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Douglas L. Parker
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Hope M. Babcock
Associate Director
Environmental Law Project
Angela J. Campbell
Associate Director
Citizens Communications Center Project
Christopher R. Day
J. Steven Farr
Fellows

October 27, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

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

Re: Petition to Deny Application (Form 314 and 345) for Assignment of Licenses of KBHK-TV, KCOP-TV, KMOL-TV, KMSP-TV, KPTV(TV), KTVX(TV), KUTP(TV), WWOR-TV, WUTB(TV), and WRBW(TV) and associated translator stations: 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

Dear Ms. Salas:

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Consumer Federation of America, Consumers Union, New York Metropolitan Association of the United Church of Christ, Rainbow/PUSH Coalition, and Valley Community Access Television ("Petitioners"), through undersigned counsel, hereby file their Petition to Deny ("Petition") the above-referenced Application. A Motion to Dismiss the above-captioned Application is also being filed concurrently with this Petition.

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

Respectfully submitted,

Christopher R. Day
Angela J. Campbell

Counsel for the Petitioners

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

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

PETITION TO DENY

Of Counsel:

Veronica Manahan
Emily Roskey
Jennifer Hetterly
Law Students
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 18th Street, NW, Suite 220
Washington, DC 20006
(202) 454-6581

October 27, 2000

Counsel for Petitioners

SUMMARY

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Consumer Federation of America, Consumers Union, New York Metropolitan Association of the United Church of Christ, Rainbow/PUSH Coalition, and Valley Community Access Television (“Petitioners”) hereby petition to deny the applications of Fox Television Stations, Inc. (“Fox”) for assignment of certain broadcast licenses currently held by Chris-Craft Industries, Inc. (“CCI”), and its subsidiaries.

In these applications, the News Corp. media octopus and its Fox subsidiary seek to reach their tentacles even further into the United States media market. Fox requests no fewer than three separate waivers of the Commission’s rules governing the ownership of two television stations in a local market, the Daily Newspaper/Broadcast Cross-Ownership Rule, and the thirty-five percent national market share ownership cap, which Fox already exceeds. While Fox presents each waiver request as a minor, temporary waiver, these requests should be viewed together for what they truly represent: a full-fledged attack on the Commission’s rules protecting diversity and multiple-ownership of media outlets. In the past, Fox has been content to merely nibble at the Commission’s ownership rules. Now, through waiver after waiver, it attempts to swallow the rules whole.

First, Fox asserts that its waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule, which allows ownership of the *New York Post* and WNYW, can be read to automatically allow the common ownership of the *New York Post* and two VHF television stations in New York City. This assertion completely ignores the fact that Fox’s prior waiver was based on a very specific set of facts, namely that the *New York Post* was in bankruptcy and could not be

sold, and unlike this proposed acquisition, resulted in preserving a media voice rather than the loss of an independent voice. In addition, Fox's current waiver was premised on the Commission's old local ownership rules, which only allowed ownership of one television station per market and could not have envisioned the creation of a possible television duopoly/daily newspaper combination.

Fox alternately argues that it should receive a waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule until as the Commission completes a re-examination of the rule. This argument fails for two reasons. First, in its Biennial Review, the Commission stated that it favored retention of the rule. Second, the Commission has not yet initiated a rulemaking proceeding in this matter. Any final action to modify the rule, therefore, could be years away. Fox was clearly on notice of the Commission's intent to retain the rule when it announced its intention to purchase the CCI stations, and chose to ignore it. Accordingly, in the complete absence of any compelling reason to grant a waiver, Fox's request for a waiver of the Daily Newspaper/Broadcast Cross-Ownership Rule should be denied.

With the acquisition of the CCI stations, Fox seeks to create television duopolies in New York, Los Angeles, Phoenix and Salt Lake City. In Phoenix, Fox alleges that eleven independent television voices will exist post-merger and, therefore, Fox's proposed duopoly conforms to the letter of Commission's rules. This analysis, however, ignores the fact the Phoenix Designated Market Area ("DMA") is so over-inclusive that it contains a number of television stations in the State of Arizona that are not and cannot be received in the City of Phoenix. As shown by Petitioner's analysis, only seven true independent voices would exist in Phoenix if the proposed combination occurs. Due to the nature of the Phoenix DMA, this proposed combination presents

a matter of first impression that should be set for an evidentiary hearing and reviewed by the full Commission due to its adverse effect on diversity in Phoenix.

The creation of VHF duopolies in New York and Los Angeles is also not in the public interest. First, Fox fails to show how the proposed combination serves the diverse populations of those cities or is in the public interest. More importantly, the Commission has never before allowed the common ownership of two VHF stations in the same city. In light of the serious reduction in diversity that will occur, and Congressional intent that VHF-VHF combinations occur only in “compelling circumstances,” this issue should be set for hearing.

Fox also requests a twelve-month waiver to divest one of the two VHF stations it will own in Salt Lake City as a result of the CCI acquisition. Such a waiver would allow Fox to control almost forty percent (40%) of the Salt Lake City market share for a twelve month period. Petitioners contend that a far more limited waiver, if any, is in order.

Fox’s third request asks for a twelve-month waiver of the national market-share cap, which Fox already exceeded prior to its acquisition of CCI. This is a crisis of Fox’s own making, which appears to be geared more at continually nibbling away at Commission rules regarding national market reach than any good-faith attempt to actually comply with Commission rules. It, like Fox’s other waiver requests, should be denied.

These applications, if approved, will gut the Commission’s broadcast ownership restrictions. Additionally, while these applications show that this acquisition is clearly in Fox’s financial interest, they do not detail, in any way, how this transaction will serve the public interest. Accordingly, the applications should be denied or, in the alternative or to the extent necessary, set for an evidentiary hearing.

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

In re Applications of

UTV of San Francisco, Inc.)
KCOP Television, Inc.)
UTV of San Antonio, Inc.)
Oregon Television, Inc.)
UTV of Baltimore, Inc.)
WWOR-TV, Inc.)
UTV of Orlando, Inc.)
United Television, Inc.)
(Assignors))

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,
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ABR, ABS, ABV, ABW, ABX,
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To: The Commission

PETITION TO DENY

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Consumer Federation of America, Consumers Union, New York Metropolitan Association of the United Church of Christ, Rainbow/PUSH Coalition, and Valley Community Access Television ("Petitioners"), by their attorneys and pursuant to

Sections 309(d) and (e) and 310 of the Communications Act of 1934, as amended (“the Act”), and Section 73.3584 of the Rules and Regulations of the Federal Communications Commission (“Commission”) hereby petition to deny the above-referenced applications for consent to transfer the television broadcast licenses held by Chris-Craft Industries, Inc. (“CCI”) and its subsidiaries to Fox Televisions Stations, Inc. (“Fox”). In the alternative, Petitioners request that the Commission designate these applications for hearing, as provided by Section 309(e) of the Act, grant Petitioners leave to intervene in the proceeding, and grant any other appropriate relief.

