., 9 FCC Rcd 1577, 1579 (1994). In crafting a "limited means" of relieving corporate officers and directors of attribution, the Commission explained that such relief should be "narrow," that is, not intended to permit disclaimer of positional interests "as a matter of course." Attribution of Ownership Interests, 97 FCC 2d 997, 1025 (1984). The corporations on whose boards the three Westinghouse directors sit, Prudential, First Chicago, First National Bank of Chicago and Dow Jones, are all companies whose primary businesses are other than that involving broadcasting. Thus, we believe that the recusal of Gray, Morrow and Li from any and all matters relating to any and all aspects of the broadcast business coming before these companies' boards will satisfy the requirements of Note 2(h), thereby avoiding further conflict with our multiple ownership rules. Accordingly, Gray, Morrow and Li are relieved from any attributable interests arising from their director positions at Prudential, First Chicago, First National Bank and Dow Jones so long as they recuse themselves from all matters that involve and/or implicate those companies' broadcast businesses.³³

CONCLUSION

111. We have reviewed the proposed merger and the related pleadings and find that Westinghouse is qualified to be a Commission licensee. Finally, we find that grant of the transfer of control of the CBS broadcast stations to Westinghouse will serve the public interest, convenience and necessity.

112. Accordingly, IT IS ORDERED that the petitions to deny filed by Spectrum, Serafyn and Nikolyszyn ARE DENIED, the petition to revoke filed jointly by Serafyn and the Ukrainian Congress IS DENIED, the comments filed by Duquesne Light ARE DISMISSED, and the petition to deny filed by UCC IS DISMISSED. IT IS FURTHER ORDERED that the letters filed in opposition to the applications ARE DISMISSED.

³³ We expect that the appropriate recusal statements for each of the three directors will also be submitted by Westinghouse in its Ownership Reports.

113. IT IS FURTHER ORDERED that the applications for transfer of control of the CBS broadcast stations, BTC, BTCH, BTCCT-950803KF through 950803LI, ARE GRANTED.

114. IT IS FURTHER ORDERED that temporary waivers of the radio contour-overlap rule, Section 73.3555(a), to permit common ownership of WBBM(AM), WMAQ(AM), WSCR(AM), WBBM-FM, and WXRT(FM) in the Chicago market and to permit common ownership of KILT(AM), KIKK(AM), KKRW-FM, KILT-FM, and KIKK-FM in the Houston market for a period not to exceed twelve months from the date of consummation of the merger ARE GRANTED.

115. IT IS FURTHER ORDERED that permanent waiver of the television duopoly rule, Section 73.3555(b), to permit common ownership of WCBS-TV, New York, and WKYW-TV, Philadelphia, IS GRANTED, and that temporary waiver of the television duopoly rule, Section 73.3555(b), to permit common ownership of WBZ-TV, Boston, and WPRI-TV, Providence, for a period not to exceed six months from the date of consummation of the merger IS GRANTED.

116. IT IS FURTHER ORDERED that permanent waivers of the one-to-a-market rule, Section 73.3555(c), to permit common ownership in the Boston market of WBZ-TV, WBZ(AM), and WODS-FM, in the Minneapolis market of WCCO-TV, WCCO(AM), and WLTE-FM, and in the Washington, D.C./Baltimore markets of WJZ-TV and WARW-FM, ARE GRANTED, that temporary waiver of the one-to-a-market rule, Section 73.3555(c), to permit common ownership of WPRI-TV, Providence, and WBZ(AM) and WODS-FM, Boston, IS GRANTED, for a period not to exceed six months; and that temporary waivers of the one-to-a-market rule, Section 73.3555(c), to permit common ownership of the following combinations in the following six markets ARE GRANTED, for a period not to exceed twelve months from the date of consummation of the merger: WCBS-TV, WCBS(AM), WINS(AM), WCBS-FM, and WNEW(FM), New York; KCBS-TV, KNX(AM), KFVB(AM), KCBS-FM, and KTWV(FM), Los Angeles; WBBM-TV, WBBM(AM), WMAQ(AM), and WSCR(AM), and WBBM-FM, and WXRT(FM), Chicago; KYW-TV, KYW(AM), WGMP(AM), WMMR-FM, and WOGL-FM, Philadelphia; KPIX-TV, KCBS(AM), KPIX(AM), KRQR-FM, and KPIX(FM), San Francisco; WGPR-TV, WWJ(AM), WLLZ-FM, and WYST(FM), Detroit.

117. IT IS FURTHER ORDERED that temporary waivers of the national radio ownership rule, Section 73.3555(e)(1), to permit ownership of 21 FM stations, and of the national television ownership rule, Section 73.3555(e)(1), (2), to permit ownership of 16 television stations with an aggregate reach of 32.095 percent, for a period not to exceed twelve months from the date of consummation of the merger, ARE GRANTED.

