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March 8, 2017

*Via email*

Michelle Carey  
Acting Chief, Media Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Fox Television Stations, LLC's (Fox) Request for Temporary Waiver of the  
Newspaper-Broadcast Cross-Ownership Rule, MB Docket No. 07-260

Dear Ms. Carey,

The Office of Communication, Inc. of the United Church of Christ, the Rainbow/PUSH Coalition, Free Press, and Voices for New Jersey ("Petitioners") oppose Fox Television Stations, Inc.'s ("Fox") Request for Temporary Waiver of the Newspaper-Broadcast Cross-Ownership Rule (NBCO), 47 CFR §73.7555(d).

Since 2001, pursuant to a series of temporary waivers, Fox has owned a daily newspaper, the New York Post (the "Post"), and two television stations, WNYW(TV), New York, New York ("WNYW"), and WWOR-TV, Secaucus, New Jersey ("WWOR"), that serve the New York metropolitan area. The NBCO prohibits this arrangement in the absence of a waiver. Fox obtained a temporary two-year waiver in 2001, when it purchased WWOR, to give it time to come into compliance with the NBCO. However, Fox has never sought to comply with the rule and instead, has managed to get several additional temporary waivers.

Fox's most recent waiver, granted by the Media Bureau on August 8, 2014, expired ninety days after the effective date of the order in the *2014 Quadrennial Review*. That order was adopted in August 2016 and took effect on December 1, 2016. *2014 QR Order*, 31 FCC Rcd 9864 (2016). Thus, Fox's temporary waiver expired on March 1, 2017. On February 28, 2017, Fox asked for a new temporary waiver until ninety days after the Commission acts on the petition for reconsideration of the *2014 QR Order* filed by the NAB on December 1, 2016.

Petitioners filed an application for review of the Bureau's last grant of a new temporary waiver on October 8, 2014 (a copy is attached). That application has still not been acted upon by the Commission. In May 2015, Petitioners filed two petitions to deny the license renewals for WWOR and WNYW. The Commission has not acted on those petitions either.

The *2014 QR Order* adopted a new "case-by-case" waiver process in which it will assess "the totality of the circumstances." Under this approach, "applicants will have the flexibility to present their most compelling reasons why strict application of the rule is not necessary to promote the goal of viewpoint diversity in that particular local market. . . . Likewise, opponents of a transaction can respond with a range of arguments and evidence they consider most pertinent to that case." *2014 QR Order*, 31 FCC Rcd at 9938. Petitioners understand this to mean that that Fox's request and other waiver requests will be placed on public notice and that members of the public will have the opportunity to file an opposition. Requiring public notice here would be consistent with Chairman Pai's oft-stated goal to make the FCC more transparent and to ensure that the public has the same access as well-connected lobbyists. *See, e.g.*, Testimony of FCC Chairman Ajit Pai before the Senate Commerce, Science, and Transportation Committee, Oversight of the Federal Communications Commission Hearing (Mar. 8, 2017) at 4.

Petitioners will supplement their petitions to deny on a timely basis to elaborate upon the reasons why it would not be in the public interest to grant Fox another temporary waiver.

Sincerely,

/s/

\_\_\_\_\_  
Angela J. Campbell

Andrew Jay Schwartzman

Chris Laughlin

Institute for Public Representation

*Counsel for Office of Communication of the United  
Church of Christ, Rainbow/PUSH Coalition, Free  
Press, and Voices for New Jersey*

cc: via email

Chairman Ajit Pai

Commissioner Mignon Clyburn

Commissioner Michael O'Rielly

Alison Nemeth

David Grossman

Robin Colwell

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Fox Television Stations, Inc.	)	MB Docket No. 07-260
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	)	
Application for Renewal of License of	)	File No. BRCT-20070201AJT
WWOR-TV, Secaucus, New Jersey	)	
	)	
&	)	
	)	
Application for Renewal of License of	)	File No. BRCT-20070201AJS
WNYW(TV), New York, New York	)	

**APPLICATION FOR REVIEW**

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October 8, 2014

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## Summary

In 2001, the Commission approved Fox Television Stations, Inc.'s (Fox) acquisition of WWOR-TV on the condition that it come into compliance with the Newspaper/Broadcast Cross-Ownership (NBCO) rule within 24-months. Fox did not comply. Eleven years later, Fox still owns WWOR-TV along with WNYW(TV), the *New York Post*, and the *Wall Street Journal*, as well as other media outlets serving the New York metropolitan area.

The Bureau has granted Fox a new “temporary” waiver that will allow Fox to continue its ownership of all of these media properties for many years to come, without considering whether the waiver is in the public interest or addressing any of the objections raised by the Office of Communication, Inc. of the United Church of Christ (UCC) and Rainbow/PUSH Coalition (RPC) in their Petition to Deny or by Free Press in its Petition for Reconsideration. UCC/RPC and Free Press request that the full Commission reverse the Bureau’s Order denying UCC/RPC’s Petition to Deny the renewal application of WWOR, denying Free Press’s Petition for Reconsideration, granting the renewal application of WWOR, and granting Fox a waiver of the NBCO rule until after the Commission makes a decision in its 2014 Quadrennial Review and that order takes effect.

When the license for WWOR came up for renewal in 2007, UCC/RPC challenged the renewal on the ground that it would violate the NBCO rule and that Fox had not met the test for a waiver. The petition also argued that Fox’s violation of the NBCO rule, as well as its duty of candor to the Commission, constituted major violations and/or a pattern of violations demonstrating abuse of the FCC rules, and thus Fox failed to meet the standards for renewal set forth in Section 309(k) of the Communications Act. The Commission took no action on this petition until the Bureau released its *Order* in August 2014. Without any analysis of UCC/RPC’s allegations, the Bureau renewed WWOR’s license and granted Fox a waiver of the

NBCO rule that will last until long *after* the Commission completes its 2014 Quadrennial Review of the broadcast ownership rules and the revised rules take effect.

