

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

RECEIVED

FEB 8 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of )  
)  
UTV of San Francisco, Inc., KCOP Television, )  
Inc., UTV of San Antonio, Inc., Oregon )  
Television, Inc., UTV of Baltimore, Inc., )  
WWOR-TV, Inc., UTV of Orlando, Inc. )  
United Television, Inc. )  
(Assignors) )  
)  
and )  
)  
Fox Television Stations, Inc. )  
(Assignee) )  
)  
For Consent to Assignment of Licenses )  
for Stations KBHK-TV, San Francisco, CA; )  
KCOP-TV, Los Angeles, CA; KMOL-TV, )  
San Antonio, TX; KPTV-TV, Portland, OR; )  
WUTB-TV, Baltimore, MD; WWOR-TV, )  
Secaucus, NJ; WRBW-TV, Orlando, FL; )  
KMSP-TV, Minneapolis, MN; KTVX-TV, )  
Salt Lake City, UT; KUTP-TV, Phoenix, AZ )

File Nos. BALCT-20000918ABB,  
ABC, ABD, ABF, ABK, ABL,  
ABM, ABN, ABU, ABY, ABG,  
ABH, ABI, ABJ, ABO, ABP, ABQ,  
ABR, ABS, ABV, ABW, ABX,  
ABZ, ACA, ACB, ACC, ACD, ACE

RESPONSE TO AMENDED APPLICATION OF FOX AND CHRIS-CRAFT

Of Counsel:  
  
Jennifer L. Mercer  
Law Student  
Georgetown University  
Law Center

Christopher R. Day  
Angela J. Campbell  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW, Suite 312  
Washington, DC 20001  
(202) 662-9535

Andrew Jay Schwartzman  
Harold Feld  
Media Access Project  
950 18<sup>th</sup> Street, NW, Suite 220  
Washington, DC 20006  
(202) 454-6581

February 8, 2001

Counsel for Petitioners

## TABLE OF CONTENTS

SUMMARY .....	iii
I. Fox's Proposed Ownership Structure Will Place the Chris-Craft Licenses Under Foreign Control .....	2
A. The Proposed Ownership Structure is Materially Different Than That Approved by the Commission in <i>Fox II</i> .....	3
1. The Addition of Newco Materially Changes Fox's Corporate Structure ..	3
2. The Rationale for Allowing Alien Ownership in <i>Fox II</i> does not Apply Here .....	6
B. Newco will have Control of the Chris-Craft Licenses .....	9
1. The Changes to the Operating Agreement are Insufficient to Eliminate Newco's Control .....	10
2. When All Factors Are Taken Into Account, It is Clear That Newco Has <i>De Facto</i> Control .....	12
a. Day-to-day management rests with Newco .....	13
b. Newco will control finances, personnel and programming .....	14
c. The affidavits of Fox executives do not assure future FTS control over the Chris-Craft licenses .....	16
d. The case law provides support for finding Newco in control ...	17
3. Even if it does not amount to <i>de facto</i> control, Newco's involvement raises questions under Section 310(b) .....	19
II. Although Fox Has Failed To Provide Complete Information About the Ownership and Control of Newco, There is No Question That it is Controlled by Aliens .....	21
A. Fox Has Failed To Provide All Of the Information Requested .....	22
B. Newco is Foreign-Controlled .....	23

C.	The Applicants Do Not Provide Any information About Who Owns and Controls News Corp .....	24
III.	The Grant of the Applications Will Not Serve the Public Interest .....	27
A.	Fox Has Not Satisfied Its Section 310(d) Public Interest Obligation Through Submission of Form 314 .....	28
B.	The Information Provided in Fox’s Letter Does Not Satisfy the Public Interest Obligations of Section 310(d) .....	30
IV.	The Commission Should Require That The Hart-Scott-Rodino Documents Be Submitted To It For Review .....	32
V.	New York Post Financial Information .....	34
	CONCLUSION .....	36

## SUMMARY

Fox and The News Corporation Limited ("News Corp") have now been afforded three separate opportunities before the Commission to show that their applications to acquire the broadcast licenses and stations assets of Chris-Craft Industries will comply with applicable law, Commission rules and policies and the public interest. In all three attempts, Fox and News Corp have failed to make the requisite showings to justify approval of applications that raise very serious foreign ownership questions and request no fewer than three waivers of Commission rules governing broadcast ownership.

Fox and News Corp's responses to the Commission's request for additional information regarding the proposed ownership structure of the Chris-Craft station assets are incomplete and, in some cases, inaccurate. Contrary to Fox's assertions, the addition of Newco was not approved by the Commission in 1995, or in any Commission decisions subsequent to that date. Furthermore, the Commission never approved Fox's 1998 decision to split Fox Television Station, Inc.'s ("FTS") licenses and broadcast assets between FTS and Fox Entertainment Group, Inc. ("FEG") respectively. Accordingly, Fox cannot rely on prior Commission decisions for support of either the addition of Newco or the license/broadcast asset split contemplated in the instant transaction.

Fox nonetheless claims that its newly revised "Operating Agreement" between FTS and Newco would sufficiently tie the Chris-Craft station assets, held by Newco, with the Chris-Craft station licenses, held by FTS. This claim is also inaccurate. Under the terms of the Operating Agreement, Newco will own all the station assets, maintain and replace all station equipment, and hire almost all station employees. Newco will receive ninety-five percent (95%) of the

profits from this arrangement. FTS will receive only five percent (5%). Furthermore, for tax purposes, the Operating Agreement states that Newco and FTS are "partners." Rearranging deck chairs on the *Titanic* may have created a different appearance during the ship's final moments, but the end result was still the same. Fox's wordsmithing in the Operating Agreement has the same net effect. It changes the appearance, but in the end, Newco is still in control.

The critical question then turns on who controls Newco. Fox claims that the Commission need not resolve this question. This question, however, is key to determining who will ultimately control the Chris-Craft stations. Newco's ultimate corporate parent is News Corp., an Australian corporation. This violates Section 310(b)(4) of the Communications Act. While Fox and News Corp claim that Murdoch "may be deemed to be in control" of News Corp, they provide no evidence to substantiate that claim. Quite to the contrary, in fact, the publicly available evidence points to a finding that Murdoch exerts neither *de facto* nor *de jure* control over Newco or its ultimate corporate parent, News Corp. In light of Fox and News Corp's failure to reveal information regarding the exact ownership of News Corp, it is impossible for the Commission to make a determination of the level of foreign control involved in this proposed transaction, and whether that level of control serves the public interest. Therefore, the Commission must deny Fox's applications for failure to comply with Section 310(b)(4) of the Communications Act.

Fox's responses to the Commission's request for additional information on the public interest benefits of this transaction are also unpersuasive. In fact, Fox only claims one public interest benefit of this transaction: Chris-Craft stations' access to "Fox News Edge," a service of the Fox News Channel that provides "canned" news feeds to Fox affiliates. Access to Fox News

Edge will do nothing to further the public interest. In fact, it will likely have the opposite effect and encourage Chris-Craft stations to rely on "canned" news and public interest stories, rather than focusing resources on local news and public interest programming.

In a defiant move, Fox and News Corp also refuse to allow the Commission access to its Hart-Scott-Rodino ("HSR") filing made with the U.S. Department of Justice, claiming that the material is not necessary for the Commission's review. Fox's refusal ignores the fact that the Commission has requested, and received, access to the HSR filings in a number of other large transactions, including the AT&T-TCI merger. It also ignores the fact that the Commission has an obligation to review broadcast applications to ensure that they do not present anti-competitive outcomes that could hurt the viewing public. Accordingly, the Commission should demand that Fox and News Corp immediately provide the HSR documents directly to the Commission, as allowed under Commission rules and policies.

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

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

**RESPONSE TO AMENDED APPLICATION OF FOX AND CHRIS-CRAFT**

On January 25, 2000, UTV of San Francisco, Inc., KCOP Television, Inc., UTV of San Antonio, Inc., Oregon Television, Inc., UTV of Baltimore, Inc., WWOR-TV, Inc., UTV of Orlando, Inc. and United Television, Inc. (collectively "Chris-Craft" or "CCI") and Fox Television Stations, Inc. ("Fox") filed a letter and amended application ("Fox Letter") in response to the Commission's December 21, 2000, letter ("Commission Letter") requesting additional information regarding the above-referenced applications. The Office of Communication, Inc. of the United Church of Christ, Academy of Latino Leaders in Action, Black Citizens for a Fair Media, Center for Media Education,

Consumer Federation of America, Consumers Union, New York Metropolitan Association of the United Church of Christ, Rainbow/PUSH Coalition and Valley Community Access Television (collectively "Petitioners") hereby file their response to the Fox Letter, pursuant to the instructions in the Commission Letter.