118. IT IS FURTHER ORDERED that continued television satellite authorization, pursuant to Note 5 of Section 73.3555, for KCCO-TV, Alexandria, Minnesota, and KCCW-TV, Walker, Minnesota, satellite stations of WCCO-TV, Minneapolis, and WJMN-TV, Escanaba, Michigan, satellite station of WFRV-TV, Green Bay, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**SEPARATE STATEMENT OF
CHAIRMAN REED HUNDT**

*Re: Applications of Stockholders of CBS, Inc. and Westinghouse Electric Corporation
(File Nos. BTC, BTCH, BTCCT-950803KF through 950803LI)*

The transfer of the CBS stations to Westinghouse is a major event in broadcast history. The waivers we have granted will facilitate Westinghouse's ability to compete and to do a fine job as a trustee of the public's airwaves.

As a public trustee, Westinghouse will be correcting the disappointing performance of its stations and the CBS stations in terms of educating children. We have Westinghouse's commitment that CBS will do at least three hours of educational TV for children. This written commitment to the Commission can be counted on by America's parents and children. It is double what Westinghouse has been doing and nearly triple what CBS was doing. This is a good day for kids.

The Commission has also reaffirmed our doctrine that petitions to deny applications for transfer or assignment on the grounds of violating programming rules are acceptable, appropriate, and worthy of serious scrutiny. We seriously scrutinized the petitions against Westinghouse and we have not decided on the record that Westinghouse historically has complied with the Children's Television Act. That determination will be taken up at the time of the renewal of licenses, starting next year. Westinghouse's commitment to increase greatly its performance under the Act and to meet a minimum of three hours will go a long way to helping its case at the time of renewal.

The Commission has also decided today that the waivers of multiple ownership rules are based, *inter alia*, on Westinghouse's commitment to air specific quantified amounts of children's educational programming. This is another important victory for parents and kids.

I'm also very proud of the Commission for ruling on this historic application with unprecedented care and speed. We need to keep our commitment to the public to get things done, and we've proved that here.

**Separate Statement of
Commissioner James H. Quello**

**In re Applications of CBS, Inc. and
Westinghouse Electric Corporation**

After all is said and done -- and, in this case, a great deal has been said and done -- we must not lose sight of the fact that the Commission's approval of the CBS/Westinghouse merger demonstrates our unanimous belief that this transaction will benefit the broadcast industry, the parties, and the public. Approval of a merger between these two public-spirited companies will help lead the CBS network into the next era of broadcast technology and programming.

One issue of particular concern to me throughout this proceeding has been the agreement by Westinghouse to increase the amount of children's educational and informational programming aired on the CBS network and on its owned and operated stations. With respect to this issue, I would observe that this item is just as significant for what it does not say as for what it does say. What it does say is that this agreement exists. It also says that, to the extent this undertaking is truly voluntary, increasing the amount of children's educational programming is in the public interest.

But what this item does not say is that approval of the transaction is in any way conditioned on Westinghouse's implementation of the agreement. It expressly is not so conditioned. In this connection, another thing this item does not say is that this merger would have been approved whether or not Westinghouse had agreed to increase the amount of children's programming that is aired by CBS. Clearly, it would have been. And that would have been the right result. I am concerned about the precedent that might have been established had this Commission in any way encouraged, endorsed, or approved the filing of petitions to deny assignment or transfer applications that do not raise issues directly relevant to the case before us, but rather are designed only to secure "voluntary" agreements to a particular type of programming desired by a certain group or individual, but not otherwise required by any Commission rule or policy. Groups and individuals can and should attempt to influence the programming decisions of broadcasters through grass roots efforts, or through the rule making processes of the Commission, not through the transfer and assignment process where the focus of our public interest review is on compliance with existing, and not proposed, rules.

However, the item before us today does not embark on this thorny and treacherous path. As a result, I am confident that licensees in the future will not feel compelled to accede to the demands of groups whose arguments are more appropriately aired and decided in notice and comment rule making proceedings in which the views of all interested parties can be fully and fairly considered.

I vote to approve the merger of CBS and Westinghouse.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Applications of Stockholders of CBS, Inc. and Westinghouse Electric Corporation For Transfer of Control CBS, Inc.

As a result of this decision, the Commission has approved a considerable transfer of broadcast authorizations from CBS, Inc. to Westinghouse Electric Corporation (Westinghouse). The Commission, while reviewing this matter, has been faced with unprecedented issues. As such, I have continually expressed my belief that it is exactly this type of significant public interest determination that should be reviewed and adopted at an open meeting and not by way of the Commission's circulation process. In my opinion, the public should have the opportunity to hear the Commissioner's views on all decisions, but most certainly those that will have potentially consequential impact on their daily lives. Therefore, I believe the Commission, despite the short notice of the meeting, has taken an appropriate step towards better informing the public of its determination in this matter.

