



Federal Communications Commission  
Washington, D.C. 20554

June 28, 2001

Mr. Paul D. Colford  
Daily News, L.P.  
450 West 33<sup>rd</sup> Street, 3<sup>rd</sup> Floor  
New York, New York 10001-2681

Dear Mr. Colford:

This is in reference to the Freedom of Information Act request (FOIA Control No. 21-132), which you filed on behalf of the Daily News.

As you are aware, Fox Television Stations (FTS) has filed applications seeking Commission approval of FTS's acquisition of control of ten television broadcast station licenses held by subsidiaries of Chris-Craft Industries. Several parties have jointly petitioned to deny these applications. Through this pending transaction, FTS proposes to own station WWOR-TV, Secaucus, New Jersey, which will implicate the Commission's television/newspaper cross-ownership rule due to the common ownership of collocated station WNYW(TV) and the New York Post in New York City. In support of its proposed ownership of these two television stations and the New York Post, FTS maintained that the New York media market was very competitive and that the New York Post continues to suffer from serious financial difficulties. By letter of December 13, 2000, FTS and its parent, The News Corporation Limited (News Corp.), offered to submit to the Commission financial information concerning the New York Post's operations, provided that "any and all financial information" it may, in the future, submit be treated as confidential due to its sensitive nature. Concluding that that request was premature and inconsistent with Section 0.459 of the Commission's Rules, which sets forth the procedures and specificity requirements for submitting requests that materials furnished to the Commission be withheld from public inspection, the Chief of the Mass Media Bureau dismissed the request "without prejudice to FTS's subsequent submission, if it so chooses, of a request for confidentiality filed in accordance with Section 0.459 of the Commission's Rules." See Letter to William S. Reyner, Jr., et al., dated December 21, 2000.

On January 22, 2001, Arthur M. Siskind, News Corp's Senior Executive Vice President, submitted certain financial data regarding the New York Post, which he maintained was entitled to confidential treatment, and requested that disclosure of the information only be permitted to counsel for the petitioners pursuant to a proposed Protective Order. Also attached to Mr. Siskind's letter was a declaration of Michael Carvalhido, Vice President, Finance of the New York Post, attesting that the financial data proffered is not made publicly available and is considered by News Corp. to be proprietary and competitively sensitive. Specifically, a one page submission entitled "New York Post Consolidated Newspaper Operations," setting forth total revenues and operating profit (loss) for the fiscal years ending June 30<sup>th</sup> for the 1995-2000

period and for the estimated fiscal year 2001. To correct a typographical error, a revised copy of this submission was filed on January 31<sup>st</sup>. By Order, DA 01-528, released March 1, 2001 (16 FCC Rcd 4807), the Bureau Chief adopted a Protective Order with respect to the alleged proprietary information proffered by News Corp. See also DA 01-579, 16 FCC Rcd 5259.

By letter of April 3, 2001, the Chief of the Mass Media Bureau's Video Services Division sought additional information from FTS to aid the Commission in its review of certain issues pertaining to the proposed transaction, including FTS's claims regarding the financial condition of the New York Post. "We therefore request," stated the Division Chief, "that you provide any available, independently audited certified financial statements, prepared in accordance with Generally Accepted Accounting Principles (GAAP), or similarly probative statements that support your contentions regarding the New York Post's financial viability." On April 9<sup>th</sup>, Mr. Siskind responded to the Division Chief's letter. Included in that submission was a declaration of David F. DeVoe, News Corp.'s Senior Executive Vice President and Chief Financial Officer, as well as a declaration of Mr. Siskind. Attached to Mr. DeVoe's declaration was a one-page, "Unaudited Statement of Operations" for the New York Post setting forth its revenues, expenses and losses for the fiscal years ended June 30, 1999 and 2000 and for the six months ended December 31, 2000, as well as its forecasts for the fiscal year ending June 30, 2001. Similarly, attached to Mr. Siskind's declaration was a three-page recitation of the capital improvement costs incurred since the New York Post was reacquired by News Corp. in 1993 and the costs being incurred by the New York Post in connection with the construction of its new printing plant, including projections of the annual financing costs of the investment in the new printing plant and the increases in annual operating expenses for the new printing plant vis-à-vis the old printing plant. Mr. Siskind also requested that the Protective Order be amended to authorize withholding from public disclosure the financial information and data submitted in the April 9<sup>th</sup> response. By Order, DA 01-976, released April 19, 2001, the Bureau Chief granted that request.

Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, you request a copy of the January 22, 2001 letter filed on behalf of FTS and News Corp. You also seek a copy of their April 9<sup>th</sup> submission, including the declarations of Messrs. DeVoe and Siskind. FTS and News Corp. have opposed your request, maintaining that the information they submitted is highly confidential and competitively sensitive and is not subject to disclosure pursuant to the Freedom of Information Act. They also note that it is not clear whether the Commission will rely on News Corp.'s financial submissions in reaching a decision on the license assignment applications. In reply, you argue that FTS and News Corp. have voluntarily sought a waiver to allow it to own two television stations and the New York Post in New York City and that the public has a right to know what information the Commission is considering as it makes a decision that will directly effect them as media consumers.