**I. Fox's Proposed Ownership Structure Will Place the Chris-Craft Licenses Under Foreign Control.**

The Commission Letter summarizes the facts presented in the applications and concludes that, "if Newco is in control of the licenses of the Chris-Craft stations, this would appear to be a violation of Section 310(b)(4) of the Communications Act."<sup>1</sup> Thus, the Commission Letter requires "the applicants to explain how the operating agreement, which appears to place virtually all control of the Chris-Craft licensees and 95% of the income from those stations in the hand of Newco, comports with *Fox II*."<sup>2</sup> It also asks Fox "to provide information that details the level of foreign investment and control in Newco, FEG and their parent companies."<sup>3</sup>

In response, Applicants argue that the ownership structure of Newco "is identical to the ownership structure approved in *Fox II*."<sup>4</sup> Second, they argue, based in part on amendments to the Operating Agreement<sup>5</sup> between FTS and Newco, that FTS, which is under the control of K. Rupert Murdoch ("Murdoch"), not Newco, will control the Chris-Craft Stations. Finally, Applicants argue that "the precise levels of foreign ownership of Newco and its parent companies

---

<sup>1</sup>Commission Letter, at 2.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>Fox Letter, at 2.

<sup>5</sup>*See infra* note 36.

is not material or necessary to the Commission's review of the Application."<sup>6</sup> They nonetheless grudgingly provide some information about these corporations, but fall far short of providing the information requested by the Commission, and as we show below, what is necessary for the FCC to faithfully fulfill its obligations under the Communications Act.

**A. The Proposed Ownership Structure is Materially Different Than That Approved by the Commission in *Fox II*.**

The Applicants' lengthy and confusing arguments in support of its claim that "the proposed ownership structure for the Chris-Craft Stations does not differ in any material respect from the structure approved in *Fox II*,"<sup>7</sup> turn on two claims. The first claim is that in *Fox II*, the Commission found that it was in the public interest to permit "99+ percent" of the economic benefits to flow to aliens. The second claim is that the FCC previously approved a separation of the Fox stations licenses and assets. Neither of these claims is true.

**1. The Addition of Newco Materially Changes Fox's Corporate Structure.**

The Applicants focus on a claimed "inaccurate assumption" by the FCC that 99% of the economic benefits of the station operations flowed to aliens while 1% flowed to Murdoch, a naturalized US citizen. The "correct facts" of *Fox II*, according to the Applicants, are that "the entire equity interest in FTS belongs to News Corp less only Rupert Murdoch's Fixed Return Interest, the calculation of which is not related to the profits and losses of FTS."<sup>8</sup> The Applicants then argue that because "FEG will be entitled to all of the economic interest in the Chris-Craft

---

<sup>6</sup>*Id.* at 7.

<sup>7</sup>Fox Letter, at 3.

<sup>8</sup>*Id.* at 5.

Stations, less only the Fixed Return Interest due to Rupert Murdoch,” the “breakdown of economic benefits between aliens and U.S. citizens under the proposed ownership structure for the Chris-Craft Stations remains the same as in the FTS structure previously approved by the Commission.”<sup>9</sup>

Even assuming *arguendo* that the Applicants’ version of the facts is correct, just because the extent of economic benefits flowing to alien investors under the proposed ownership structure may be the same as that approved under *Fox II* does not mean that the proposed ownership structure is the same or that it is in the public interest to approve this arrangement.

On its face, the corporate structure proposed here is different from that allowed in *Fox II*. First, the Chris-Craft stations’ assets will be held by Newco. Newco is a new subsidiary of FEG (formerly THC) that did not exist at the time the Commission made its determination on foreign ownership in *Fox II*. In addition, since the 1995 decision, Murdoch’s 76 percent voting interest has moved from the THC (now FEG) level to the FTS level. Thus, Murdoch’s 76 percent voting interest does not apply to Newco.

In a footnote, the Applicants admit that Newco is a new entity not part of the ownership structure approved in 1995, but claim this fact is “not material.”<sup>10</sup> Specifically, they contend that the Commission “could not and would not have routinely approved the *pro forma* transfer reorganization in 1998,” if the introduction of new subsidiaries was inconsistent with *Fox II*.<sup>11</sup> This statement is misleading and incorrect in several respects.

---

<sup>9</sup>*Id.* at 6 (bolding omitted).

<sup>10</sup>*Id.* at 6 n.9.

<sup>11</sup>*Id.*

The facts are that on July 27, 1998, Fox filed a *pro forma* transfer application stating that it was being filed for “the sole purpose of assigning the assets (including all FCC licenses)” from the old Fox Television Stations, Inc. subsidiary, now FTH, to a newly formed subsidiary also named FTS.<sup>12</sup> This application, which was granted on August 26, 1998, was uncontested and resulted in no Commission or Bureau decision explaining the rationale.<sup>13</sup> The separation of the assets and licenses between FTH and FTS, however, was not part of the *pro forma* application. Instead, this “modification” was reported to the Commission, in a letter from William S. Reyner, dated September 30, 1998,<sup>14</sup> *after* the Commission approved the short-form “*pro forma*” reorganization.<sup>15</sup> Thus, the Commission was never asked to rule on, nor did it approve, either implicitly or explicitly, the split of the broadcast assets and licenses.<sup>16</sup> The Commission’s failure to recognize and rule on the issue at the time of the Reyner Letter does not preclude it from addressing the issue at this time.<sup>17</sup>

---

<sup>12</sup>*Fox Television Stations, Inc., Application for Consent to Pro Forma Assignment of Licenses*, File Nos. BALCT-980727, LE, KM-KU (filed July 27, 1998).

<sup>13</sup>*See Mass Media Bureau Broadcast Actions*, Report No. 44317 (Rel. Sept. 1, 1998).

<sup>14</sup>Letter from William S. Reyner, Jr. to Magalie Roman Salas, Commission Secretary (filed Sept. 30, 1998) [hereinafter “*Reyner Letter*”]. A copy of the letter was attached to the *Petitioners’ Reply*.

<sup>15</sup>This point is also discussed in Reply to Joint Opposition of Fox and Chris-Craft, filed Nov. 22, 2000, at 7-10 (“*Petitioners’ Reply*”).

<sup>16</sup>*See id.* (arguing that the split was both inconsistent with *Fox II* and in violation of long-standing Commission’s policy against the transfer of bare licenses).

<sup>17</sup>*See Letter from Univision, Inc.*, 4 FCC Rcd 2417, 2417 n.5 (1989) (“For future reference . . . we caution that, where, as here, the Commission has received notification of a licensee’s interpretation of a Commission rule or policy, the Commission’s silence or inaction with respect to that notification should not be read to suggest the Commission’s approval of, or agreement with, the licensee’s interpretation.”); *see also Digital Paging Systems of Philadelphia*,

Moreover, even assuming *arguendo* that Commission inaction in the face of the September 30, 1998 letter could be construed somehow as approving the license and asset split, both the licenses and assets remained under the same chain of corporate ownership and control.<sup>18</sup> Thus, by no stretch of the imagination can the ownership structure proposed here, where the assets are held by a foreign-controlled corporation and only the bare licenses held by FTS, be considered to be the same as the corporate structure permitted in *Fox II*.<sup>19</sup>

## **2. The Rationale for Allowing Alien Ownership in Fox II Does not Apply Here.**

It is important to bear in mind that the corporate structure presented in *Fox II* was in fact found to violate Section 310(b)(4).<sup>20</sup> Having found that News Corp's ownership of THC and

---

*Inc.*, 2 FCC Rcd 5320, 5320-21 (Rev. Bd. 1987) (citing *Atlantic Broadcasting Co. (WUST)*, 5 F.C.C.2d 717, 720-21 (1966) (Commission precedence establishes that silence "does not constitute conclusive Commission action"). Even if silence were to be interpreted as "approval," such approval occurred at the Mass Media Bureau level, and the Commission is free to overturn that decision in the instant case.

<sup>18</sup>*Petitioners' Reply*, at 9-10.

<sup>19</sup>Fox argues that a "broadcast licensee is not required to own its station's assets," Fox Letter, at 12 n.18, supporting its argument with Commission decisions that purportedly hold that "no 'bare license' issue arises when a proposed licensee will have access to the assets required to operate the station through means other than ownership of those assets." *Id.* However, the cases that Fox cites do not support their assertion. In *Broadcasters of Douglas County*, the Commission found that no bare license issues existed where the licensee had a lease-back contract for the station assets with the owner of them. 10 FCC Rcd 10429, 10429 (1995). In *KPAL Broadcasting Corp. (Assignor) and R.R. Moore Corp. (Assignee)*, the Commission found that although the station assets were "burdened with encumbrances," there was no bare license issue because the corporation was not legally bankrupt, the principal liabilities were loans to shareholders, and the "remainder of claims will be satisfied with the proceeds from the sale of the station." 28 F.C.C.2d 46, 48 (1970). In both *Douglas County* and *KPAL*, the licensees had a property interest (leasehold and ownership, respectively) in the station's assets. In the present case, FTS does not have a property interest in the assets owned by Newco.