One of the most controversial and contentious issues has been the "voluntary" agreement by Westinghouse to increase the amount of children's educational and informational programming that will be aired on its stations. As I have stated on numerous occasions during my tenure at the Commission, I firmly believe that broadcasters should air more children's educational and informational programming. However, I am loathe to use government intrusion as a means of ensuring this objective. Notwithstanding my desire to see more children's educational programming, my support of this transaction was in no way contingent upon the commitment to increase children's programming on the CBS network by Westinghouse.

The announcement by Westinghouse expressing its commitment to increase the amount of children's educational and informational programming on the CBS television network as well as stations owned and operated by the merged entity, was in direct response to the petition to deny filed by the Office of Communication of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Dr. Everett Parker and other representatives (collectively referred to as "Petitioners"). The Petitioners alleged, among other things, that Westinghouse's record regarding children's educational and informational programming called into question its fitness as a licensee. Interestingly, the terms of the commitment mirror the quantitative standard that has been

¹ See Notice of Proposed Rulemaking in MM Docket No. 93-46, 10 FCC Rcd 6308 (1995) (children's programming NPRM). (Statement of Commissioner Andrew C. Barrett, Concurring in Part/Dissenting in Part).

proposed in the Commission's Notice of Proposed Rulemaking on children's educational and informational programming.² Though some would argue that the announcement was purely voluntary, I remain skeptical, particularly because Westinghouse's original filing in this matter made no mention of its intention to air an increased amount of children's programming on its stations. Moreover, the importance of the Commission's expedited review for CBS and Westinghouse was not lost on any of the Petitioners in this action. For these reasons, I am deeply troubled by the notion that the Commission prohibits "green mail" tactics in other instances, but in effect appears to endorse use of a similar strategy here.

I am pleased, however, that the Commission has chosen not to review CBS' or Westinghouse's compliance with the Children's Television Act of 1990 (CTA)³ as it considered this transfer and the corresponding waiver requests. Simply put, in my estimation, it is irrelevant to the issues at hand. Moreover, despite the Petitioners' contentions to the contrary, it would have been inappropriate (and one may argue redundant) for several reasons for the Commission to consider Westinghouse's compliance with the CTA in order to approve this transaction. First, as Commission precedent and practice dictate, the appropriate time for ascertaining a broadcaster's compliance with the CTA is upon renewal of a broadcaster's license term, not at the time of a license transfer or assignment. In this instance, of five (5) licenses for which Westinghouse sought renewal, three (3) were granted and the other two (2) are still pending.⁴ Second, by reviewing the children's programming contentions raised by the Petitioners, qualitative issues already being considered in the context of its children's programming NPRM would have most certainly arisen. Third, the issue of whether a quantitative standard should be established has yet to be decided by the Commission and has already been raised in the children's programming NPRM. As a result, the Commission could have been embroiled in a definitional and quantitative battle which had the potential to create delay in the approval process when the Commission has not reviewed such compliance in the context of a transfer in the past, and will ultimately consider these issues in the children's programming proceeding.

I am also pleased that we have carefully considered our policy with respect to temporary waivers. As similar mergers of broadcast

² Id.

³ 47 U.S.C. §303b.

⁴ License renewal applications were filed for four of the five Westinghouse stations. Stations KDKA-TV, WBZ-TV and KPIX-TV were granted by the Commission. The renewal application for KYW-TV is still pending as a result of an unrelated petition to deny and for WJZ-TV filed its most recent renewal application in May 1991, prior to the implementation of the CTA.

entities and thus, facilities ensue, the Commission will be forced to consider the potential detrimental impact on the diversity of the marketplace, and in particular, local markets. Here, the Commission was forced to consider an unprecedented number of waivers against the backdrop of pending legislation and the Commission's own proceedings, having the potential of further relaxing broadcast ownership caps.

While I understand Westinghouse's desire to retain broadcast stations in the event of favorable treatment resulting from the pending legislation, I do not believe it fair to allow any party to further its ownership strategy by "gaming" the Commission's process for extended periods of time. Moreover, I am uncomfortable disregarding the potentially detrimental consequences to diversity that could develop as a result of cumulative grants by the Commission. To that end, I believe that the Commission should continue to view a temporary waiver as the period that will allow an entity involved in a multiple station transfer the ability to conduct an orderly divestiture of properties that exceed the Commission's ownership cap. Therefore, I support the Commission's grant of twelve (12) month waivers for the majority of temporary waivers in this matter and the grant of a six (6) month temporary waiver for the television duopoly in the Boston/Providence market.