The Commission should reverse the Bureau's decision for two main reasons. First, the Bureau's actions conflict with the Communications Act, FCC regulations, case precedent, and established Commission policy. Under Section 309(d) of the Communications Act, the Commission must designate a renewal application for a hearing if it finds that the Petition to Deny contains specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with Section 309(k), and "the application, the pleadings filed, or other matters which [the Commission] may officially notice," raise a substantial and material question of fact. Section 309(k) provides that the Commission may renew a broadcast license only if it finds that the station has served the public interest, there have been no serious violations of the Communications Act or FCC rules, and there have been no other rule violations, which taken together, would constitute a pattern of abuse.

The Commission should reverse the Bureau's *Order* because it failed to follow the procedures set forth in Section 309(d) when it denied UCC/RPC's Petition to Deny with no analysis or discussion. Had the Bureau properly considered the pleading before it, it should have concluded that the Petition to Deny established a *prima facie* case that renewal was not in the public interest and raised substantial and material questions of fact that required a hearing.

Second, the Commission should reverse the Bureau's grant of a waiver until the 2014 Quadrennial Review is completed and the revised rules take effect. Because the Commission is required to review its broadcast ownership rules every four years, this new waiver will allow Fox to hold on to all of its New York media outlets indefinitely. In effect, it operates as a permanent waiver of the NBCO rule, which the Bureau's *Order* purports to deny. This action is arbitrary and capricious because under Commission precedent, even temporary waivers are only available where the applicant has demonstrated that the purpose of the rule—diversity and competition—is

better served by waiving than enforcing the rule. Here, the Bureau failed to find that Fox met this standard and failed to address any of the objections raised by UCC/RPC.

The Bureau's decision also violates longstanding Commission policy of not granting waivers of the NBCO rule because of the pendency of a rulemaking proceeding. Particularly where the Commission is required to review its ownership limits every four years, there is rarely any time at which its rules are not the subject of a pending proceeding. In fact, there has been an open rulemaking docket on broadcast ownership at all times since 2002. Moreover, in the recently initiated 2014 Quadrennial Review, the Commission proposed to retain the NBCO rule and allow waivers only on a case-by-case basis. Thus, not only does this undermine the Commission's decision in this case from over a decade ago, but also the proposal from just this year. Furthermore, the pending 2014 Quadrennial Review provides no reason to permit Fox to continue its control over *two* television stations and at least one daily newspaper in violation of the NBCO rule.

Because the Bureau has effectively overruled a key Commission ownership rule even though it lacks the authority to do so, the Commission should reverse the Bureau's decision to grant Fox a contingent waiver and require Fox to immediately divest one of its three media holdings in New York. In reversing the Bureau decision, the Commission should also make clear that the mere filing of a waiver request in the absence of Commission action does not extend the term of a temporary waiver and address Free Press's Petition for Reconsideration.

***Before the***  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of	)	
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Fox Television Stations, Inc.	)	MB Docket No. 07-260
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Application for Renewal of License of	)	File No. BRCT-20070201AJT
WWOR-TV, Secaucus, New Jersey	)	
	)	
&	)	
	)	
Application for Renewal of License of	)	File No. BRCT-20070201AJS
WNYW(TV), New York, New York	)	

**APPLICATION FOR REVIEW**

The Office of the Communication, Inc. of the United Church of Christ and Rainbow/PUSH Coalition (UCC/RPC), by their attorneys, the Institute for Public Representation, along with Free Press, pursuant to 47 C.F.R. § 1.115, seek full Commission review of the Media Bureau’s *Order* renewing Fox’s license for WWOR-TV, and granting Fox an indefinite waiver of the newspaper/broadcast cross-ownership (NBCO) rule to allow it to continue to control two television stations serving the NY metropolitan area and the *New York Post (Post)*.<sup>1</sup> UCC/RPC and Free Press respectfully request that the full Commission reverse the 2014 *Order* and require Fox<sup>2</sup> to immediately come into compliance with the NBCO rule.

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<sup>1</sup> *Fox Television Stations, Inc., Application for Renewal of License WWOR-TV and WNYW(TV) and Supplemental Petition for Modification of Permanent Waiver*, Memorandum Opinion and Order, MB Dkt. No. 07-260 (Aug. 8, 2014) (*Order*). This Application for Review is timely, as the deadline to file an Application for Review of the Media Bureau’s *Order* was extended from September 8, 2014 to October 8, 2014. *Fox Television Stations, Inc.*, MB Dkt. No. 07-260 (Aug. 19, 2014).

<sup>2</sup> On June 28, 2013, News Corp. (Fox’s parent company) separated into two new, publicly-traded companies: News Corp. and 21<sup>st</sup> Century Fox. 21<sup>st</sup> Century Fox now controls the cable,

## I. QUESTIONS PRESENTED

Did the Bureau violate Section 309 of the Communications Act when it denied UCC/RPC's Petition to Deny and Free Press's Petition for Reconsideration without addressing the merits, granted Fox an indefinite waiver of the NBCO rule, and renewed the license of WWOR?

Did the Bureau's grant of a waiver conditioned on the effective date of the 2014 Quadrennial Review violate the Communications Act, Commission rules, Commission precedent or established policy?