I. Petitioners Satisfy the Requirements of Section 309(d)(1)

Under well-established authority, Petitioners are parties in interest within Section 309(d)(1) of the Act as to the proposed transfer.¹ As demonstrated in the attached Declarations, Petitioners represent the interests of many church, consumer, advocacy, and minority group members who reside within the Los Angeles, New York City, Phoenix, and Salt lake City metropolitan areas. These members would be aggrieved by the decrease in diversity or the loss of the independently produced viewpoints, especially public affairs programming provided by the stations whose licenses may be transferred, and by the decrease in competition in those markets.

As demonstrated in the attached Declarations, Petitioners throughout the United States would be aggrieved by the grant of a waiver of the national ownership cap, which would further reduce the number of independent voices and programming available nationwide. In addition, Petitioners will be aggrieved by the likely loss of programming from the United Paramount

¹See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-02 (D.C. Cir. 1966); *Holiday Broadcasting Co.*, 10 FCC Rcd 4500, 4500-01 (1995); *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 90 (1980).

Network (“UPN”), which will lose its affiliates in a number of markets, including the two largest United States television markets, as a result of this acquisition.

II. The Transfer of the Chris-Craft Broadcast Licenses to Fox Would Not Serve the Public Interest

Under the Act, no broadcast station license may be voluntarily or involuntarily transferred or assigned without the prior Commission approval of the requisite application or applications. Such Commission approval must be grounded upon an informed and affirmative finding by the Commission, supported by an adequate record, that “the public interest, convenience and necessity will be served thereby.”² The Act does not expressly define all of the criteria that the Commission must apply to reach a public interest determination. The courts have held, however, that this standard “requires the Commission to provide the ‘widest possible dissemination of information from diverse and antagonistic sources’ and to guard against undue concentration of control of communications power.”³ In addition, the courts have stated that the Commission must hold an evidentiary hearing on any application where the Commission is “for any reason unable, on the basis of the application, pleadings, and officially noticeable matters, to make the requisite finding that the public interest would be served.”⁴

These applications only serve to enlarge News Corp., the voracious media octopus that would control the Fox licenses, and further reduce broadcast diversity in the United States. Fox has made no showing that its applications will serve the public interest. Quite to the contrary,

² 47 U.S.C. § 310(d) (1994).

³ *Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir 1968).

⁴ *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C. Cir. 1974)(*en banc*).

these applications indicate that Fox has no intention of complying with existing Commission rules. As detailed below, the national market reach of existing Fox television stations already exceed the Commission's thirty-five percent (35%) market cap. Apparently not content with a single infraction, the Fox applications would require at least three (3) waivers to cure multiple violations of the Commission's rules governing broadcast ownership. In addition, the applications would greatly reduce broadcast diversity in a number of U.S. cities, including Los Angeles and New York.

The Commission should not be fooled by the cloud of ink emitted by the News Corp. media octopus in its subsidiary's applications. The applications are not, as presented by Fox, requests for minor variations of the Commission's rules. When viewed in their totality, these applications represent a clear attempt to gut, through the waiver process, almost all of the Commission's remaining broadcast ownership rules, all in the name of creating a multi-tentacled media colossus that will substantially reduce advertising competition, viewpoint diversity, and independent news coverage in the affected cities. In the absence of any showing by Fox that the applications are in the public interest, the Commission must deny or, to the extent applicable, designate the applications for a full evidentially hearing.

III. Fox Television Station's Request for Extension of a Waiver or, in the Alternative, Grant of a New Waiver of the Daily Newspaper Cross-Ownership Rule to Operate WNYW, WWOR and the *New York Post* Should Be Denied

Fox seeks to acquire a VHF television station, WWOR, in Secaucus, New Jersey, which serves the New York, New York Designated Market Area ("DMA"). In the same New York market, Fox already owns a VHF television station, WNYW, in New York City and pursuant to a

waiver of the Daily Newspaper Cross-Ownership Rule⁵ granted in *Fox Television Stations, Inc.*,⁶ it also owns a daily newspaper, the *New York Post* (“*Post*”).

Despite the prohibition against one entity owning a broadcast station and a daily newspaper within the same market, Fox asserts that it should be allowed to purchase WWOR on the basis of the previous waiver it received in order to purchase the *Post*.⁷ Fox argues in the alternative, that if the Commission does not agree that Fox’s previously granted waiver should extend to cover this new situation, the Commission should grant Fox an interim waiver to allow the ownership combination to stand pending the conclusion of a yet-to-be-initiated rulemaking regarding television/newspaper cross-ownership combinations.⁸ Petitioners assert that Fox’s previous waiver does not permit the acquisition of a second television station. Further, Fox has made no showing sufficient to support a waiver. Finally, Fox should not be granted an interim waiver pending the outcome of a rulemaking that has yet to be initiated.

A. The Current Waiver Does Not Allow the Acquisition of Another Television Station

The Daily Newspaper Cross-Ownership Rule states that:

No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in the Grade A

⁵47 C.F.R. 73.3555(d)(3) (1999).

⁶*Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993), *aff’d sub nom.*, *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) [hereinafter *Fox Televisions Stations, Inc.*].

⁷*Fox App. Ex. No. 4* at 19.

⁸*Id.* at 23.

contour of a TV station . . . encompassing the entire community in which such newspaper is published.⁹

As the Commission has explained, the rule serves the twin goals of promoting viewpoint diversity and economic competition.¹⁰ In adopting the rule, the Commission determined that, generally, granting a broadcast license to an entity in the same community in which the entity also publishes a daily newspaper would harm local diversity. The rule has been unanimously upheld by the Supreme Court, which found it well within the Commission's authority to pursue "the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'"¹¹

Because Fox's parent company, News Corp., controls the *Post*, a daily newspaper published in New York, the regulation on its face prohibits the Commission from granting Fox's application for WWOR, a television station serving the New York DMA. Nonetheless, Fox claims that "creation of a permitted television duopoly in the New York DMA and continued ownership of the *New York Post* requires no Commission action at this time."¹² Fox cites no cases for its argument that an entity that has previously received a waiver need not obtain a new waiver to subsequently acquire an additional station in violation of the rules. Indeed, the cases

⁹47 C.F.R. § 73.3555(d)(3).