Finally, I commend Westinghouse for its commitment to seek minority purchasers for the divested stations. I have consistently supported increased minority ownership in the communications arena and am certain that numerous minorities have the acumen to be capable broadcasters if given the opportunity. As a result, I do not believe it will be difficult for Westinghouse to identify a minority purchaser and thus do not see any reason to grant eighteen (18) month temporary waivers of our rules for the divestiture of properties where necessary. Given the historical difficulties in obtaining capital that minorities have encountered, the greater challenge will be the procurement of capital necessary to effectuate the transaction. For these reasons, I support the Commission's decision to encourage divestiture of broadcast facilities to minorities by considering short extensions of a temporary waiver where Westinghouse makes a showing that it needs additional time to consummate a sale of its station to a minority.

**SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS**

Re: Applications of Stockholders of CBS, Inc. and Westinghouse Electric Corporation

Today, we approve a transfer of control of 28 radio and television broadcast licenses from CBS to Westinghouse. We also approve 18 associated requests for waivers of our ownership rules -- an unprecedented number. We do so in record time for a highly complex, multiple-station transaction. More importantly, we both accommodate the realities of the commercial marketplace and promote our public interest objectives.

Local Ownership Rules

Competition and diversity of voices are core values in our stewardship of the broadcast spectrum. They are the principles upon which our local ownership rules are founded. Fundamental democratic goals are promoted by ensuring that different viewpoints have access to the media, and this in turn is achieved by limiting the number of radio and television stations that any single entity can own in the same community.

In this case, we are confronted with a variety of specific waiver requests because the owner of a large group of stations (Westinghouse) is seeking to acquire a network (CBS) that maintains a number of its own "owned and operated" stations. In these circumstances, to prevent forced "distress sales" of broadcast properties, we properly allow the time necessary for compliance with our local ownership rules.

Here, balancing commercial realities against the goals of competition and diversity, we are granting several waivers on a permanent basis. Most other waivers are being granted on a temporary basis for 12 months. Two waivers are being granted to accommodate the Providence and Boston TV duopoly; there, because the stations' extensive signal overlap triggers greatest concern for competition and diversity objectives, we have limited the waivers to six months. Overall, we have allowed for the orderly, but not leisurely, divestiture of those properties whose sale is needed to conform to our rules. We have no evidence of market conditions that necessitate waivers of longer periods, such as the 18 months Westinghouse has proposed.

Children's Television

Today's action relates solely to the transaction proposed by CBS and Westinghouse. This proceeding is not the rulemaking regarding implementation of the Children's Television Act, and none of us seeks to resolve that proceeding in this docket.

In this case, however, a group of parties petitioned to deny this transaction because of concerns about Westinghouse's compliance with its statutory obligation to serve the educational and informational needs of children. In response, Westinghouse represented to the Commission that it will increase substantially the quantity of high-quality programming for children that will be transmitted both over the CBS television network and by the network's own stations. Relying on this assurance, petitioners withdrew their petition to deny.

I salute Westinghouse for this commitment, which will benefit America's children for years to come and set a commendable example for all television broadcasters. Consistent with well-established precedent, I have weighed Westinghouse's promise in the public interest balance.

This transaction raised significant issues that required thoughtful analysis and careful resolution. We have responded directly to the applications and petitions before us and also provided guidance for the structure and review of future media transactions. For the reasons stated above, I believe we have discharged our duties responsibly and expeditiously.

Separate Statement of
Commissioner Rachelle B. Chong

*Re: In re Applications of Stockholders of CBS, Inc. and Westinghouse Electric Corporation,
File Nos. BTC, BTCH, BTCCT-950803KF through 950803LI*

I write separately to clarify my position with regard to the temporary waivers approved in this item. We have found in this item that the merger of CBS, Inc. and Westinghouse Electric Corporation is in the public interest. I wholeheartedly agree. This coupling will effect cost savings, make CBS a stronger network, and allow CBS to provide better service to its audiences. I applaud CBS and Westinghouse for their vision in recognizing that those who provide free, over-the-air broadcasting must strengthen and position themselves to compete in the increasingly competitive communications industry.

One by-product of this major transaction is that Westinghouse will own more broadcast stations in some markets than our multiple ownership rules permit. In these markets, I believe it is appropriate for us to grant temporary waivers of our multiple ownership rules so that this transaction can close. By granting Westinghouse temporary waivers, we will permit it to sell these stations in a reasonable and orderly manner. I support our grant of these temporary waivers because I believe that government should facilitate and not impede business transactions that are in the public interest.

Given the scope of this merger and the number of transactions that will have to take place to come into compliance with our multiple ownership rules, it is my view that it would have been appropriate and consistent with our caselaw to grant the full 18 month period that Westinghouse requested. A majority of my colleagues have concluded, however, that a year is a more suitable period. I accept the majority's conclusion, but I want to make clear that, if needed, I would entertain a request for an extension of the temporary waivers.