## II. BACKGROUND

### A. Fox's First Temporary Waiver

In 2001, the Commission granted Fox a 24-month waiver of the NBCO rule so that it could acquire television station WWOR, licensed to Secaucus, NJ, within the New York designated market area (DMA), as part of a larger transaction.<sup>3</sup> At the time, Fox already owned New York television station WNYW and daily newspaper the *Post* pursuant to a 1993 permanent

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broadcast, film, TV, and satellite assets of the old News Corp., including the licensees of the television stations in this action. The *New York Post* and the *Wall Street Journal* are operated by the new News Corp., which manages the newspapers, information services, integrated marketing services, digital real estate services, book publishing, digital education, and sports programming divisions. Because K. Rupert Murdoch continues to be chairman of News Corp. and 21<sup>st</sup> Century Fox, as well as CEO of 21<sup>st</sup> Century Fox, the newspapers and TV stations remain under common control. See 21<sup>st</sup> Century Fox Press Release, *21<sup>st</sup> Century Fox Announces Completion of Separation: Premier Brands of Industry Leading Media and Entertainment Company Include Twentieth Century Fox, FOX, Sky, National Geographic, Fox News, START, Fox Sports, and FX* (June 28, 2013), available at [http://www.21cf.com/News/21st\\_Century\\_Fox/2013/21ST\\_CENTURY\\_FOX\\_ANNOUNCES\\_COMPLETION\\_OF\\_SEPARATION/](http://www.21cf.com/News/21st_Century_Fox/2013/21ST_CENTURY_FOX_ANNOUNCES_COMPLETION_OF_SEPARATION/); 21<sup>st</sup> Century Fox Press Release, *News Corporation Announces 21<sup>st</sup> Century Fox as New Name of Independent Media and Entertainment Company* (April 16, 2013), available at [http://www.21cf.com/News/21st\\_Century\\_Fox/2013/News\\_Corporation\\_Announces\\_21st\\_Century\\_Fox\\_as\\_New\\_Name\\_for\\_Independent\\_Media\\_and\\_Entertainment\\_Company/](http://www.21cf.com/News/21st_Century_Fox/2013/News_Corporation_Announces_21st_Century_Fox_as_New_Name_for_Independent_Media_and_Entertainment_Company/); [www.21cf.com/management](http://www.21cf.com/management); [www.newscorp.com/about/leadership](http://www.newscorp.com/about/leadership).

<sup>3</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14990 (2001) (*2001 Order*).

waiver of the NBCO rule.<sup>4</sup> Fox argued that it did not need another waiver because it already had the permanent waiver. In the alternative, Fox asked for an “interim waiver” until the conclusion of the 2002 Biennial Review of the ownership rules.<sup>5</sup>

The FCC rejected Fox’s contention that the 1993 permanent waiver covered the addition of WWOR.<sup>6</sup> It also rejected Fox’s request for an “interim waiver” predicated on the conclusion of the 2002 Biennial Review, finding that “the fact that such a proceeding was on the horizon, would not be sufficient to warrant an interim waiver.”<sup>7</sup> Instead, the FCC granted Fox a temporary 24-month waiver so that Fox would have time to divest either the *Post* or one of the television stations and avoid a “forced sale.”<sup>8</sup>

UCC/RPC appealed this decision. Fox’s brief assured the court that it understood the waiver was not a “free pass,” but was instead intended to allow Fox time to “locate a new buyer for a fragile . . . enterprise.”<sup>9</sup> The D.C. Circuit affirmed the FCC ruling, holding the FCC was within its discretion to grant a temporary waiver for 24-months to allow Fox time to divest a property and come into compliance with the NBCO rule.<sup>10</sup>

### **B. Fox’s Second Temporary Waiver**

Fox’s 24-month waiver expired in July 2003. The month before, the FCC had voted to replace the NBCO rule with a more relaxed rule as part of its 2002 Biennial Review.<sup>11</sup> However,

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<sup>4</sup> *Id.* at 14985. The Commission granted the 1993 permanent waiver because News Corp. demonstrated that it was the only viable purchaser of the bankrupt *Post*, and without the purchase, New York would lose an important local voice. *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5351-52 (1993).

<sup>5</sup> *2001 Order* at 14977.

<sup>6</sup> *Id.* at 14988-90.

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

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

<sup>9</sup> Br. by Fox Television Stations, Inc., No. 01-1374, filed July 15, 2002 at 23-24.

<sup>10</sup> *United Church of Christ v. FCC*, 51 F. App’x. 21 (D.C. Cir. 2002).

<sup>11</sup> *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (2002 Biennial Review), *rev’d and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

before the new rule took effect, it was stayed by the Third Circuit.<sup>12</sup> Fox waited an entire year, until September 2004, to request an extension of its expired waiver.<sup>13</sup> The Commission failed to act on Fox's request.

In 2005, Fox proposed a corporate restructuring that required FCC approval. The FCC placed Fox's transfer application on public notice in August 2005, but gave no indication that approval of the request necessitated a new waiver or that Fox had attached its September 2004 waiver request to the transfer application.<sup>14</sup> In August 2006, the Commission voted 3-2 to approve the transfer. At the same time, it granted Fox a second 24-month waiver from the date of consummation, explaining that it sought to avoid forcing a sale "at an artificially depressed price."<sup>15</sup> Commissioners Copps and Adelstein strongly dissented, criticizing the majority for failing to undertake a public interest analysis and examine how Fox's common ownership would impact the market and diversity.<sup>16</sup> UCC/RPC filed a Petition for Reconsideration of this order, which the Commission denied over the dissent of Commissioners Copps and Adelstein.<sup>17</sup> Free Press then sought reconsideration of this order.<sup>18</sup>

A few days before Fox's second 24-month waiver was about to expire, Fox wrote the FCC stating its belief "that their temporary waiver permitting common ownership of WWNYW(TV), WWOR-TV and the Post will remain in effect until such time as the FCC takes

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<sup>12</sup> *Prometheus Radio Project v. FCC*, 2003 WL 22052896 (3d Cir. 2003).

<sup>13</sup> *Fox Television Stations, Inc.*, Petition for Modification of Permanent Waiver (Sept. 22, 2004).

<sup>14</sup> Fox was required to file a Form 315 Transfer of Control Application with the FCC and attached a copy of the 2004 waiver request to its Form 315.

<sup>15</sup> *K. Rupert Murdoch*, 21 FCC Rcd 11499, 11502 (2006) (2006 Order).

<sup>16</sup> Although the Commission voted on the transfer in August 2006 and released the Order in October 2006, the dissents were not released until 2009 when the Commission denied UCC/RPC's Petition for Reconsideration. See *infra* at n. 65-67.