¹⁰*See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1074, (1975), *recon. denied*, 53 FCC 2d 589 (1975), *aff'd sub nom.*, *FCC v. Nat'l Citizens Comm'n. for Broadcasting*, 436 U.S. 775 (1978).

¹¹*FCC v. Nat'l Citizens Comm'n. for Broadcasting*, 436 U.S. 775, 785 (1978) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

¹²*Fox App. Ex. No. 4* at 19.

cited by Fox demonstrate the need for an additional waivers.¹³

The fact that Fox was granted a waiver of the Daily Newspaper Cross-Ownership Rule in 1993 to allow it to acquire the *New York Post* provides no basis for allowing Fox to acquire an additional VHF television station. The Commission's grant of the waiver was premised upon two highly unusual circumstances. First, Fox's parent company, News Corporation ("News Corp."), had owned the *Post* several years earlier.¹⁴ Fox's ownership of the *Post* was not seen so much as a new ownership combination but rather a reacquisition.¹⁵ Second, the *Post* was in the midst of a bankruptcy proceeding. In that special case, the Commission found that the grant of a permanent waiver was an appropriate accommodation between bankruptcy law policies of "equality of distribution among creditors, fresh start[s] for debtors . . . [and] the efficient and

¹³See, e.g., *NewCity Communications, Inc.*, 12 FCC Rcd 3929, 3951-53 (1997) (requiring Cox to seek temporary waiver of newspaper-broadcast cross ownership rule to acquire FM station serving Atlanta, where Cox already held grandfathered AM-FM-TV stations and daily newspapers).

¹⁴*Metromedia Radio and Television, Inc.*, 102 FCC 2d 1334 (1985) (granting News America Television Inc. (which later became Fox) a two-year period in which to divest its interest in the *Post*, which it had owned since 1976, in exchange for the Commission's approval of its purchase of WNEW (which later became WNYW).

¹⁵See *Columbia Montour Broadcasting Co.*, 13 FCC Rcd 13,007, 13,013 (1998) (citing *Field Communications Corp.*, 65 FCC 2d 959, 961 (1977) and *Fox Television Stations Inc.*, 8 FCC Rcd at 5341-42, for proposition that in both cases the "media property was actually formerly owned by the acquiring party, who had extensive and relatively recent experience in operating the property, and who had maintained a continuing financial interest in the property."); The only other permanent waiver of a television-newspaper cross-ownership combination was also premised in part on the fact that the ownership pattern was a reacquisition. *Field Communications Corp.*, 65 FCC 2d 959 (1977); *Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, MM Dkt 96-197, 11 FCC Rcd 13,003, 13,006 at ¶ 5 (1996) (stating that the Commission believed the "reacquisition of the *Post* might be pivotal to the paper's continued survival.")

economical administration of cases" and communications law policies of viewpoint diversity and economic competition.¹⁶ The ultimate result of the earlier waiver was to preserve the *Post*, an important voice that would otherwise be silenced, thus increasing diversity overall. By contrast, were the Commission to grant the waiver requested here, WWOR would be lost as an independent voice, and overall diversity would be decreased.

Moreover, Fox's waiver of the Daily Newspaper Cross-Ownership Rule was narrow in scope. The Commission emphasized that the waiver was "personal to Murdoch and News Corp., as controlling entities of both WNYW and, possibly, the *Post*. Consequently, waiver of the cross-ownership rule terminates upon a long-form transfer of control of either entity or assignment of either media outlet."¹⁷ Thus, the Commission made it clear that its grant of the waiver did not extend to any situation beyond the specific set of circumstances presented at that time. Accordingly, in the instant case, it is clear that Fox's prior waiver does not apply to an acquisition of a second VHF television license while retaining control of the *Post*.¹⁸

Finally, although the Local Television Ownership Rule ("Duopoly Rule")¹⁹ allows an

¹⁶*Fox Television Stations Inc.*, 8 FCC Rcd at 5353.

¹⁷*Id.* (noting that both Fox and the *Post* are subsidiaries of News Corp. and are controlled by K. Rupert Murdoch).

¹⁸Fox claims that the Commission should not require "divestiture of the *Post* as the price for an otherwise permissible duopoly." *Fox App. Ex. No. 4* at 22. However, Fox is not being forced by the Commission to divest its newspaper. Fox has the choice of divesting its television stations or the *Post* and any divestiture is due to Fox's decision to acquire WWOR.

¹⁹*Review of the Commission's Regulations Governing Television Broadcasting*, MM Dkt 91-221, *Television Satellite Stations Review of Policy and Rules*, MM Dkt 87-8, 14 FCC Rcd 12,903 (1999) [hereinafter *Duopoly R&O*]; 47 C.F.R. § 73.3555(b) (1999).

entity to control two television stations in the same DMA in some circumstances,²⁰ the Duopoly Rule does not change or supersede other ownership regulations, including the Daily Newspaper Cross-Ownership Rule. In revising the Duopoly Rule last year, the Commission reaffirmed "our continuing goals of ensuring diversity and localism and guarding against undue concentration of economic power."²¹ As Chairman Kennard explained, the modifications were "tailored to grant broadcasters more flexibility while at the same time ensuring that consolidation will only occur in markets where these core values [of competition, diversity and localism] will not be undermined. Our action . . . thus strikes an appropriate balance, by relaxing the rules but maintaining a diversity floor."²² Therefore, some ownership combinations, such as the one contemplated by Fox, even if allowed under the Duopoly Rule, are impermissible under the Daily Newspaper Cross-Ownership Rule.

B. Fox's Proposed Acquisition of WWOR Does Not Qualify Fox for a New Waiver Because Fox Has Not Met Any of the Waiver Criteria

Because Fox's acquisition of WWOR violates the Daily Newspaper Cross-Ownership Rule, the Commission can only approve the acquisition if Fox is able to show that it meets the criteria for a waiver. To obtain a waiver of the Daily Newspaper Cross-Ownership Rule, an applicant must show: (1) an inability to sell the broadcast station or newspaper, (2) an inability to

²⁰In this case, however, Fox's ownership of two VHF stations in the New York DMA is not in the public interest. *See, infra* at Part IV(B)(2).