<sup>20</sup>*Fox Television Stations, Inc.*, 11 FCC Rcd 5714, 5716 (1995) [hereinafter "*Fox II*"] (rejecting Fox's argument that the revised capital structure of FTH brought News Corp's share

FTS exceeded the statutory benchmark, however, the FCC went on to consider whether Fox had “presented reasons sufficient to overcome the presumption against alien ownership in excess of the statutory benchmark.”<sup>21</sup> The determination that Fox had presented sufficient reasons did not have anything to do with the flow of the economic benefits. Rather, the Commission found that the equities unique to that case weighed in favor of allowing Fox to retain its current (as of 1995) ownership structure.

The “unique circumstance” that led the Commission to allow Fox to maintain its 99+ percent foreign ownership was that the *same* corporate structure had been approved by the FCC in 1985. As a result there were, in the words of the Commission, issues of “good faith reliance.”<sup>22</sup> Fox had relied on the Commission’s approval of the structure with control measured by number of shares owned by each party. The Commission noted that it had not issued a decision suggesting that it would determine Section 310(b) compliance based upon the equity contributions of investors until 1992, seven years after approving FTS’s initial structure.<sup>23</sup> Forcing FTS to restructure following the 1992 decision was likened to retroactive agency adjudication.<sup>24</sup> Moreover, the Commission found that the cost of restructuring Fox to bring it

---

below the 25 percent statutory benchmark for alien ownership).

<sup>21</sup>*Id.* at 5723.

<sup>22</sup>*Id.* at 5725.

<sup>23</sup>*Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8481(1995) [hereinafter “*Fox I*”] (referring to *Univision Holdings, Inc.*, 7 FCC Rcd 6672 (1992)).

<sup>24</sup>*Fox II*, 11 FCC Rcd at 5726.

into compliance with the 1992 ruling would result in capital gains tax ranging from \$540 to 720 million.<sup>25</sup>

The same equitable arguments are not present in the case at hand. Good faith reliance is not involved. Fox has been on notice since 1995 that it could acquire additional broadcast stations only as it was “presently structured.”<sup>26</sup> Furthermore, while the Applicants claim that they structured the deal “to comply with federal income tax law requirements relating to tax-free organizations,”<sup>27</sup> they nowhere quantify the tax consequences of structuring the deal to be consistent with the structure permitted in *Fox II*. Even were this amount substantial, it is not the Commission’s job to assist Fox and News Corp’s tax avoidance scheme by allowing an ownership structure that differs markedly from that approved in 1995.

In sum, the corporate structure proposed here differs materially from that permitted in *Fox II*, and the equities upon which the Commission based its public interest finding to allow alien ownership in excess of the statutory benchmark simply do not apply in this case. The Applicants’ long discussion of the distribution of economic benefits is nothing more than a smokescreen to obscure what is really going on in this case. The real issue is that identified in the Commission’s letter, *i.e.*, whether Newco will be in control of the Chris-Craft licenses. We turn now to that question.

---

<sup>25</sup>*Id.* at 5724.

<sup>26</sup>*Id.* at 5729.

<sup>27</sup>Fox Letter, at 2.

**B. Newco will have control of the Chris-Craft Licenses.**

The Commission Letter raises the issue of whether Newco will be the *de facto* licensee of the stations being acquired based on the following factors:

Newco would own all of the stations' assets and employ all of the stations' personnel. Newco would perform all of the day-to-day operations of the stations, purchase the stations' equipment, enter into and administer programming contracts and pay all station expenses and capital costs. Newco would also retain all the advertising and other receipts from station operations and would receive 95% of the net income from the stations. If the stations were sold, Newco would receive 95% of the proceeds of the sale. Finally, Newco has the right to approve or disapprove any sale.<sup>28</sup>

The Applicants admit that Newco will perform all of the day-to-day operations of the stations, including purchasing the stations' equipment, entering into and administering programming contracts and paying all station expenses and capital costs.<sup>29</sup> Likewise, they admit that Newco will own all of the station assets,<sup>30</sup> Newco is required to purchase equipment for the stations,<sup>31</sup> Newco is obligated to maintain and replace equipment and to make all repairs and capital improvements,<sup>32</sup> Newco will employ the stations' personnel,<sup>33</sup> and Newco will pay all expenses and capital costs.<sup>34</sup> They claim that Newco will do all of the above subject to the direction and approval of FTS. Nonetheless, previous Commission decisions have found it

---

<sup>28</sup>Commission Letter, at 1-2.

<sup>29</sup>Fox Letter, at 10.

<sup>30</sup>*Id.* at 11.

<sup>31</sup>*Id.* at 12.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 13.

<sup>34</sup>*Id.* at 14.

necessary to “look behind the contractual language that purportedly reserves ultimate decision making.”<sup>35</sup>

**1. The Changes to the Operating Agreement are Insufficient to Eliminate Newco’s Control.**

Fox has amended the Operating Agreement<sup>36</sup> between FTS and Newco to bolster its argument that FTS rather than Newco will exercise control. However, rather than creating clear lines of control, many of the new provisions conflict with other provisions, thus creating ambiguity and uncertainty. For example, the preamble to the Operating Agreement has been

---

<sup>35</sup>Letter from Chief, MMB, to American Colonial Broadcasting Corp. (Jan. 10, 1985) at 8 (“*American Colonial Letter*”). The letter is attached as “Exhibit 1.” The situation described in the *American Colonial Letter* is strikingly similar to the one here. Section 310(b)(4) issues arose because the total alien interest amounted to 27.28 percent. The Bureau Chief found that the existence of consulting contracts with Quico/Newco, which were alien owned companies, resulted in *de facto* control even though the licensee had reserved ultimate decision-making authority. Quico/Newco were to maintain the equipment and property of the stations; hire and train technical, administrative, accounting and sales personnel; sell advertising time; and administer the business of the stations. See *American Colonial Letter*, at 6. For its services, Quico/Newco was to be paid a fee and their services were subject “to the overall power of [American Colonial] to manage its business. *Id.* In addition, Quico/Newco were to recommend programs and hire and train staff for program production. *Id.* All officers of Quico/Newco were to “report at least weekly to the officers of American Colonial.” *Id.* Quico/Newco’s obligations under the contracts were very similar to Newco’s obligations under the Operating Agreement with FTS. And in some ways, Newco’s authority is even greater than that of Quico/Newco. Quico/Newco was not authorized to “create or assume any obligations on behalf” of American Colonial. *Id.* Newco is permitted to enter into and administer programming contracts. Operating Agreement, § 2.2. American Colonial could terminate the contract if Quico/Newco’s subsidiary (which owned the shares in American Colonial) transferred any American Colonial shares, or if Quico/Newco defaulted on their contracts. *Id.* FTS can terminate the Operating Agreement only upon the “mutual written consent of Newco and FTS.” Operating Agreement, § 7.2(b). In short, FTS and Newco have failed to meet the congressional requirement of “amply safeguard[ing]” American communications in much the same way that American Colonial failed. See *American Colonial Letter*, at 10 (quoting 78 Cong. Rec. 8825 (1934)).

<sup>36</sup>Fox Letter, Attachment A, “Revised Stations Operating Agreement” [hereinafter “Operating Agreement”].

amended to add language that “Newco and FTS intend that FTS shall exercise *de facto* and *de jure* control over the Stations within the meaning of Section 310 of the Communications Act.”<sup>37</sup> Yet, the previous sentence remains unchanged. It states their intent that “the activities of Newco and FTS under this Agreement be treated for Federal income tax purposes as a *partnership* formed to operate the Station for joint profit,” (emphasis added).<sup>38</sup> This gives Newco a chameleon-like quality. For Commission purposes, FTS is in control. For tax purposes, however, FTS is held out to the IRS as merely a “partner.”

As the Commission stated in *Fox II*, “in assessing compliance with Section 310(b), we must examine the economic realities of the transactions under review and not simply the labels attached by the parties to their corporate incidents.”<sup>39</sup> If the Commission determines that Newco and FTS have formed a partnership to operate the stations, this arrangement would violate Section 310(b). It is well settled that although the language of Section 310(b) refers to corporations, the statutory restrictions apply to non-corporate entities and associations including

---

<sup>37</sup>*Id.* at 1.

<sup>38</sup>*Id.*

<sup>39</sup>*Fox II*, 11 FCC Rcd at 5719.

partnerships.<sup>40</sup> By definition, a general partner exercises control.<sup>41</sup> Thus, a grant of licenses to a partnership where one of the partners is alien-controlled would violate Section 310(b).