<sup>17</sup> *K. Rupert Murdoch*, Reconsideration Order, 24 FCC Rcd 5824 (2009).

<sup>18</sup> *Free Press Petition for Reconsideration*, BTCCT-20050819AAF, et al. (June 22, 2009).

action on the pending permanent waiver request.” Alternatively, “[o]ut of an abundance of caution,” Fox requested another temporary waiver.<sup>19</sup>

### C. Fox’s Third Waiver

In February 2007, Fox filed applications for the renewal of WWOR and WNYW. UCC/RPC filed a Petition to Deny, alleging that renewing both licenses would violate the NBCO rule, and would thus be *prima facie* inconsistent with the public interest. In addition, the Petition to Deny alleged that Fox failed to meet the renewal standard set forth in Section 309(k) of the Communications Act.<sup>20</sup>

The Commission waited seven years—almost an entire license term—to act on Fox’s application for renewal of WWOR.<sup>21</sup> On August 8, 2014, the Media Bureau denied UCC/RPC’s Petition to Deny and granted WWOR’s renewal along with a waiver of the NBCO rule.<sup>22</sup> Unlike the previous 24-month waivers, however, the third waiver gave Fox either (1) “90 days after the effective date of an order in the 2014 Quadrennial Review” to come into compliance with any

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<sup>19</sup> Letter from Antoinette Cook Bush to Marlene H. Dorch, re: BTCCT-20050819AAF, *et al.* Status of Waiver at 8 (Dec. 24, 2008).

<sup>20</sup> *Fox Television Stations, Inc.*, UCC/RPC Petition to Deny Fox’s License Renewals of WWOR-TV and WNYW(TV), File No. BRCT-20070201AJT, at 10-17, (May 1, 2007) (UCC/RPC Pet. to Deny). The Petition to Deny also requested that the Commission act on the pending Petition for Reconsideration of the 2006 Order. *Id.* at 9. The Petition for Reconsideration argued that: (1) the FCC decision to grant Fox another waiver offended basic due process requirements by failing to give public notice and take comment on Fox’s waiver request; (2) the decision was arbitrary and capricious because FCC based it on incorrect factual assumptions; (3) Fox failed to show it met any of the qualifications for waiver because it had failed to attempt to divest and could not show an increase in diversity; and (4) the Commission must consider Fox’s lack of candor and character issues. UCC/RPC Petition for Reconsideration, File No. BCTCCT-20050819AAF (Nov. 6, 2006).

<sup>21</sup> WNYW(TV)’s renewal is still pending. *See Order* at n. 7.

<sup>22</sup> *Order* at ¶ 2.

“new rule in effect at that time or (2) to file a new request for a waiver of such rule.”<sup>23</sup> The Bureau also denied Free Press’s Petition for Reconsideration without addressing the merits.<sup>24</sup>

### **III. THE COMMISSION SHOULD REVERSE THE BUREAU’S ORDER**

The Bureau failed to meet its legal obligation in every way. It failed to assess whether UCC/RPC’s Petition to Deny established a *prima facie* case or whether it presented substantial and material questions of fact, both of which are required under the Communications Act and judicial and Commission precedent. It failed to recite, let alone respond to, the questions of law raised in the Petition to Deny. It established a decision with respect to a “temporary” waiver which, in light of the statutorily-mandated quadrennial review process, inevitably results in a perpetual waiver. This perpetual waiver does not comply with a Commission precedent, including an earlier decision in this very case. Each of these transgressions individually would be arbitrary and capricious, but together they epitomize a Bureau decision-making process unmoored from law and precedent.

#### **A. Legal standard**

The Commission should reverse the Bureau’s renewal of WWOR’s license and reverse its grant of an indefinite waiver of the NBCO rule because these actions are “in conflict with statute, regulation, case precedent, or established Commission policy” and involve a “question of law or policy which has not previously been resolved by the Commission.”<sup>25</sup> Under Section 309(k) of the Communications Act, the FCC may grant an application for renewal only if it finds that “(A) the station has served the public interest, convenience, and necessity; (B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and (C) there have been no other violations by the licensee of this chapter or the

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<sup>23</sup> *Order* at ¶ 44.

<sup>24</sup> *Order* at ¶ 46.

<sup>25</sup> 47 C.F.R. § 1.115(b)(2)(i)-(ii).

rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.” Under 309(d), a petition to deny must “contain specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with . . . subsection (k) of this section.”

In making the *prima facie* determination under Section 309(d), the Commission, or the Bureau acting under delegated authority, applies a two-step analysis.<sup>26</sup> First, the Commission must determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.<sup>27</sup> The D.C. Circuit has found this step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”<sup>28</sup>

If the petition meets the first step, the Commission next determines whether “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petition raises a substantial and material question of fact that warrants further inquiry by the Commission.<sup>29</sup> In conducting this inquiry, the Commission may not require that the petitioner fully establish that renewal would not be in the public interest. As the D.C. Circuit explained in *Citizens for Jazz on WRVR, Inc. v. FCC*:

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<sup>26</sup> For example, when Fox’s license renewals of television stations in the D.C. and Baltimore area recently came up for renewal, Citizens for Responsibility and Ethics in Washington (CREW) filed a Petition to Deny, alleging that because News Corp. officials were guilty of phone hacking, bribery, and other misconduct, News Corp. and K. Rupert Murdoch, and by extension Fox, lacked the requisite character necessary to operate a broadcast station. In dismissing CREW’s Petition, the Bureau analyzed the allegations under the two-step analysis of Section 309(d). *Fox Television Stations WTTG(TV) et al.*, 28 FCC Rcd 6312 (2013).

<sup>27</sup> 47 U.S.C. § 309(d)(1).

<sup>28</sup> *Gencom, Inc. v. FCC*, 832 F. 2d 171, 181 (D.C. Cir. 1987).