²¹*Duopoly R&O*, 14 FCC Rcd at 12,904, ¶ 1.

²²*Id.* at 12,982, Separate Statement of Chairman William E. Kennard, Aug. 5, 1999 Meeting.

sell the broadcast station or newspaper without accepting an artificially depressed price, (3) an inability of a locality to support separate ownership of the enterprises, or (4) an application of the rule disserves the rule's twin purposes of diversity of viewpoints and economic competition (the "catch-all" criterion).²³

In this case, Fox has offered no evidence whatsoever to support the grant of a temporary waiver. Moreover, unlike its previous request, Fox has not shown its purchase of WWOR demonstrates the "highly unusual facts" or "extraordinary circumstances" necessary to support a permanent waiver.²⁴ The burden is on Fox to show its inability to sell either the television station or the newspaper, yet Fox gives no indication in its application to the Commission that it would not be able to sell these properties or would only be able to sell them at an artificially depressed price. There is simply no basis for concluding that the New York market could not continue to support the *Post* and WWOR. Accordingly, Fox has failed to meet its burden for any of the first three waiver criteria.

Nor does Fox qualify for a waiver of the Daily Newspaper Cross-Ownership Rule under

²³See *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1074, 1085 (1975), *recon. denied*, 53 FCC 2d 589 (1975), *aff'd sub nom.*, *FCC v. Nat'l Citizens Comm'n. for Broadcasting*, 436 U.S. 775 (1978); *Fox Television Stations, Inc.* 8 FCC Rcd at 5348, ¶39 (citing "catch-all" language from *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1042 (D.C. Cir. 1986).

²⁴The burden is "considerably heavier" on a party requesting a permanent waiver and the party must demonstrate "highly unusual facts" or "extraordinary circumstances" in order to be considered for such a waiver. *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5887 at ¶ 85 (1996) (citing *Hopkins Hall Broadcasting, Inc.*, 10 FCC Rcd 9764, 9764 (1995)); *Fox Television Stations, Inc.*, 8 FCC Rcd at 5348 (citing *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988).

the fourth "catch-all" criterion. It was under this criterion that Fox received its 1993 waiver of the Daily Newspaper Broadcast Cross-Ownership Rule for its ownership of WNYW and the *Post*.²⁵ In the current instance, however, Fox has not shown that the purpose of the rule – promotion of diversity and economic competition – would be disserved by applying the rule. On the contrary, enforcement of the rule here directly supports that purpose. Unlike in 1993, the *Post* is no longer in bankruptcy. In fact, Fox boasts of the success of the newspaper in its petition to the Commission, stating that "[a] very sick *New York Post* has risen from its deathbed under News Corporation's ownership"²⁶ According to News Corp, the *Post*'s circulation recently rose for the tenth consecutive six-month period, "a feat unequaled by any other major title in North America."²⁷ Moreover, WWOR is not a failing station.²⁸

Fox attaches numerous tables to its application purporting to show that the number of independent media voices in the New York DMA allows for enough diversity and economic competition to justify Fox's violation of the Daily Newspaper Cross-Ownership Rule.²⁹

²⁵*Fox Television Stations, Inc.*, 8 FCC Rcd at 5349 (concluding that under fourth category's "special circumstances" presented in the case, "a permanent waiver is warranted").

²⁶*Fox App. Ex. No. 4* at 27.

²⁷News Corporation Global Statistics, *available at* <http://www.newscorp.com/report99/news2.html> (last visited Oct. 16, 2000).

²⁸See BIA Research, Inc., BIA Financial Network, *Television Market Report 2000* DMA Rank 1 (3d ed. 2000) [hereinafter *BIA*] (stating that in 1999 WWOR had estimated revenue of \$170,000,000 and an estimated power ratio (ratio of revenue share to audience share) of 1.05). A power ratio of greater than 1 signifies a station is receiving a percentage share of market revenues greater than its local commercial share of the viewing audience. *Id.*

²⁹See *Fox App. Ex. No. 4* Tables 4-J – 4-S (citing media voices including major national periodicals, mass circulation of weekly newspapers and New York based/oriented web sites).

However, the Commission does not look to those media as sources for measuring diversity. The Daily Newspaper Cross-Ownership Rule by its terms only looks at daily newspapers, radio and television broadcast stations as factors relevant to the application of the rule.³⁰ Moreover, in the Biennial Review Report, the Commission explicitly examined the question of whether to take into account changes in the media marketplace in applying the Daily Newspaper Cross-Ownership Rule. It concluded that "many of the new media outlets do not yet appear to be substitutes for broadcast stations and newspapers on the local level for diversity purposes. . . . New outlets such as DBS and MMDS, ... typically do not provide locally originated programming."³¹ Indeed, the media sources Fox lists are, for the most part, national enterprises with no local New York-oriented content.³² The Biennial Report further found that not all of the

³⁰See 47 C.F.R. § 73.3555(d) (1999).

³¹1998 Biennial Regulatory Review-- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Dkt No. 98-35, 15 FCC Rcd 11,058, 11,105-06 at ¶ 89 (rel. June 20, 2000) [hereinafter *1998 Biennial Review Report*]. The Biennial Review Report further explains that the Commission is "most concerned with viewpoint diversity at the local level . . . because '[m]onopolization on the means of mass communication in a locality assures the monopolist control of information received by the public and based upon which it makes elective, economic, and other choices.'" *Id.* citing *Further Notice of Proposed Rule Making* in MM Dkt Nos. 92-221 and 87-8, 10 FCC Rcd 3532, 3559 (1995).

³²For example, Fox lists Direct Broadcast Satellite (DBS) services, which primarily offer national program services. Although DBS services may retransmit local television signals, this does nothing to increase the diversity of local viewpoints. Fox also cites magazines with national circulations such as Time Magazine, Newsweek and U.S. News and World Report. *Fox App. Ex. No. 4* at 30-31.

new media are available to all free of charge, as broadcasting is.³³ Again, many of the sources listed by Fox are not available to all and are not available free of charge.³⁴

Thus, none of these other "sources" should be taken into account.³⁵ Fox's purchase of WWOR must be seen for what it is—a new ownership pattern that diminishes the number of independent voices in the New York market and results in a harm to the viewing public by curtailing diversity of viewpoint and economic competition.