Exemption 4 of the Freedom of Information Act permits non-disclosure of trade secrets and commercial or financial information that are obtained from a person and that are privileged or confidential. 5 U.S.C. Section 552(b)(4). As interpreted by the courts in Critical Mass Energy Project v. NRC, 975 F. 2d 871 (D.C. Cir 1992), cert. denied, 507 U.S. 984 (1993), if

materials are submitted voluntarily, and are the kind of records that are not customarily disclosed to the public by the submitter, an agency's confidentiality assessment is at an end and the materials may be withheld under Exemption 4. Where financial or commercial information is furnished by a person obligated to do so, the materials may be treated as confidential if disclosure would either cause substantial harm to the competitive position of the person from whom the information was obtained or impair the government's ability to obtain necessary information in the future. See National Parks and Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974), and National Parks and Conservation Association v. Kleppe, 547 F. 2d 673 (D.C. Cir. 1976). While there is some question here whether the January 22<sup>nd</sup> and April 9<sup>th</sup> submissions by FTS and News Corp. were "voluntary" or "required," we need not address that issue since FTS and News Corp. maintain that public disclosure "is likely to cause substantial harm to the competitive position of the New York Post by allowing competitors to use such information to disadvantage the paper with readers and advertisers at a time when competition in the New York market has become increasing fierce." April 9<sup>th</sup> transmittal letter at note 1. See also Declaration of Mr. Carvalhido attached to the January 22<sup>nd</sup> letter. We agree.

Release of the financial data included in the January 22<sup>nd</sup> submission and attached to the Declarations of Messrs. DeVoe and Siskind as described above could conceivably assist a competitor in ascertaining the New York Post's financial position and its past and planned capital expenditures, and might be used against the New York Post in the market. While you assert that the public has a "right" to know what information has been submitted to the Commission, the Commission has not acted on the aforementioned license assignment applications and whether the common ownership of WNYW(TV), WWOR-TV and the New York Post should be permitted. To prevent public confusion, the courts have recognized that an agency should be judged on the basis of the reasons set forth in its publicly promulgated decisions and not on facts or rationales that were not ultimately the grounds for the agency's actions. E.g., Russell v. Department of the Air Force, 682 F. 2d 1045, 1048 (D.C. Cir. 1982). The fact that FTS and News Corp. may have placed the New York Post's financial condition in issue here is not dispositive of whether disclosure of the financial information is appropriate. See Leesburg Communications and Answering Service, Inc., 89 FCC 2d 119 (1982) and Knoxville Broadcasting Corp., 87 FCC 2d 1103 (1981).<sup>1</sup> Under these circumstances, we do not believe that the important public policy concerns underlying according confidential treatment of proprietary and competitively sensitive financial data, such as proffered by FTS and News Corp., is outweighed by your asserted interest in disclosure.

Notwithstanding the above, enclosed for your information and use is a copy of those portions of the January 22<sup>nd</sup> and April 9<sup>th</sup> submissions for which FTS and News Corp. have not

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<sup>1</sup> As the Commission stated in Knoxville Broadcasting Corp. at 1110: "allegations in pleadings relating to a licensee's financial condition will have the same status as other factual allegations. That is, the burden of providing appropriate &/ evidentiary support for such contentions will rest with the licensee; and absent such support, the Commission may disregard the factual contentions. . . ." (Footnote omitted.)

asserted a privilege and which are publicly available. FTS and News Corp. have requested that the initial statement of "New York Post Consolidated Newspaper Operations," as well as the January 31<sup>st</sup> erratum and corrected statement, be withheld in their entirety. However, we do not believe a general withholding of these materials is appropriate. While the actual revenue and operating profit (loss) figures will be withheld, segregable factual portions of those materials will be subsequently made available to you in accord with Section 0.461(i)(2) of the Commission's Rules. Similarly, we will withhold the actual and projected revenue and expenditure figures in the financial information attached to the Declarations of Messrs. DeVoe and Siskind, albeit segregable factual portions will later be released. With respect to the Declarations themselves, we disagree with FTS and News-Corp. that Mr. DeVoe's one-page statement describing the financial data attached to his Declaration falls within Exemption 4. In the same vein, we intend to release that portion of Mr. Siskind's three-page Declaration, describing in paragraphs 1 through 6 the attached financial data. However, Mr. Siskind's analysis of that financial data as set forth in paragraphs 7 through 9 will be withheld as requested.

The individual responsible for the foregoing determinations is the undersigned. Should you wish to appeal any of the determinations made with respect to FOIA 21-132, an application for review should be filed with the Commission's General Counsel within ten (10) working days after the date of this letter in accordance with Section 0.461(i)(2) of the Commission's Rules.

Sincerely,



Roy J. Stewart  
Chief, Mass Media Bureau

Enclosures

cc: William S. Reyner, Jr., Esq.  
John C. Quale, Esq.  
Marvin J. Diamond, Esq.