<sup>29</sup> 47 U.S.C. § 309(d)(2). See *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

It would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish (in the face of the applicant's contrary affidavit evidence) what it is the very purpose of the hearing to inquire into; and the statutory requirement of a “substantial question” is a particularly inapt choice of language to convey that peculiarity. The statute in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into the possible existence of a fire only when it is shown the existence of a fire.<sup>30</sup>

Finally, if “a substantial and material question of fact is presented or the Commission for any reason is unable to [find that the grant would serve the public interest], it shall formally designate the application for hearing.”<sup>31</sup>

**B. The UCC/RPC Petition to Deny made the legally required allegations**

The Petition to Deny asked the Commission to grant UCC/RPC’s “pending Petition for Reconsideration of the Commission’s grant of a second 24-month waiver, rescind Fox’s waiver of the cross-ownership rule, and deny renewal outright.”<sup>32</sup> The Petition explained that “[i]f the FCC rescinds Fox’s waiver, . . . renewal of the licenses for WWOR-TV and WNYW would violate the plain language of the newspaper-broadcast cross-ownership rule and the applications would be defective on their face.”<sup>33</sup> In the alternative, if the Commission did not rescind the waiver and dismiss the renewal applications, the Petition asked the Commission to designate WWOR’s renewal application for hearing on the ground that Fox had failed to make the showing

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<sup>30</sup>775 F.2d 392, 397 (D.C. Cir. 1985).

<sup>31</sup> 47 U.S.C. § 309(e). See *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (en banc) (finding FCC abused its discretion when it renewed a broadcast license when it “had insufficient undisputed factual information to conclude the renewal . . . was in the public interest.”).

<sup>32</sup> UCC/RPC Pet. to Deny at 5. See also *id.* at 10 (citing the Supreme Court holding in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978) that “[i]f a license applicant does not qualify under standards set forth in [FCC] regulations, and does not proffer sufficient grounds for waiver or change of those standards, the Commission may deny the application without further inquiry.”).

<sup>33</sup> *Id.* at 2.

required by Section 309(k) and because renewal would violate section 309(k). Specifically, the Petition alleged that “Fox has committed serious violations of the NBCO rule, its duty of candor, and rules governing *ex parte* communications.”<sup>34</sup>

UCC/RPC argued that Fox had violated the NBCO rule because it made no effort to come into compliance with the NBCO rule and, after its first 24-month waiver expired, it waited almost a year before seeking another waiver. As a consequence, “Fox was in violation of the rule from July 2003 (when the 24-month waiver expired) until October 2006 (when the FCC released its order granting a new 24-month waiver).”<sup>35</sup> Fox disputes this allegation, claiming that it “at all times has complied with” the NBCO rule.<sup>36</sup>

The Petition to Deny also alleged that Fox had lacked candor with the Commission. Specifically, UCC/RPC alleged that Fox violated 47 C.F.R. § 1.17 by: 1) certifying in its renewal application that it had not violated any provision of the FCC rules during the preceding license term when, in fact, it was in violation of the NBCO for over three years;<sup>37</sup> 2) falsely certifying in its Form 315 transfer application submitted in 2005 that the proposed transfer complied with the Commission’s cross-ownership rules when it did not; 3) failing to disclose in that application that its 2004 request for a permanent waiver had been opposed; and 4) misrepresenting the reasons why the Commission granted the temporary waiver in 2001.<sup>38</sup> The Petition explained that candor and character issues are always material and that Fox’s multiple misrepresentations to the Commission constituted serious violations of Commission rule, and/or taken together, constituted a pattern of abuse.<sup>39</sup>

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<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Fox Television Stations, Inc.*, Fox’s Opposition to UCC/RPC Petition to Deny at 2-7 (Fox Op.)

<sup>37</sup> Since the original first temporary waiver expired in 2003, Fox was out of compliance with the NBCO rule until 2006, when the Commission granted its second temporary waiver.

<sup>38</sup> UCC/RPC Pet. to Deny at 14-15.

<sup>39</sup> UCC/RPC Pet. to Deny at 12-17. The petition also alleged the Fox had violated the *ex parte*

Subsequently, in a letter dated December 7, 2010, UCC/RPC, along with Media Access Project (MAP) and Voice for New Jersey (VNJ), alleged that WWOR made misrepresentations and lacked candor in failing to identify the fact that it changed the contents and the tense of its presentations between August and September 2009.<sup>40</sup> That letter pointed out that “[I]ack of candor is the failure of an applicant ‘to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited.’”<sup>41</sup> The letter went on to state that the “fact that a presentation may be truthful when viewed in isolation does not resolve a candor question because the statement may be incomplete or misleading in context. As the Commission said in *RKO General*, “[w]e need not decide whether RKO’s pleadings were affirmatively misleading - it is enough to find that they did not state the facts.”<sup>42</sup> As a result, the Bureau sent an inquiry letter to Fox on April 10, 2011, and in response, Fox denied that it had attempted to mislead the Commission.

**C. The Media Bureau failed to assess whether UCC/RPC’s Petition established a *prima facie* case that renewal was not in the public interest and whether it presented substantial and material questions of fact requiring a hearing**

While the *Order* acknowledges that the Petition to Deny filed by UCC/RPC was before it,<sup>43</sup> the Bureau does not analyze or even describe any of the allegations made in that Petition. Similarly, the *Order* notes that UCC/RPC had opposed Fox’s 2004 Petition for Modification of Permanent Waiver and 2008 Supplement to the Modification Petition,<sup>44</sup> but it does not consider

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rules. *Id.* Fox responded that the *ex parte* rules did not apply because the application was uncontested (when in fact it had been contested), but did not dispute the *ex parte* communications had occurred. Fox Op. at 8-9.

<sup>40</sup> Letter from Media Access Project, the Office of Communication of the United Church of Christ and Rainbow/PUSH (MAP Letter).

<sup>41</sup> MAP Letter at 5, quoting *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994).