C. Fox Should Not Be Granted an Interim Waiver Pending the Outcome of a Yet-to-Be-Initiated Rulemaking Proceeding

Because Fox is unable to make a showing under any of the four prongs of the waiver test, it is not entitled to a waiver of any kind. Nonetheless, Fox argues in the alternative for an interim waiver pending the outcome of the not-yet-initiated rulemaking proceeding in which the Commission will examine possible changes to the Daily Newspaper Cross-Ownership Rule.³⁶ An interim waiver would be patently contrary to the public interest.

³³1998 Biennial Review Report, 15 FCC Rcd at 11,106-07, ¶ 90.

³⁴For example, cable, MMDS, DBS, and the Internet require monthly subscriptions and may also require the purchase of expensive equipment (satellite dishes, computers). In addition, many of these other sources are also owned by Fox affiliates. *See infra* at Part IV(B)(2).

³⁵*See also, Stockholders of Renaissance Communications Corp.*, 12 FCC Rcd 11,866, 11,885 at ¶ 46 (1997) [hereinafter *Renaissance I*] (noting that “the existence of even a considerable number of media voices in a market is not sufficient, without ‘special circumstances,’ to justify a waiver of the cross-ownership rule”).

³⁶*Fox App. Ex. No. 4* at 22-23.

1. The FCC made it clear in *Renaissance Communications* that it will no longer grant interim waivers based on the existence of pending rulemaking proceedings

Fox cites a series of cases regarding Renaissance Communications Corporation in an attempt to bolster its argument that the Commission should grant Fox an interim waiver of the rule pending the outcome of the rulemaking proceeding.³⁷ In that case, Tribune Co. bought six television stations, one of which, was located in the same market in which the Tribune published a daily newspaper.³⁸ The FCC granted Tribune a “temporary twelve-month waiver to allow an orderly divestiture of either WDZL or the Sun-Sentinel newspaper.”³⁹ When the end of the twelve-month period was near and Tribune had not divested its holdings to comply with the rule, the Commission refused to grant it a permanent waiver, or in the alternative, a temporary waiver pending the outcome of future rulemaking on the Daily Newspaper Cross-Ownership Rule.⁴⁰ On appeal, the D.C. Circuit upheld the Commission’s decision, but questioned the Commission’s rationale in granting such waivers.⁴¹ Subsequently, the Chief of the Mass Media Bureau issued an order stating that “[t]he Commission’s position with respect to interim waivers pending rulemaking has apparently not been clearly articulated, as evidenced by the [D.C. Circuit]

³⁷*Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998); *Stockholders of Renaissance Communications Corp.*, 13 FCC Rcd 4717 (1998) [hereinafter *Renaissance II*]; *Renaissance I*, 12 FCC Rcd 11,866.

³⁸*Renaissance I*, 12 FCC Rcd at 11,868, ¶ 2.

³⁹*Id.* at 11,890, ¶ 55.

⁴⁰*Tribune Co. v. FCC* at 64.

⁴¹*Id.* at 70.

[C]ourt's opinion. In light of this confusion, we believe it would be unduly harsh for Tribune not to receive some further interim relief."⁴² The Bureau then granted Tribune a temporary waiver lasting until six months after the end of the FCC's reexamination of the Daily Newspaper Cross-Ownership Rule.⁴³

At the same time, the order stated that "it should now be clear that the mere initiation of a proceeding stating that the rule would be examined, or merely the fact that such a proceeding was on the horizon, *would not be sufficient to warrant an interim waiver.*"⁴⁴ It went on to explain that "[i]f the mere initiation of a proceeding called for an interim waiver of our broadcast cross-ownership rules, the granting of waivers would be the rule rather than the exception."⁴⁵

Thus while the interim waiver policy may have been unclear during the time of *Renaissance I*, the Commission's policy is now crystal clear after *Renaissance II*: pending rulemaking proceedings are not a viable basis for granting an interim waiver. Thus, Fox should not be granted a waiver of the Daily Newspaper Cross-Ownership Rule during the pendency of the rulemaking proceeding.

2. In Fox's case, there are particularly strong reasons for denying an interim waiver of the Daily Newspaper Cross-Ownership Rule

Even if the Commission did not have a policy against granting waivers based on the intent of a rulemaking, there are particularly strong reasons for denying an interim waiver here.

⁴²*Renaissance II*, 13 FCC Rcd at 4718 (referring to D.C. Cir. Court's opinion in *Tribune Co. v. FCC*).

⁴³*Id.* at 4718-19.

⁴⁴*Id.* at 4719 (emphasis added).

⁴⁵*Id.*

First, although the Commission announced its intent to initiate a television/newspaper ownership combination proceeding, it has not yet done so.⁴⁶ When that rulemaking is initiated, it will likely be a lengthy proceeding.⁴⁷ Allowing Fox to hold two VHF television stations and a newspaper for such a long duration would result in significant harm to the public interest.⁴⁸

Second, the rulemaking contemplated by the Commission is unlikely to result in significant changes to the rules. The Commission explicitly found that the rule "continues to serve the public interest because it furthers our important and substantial policy of viewpoint diversity . . . [and] therefore conclude[d] that, as a general matter, the rule should be retained."⁴⁹ In its 1998 Biennial Review Report, the Commission stated its intent to initiate a rulemaking proceeding merely to "consider tailoring" the Daily Newspaper Cross-Ownership Rule for "certain circumstances in which the rule may not be necessary to achieve the rule's public interest benefits."⁵⁰ Thus, any changes the Commission contemplates for the rule likely will be minor. Because at the end of this rulemaking Fox would be required to divest either one of its

⁴⁶1998 Biennial Review Report, 15 FCC Rcd at 11,102, ¶ 83.

⁴⁷By way of comparison, the Commission initiated a rulemaking proceeding on the Newspaper/Radio Ownership Rule in 1996 which still has not been completed. Waiver of the Newspaper/Broadcast Cross-Ownership Restriction, 61 Fed. Reg. 53,694 (1996) (to be codified at 47 C.F.R. ch. I).

⁴⁸See *infra* at Part IV(B).

⁴⁹1998 Biennial Review Report, 15 FCC Rcd at 11,105, ¶ 88. Because the Commission recently amended its television duopoly and "one-to-a-market" rules and waiver policies, it promised a "measured approach" in making changes to the Daily Newspaper Cross-Ownership Rule. *Id.* at ¶ 93.

⁵⁰*Id.* at ¶ 83.

television stations or the *Post*, it makes no sense to grant an interim waiver.