Another example of how Fox has amended the Operating Agreement in such a way that creates ambiguity about control can be seen in Sections 2.1 and 2.2. Section 2.2 now provides that “[s]ubject to the rights and powers of FTS over the management and operations of the station as set forth in Section 2.1 hereof, Newco shall perform the day-to-day operations of the Stations, including *without limitation*,” preparing the budget, purchasing equipment, entering into and administering programming contracts, and hiring and employing of personnel.<sup>42</sup> Section 2.1 purports to give FTS “full control over the management and operations of the Stations during the Term, including, *without limitation*, determination of programming decisions, active control over finances and budgets; and selection of all personnel.”<sup>43</sup> It is impossible for both of these corporate entities to perform the same functions “without limitation.”

**2. When All Factors Are Taken Into Account, It is Clear That Newco Has *De Facto* Control.**

The changes to the Operating Agreement do not alter the fact that when the totality of the circumstances are considered, *de facto* control lies with Newco. As the Commission stated in

---

<sup>40</sup>See *Cellwave Telephone Service, LP v. FCC*, 30 F.2d 1533, 1534 (D.C. Cir. 1994); *Moving Phones Partnership, LP v. FCC*, 958 F.2d 1051, 1055 (D.C. Cir. 1993), *reh'g denied*, 998 F.2d 1051, *cert. denied*, 511 U.S. 1004 (1994). As the Commission explained in *Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310(b)(3) and (4)*, filed by Wilner & Scheiner, 103 FCC 2d 511, 514 (1985), *recon. granted in part*, 1 FCC Rcd 12 (1987) (“*Declaratory Ruling*”), Section 153 of the Communications Act defines “corporation” to include “any corporation, joint-stock company or association,” which includes partnerships.

<sup>41</sup>See *Moving Phones Partnership*, 998 F.2d at 1055.

<sup>42</sup>Operating Agreement, § 2.2 (emphasis added).

<sup>43</sup>*Id.* § 2.1 (emphasis added).

*Fox I*, determining *de facto* control “transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented. Case-by-case rulings are therefore required, and we have considered a variety of factors in making our determination.”<sup>44</sup>

**a. Day-to-day management rests with Newco.**

The Commission has found that one of the relevant factors in determining *de facto* control is involvement in the day-to-day management of the station in question.<sup>45</sup> In fact, in *Fox I*, one of the grounds for the Commission’s finding that Murdoch had *de facto* control of FTS (which held the Fox licenses) was that he was active in day-to-day management.<sup>46</sup> No such representations have been made here, and considering the size of the News Corp empire, it is unlikely from a practical perspective that Murdoch would be involved in the day-to-day management of the ten Chris-Craft television stations.<sup>47</sup> To the contrary, the Operating Agreement clearly gives Newco responsibility for managing the stations on a day-to-day basis.

---

<sup>44</sup>*Fox I*, 10 FCC Rcd at 8514 (quoting *Univision*, 7 FCC Rcd at 667 (quoting *Stereo Broadcasters, Inc.*)) (internal quotation marks omitted). See also *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981) (“The Commission has recognized many times that there is no exact formula by which ‘control’ can be determined.”).

<sup>45</sup>See, e.g., *Fox I*, 10 FCC Rcd at 8515; *Univision*, 7 FCC Rcd at 6676 (noting in support of the licensee’s assertion of control, that he was “actively involved in all aspects of the day-to-day operations of the stations).

<sup>46</sup>The other factors were that 1) Murdoch held 76 percent of the voting interest; 2) Murdoch was Chairman of THC; and 3) Murdoch was Chairman of THC’s direct parent. *Fox I*, 10 FCC Rcd at 8514. In this case, Murdoch does not have 76 percent of the voting control in Newco (which is 100% owned by FEG) and he is not Chairman of Newco (Chase Carey and Mitchell Stern are the Chairmen).

<sup>47</sup>See “Note 30 Controlled Entities,” Annual Report, *infra* note 82 (attached as “Exhibit 2”).

**b. Newco will control finances, personnel and programming.**

The Commission also considers who has control over finances, personnel and programming.<sup>48</sup> Newco, not FTS, will have control over the stations' finances. Under Section 2.2, "all expenses and capital costs incurred in operating the Stations shall be paid by Newco, and all advertising and other receipts collected in operating the stations shall be deposited in Newco accounts" to be distributed as provided by the agreement. Section 5.1 then provides that 95% of the net income and losses from the operations of the station will be allocated to Newco, and only 5% to FTS. Although FTS declares its intention to maintain "active control over finances and budgets,"<sup>49</sup> and has the right to review the budgets, Newco is the one that pays all of the costs, collects all of the revenues, keeps 95% of the profits (or bears 95% of the losses), and prepares all the budgets. Both the "Commission and the courts have consistently recognized the inherent problems in maintaining control of a broadcast station when someone other than the licensee controls the purse strings."<sup>50</sup> It strains credulity to suppose that Newco, the company that bears

---

<sup>48</sup>*Univision*, 7 FCC Rcd at 6675 (1992); see also *Southwest Texas Broadcasting Council*, 85 F.C.C.2d at 715 ("Generally, the principal indicia of control examined to determine whether an unauthorized transfer of control has occurred are control of policies regarding (a) the finances of the station, (b) personnel matters and (c) programming.").

<sup>49</sup>Operating Agreement, § 2.1.

<sup>50</sup>*Channel 31, Inc.*, 45 Rad.Reg.2d (P&F) 420, 421 (1979). In this case the Commission found that an application for an assignment of a license of a Sacramento television station presented substantial and material questions of improper alien control where 20 percent of the stock of the buyer was held by a Canadian company and that company would furnish nearly all of the funds for operating the station.

virtually all of the financial risk and that is in control of the day-to-day operations, does not have *de facto* control over the finances.<sup>51</sup>

Newco will also have *de facto* control over station personnel. Section 2.2 states that Newco shall be responsible for "without limitation . . . hiring and employing personnel, subject to the direction and approval of FTS as provided in Sections 2.1 and 2.5."<sup>52</sup> Section 2.1 was revised to give FTS authority over the "selection of all personnel." But Section 2.5 provides that: "Except for two employees (one of whom shall be a management-level employee) who shall be selected and employed by FTS . . . all employees of each Station shall be employed by Newco."<sup>53</sup> While it is difficult to reconcile these two provisions, it is hard to see how FTS's selection of a single management employee and one other would give it control over station personnel. The majority of employees will be hired by Newco. All employees, whether hired by Newco or FTS

---

<sup>51</sup>The FCC cases involving local marketing agreements that Fox cites are inapposite. In *Choctaw Broadcasting Corp. (Assignor) and New South Communications (Assignee)*, 12 FCC Rcd 8534 (1997), the licensee maintained control over programming, personnel, and, most importantly, finances. The licensee bore "all costs of station operation" with only fixed reimbursement from the other party. *Id.* at 8541. The same cannot be said of the agreement between Newco and FTS in which Newco will pay most, if not all, of the bills. *See also WGPR (Assignor) and CBS (Assignee)*, 10 FCC Rcd 8140 (1995) in which the Commission found that loans and monetary payments by CBS to the licensee did not indicate that licensee had abdicated control over its finances because payments were limited, and were not abnormal in the *LMA* context. However, the Commission "cautioned" licensees in such arrangements that they must operate as "discrete" stand-alone entities. *Id.* at 8145. There is no indication that FTS will "stand alone."

<sup>52</sup>Operating Agreement, § 2.2.

<sup>53</sup>*Id.* § 2.5.

will work on Newco property and be paid by Newco.<sup>54</sup> Moreover, Newco will be liable for the employees' actions.<sup>55</sup>

Newco will have *de facto* control over programming decisions as well. Although Section 2.1 purports to give FTS authority to "approve all Station programming, including without limitation having the power to direct the scheduling of any programming and to direct Newco to acquire, produce, pre-empt or discontinue any programs or program series," Section 2.2 provides that Newco enter into and administer program contracts, pay for the programming, and collect the advertising revenues. Since the popularity of programming determines advertising revenue, and ultimately the amount of profit or loss (95% of which goes to Newco), it follows that Newco has both the greater incentive as well as the greater ability to control programming.

**c. The affidavits of Fox executives do not assure future FTS control over the Chris-Craft licenses.**

Finally, the newly filed affidavits from Ellen Agress and Mitchell Stern do not indicate that FTS will have control over the Chris-Craft Stations. The affidavit of Ellen Agress, Senior Vice President of FEG, the parent of Newco, merely states that "FEG, through its wholly owned subsidiary Newco, has no *present intention* of acquiring 'control' of the Stations as that term is interpreted under Section 310 of the Act and recognizes that it would be required to obtain necessary approvals from the [FCC] before it could acquire such 'control.'" (emphasis added)

---

<sup>54</sup>See *id.* at § 2.2 ("All expenses and capital costs incurred in operating the Stations shall be paid by Newco. . .").