<sup>42</sup> *RKO General v. FCC*, 670 F.2d 215, 230 (D.C. Cir. 1981).

<sup>43</sup> *Order* at ¶ 2.

<sup>44</sup> *Id.* at ¶ 43.

any of the arguments made in those oppositions.<sup>45</sup> The Bureau *Order* did acknowledge some of the candor claims raised by VNJ, but did not address UCC/RPC's misrepresentation allegations.<sup>46</sup>

The Bureau did not meet its obligation under Section 309(d) to determine whether, assuming the truth of UCC/RPC's allegations, they raised a *prima facie* case that the licensee had failed to meet the requirements of Section 309(k) and if so, whether pleadings before it raised a substantial and material question of fact requiring a hearing. The Bureau completely failed to conduct either step of this inquiry. This is the epitome of "arbitrary and capricious action."

For this reason alone, the Commission must reverse the Bureau's action and make the determinations required by statute. It should find based on the Petition to Deny and other pleadings, that there are substantial and material questions of fact requiring the application to be designated for a hearing. UCC/RPC also support VNJ's Application for Review of the Bureau's failure to take seriously its allegations concerning Fox's lack of candor and failure to meet the programming needs of Northern New Jersey. Taking VNJ's allegations together with UCC/RPC's clearly suggests a pattern of violations that pose substantial and material questions of fact that need to be addressed at a hearing.

In reversing the Bureau, the Commission should also address an unresolved question of law presented in UCC/RPC's Petition, *i.e.*, does the mere filing of a waiver request in the absence of Commission action extend an expired temporary waiver until the Commission rules on the request? Fox alleged that Commission precedent makes clear that a licensee is "'in full compliance' with the Commission's multiple ownership rules" during the pendency of any waiver extension request.<sup>47</sup> UCC/RPC replied that the single "precedent" cited by Fox did not

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<sup>45</sup> This paragraph mainly summarizes Fox's main arguments throughout the cited documents, but does not discuss any of UCC/RPC's arguments.

<sup>46</sup> *Order* at ¶ 37.

<sup>47</sup> *See* Fox Op. at 11.

hold what Fox claimed it held, and in any event, was distinguishable.<sup>48</sup> UCC/RPC also pointed out that although the Communications Act provides that a licensee may continue to operate a station after its license expires until the Commission decides whether to renew, there was no similar statutory basis for waivers.<sup>49</sup> This unresolved question has significant consequences. Adopting Fox’s position would create perverse incentives to make an “end run” of ownership rules simply by filing waiver requests and extensions, as Fox did here. Thus, the Commission should also grant review to resolve this unsettled legal question.

**D. The Bureau’s grant of a contingent waiver pending the conclusion of the 2014 Quadrennial Review was arbitrary and capricious in violation of Commission precedent**

The Bureau’s *Order* summarizes arguments for a permanent waiver of the NBCO rule set forth by Fox in its 2004 Modification Petition and 2008 Supplement.<sup>50</sup> It notes that “UCC/RPC opposed both the Modification Petition and the Supplement,”<sup>51</sup> but it provides no summary or analysis of UCC/RPC’s oppositions. Instead, in the next paragraph, it merely observes that the Commission had initiated the 2014 Quadrennial Review in April and had sought comment on whether to revise the NBCO rule. It then concludes:

In light of the Commission’s having just begun a proceeding that bears directly on the combination at issue here, which is admittedly unique (among other things, two television stations, one newspaper, the number one media market), we believe it is inappropriate to make a final ruling on Fox’s request for a permanent waiver at this time. Therefore, we will deny its Modification Petition and Supplement. Instead, we will afford the licensee 90 days after the effective date of an order in the 2014 Quadrennial Review that either adopts a new NBCO rule or

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<sup>48</sup> Reply to Fox’s Opposition at 2, distinguishing *Counterpoint Communications, Inc.*, 20 FCC Rcd 8582 (2005).

<sup>49</sup> Reply to Fox’s Opposition at 4, citing 47 U.S.C. §307(c).

<sup>50</sup> *Order* at ¶ 49.

<sup>51</sup> *Id.*

upholds our existing rule to (1) comply with the rule in effect at that time or (2) file a new request for a waiver of such rule.<sup>52</sup>

This conclusion is both arbitrary and capricious and in contravention to Commission precedent and established policy.

**1. The Bureau's decision grants Fox a *de facto* permanent waiver of the NBCO rule**

Although the Bureau purports to deny Fox's request for a permanent waiver, its grant of a waiver until after the effective date of the 2014 Quadrennial Review has the same effect. As discussed *supra*, although Fox was granted a 24-month waiver in 2001, it has managed to avoid coming into compliance with the NBCO rule for 11 additional years. Similarly, unless the Commission reverses the Bureau's decision, Fox will avoid compliance for an undetermined number of additional years. At the earliest, the Commission is expected to issue an Order in the 2014 Quadrennial Review in June 2016. However, that date seems optimistic given that the Commission still has not concluded the 2010 Quadrennial Review. After the Commission issues an Order, multiple parties are likely to seek reconsideration and/or judicial review, as has happened in all previous ownership reviews. If history is any guide, judicial review will not be completed before it is time for the 2018 Quadrennial Review to begin.<sup>53</sup> It is also possible that the Commission or a court could stay the effective date of the new rule pending review. Even if the rule is not stayed, Fox will undoubtedly request that the waiver be extended until the Order becomes final.

Finally, it seems unlikely that any rule change the Commission may adopt as part of the 2014 Quadrennial Review would allow Fox to comply with the rule absent a new waiver. The Commission states in the notice for proposed rulemaking (NPRM) that it "continue[s] to believe

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<sup>52</sup> *Order* at ¶ 44 (footnotes omitted).