Third, it appears that Fox's actual motive is to delay divestiture in hopes of either getting rid of the rule in either Congress or the courts, or in creating equities that make it more difficult for the Commission to order divestiture. Fox has used this strategy in the past. In 1986, when Fox acquired WNYW, it was granted a two-year waiver of the rule in order to allow Fox time to sell its interest in the *Post*.⁵¹ Despite the generous two-year divestiture waiver period and the fact that Congress enacted a law prohibiting the Commission from using funds to extend existing temporary waivers of the rule for the fiscal year,⁵² Fox petitioned the Commission for an extension of its waiver.⁵³ Instead of being content with its lengthy divestiture period, Fox relentlessly pressed for additional time. The Commission should not allow Fox to avoid compliance with its rules in this case.

3. Granting Fox's Request Would Encourage Other Parties to Seek Waivers and Undermine the Rule

A grant of Fox's waiver request would encourage other parties to make similar requests and thus undermine both the rule itself and an orderly administrative process. The Commission has had this problem in the past. As Chairman Kennard noted in his Separate Statement in the Duopoly Rule proceedings, "[f]or far too long it's been a case of administration by waiver, not

⁵¹*Metromedia Radio & Television, Inc.*, 102 FCC 2d 1334 (1985).

⁵²Continuing Appropriations for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-32 (1987).

⁵³*News America Publishing, Inc.*, FCC 88-19, slip op. (Jan. 19, 1998).

by rule."⁵⁴ In that same proceeding, Commissioner Ness noted that the practice of granting conditional waivers had become "an albatross around our necks."⁵⁵ Commissioner Tristani has expressed similar concern about the FCC's "willingness to churn out waiver after waiver" to parties who have presented inadequate waiver requests of the ownership rule and that doing so "invites cynicism and disrespect for the Commission and its processes."⁵⁶ A grant of Fox's interim waiver request, where the ownership pattern clearly violates the Daily Newspaper Cross-Ownership Rule and the Commission has stated explicitly that waiver requests based on a pending rulemaking proceeding will not be allowed, will only encourage others to follow suit and thereby harm the public interest and credibility of the Commission's processes.

4. None of the cases Fox cites provides support for granting an interim waiver

None of the cases cited by Fox provides grounds for the grant of this waiver because none involved two VHF television stations and a daily newspaper.⁵⁷ Indeed, most involved

⁵⁴ *Duopoly R&O*, 14 FCC Rcd at 12,981 (separate statement of Chairman William E. Kennard, Aug. 5, 1999 Meeting); *See also, United Broadcasting Company, Inc.*, 13 FCC Rcd 21,563, 21,572 (1998) (concurring statement of Chairman William E. Kennard) (In a case dealing with the grant of a waiver of the one-to-a-market ownership rule, the Chairman reluctantly supported the Commission's decision to grant the waiver noting that "[t]he history of application of the one-to-a-market waiver process has made it clear that the waiver standards, as applied, are so discretionary that the grant of waivers has become a foregone conclusion.").

⁵⁵ *Duopoly R&O*, 14 FCC Rcd at 12,983 (separate statement of Commissioner Susan Ness, Aug. 5, 1999 Meeting).

⁵⁶ *United Broadcasting Company, Inc.*, 13 FCC Rcd 21,563, 21577 (1998) (dissenting statement of Commissioner Gloria Tristani).

⁵⁷ *Fox App. Ex. No. 4*, at 25 n.37.

radio/newspaper combinations, not television/newspaper combinations.⁵⁸ Television and radio differ because radio stations are more numerous.⁵⁹ The Commission has acknowledged the unique importance of television in our society stating that "broadcast television, more than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."⁶⁰ Thus, Fox's situation in which it seeks to own a daily newspaper and two VHF television stations in that same market, is clearly not analogous to cases involving radio/newspaper combinations.

Although Fox cites *Tribune*, which involved a television station, that case presented unique considerations that are not present here. As stated earlier, *Tribune* received an extension of an interim waiver as a result of the confusion surrounding the grant of such waivers. That confusion was laid to rest in *Renaissance II*. Also, *Tribune* only dealt with the acquisition of one television station, not two. *Tribune*'s case therefore differs significantly from Fox and therefore should not be relied upon to justify a grant of a waiver which is not allowed under the rules.

⁵⁸See, e.g., *NewCity Communications, Inc.*, 12 FCC Rcd 3929 (1997) (granting Cox Radio a temporary waiver due to the FCC's Notice of Inquiry contemplating changes to the radio/newspaper cross-ownership aspect of the rule after Cox purchased a radio station in the same market in which it owned one VHF television station, four radio stations and two daily newspapers (the ownership of which was allowed under a grandfathering provision)); *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5895 (1996) (granting Disney a temporary twelve-month waiver "to allow an orderly divestiture of either the radio stations or the newspapers in each market" after Disney purchased Capital Cities/ABC's grandfathered holdings of one FM radio station, one AM radio station and one daily newspaper in two cities).

⁵⁹At the end of 1999, there were 12,615 radio stations and 1,616 television stations operating in the United States. Only 561 television stations were commercial VHF stations. *Year in Review: Broadcasting & Cable 1999*, Broadcasting & Cable Y.B. 2000, at xxx.

⁶⁰*Duopoly R&O*, 14 FCC Rcd at 12,934, ¶ 68.

Thus, Fox has failed to show that an interim waiver pending the outcome of the not-yet-initiated rulemaking would serve the public interest.

In sum, by purchasing WWOR while maintaining control of the *Post*, Fox will be violating the Daily Newspaper Cross-Ownership Rule. Fox has failed to show that it meets any of the criteria for a waiver of the rule. Moreover, it would be contrary to the public interest to grant an interim waiver of the rule due to the pendency of the rulemaking proceedings. Fox's transaction must be seen for what it plainly is—an attempt to create more revenue for an already wealthy media empire. Consequently, Fox's request that its previous waiver be read to cover this transaction or, in the alternative, the grant of a new waiver of the Daily Newspaper Cross-Ownership Rule to allow it to own and operate WNYW, WWOR and the New York *Post*, must be denied.

IV. The Creation of Duopolies by Fox in Four Cities is Not in the Public Interest

Fox seeks to acquire four CCI broadcast stations in four different DMAs - Phoenix, New York, Los Angeles, and Salt Lake City - where it already owns stations.⁶¹ In some cases, the creation of duopolies violates Commission rules; in all cases the creation of duopolies is contrary to the public interest. Therefore, Petitioners submit that the Commission should not approve Fox's application.