<sup>55</sup>See *id.* at §§ 2.2, 2.5. See also *WGPR*, 10 FCC Rcd at 8143. One factor in determining that CBS did not have *de facto* control over the WGPR station was that CBS had no employee-employer relationship with station employees, and that WGPR remained contractually responsible for compensation. See *id.* In the instant case, Newco will be responsible for all employee compensation, other than the two employees employed by FTS.

To the extent that the proposed arrangements give Newco *de facto* control over the Stations, FEG's present intent is irrelevant. Moreover, because the determination of "control" for purposes of Section 310 is made by the Commission on a case-by-case basis taking into account a wide variety of factors, the assurance offer no meaningful protection.<sup>56</sup> The affidavit of Mitchell Stern, Chairman and CEO of FTS, which contains virtually identical language, suffers from the same deficiencies.

**d. The case law provides support for finding Newco in control.**

None of the cases cited by the Applicants mandate a different result. Unlike *Choctaw*, in which the Commission found no "evidence that Choctaw is unable to operate the Station in the absence of New South,"<sup>57</sup> FTS cannot operate the Chris-Craft Stations without Newco because it is Newco that supplies the necessary equipment, buildings, nearly all of the personnel, and all of the funds needed to operate the station. Similarly, the relationship between FTS and Newco differs markedly from that in *Southwest Texas Public Broadcasting Council*. In that case, the Commission considered whether the licensee, the Southwest Texas Public Broadcasting Council, had transferred the control of two noncommercial educational stations to the University of Texas. The Commission found that while the University was involved in day-to-day management of the stations, the Council could, pursuant to the management agreement, "revoke this delegation by terminating the contract and thereafter to exercise full responsibility over all matter involving the

---

<sup>56</sup>Even assuming *arguendo* that the Commission were to determine that on balance, FTS presently has *de facto* control, slight changes to the Operating Agreement could alter that balance. If such changes were subsequently made, it seems unlikely that the parties would seek FCC approval, perhaps believing it unnecessary, and the FCC would not be able to effectively monitor compliance with its rules.

<sup>57</sup>*Choctaw*, 12 FCC Rcd at 8541.

operation of the station.<sup>58</sup> The management agreement in that case permitted either party to terminate the contract upon six months notice. In contrast, the Operating Agreement in the instant case can be terminated only by the "mutual written consent of Newco and FTS."<sup>59</sup>

*Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc.*,<sup>60</sup> is distinguishable as well. In that case, the party involved in the day-to-day management of the station was a prospective purchaser of a station that was in bankruptcy and held in receivership by Gaines. The Review Board relied on Commission precedent stating that "[p]rospective purchasers or their principals have . . . been allowed to furnish funds and act in varying capacities in the operation of the station involved, under supervision of court appointed Trustees in Bankruptcy in order to assure continuance of service."<sup>61</sup> Furthermore, Gaines' actions under the consulting agreement were distinctly different from FTS's proposed actions under the Operating Agreement. As to finances, Gaines not only approved budgets, but worked to plan them. In contrast, Newco will "prepare initial budget presentations."<sup>62</sup> Gaines' paralegal maintained all of the financial records.<sup>63</sup> In contrast, Newco "shall maintain complete and accurate books and

---

<sup>58</sup>*Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d at 716.

<sup>59</sup>Operating Agreement, § 7.2(b).

<sup>60</sup>8 FCC Rcd 1405, *recon. denied*, 8 FCC Rcd 3986 (Rev. Bd. 1993)

<sup>61</sup>*Id.* at 1408 (quoting *Phoenix Broadcasting Co.*, 44 FCC 2d 838, 839-40 (1973)). Gaines, as court-appointed receiver, "played a role in [the station's] operation consistent with [his position]." *Id.* The Review Board emphasized the fact that the contract was "[c]onsistent with [Gaines'] understanding of his fiduciary obligation to keep the station in full operation until he could permanently transfer the license to a qualified buyer." *Id.* In the present case, Newco is not a prospective purchaser and FTS is not a court-appointed receiver.

<sup>62</sup>Operating Agreement, § 2.2.

<sup>63</sup>*Bennett Gilbert Gaines*, 8 FCC Rcd at 1406.

records." Gaines, having a financial interest as receiver in the economic well being of the station "monitored the station to ensure that the program format he wanted" was followed.<sup>64</sup> Newco, having a financial interest as 95 percent owner, will enter into and administer programming contracts. Gaines not only provided the employee manual, but he was also involved in hiring and firing decisions.<sup>65</sup> FTS is not permitted to have more than two individuals per station.<sup>66</sup>

In sum, when all of the circumstances are taken into account, it is clear that Newco will have *de facto* control over the Chris-Craft licenses. It is Newco that controls all of the assets except for the bare licenses,<sup>67</sup> earns 95% of the profits, and bears 95% of the economic risks. Notwithstanding certain language in the Operating Agreement giving FTS some say in the way the stations are operated, it strains credulity to find that the party that controls the assets does not control the licenses since the licenses are of no use without them.

**3. Even if it does not amount to *de facto* control, Newco's involvement raises questions under Section 310(b).**

Even assuming *arguendo* that the Commission were to find that FTS will have *de facto* control over the Chris-Craft licenses, it is not clear that this is the end of the matter for purposes of Section 310(b). In the *Declaratory Ruling*, *supra* note 40, the Commission cites with approval a staff letter stating that "the provisions pertaining to alien interests are clearly intended to apply

---

<sup>64</sup>*Id.* at 1406.

<sup>65</sup>*Id.*

<sup>66</sup>Operating Agreement, § 2.5.

<sup>67</sup>While it is true that the Operating Agreement has been amended to allow FTS to sell the assets of one or more stations without Newco's approval in certain circumstances, even in this case, Newco get the 95% of the profits or losses and can veto the sale if certain criteria are not met. Operating Agreement, § 6.

to many cases that do not constitute *de jure* or *de facto* control under 310(d).<sup>68</sup> Moreover, the D.C. Circuit has noted that stock ownership, voting rights and directorships are “usual indicia of control or influence over a corporation’s affairs. As the Commission is well aware, however, they may not always reflect operational reality. Thus, even in instances in which the technical statutory requirements are met, the Commission may still find that aliens exercise an effective control over the operations of a station that is contrary to statutory policy.”<sup>69</sup>

This case presents a set of facts that have never been addressed by the FCC before – that is, where the stations’ licenses would be held by a corporation under the control of a US citizen and the stations’ assets would be held by a corporation under foreign control. If control were shared by two corporations, one of which was alien-controlled, in a more typical manner, e.g., with each owning at least 25% of the stock, such arrangement would violate Section 310(b). Here, however, control is to be shared in a different manner: instead of each corporation owning stock, the U.S. corporation will hold the stations’ licenses while the alien-controlled corporation will hold the stations’ assets. Under this arrangement, because both corporations have the ability to influence the stations’ operations and programming, both must meet the statutory requirements of Section 310(b).

This ownership structure is analogous to the case of LMAs, where two separate corporations may be found to have attributable ownership interests in a station.<sup>70</sup> Where an LMA

---

<sup>68</sup>102 F.C.C.2d at 517 n.32, citing *American Colonial Letter*, at 10.

<sup>69</sup>*Telemundo, Inc. v. FCC*, 802 F.2d 513, 516 (D.C. Cir. 1986).

<sup>70</sup>See Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, 14 FCC Rcd 12559 (1999), *recon. denied*, Release No. FCC 00-438, 2001 FCC Lexis 406, (FCC 2000) [“Attribution Order”].

results in a non-local market media-entity controlling more than 15 percent of a station's programming and holding more than 33 percent of that station's assets, the Commission attributes ownership to both companies.<sup>71</sup> In the present situation, Newco owns the assets, at least 95 percent of the equity and enters into contracts for programming, while FTS owns only the licenses. When compared to the LMA rules for assigning attribution interests, it is clear that Newco and FTS present a situation in which the level of influence is at least equally "sufficient to warrant attribution."<sup>72</sup>

In sum, although there are several ways to conceptualize Newco's role – *e.g.*, partner, a corporation exercising *de facto* control through ownership of the assets and control of the finances – all involve a significant degree of control such that because Newco is indisputably controlled by an alien corporation, the Commission must conduct a full public interest analysis under Section 310(b).

**II. Although Fox Has Failed To Provide Complete Information About the Ownership and Control of Newco, There is No Question That it is Controlled by Aliens.**

Under the proposed arrangement, Newco would have *de facto* control of the Chris-Craft licenses. Therefore, the Applicants must provide complete information about the ownership and control of Newco and its parent corporations. So far, the Applicants have failed to do so, even in response to the specific request of the FCC.<sup>73</sup> However, based on the information provided and other publicly available sources, there is no question that Newco is under foreign control.