<sup>53</sup> For example, the Commission began the 2010 Quadrennial Review before the court issued a ruling on the 2006 Quadrennial Review Order adopted in 2008. In this case, Fox still would not have qualified for waiver under the standard in the 2006 Quadrennial Review order.

that some restriction on newspaper/broadcast cross-ownership is necessary to protect and promote viewpoint diversity in the markets.”<sup>54</sup> The NPRM further states that Commission is “disinclined to impose a bright-line rule permitting combinations in certain circumstances,” and instead seeks “comment on approaches that would maintain the ban on newspaper/television combinations in all markets” but would allow applicants the opportunity to seek case-by case-waivers for particular transactions.<sup>55</sup> Thus, when the 2014 Quadrennial Review is completed, Fox will again have to file for a permanent waiver. It could take years for the Commission to act on Fox’s waiver request. Indeed, it has taken a decade for the Bureau to rule on Fox’s 2004 request. Thus, the effect of the Bureau’s decision is to grant Fox a permanent waiver of the NBCO rule without providing any analysis finding that a waiver would be in the public interest.

## **2. The Bureau failed to conduct the public interest analysis required for either a permanent or temporary waiver**

Under current law, the Commission may waive the NBCO rule in only four narrow circumstances: (1) where the licensee is unable to sell the station; (2) where the only sale possible would be at an artificially depressed price; (3) where separate ownership and operation of the broadcast station and newspaper could not be supported in the locality; or (4) where the purposes of the rule would be disserved by its application.<sup>56</sup> The Commission imposes a heavy burden on applicants, who “must plead with particularity the facts and circumstances which

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<sup>54</sup> *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking and Report and Order, MB Docket 14-50, FCC 14-28 (rel. Apr. 15, 2014) (2014 Quadrennial Review) at ¶ 114.

<sup>55</sup> 2014 Quadrennial Review at ¶ 117. Case-by-case waivers require that the FCC assess “each request independently and considering the totality of the circumstances each proposed transaction presented, including all asserted and potentially likely public interest implications of the specific proposed combination.”

<sup>56</sup> UCC/RPC Opposition to Fox’s Supplement to Petition for Modification of Permanent Waiver, MB Dkt. 07-260, at 7-8 (July 15, 2009), citing *NBCO Order*, 50 FCC 2d at 1084-1085, at ¶119 (Opp. to Supplement).

would support a deviation from the general rule.”<sup>57</sup> The same test applies whether the applicant seeks a permanent or temporary waiver.<sup>58</sup> In addition, the Commission has made clear that when a licensee seeks permanent waiver instead of temporary waiver, that a “considerably heavier” burden applies.<sup>59</sup> Moreover, “[w]here an extension of a waiver is requested ... the Commission expects to see evidence of efforts to divest properties, details of offers received, and reasons those offers were not reasonable.”<sup>60</sup>

Despite many opportunities, Fox has never even attempted to show that it meets any of the first three tests. Nor could it, since it is inconceivable that Fox would be unable to sell a television station that serves the largest media market in the nation.<sup>61</sup> Similarly, Fox has not met its burden under the fourth prong to show that waiving the rule would *promote* diversity and competition.

Instead, Fox contended that a second permanent waiver would not *harm* diversity because the New York DMA was served by a large number of television stations and daily newspapers, as well as radio stations, satellite and cable systems and channels, weekly

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<sup>57</sup> See, e.g., *Angelo State University*, 19 FCC Rcd 24538, 24539 (2004); *Columbia Commc’ns Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987); *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 665 (D.C. Cir. 1968).

<sup>58</sup> See, e.g., *Renaissance Commc’ns Corp.*, FCC Rcd 11866 (1997); *News America Publishing, Inc. v. FCC*, F.2d 800, 803 (D.C. Cir. 1988); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993); *Second Report and Order*, 50 FCC 2d at 1084-85;

<sup>59</sup> *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5348 (1991); See also *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988); *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1042-43 (D.C. Cir. 1986); *Renaissance Commc’s Corp.*, 12 FCC Rcd 11866 (1997); *Hopkins Hall Broadcasting*, 10 FCC Rcd 9764 (1995); *Metropolitan Council of NAACP Branches v. FCC*, 46 F. 3d 1154, 1163 (D.C. Cir. 1985); *Applications of Tribune*, 27 FCC Rcd 14239, 14251 (2012).

<sup>60</sup> *Counterpoint Communications, Inc. (Transferor) and Tribune Television Co. (Transferee)*, 20 FCC Rcd 8582, 8585 (2005).

<sup>61</sup> Moreover Fox also has the option to divest the station through the forthcoming incentive auction.

newspapers, monthly magazines and websites.<sup>62</sup> UCC/RPC and Free Press pointed out that many of those media outlets either did not provide local news or had limited coverage. But, they added, “even if the Commission were to look beyond broadcast stations and daily newspapers, it would need to assess the public interest considerations of . . . Fox’s acquisition of the *Wall Street Journal* and numerous community papers, as well as its joint venture with competing local television stations, [that] suggest that diversity and competition in the New York DMA has decreased, not increased, in recent years.”<sup>63</sup>

Commissioner Copps also raised concerns about News Corp.’s acquisition of the *Wall Street Journal*, first in a 2007 letter to then-Chairman Kevin Martin,<sup>64</sup> and later in his dissenting opinion to the Commission’s denial of UCC/RPC’s Petition for Reconsideration of the Commission’s grant of a second temporary waiver to Fox. That order was adopted in January 2008, but not released until May 2009.<sup>65</sup> In his dissent, Commissioner Copps repeated his prior concerns that the majority had failed to conduct the required *de novo* review of the transferor’s

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<sup>62</sup> Fox Supplement to Petition for Modification of Permanent Waiver at 40-42 (June 23, 2008).

<sup>63</sup> UCC/RPC/Free Press Opp. to Supp. at 12, Dkt. No. 07-260 (July 15, 2009). The Opposition also pointed out that Fox received a permanent waiver for its cross-ownership of WNYW and the *Post* back in 1993 under the fourth prong because it promised to invest money in the *Post* and provide managerial, technical, and editorial assistance to help it grow. In contrast this time, Fox provided no evidence that it needed a second television station in New York to keep the *Post* publishing. *Id.* at 9. See also UCC/RPC Pet. for Recon. at 15-16.