A. The Creation of a Duopoly in Phoenix Will Greatly Reduce Diversity and is Not in the Public Interest

Under the recently revised Duopoly Rule, the FCC will permit common ownership of two

⁶¹Fox already owns KSAZ in the Phoenix DMA, KTTV in Los Angeles, WNYW in New York, and KSTU in Salt Lake City. *See generally*, BIA. Fox proposes to acquire KUTP in Phoenix, KCOP in Los Angeles, WWOR in New York, and KTVK in Salt Lake City. *Id.*

television stations in the same DMA if their Grade B contours do not overlap or if:

at least eight independently owned and operating full power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of TV stations in question are located *and* the two merging stations are not both among the top four-ranked stations in the market as measured by audience share.⁶²

The Commission chose the DMA standard because of its belief that "DMAs reflect actual television viewing patterns."⁶³ As UCC et al. pointed out in their Petition for Reconsideration, which has been pending for almost year, many DMAs do not in fact reflect actual viewing patterns.⁶⁴ In many cases, DMAs in fact overstate the number of television stations that can be or are viewed. The Phoenix DMA is an example of a case where the DMA is over-inclusive.

In Phoenix, where Fox already owns KSAZ, which broadcasts Fox network programming, it seeks to acquire CCI's KUTP, which currently broadcasts UPN network programming.⁶⁵ Fox asserts that, using the most recent Nielsen audience share data, Fox's KSAZ ranked third in the Phoenix DMA and CCI's KUTP ranked sixth, thus satisfying the Duopoly Rule's top four-ranked requirement.⁶⁶ While independent analysis verifies that Fox's

⁶²*Duopoly R&O*, 14 FCC Rcd. at 12,932-33, ¶ 64 (emphasis added). The top four ranking is based on audience share data at the time the application is filed. *Id.* at ¶ 59.

⁶³*Duopoly R&O*, 14 FCC Rcd at 12,926, ¶ 48.

⁶⁴*Review of the Commission's Regulations Governing Television Broadcasting*, Petition for Reconsideration of UCC et al., MM Dkt 91-221 (filed Oct. 18, 1999). UCC et al. urge the Commission to act promptly on that Petition for Rulemaking before it considers Fox's application.

⁶⁵BIA at DMA Rank 17.

⁶⁶*Fox App. Ex. No. 4* at 6. The Nielsen data was from the July 2000, the most recent data available. *Id.*

acquisition of KUTP satisfies the top four-ranked prong of the Duopoly Rule,⁶⁷ careful analysis of the Phoenix DMA clearly shows that Fox's acquisition of KUTP does not satisfy the key premise of the Duopoly Rule—that eight independent voices remain in the viewing area following a merger.

Fox's application lists eleven pre-transfer independent voices in the Phoenix DMA: (1) the Board of Regents for Arizona State University's Phoenix-based KAET; (2) Paxson Communication's Flagstaff-based⁶⁸ KBPX; (3) Gannett Broadcasting Group's Kingman-based⁶⁹ KMOH, Flagstaff-based KNAZ, and Mesa-based⁷⁰ KPNX; (4) Scripps Howard Broadcasting Co.'s Phoenix-based KNXV; (5) Trinity Broadcasting Network Inc.'s Phoenix-based KPAZ; (6) Meredith Broadcasting Group's Phoenix-based KPHO; (7) Belo Corp.'s Phoenix-based KTVK and Phoenix-based KASW⁷¹; (8) Univision Communications Inc.'s Phoenix-based KTVW; (9) KUSK Inc.'s Prescott-based⁷² KUSK; (10) Fox Television's Phoenix-based KSAZ; and (11)

⁶⁷BIA at DMA Rank 17.

⁶⁸Flagstaff is located 136 miles north of Phoenix. Rand McNally, Road Atlas 2000 8 (2000).

⁶⁹Kingman is located 185 miles northwest of Phoenix. *Id.*

⁷⁰Mesa is a suburb of Phoenix. *Id.*

⁷¹In its list of the Phoenix stations, Fox states that Mac America Communications Inc. owns Phoenix-based KTVK, that Brooks Broadcasting L.L.C. owns Phoenix-based KASW, and that the two stations count as one voice because they are operating under an LMA. *Fox App. Ex. No. 4* at 7. However, Belo Corp. now owns both stations. BIA at DMA Rank 17.

⁷²Prescott is located 94 miles north of Phoenix. Rand McNally, Road Atlas 2000 at 8 (2000).

CCI's Phoenix-based KUTP.⁷³ Using a mechanical analysis of the Phoenix DMA, Fox asserts that ten voices would therefore remain once KUTP's license is transferred to Fox.⁷⁴

In reality, however, only seven voices would be available to Phoenix metropolitan-area viewers after the acquisition. This is because the Phoenix DMA is quite large, encompassing the northern two-thirds of Arizona, including the cities of Phoenix, Flagstaff, Prescott, and Kingman.⁷⁵ Two stations that Fox listed as independent voices in the DMA are actually not available over the air to households in the Phoenix metropolitan area. The Grade B contours of Flagstaff-based KBPX and Prescott-based KUSK do not reach Phoenix.⁷⁶ Because the broadcast stations' signals are not technologically available to Phoenix-area households, these stations cannot be counted as viable voices throughout the Phoenix DMA. And in any case, because they are licensed to different communities, any locally oriented programming would address their community of license, rather than Phoenix.

Not surprisingly, these two stations do not have any recorded market share in the Phoenix DMA.⁷⁷ In addition, Trinity Broadcasting Network Inc.'s KPAZ lacks any recorded market

⁷³ *Fox App. Ex. No. 4* at 6-7. In its list of Phoenix stations, Fox states that United Television Inc., a subsidiary of CCI, owns Phoenix-based KUTP. *Id.* at 7. However, for purposes of this argument, we will refer to CCI as the owner of KUTP.

⁷⁴ *Fox App. Ex. No. 4* at 6.

⁷⁵ Broadcasting & Cable Y.B. 2000, at B-217 [hereinafter B&C 2000]. The southern one-third of the state, including the city of Tucson, is in a separate DMA. *Id.*

⁷⁶ 1 Television & Cable Factbook 2000 No. 68, at A-63, A-75.