---

<sup>71</sup>*Id.* at 12599.

<sup>72</sup>*Id.* at 12600.

<sup>73</sup>Commission Letter, at 2.

**A. Fox Has Failed To Provide All Of the Information Requested.**

The charts in both Attachments C and D of Fox's amended application indicate that Newco is a wholly owned subsidiary of FEG. After that, the ownership situation is very murky. For example, it is not clear who owns how much of FEG. Fox claims that it "does not know and therefore cannot provide the precise level of foreign investment in FEG or News Corp because random surveys of their shareholders have not been required and have not be conducted."<sup>74</sup> But foreign public shareholders aside, the corporate, News Corp family shareholders, listed on the ownership charts in Attachments C and D are not clearly and consistently delineated. This response is not acceptable.

The information that Fox does provide is both incomplete and inconsistent. The charts in Attachment C, which list the officers, directors, and 5% or greater stockholders in the various corporate entities, does not provide captions indicating what the figures in columns 4 and 5 mean. Moreover, information provided in one part appears inconsistent with information provided in other parts. For example, in the Fox Letter,<sup>75</sup> and in the proposed ownership chart in Attachment D, Fox states that FEG Holdings has an 85.75 percent interest in FEG, and that public shareholders have the remaining 14.25 percent interest. However, the ownership charts in Attachment C show that FEG Holdings has a 97.8 percent interest and an 82.76 percent interest in FEG.<sup>76</sup>

---

<sup>74</sup>Fox Letter, at 7.

<sup>75</sup>*Id.* at 8.

<sup>76</sup>Fox Letter, Attachment C, at 6. Nowhere in the amended application are the charts explained, and Fox makes no effort to clarify to what those percentages refer.

Moreover, the chart labeled “Proposed Structure for Chris-Craft Acquisition” included in Attachment D suggests that FEG Holdings is solely owned by News America, Inc. and that News America, Inc. is solely owned by News Corp. In fact, there are several foreign-owned corporate subsidiaries between News America and News Corp. News America, Inc. is 18 percent owned by News International plc (a British corporation) and 82 percent owned by News Publishing Australia, Ltd (an Australian company).<sup>77</sup> News International, plc is 95.84 percent<sup>78</sup> owned by Newscorp Investments, Ltd, a wholly owned subsidiary of News Corp. News America’s other parent company, News Publishing Australia, Ltd, is owned in part by Newscorp Investments (which is a wholly owned subsidiary of News Corp) and in part by News Corp.

**B. Newco is Foreign-Controlled.**

Although Fox has failed to provide complete ownership information, it is nonetheless clear that by any measure, Newco is controlled by News Corp, an Australian corporation. The Applicant’s letter admits that “Newco is a controlled, indirect subsidiary of News Corp.”<sup>79</sup> In sum, Attachment C shows that the Australian-based News Corp has a nearly 100 percent indirect voting interest in Newco, and an indirect equity interest of greater than 80 percent.<sup>80</sup>

---

<sup>77</sup>*Id.* at 10.

<sup>78</sup>As News International plc is a British corporation we assume that the remaining 4.16 percent ownership is alien.

<sup>79</sup>Fox Letter, at 7 n.10.

<sup>80</sup>This information is consistent with Fox’s filing with the Securities and Exchange Commission showing that News Corp not only has more than 80 percent equity interest in FEG, but also has substantially all voting control over FEG. FEG’s 1998 final amended S-1 application states that “News Corporation indirectly beneficially owns all of [FEG’s] outstanding Class B Common Stock . . . As a result of such ownership, News Corporation will be able to control the vote on substantially all matters submitted to a vote of stockholders.” *Fox Entertainment Group, Inc., Amendment No. 5 to Form S-1, Registration Statement under The*

**C. The Applicants Do Not Provide Any information About Who Owns and Controls News Corp.**

Applicants state that they “do not ask the Commission to decide, and the Commission need not decide (as it did not decide in *Fox II*), . . . whether Rupert Murdoch controls News Corp within the meaning of Section 310(b) of the Act.”<sup>81</sup> Yet this conclusion is based on two assumptions – that Newco’s ownership of the assets and financial interests in the stations is consistent with *Fox II* and that Newco lacks *de facto* control – both of which are incorrect. See discussion, *supra* at Sections I(A) and (B). Therefore, whether Murdoch controls the Australian corporation News Corp may be highly relevant.

Based upon the information that Fox has provided, as well as other publicly available information, it appears that Murdoch, a U.S. citizen, has neither *de jure* nor *de facto* control of News Corp. Although claiming that Murdoch “may be deemed to control News Corp” by virtue of his shares in the corporation as well as his positions as Chairman and CEO, the Chart on p. 13 of Attachment C indicates that Murdoch holds only 30 percent of one undefined kind of shares, and 20 percent of another undefined kind of shares in News Corp. Moreover, this share information is inconsistent with other publicly reported information about News Corp.

The footnote on that page explains that the percentage of shares attributable to Murdoch is:

calculated based on 2,044,746,771 ordinary shares outstanding on November 15, 2000, and includes ordinary shares owned by (1) Mr. K. Rupert Murdoch, (2) Cruden Investments Pty. Limited, a private Australian investment company owned by Mr. K. Rupert Murdoch, members of his family and various corporations and trusts, the beneficiaries of which include Mr. K. Rupert

---

*Securities Act of 1933*, (filed Nov. 9, 1998), at 13.

<sup>81</sup>Fox Letter, at 7.

Murdoch, members of his family and certain charities and (3) corporations, including a subsidiary of Cruden...<sup>82</sup>

However, News Corp's most recent Full Financial Report<sup>83</sup> report reveals that as of August 16, 2000, "Cruden Investments Pty. Limited and controlled entities" owned 606,788,781 shares, or approximately 30 percent of News Corp's outstanding ordinary shares.<sup>84</sup> Thus, Murdoch's 30 percent "attributable share" of ordinary stock appears to be held not by Mr. Murdoch, but by Cruden Investments ("Cruden") and "controlled entities." The Report, which lists News Corp's 20 largest shareholders (a group that controls 90 percent of News Corp ordinary shares), does not list Mr. Murdoch. Thus, it appears that Cruden, not Murdoch, actually holds 30% of the shares of News Corp.

This then raises the question of whether Murdoch controls Cruden. Because Cruden is a private foreign corporation, public information on it is difficult to obtain. Nonetheless, the most

---

<sup>82</sup>Fox Letter, Attachment C. Compare the Australian Annual Report, in which News Corp does not state that Mr. Murdoch has a controlling interest. It states that "K R Murdoch additionally is deemed to have a relevant interest in shares by reason of his beneficial and trustee interests in Cruden Investments Pty. Limited, a substantial shareholder, and may also be entitled . . . to shares by reason of his connection with Kayarem Pty. Limited, which has a relevant interest in an additional 17,247,367 ordinary shares." Annual Report, *infra* note 82, at 42. Under Australian law, this appears to mean that Mr. Murdoch has "some true or actual measure of control over the disposal of" some unnamed number of shares held by Cruden investments. HAJ FORD ET AL., FORD'S PRINCIPLES OF CORPORATE LAW § 23.160, AT 949 (8<sup>th</sup> ed. 1997) (treatise on Australian corporate law). It also states that he *may* be entitled to shares held by Kayarem. Kayarem is the beneficial owner of some shares in Cruden, which may be what News Corp means when it states that Kayarem has a relevant interest in News Corp shares. Nowhere does News Corp hint that Mr. Murdoch "may be deemed" to be in control. Stating that Mr. Murdoch has such a vague interest in an unreported number of shares held by Cruden (which achieves "substantial shareholder" status by holding not less than 5 percent of the relevant class of shares) is to state nothing.

<sup>83</sup>The News Corporation Limited, Full Financial Report (for year ended 30 June 2000) ["Annual Report"].

<sup>84</sup>Annual Report, at 65.

recent Annual Return for Cruden Investments Pty. Limited does not show Mr. Murdoch, or any members of his family, as directors or officers of the company.<sup>85</sup> The primary shareholders listed are: Kayarem Pty. Limited ("KPL"), Cruden Holdings Pty. Limited (CHPL), and Cruden Nominees Pty. Limited (CNPL). Of those, CNPL is listed as not a beneficial owner. The final shareholder is listed as "Actraint No 119. Pty. Limited and Keith Rupert Murdoch," and this shareholder is *not* listed as a beneficial owner of the shares. This information does not prove, or even suggest, that Mr. Murdoch has *de facto* or *de jure* control over News Corp. In fact, press reports indicate that Mr. Murdoch's only ownership in Cruden Investments is a 10 percent stake that he shares with his mother.<sup>86</sup> At a minimum, Fox should be required to provide additional information relevant to Murdoch's control of News Corp.

Moreover, even assuming *arguendo* that Murdoch actually controls the 30 percent of shares owned by Cruden Investments, *et al.*, absent further indicia of control, that 30 percent share is not legally sufficient to prove control of News Corp. The next two largest shareholders own a combined 610,542,482 shares - which is larger than Cruden's ownership holdings. Where two shareholders can combine to vote their shares against the minority shareholder claiming "control," that minority shareholder's share is legally insufficient to show a controlling interest. Under current legal standards, for a minority shareholder to prove control it must show a reasonable likelihood that it does control and will continue to control the corporation.<sup>87</sup> Because

---

<sup>85</sup>See Cruden Investments Pty. Limited, Annual Return (2000), at 3-4 (attached as "Exhibit 3").

<sup>86</sup>Emily Mychasuk, *Murdoch answers the £3.7bn question*, THE INDEPENDENT (London), (Nov. 16, 1999), at 11.

<sup>87</sup>See *Essex Universal Corp. v. Yates*, 305 F2d 572 (1962). Thirty percent interest may be enough in some circumstances to show control, but where, as here, a large block of stock is

a large block of stock is arrayed against Cruden, for Cruden to show that it does in fact control News Corp, it must prove, by indicia other than stock ownership that it controls News Corp.<sup>88</sup>

In sum, based on information before the FCC it is clear that Newco is controlled by News Corp, an Australian corporation, and therefore its control of the licenses would violate Section 310(b). Moreover, Fox cannot claim that News Corp's control of Newco is nonetheless in the public interest because News Corp is controlled by Mr. Murdoch, a U.S. citizen. Fox has not shown that Mr. Murdoch controls News Corp, and publicly available information suggests that he does not.

### **III. The Grant of the Applications Will Not Serve the Public Interest.**

Assuming that the Applicant can somehow overcome the presumption against granting a broadcast station license and assets to a foreign controlled corporation, the Applicant still must make the public interest showing required by Section 310(d) of the Act. As the FCC Letter states, Section 310(d) requires that a license shall only be assigned except "upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."<sup>89</sup> The letter, therefore, requests that the Applicants "supplement the record with an explanatory statement illustrating how the proposed transaction will benefit the public interest."<sup>90</sup> Instead of simply designating Fox's application for hearing, the Commission's Letter affords Fox the

---

controlled by just two holders is arrayed against that interest, serious doubt has been raised. *Id.* at 579.

<sup>88</sup>See *Zahn v. Transamerica Corp.*, 162 F.2d 36, 46 (1947) (shareholder's control of board proved by "puppet-puppeteer" relationship).

<sup>89</sup>47 U.S.C. § 310(d).

<sup>90</sup>Commission Letter, at 3.

opportunity to "supplement the record with an explanatory statement illustrating how the proposed transaction will benefit the public interest."<sup>91</sup> In response, Fox presents only one putative public interest benefit inuring from the transaction: possible increased access to "Fox News Edge," a centralized news gathering service. As shown below, this is insufficient to meet the public interest finding required by Section 310(d).

**A. Fox Has Not Satisfied Its Section 310(d) Public Interest Obligation Through Submission of Form 314.**

In its Letter, Fox re-asserts its position that "there is no requirement that applicants make an affirmative public interest showing above and beyond the information solicited by the relevant FCC form."<sup>92</sup> This statement reflects a gross misstatement of the applicable law. Section 310(d) of the Act and applicable case law require applicants to provide information sufficient to support a showing that their use of a broadcast license will serve the public interest.<sup>93</sup>

In both its Opposition and in its Letter, Fox contends that the Commission's adoption of revised Form 314 obviates its need to justify the rationale and putative public interest benefits

---

<sup>91</sup>*Id.* The Commission Letter also provided examples of information that could constitute such a showing:

The applicants may, for example, address the effects of the proposed transaction on such issues as local programming, economic competition, transaction-specific efficiencies that can demonstrably lead to consumer benefits, productivity enhancements that will flow through to consumers, and improved incentives for innovation that can lead to foreseeable benefits to consumers.

*Id.*

<sup>92</sup>Fox Letter, at 18.

<sup>93</sup>*See Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968) (stating that the Commission must designate an application for hearing "if the Commission is unable, 'for any reason,' to find that the public interest, convenience and necessity would be served by granting the application").

associated with its proposed transaction. It is important to note that in the *Streamlining Order*, the Commission established Form 314 as a standardized method for *determining* "whether a proposed action is in compliance with the Act, and Commission rules and policies."<sup>94</sup> Form 314 was not intended to necessarily provide all of the information that is required by the Commission to make a decision, on the record, involving applications that require numerous waivers of Commission rules. In fact, the Commission specifically stated in the *Streamlining Order* that further information or exhibits may be necessary for "waiver requests" and "in circumstances where additional information is necessary to support application elements potentially inconsistent with precedent, processing standards, Commission rules and policies, and the Act."<sup>95</sup>

For routine transactions that comply with all applicable Commission rules, the information requested on Form 314 may provide the requisite public interest showing. However, where an applicant requests multiple waivers of the Commission's rules, as Fox proposes in the immediate case, an additional showing must be made to create a basis to support the waiver request.<sup>96</sup> If Fox is unable to show, on the record, that its request for multiple waivers of the

---

<sup>94</sup>1998 Biennial Regulatory Review – *Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056, 23067, ¶ 22 (1998) [hereinafter "*Streamlining Order*"] (emphasis added).

<sup>95</sup>*Id.*

<sup>96</sup>*See, e.g., Shareholders of CBS, Inc.*, 11 FCC Rcd 3733, 3755 at ¶ 44 (1995) (hereinafter "CBS I"), *aff'd, Sarafyn v. FCC*, 149 F.3d 1213 (1998) ("[A]s is true with all waiver requests, an applicant must satisfy the burden of demonstrating that any benefits to be achieved by its proposed transaction are in the public interest and that a waiver would not compromise the fundamental policies served by the rule"); *see also Paramount Stations Group of Philadelphia, Inc.*, 10 FCC Rcd 10963, 10967 (1995) ("[W]e expect that in addition to satisfying the several factors evaluated in a duopoly waiver request, the applicant will offer concrete public interest benefits, such as expanded and quantifiable local or public affairs programming and/or an increased and substantial physical presence in an underserved area").

Commission rules will serve the public interest and not undermine the policies served by those rules, then Fox's applications must be denied or designated for hearing.

**B. The Information Provided in Fox's Letter Does Not Satisfy the Public Interest Obligations of Section 310(d).**

Fox's Letter describes "News Edge" as a "branded news service that provides 27 scheduled daily news feeds" and "news packages covering business news, consumer issues, entertainment news, health/medicine, investigations and sports."<sup>97</sup> These services appear to be centralized and based out of a "Washington, D.C. studio facility." Moreover, Fox News Edge is not a new service created to serve the unique needs of the markets in which Fox proposes to acquire the Chris-Craft station assets and licenses.<sup>98</sup> Rather, News Edge is an existing service of the Fox News Channel, which is already available to "over 50 million U.S. cable and DBS households."<sup>99</sup> Instead of providing diverse local news and public affairs coverage, the use of News Edge to program the Chris-Craft stations will only serve to duplicate existing offerings in the markets where duopolies will be created and reduce incentives in the affected markets to produce locally-oriented programming.<sup>100</sup>

---

<sup>97</sup>Fox Letter, at 21.

<sup>98</sup>Fox Entertainment Group, Inc., S.E.C. Form 10-K at 7 (filed Sept. 28, 2000) ("Fox News, through its Fox News Edge service, licenses news feeds to Fox Affiliates and other subscribers to use as part of local news broadcasts.").

<sup>99</sup>*Id.*

<sup>100</sup>This problem could be even further exacerbated if Fox and News Corp carry through with their stated intention to create further duopolies by "swapping" some of the Chris-Craft station in cities where Fox would only own one station. See Joe Flint, *News Corp, Viacom Discuss Swapping Several TV Stations*, WALL ST. J., Feb. 2, 2001, at B6 ("If News Corp. and Viacom start swapping stations, it could have a domino effect through much of the TV industry. . .").

The Commission has often cited enhancement of local news operations as one factor in the public interest determination.<sup>101</sup> In the instant case, however, while Fox may provide more *general* news programming, which is already available through the Fox News Channel, there is no indication that it will provide more *local* news and public affairs programming.<sup>102</sup>

Fox has now had three opportunities to provide a showing of how the proposed transaction will serve the public interest in light of the numerous waivers requested. In fact, even when confronted with a direct request from the Commission, Fox has been unable to muster up any public interest benefits associated with the proposed transaction. In light of the complete failure of Fox to provide any tangible public interest benefits for the record in this transaction, the Commission must deny the Fox applications.