⁷⁷ BIA at DMA Rank 17.

share.⁷⁸ Cox Cable's service in Phoenix does not carry KUSK, KPAZ, or KBPX, but Qwest Choice TV cable system's service in Phoenix carries KUSK and KPAZ.⁷⁹ Nonetheless, Nielsen data from 1999 through July 2000 show that KUSK, KPAZ, and KBPX do not have any recorded market share.⁸⁰

According to DMA maps, market share in the Phoenix DMA is based on ratings information gathered only from households in the two counties comprising the metropolitan Phoenix area.⁸¹ Thus, when Nielsen data shows that a station has no recorded market share, that means that the station is either not available to or not viewed by households in those counties which comprise the largest city in Arizona. When a broadcast station's signal cannot reach the majority of households in the DMA, or when a station receives no recorded market share, those stations clearly do not provide an independent source of local programming in that market and should not be counted in applying the eight voices test.

Petitioners urge the Commission to act on UCC et al.'s Petition for Reconsideration in a way that addresses the problem of over-inclusive DMAs such as Phoenix and to assess Fox's application under appropriately revised rules. However, should the Commission fail to act on the Petition for Reconsideration in time, the full Commission, not the Mass Media Bureau, should

⁷⁸*Id.*

⁷⁹TV Listings, *available at* <http://www.zap2it.com> (last visited Oct. 12, 2000). The fact that these cable systems apparently are not required to carry these stations suggests that they are not true local voices.

⁸⁰BIA at DMA Rank 17.

⁸¹B&C 2000 at B-217.

consider Fox's application. The Commission has delegated to the Mass Media Bureau only "the authority to grant any application that satisfies the eight station/top four-ranked station standard, and presents no new or novel issues."⁸² Since Fox's request to acquire KUTP raises the novel issue that not all stations in a DMA may be viable voices for the majority of households in the DMA, the permissibility of the Fox transfer application is a question for review by the full Commission.

Even if the Commission accepts Fox's assessment of the number of independent voices in the Phoenix DMA, it should not approve Fox's acquisition of KUTP. Not only must an application for a license transfer do no harm to the public interest, but the Commission must make an express finding that the public interest is affirmatively served by such a transfer.⁸³ Here, assignment of KUTP does not serve the public interest, even if eight independent voices technically remain in the DMA, because it disserves the underlying purpose of the revised Duopoly Rule. The purpose of the eight-voices/top-four ranked station test is to "provide significant relaxation of the television duopoly rule while at the same time ensur[ing] that markets remain sufficiently diverse and competitive at the local level so that common ownership of two television stations in these markets *does not threaten our core diversity concerns*."⁸⁴ Because the proposed acquisition would undermine core diversity concerns, it cannot be found to

⁸²*Duopoly R&O*, 14 FCC Rcd at 12,933, ¶ 64.

⁸³*Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968) (finding that in an appeal challenging the Commission's approval of a radio license transfer, the Commission must expressly find that the public interest was served through preservation of viewpoint and ownership diversity).

⁸⁴*Dupoloy R&O*, 14 FCC Rcd at 12,935, ¶ 70 (emphasis added).

serve the public interest.

B. The Creation of Duopolies in Los Angeles and New York Involving Two Powerful VHF Stations Would Not Serve the Public Interest

The grant of Fox's application to acquire second VHF television stations in the Los Angeles and New York DMAs, likewise has not been affirmatively shown to serve the public interest. FCC has never before approved a VHF-VHF combination when the stations in question are licensed in the same metropolitan area. Thus, the proposal to create VHF duopolies in Los Angeles and the New York metropolitan area—the two largest television viewing markets in the country—presents a case of first impression that must be decided by the full Commission.

1. The FCC Did Not Contemplate VHF-VHF Combinations in Relaxing the Duopoly Rule

Fox seeks to own two of the six VHF stations in New York and two of the seven VHF stations in Los Angeles.⁸⁵ In New York, Fox seeks to acquire CCI's Secaucus, N.J.-based⁸⁶ WWOR, which broadcasts UPN programming.⁸⁷ Fox currently owns New York-based WNYW, which broadcasts Fox network programming.⁸⁸ The remaining four VHF stations in New York broadcast programming from CBS, NBC, ABC, and WB.⁸⁹ In Los Angeles, Fox seeks to acquire

⁸⁵Fox also seeks to own two VHF stations in the Salt Lake City DMA; however, Fox has announced its intention to divest one of those stations. *Fox App. Ex. No. 4* at 8. Fox's proposed time line for divestiture will be addressed *infra* at section III.C.

⁸⁶Secaucus, N.J., is within 20 miles of New York, N.Y., and therefore is in the New York metropolitan area. Rand McNally, *Road Atlas 2000* 66 (2000).

⁸⁷*Fox App. Ex. No. 4* at 2-3; BIA at DMA Rank 1.

⁸⁸BIA at DMA Rank 1.

⁸⁹BIA at DMA Rank 1.

CCI's L.A.-based KCOP, which broadcasts UPN programming.⁹⁰ Fox currently owns L.A.-based KTTV, which broadcasts Fox network programming.⁹¹ The remaining five VHF stations in Los Angeles are the stations that run programming from CBS, NBC, WB, and ABC; and an additional station broadcasts independent programming.⁹²

The combination of two VHF stations in the two most-watched DMAs in the country was not intended by either Congress or the Commission. In passing the Act, Congress directed the Commission to review its local television ownership regulation to determine whether to "retain, modify, or eliminate its limitations."⁹³ However, the Conference Report on The Act made clear that in conducting this review, "if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in *compelling circumstances*."⁹⁴ The reason for not permitting VHF-VHF combinations are the same that motivate the continued practice of "discounting" UHF stations for purposes of the national ownership rules: VHF stations generally have a larger signal reach, greater cable carriage, higher ratings and are more profitable.⁹⁵

⁹⁰*Fox App. Ex. No. 4* at 4-5; BIA at DMA Rank 2.

⁹¹BIA at DMA Rank 2.

⁹²BIA at DMA Rank 2.

⁹³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(2), 110 Stat. 56, 111 (1996).

⁹⁴S. Conf. Rep. No. 104-230, at 163 (1996) (emphasis added). In this act, Congress directed the Commission to conduct a rulemaking to consider modifying its local multiple ownership rules for broadcasters. *See generally, id.* *See also, Duopoly R&O*, 14 FCC Rcd at 12,906, ¶ 5.

⁹⁵*1998 Biennial Review Report*, 15 FCC Rcd at 11,076-77, 11,078, ¶¶ 32, 35. Indeed, Fox was one of the parties urging the FCC to retain the UHF discount. *Id.* Because it found that VHF-UHF disparity "has not yet been eliminated," the Commission retained the competitive