---

<sup>101</sup>See, e.g., *Applications of Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5866 (1995) (citing Disney's pledge to maintain "public interest programming and physical presence in underserved areas such as New Jersey and Delaware" as a major factor in the Commission's decision to grant a waiver to allow common ownership of a television broadcast station in Philadelphia and a television broadcast station in New York City; see also *En Banc Programming Inquiry*, 44 FCC 2303, 2312 (1960) ("The principal ingredient of [the public interest] obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires for his service area.").

<sup>102</sup>Fox states that "improvements to news programming are a public interest benefit of such a degree as to justify waiver of the Commission's rules." Letter at 22. However, the line of cases that Fox cites in support of this proposition relate to the benefits of locally produced programming, not "canned" programming sent from a centralized location. See *Gaylord Entertainment Co.*, 14 FCC Rcd 12209, 12211 at ¶ 5 (noting that combined ownership of a television station and certain radio stations would permit "the improvement of the technical facilities, public affairs programming and community outreach efforts" within that community); *Infinity Broadcasting Corp.*, 12 FCC Rcd 5012, 5026 at ¶ 22 (noting that news operations would be combined within cities where Westinghouse owned multiple stations). Neither transaction suggested the national centralization of news gathering, as the Fox Letter appears to suggest.

**IV. The Commission Should Require That The Hart-Scott-Rodino Documents Be Submitted To It For Review.**

The FCC Letter requests applicants' permission to review the documents submitted to the U.S. Department of Justice in connection with its Hart-Scott-Rodino review and to discuss the transaction with Department officials. The Applicants refuse this request.<sup>103</sup> They assert that the Department of Justice has indicated in a letter dated January 18, 2001, that it has terminated its review subject to News Corp's agreement to enter into a consent decree requiring divestiture of one of the Salt Lake City stations.<sup>104</sup> Applicants have not submitted a copy of this letter. The Department of Justice has declined to make the letter available to the public, or indeed, to comment at all because it is still an "open investigation." Under these circumstances, Petitioners believe that the Commission has no choice but to require that Fox and News Corp submit copies of their HSR filing and other relevant documents directly to the Commission with a request for confidential treatment.<sup>105</sup>

---

<sup>103</sup>Fox Letter, at 24-25.

<sup>104</sup>*See id.*

<sup>105</sup>As the Commission stated in connection with its review of the AT&T-TCI merger:

In merger review proceedings, the Commission normally obtains supplemental information through one of two means. First, pursuant to section 1.1204(a)(6) of the Commission's ex parte rules, the Commission in consultation with DOJ, may review HSR documents if the Applicants grant the Commission a waiver of their confidentiality rights.

.....

*Second, the Commission may seek further information from the Applicants or parties themselves.* The Applicants or parties are directed to submit the information to the Commission for inclusion in the record.

*Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. Transferor to AT&T Corp. Transferee, 14 FCC Rcd 3160,*

There is no basis for Applicant's concern that permitting FCC access to the DOJ files would "jeopardize the confidentiality of competitively sensitive documents with no countervailing benefits to the Commission's review."<sup>106</sup> In fact, Fox and News Corp provide no basis at all to believe that confidentiality would be jeopardized.<sup>107</sup> On the other hand, the information is clearly relevant to the Commission's review of this merger under the Communications Act.

In the instant case, where Applicants request no fewer than three waivers of the Commission's ownership rules, the Commission must engage in careful review to ensure that broadcast diversity and competition is preserved in order to serve the public interest. The Commission itself has stated that the "public interest evaluation is distinct from, and broader than, the competitive analyses conducted by antitrust authorities."<sup>108</sup> In the context of a broadcast license application seeking further waivers of already relaxed broadcast ownership

---

3232, at ¶ 151 (1999) (hereinafter "*AT&T-TCI Order*") (emphasis added).

<sup>106</sup>Fox Letter, at 25.

<sup>107</sup>See *AT&T-TCI Order*, 14 FCC Rcd at 3232, ¶ 151 ("Any confidential information obtained by either means is generally subject to a protective order, under which third-party review is permissible under conditions specified in the order.").

<sup>108</sup>*Application of Worldcom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to Worldcom, Inc.*, 13 FCC Rcd 18025, 18033 at ¶ 12; see also *United States v. FCC*, 652 F.2d 72, 88 (1980) (*en banc*) (stating that the Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry"); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1<sup>st</sup> Cir. 1993) (finding that the public interest standard does not require administrative agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

rules, Commission review of Fox and News Corp's HSR filing is integral to the Commission's ability to create a record that could support such a request.<sup>109</sup>

In light of Fox and News Corp's decision to spurn the Commission's request, the Commission should demand access to this information as part of its review of the numerous waiver issues presented by the Application. Should Fox and News Corp again refuse to provide this information, then the Commission should deny their applications.

#### **V. New York Post Financial Information.**

On December 13, 2000, Fox and News Corp submitted a letter to the Commission requesting confidential treatment of "any and all financial information" that Fox or News Corp may submit to the Commission.<sup>110</sup> On December 13, 2000, Petitioners filed a written objection to this request,<sup>111</sup> and followed this objection with a further legal analysis of Petitioners' objections on December 21, 2000.<sup>112</sup> On December 21, 2000, the Commission Letter denied Fox

---

<sup>109</sup>Fox's claim that it need not provide access to the HSR information because the Commission's request is "unprecedented in the context of a broadcast transaction" is similarly without merit. Fox Letter, at 24. In the past, Department of Justice review of broadcast license transactions was relatively rare since most broadcast mergers that would raise concerns under the antitrust law would have been prohibited under the Commission's broadcast ownership rules. It is only with the liberalization of these rules that the Department of Justice has had to review broadcast mergers under HSR.

<sup>110</sup>Letter from William S. Reyner, Jr. to Roy J. Stewart, Chief, Mass Media Bureau (filed Dec. 13, 2000), at 2.

<sup>111</sup>See Letter from Christopher R. Day and Angela J. Campbell to Roy J. Stewart, Chief, Mass Media Bureau (filed Dec. 13, 2000).

<sup>112</sup>See Letter from Christopher R. Day and Angela J. Campbell to Roy J. Stewart, Chief, Mass Media Bureau (filed Dec. 21, 2000).

and News Corp's request for blanket confidential treatment of the New York Post's financial materials.

On January 25, 2001, News Corp filed a second request for confidential treatment of the New York Post's financial materials.<sup>113</sup> Attached to this letter was a "model" protective order prepared by Fox and News Corp's counsel. On January 30, 2001, Petitioners again filed a letter with the Commission requesting that the New York Post's financial information be made publicly available.<sup>114</sup> In addition, Petitioners also voiced concerns over the restrictive nature of the "model" protective order submitted by Fox and News Corp.

Petitioners again reiterate their request that the financial information be made available for public review pursuant to the Freedom of Information Act and Commission policy. In the meantime, however, Petitioners have entered into an agreement with the Applicants that will allow counsel for Petitioners and other named individuals to review the information subject to a protective order, and to have five business days after obtaining the confidential information to submit a response regarding Fox's request for a waiver of the Newspaper/Broadcast Cross-Ownership Rule to allow the common ownership of the New York Post, WNYW, and WWOR. Petitioners understand that the proposed protective order agreed to by the parties is being filed with the Commission today.

---

<sup>113</sup>See Letter from Arthur M. Siskind, Senior Executive Vice President, The News Corporation Limited to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Jan. 25, 2001).

<sup>114</sup>See Letter from Christopher R. Day and Angela J. Campbell to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Jan. 30, 2001).

## CONCLUSION

Fox and News Corp have now had three independent opportunities to present facts and evidence to support the three broadcast ownership rule waiver requests and to answer the substantial foreign ownership questions raised by their applications. In all three responses, Fox and News Corp have presented incomplete and, in some cases, misleading responses to Commission directives. In light of Fox and News Corp's failure to present all the materials and facts required to review the waiver and foreign ownership issues, and the Commission's inability to make the public interest finding required under Sections 310(b) and 310(d) of the Communications Act, Fox's applications to acquire the broadcast licenses and assets of Chris-Craft must be denied.

Respectfully submitted,



Christopher R. Day  
Angela J. Campbell  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW, Suite 312  
Washington, DC 20001  
(202) 662-9535

Andrew Jay Schwartzman  
Harold Feld  
Media Access Project  
950 18<sup>th</sup> Street, NW, Suite 220  
Washington, DC 20006  
(202) 454-6581

Of Counsel:

Jennifer L. Mercer  
Law Student  
Georgetown University  
Law Center

Dated: February 8, 2001

Counsel for the Petitioners