<sup>64</sup> Letter to FCC Chairman Kevin J. Martin, *News Corp./Dow Jones Acquisition* (Oct. 25, 2007), 2007 WL 316908. Commissioner Copps stressed how News Corp. was one of the most influential media companies in the world, in no small part due to owning Fox Broadcasting. He argued that if “approved, this transaction would leave News Corp. in control of a Big Four broadcast network and two of the nation’s five largest newspapers (as well as a vast collection of cable channels, satellite networks, motion picture studios, and publishing outlets). For residents of the local New York metropolitan area, it will also mean that a single company operates two of the area’s most popular television stations and two of its most popular newspapers.” Commissioner Copps acknowledged that the FCC had declined to apply the NBCO rule to “national newspapers” in 1986 and 1995, but observed that these decisions were reached with very little economic or legal analysis and since then, facts and public interest concerns had changed dramatically.

<sup>65</sup> *K. Rupert Murdoch*, 24 FCC Rcd 5824 (adopted Jan. 15, 2008, released May 22, 2009).

waivers and to “examine carefully whether the public interest compels extension of previously granted waivers.”<sup>66</sup>

Instead, the majority sweeps over the facts that led to these waivers, considers too little in the way of new data and reaches unsustainable conclusions about corporate efficiency, financial viability and market diversity. Loss of voices in a market due to waiver of rules like the newspaper-broadcast cross-ownership rule requires serious analysis. Yet there is no serious public interest analysis here.

He added that the Reconsideration Order did nothing to address these concerns and “it fails to even *mention* the fact that, with the acquisition of the *Wall Street Journal*, News Corp. operates *two* of the New York market’s most popular television stations and *two* of its most popular newspapers.”<sup>67</sup>

Free Press sought reconsideration of this order in June 22, 2009, arguing among other things that Fox’s acquisition of the *Wall Street Journal* violated the NBCO rule, and that to the extent the Commission might have indicated otherwise in the past, it should reconsider that interpretation.<sup>68</sup> Free Press also argued that the “Commission must review the totality of New Corporation’s local newspaper and broadcast holdings under the public interest standard” in light of the acquisition of the *Wall Street Journal* and New York community newspapers.<sup>69</sup>

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<sup>66</sup> *Id.* at 5832 (Comm’r Copps, Dissenting).

<sup>67</sup> *Id.* (Comm’r Copps, Dissenting) (emphasis in original). Commissioner Adelstein also dissented and included his earlier dissent which had never been released. In it, he wrote: “I am most critical of the fact that the Commission makes no attempt to determine the “demonstrable public interest benefits” that have resulted from the common ownership of WNYW(TV) and WWOR-TV. This is particularly troublesome because WWOR-TV is the only VHF station in the State of New Jersey. As several New Jersey elected officials reminded the Commission, WWOR-TV has unique public interest obligations to the residents of northern New Jersey – one of the most densely populated regions in the nation and a prime terrorist target – but the Commission made no effort to address the elected officials’ concerns.” *Id.* at 5833.

<sup>68</sup> Free Press Pet. for Recon. at 8-9.

<sup>69</sup> Free Press Pet. for Recon. at 9-10.

In rejecting Free Press's Petition for Reconsideration as untimely, the 2014 *Order* merely states that ownership of the *Wall Street Journal* and community newspapers is not governed by the NBCO rule.<sup>70</sup> However, it does not address, much less consider, Free Press's request that the Commission reconsider its 1986 finding that the *Wall Street Journal* was a national newspaper and thus not subject to the NBCO rule. And once again, it does not mention, much less address, the arguments that the totality of Fox's commonly-owned media holdings must be considered under the public interest standard.<sup>71</sup>

### **3. The Bureau's grant of a waiver conditioned on the outcome of the 2014 Quadrennial Review violates Commission precedent and policy**

In addition to the Bureau's failure to analyze UCC/RPC's allegations, its grant of a waiver of the NBCO rule until completion of the 2014 Quadrennial Review is contrary to Commission precedent. Because the Bureau has effectively overruled a key Commission ownership rule even though it lacks the authority to do so, the Commission should reverse the

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<sup>70</sup> *Order* at ¶ 52.

<sup>71</sup> Instead, the *Order* finds "the petition to be procedurally defective and without merit" because "Free Press was not a party to the proceeding and has not justified its failure to participate earlier; the petition was not filed within 30 days from the date of public notice of final Commission action in the 2006 Decision." *Order* at ¶ 48. This finding completely ignores the fact that Free Press had filed an objection in April 2005 to Fox's Petition for Modification of Permanent Waiver, which the Commission failed to address or even mention in its October Order approving Fox's transfer of control and granting a second, 24-month waiver. For this and other reasons, Free Press asked the Commission to treat its objection as a Petition to Deny. Free Press Pet. for Recon. at 2-4. The Bureau's dismissal of Free Press's Petition because "Free Press had more than enough opportunity to file a timely petition to deny or to file an informal objection prior to the original decision in which it could have raised those points" is factually wrong and non-responsive. In fact, Free Press did file a timely informal objection to Fox's Petition for Modification of Permanent Waiver before the Commission's original decision, which the Commission "overlooked." *Murdoch Recon*, 24 FCC Rcd at 5828. Moreover, the Bureau ignores the fact that Free Press, UCC, and RPC were unable to file a timely Petition to Deny the transfer application was that Fox did not serve it on them, and the Commission's Public Notice of August 30, 2005 gave no indication that Fox was seeking new waivers of the NBCO rule as part of its transfer application. See UCC/RPC Pet. for Recon. at 8.

Bureau's decision to grant Fox a contingent waiver and require Fox to immediately divest one of its three media holdings in New York.

Granting an open-ended contingent waiver is not only inconsistent with longstanding Commission precedent, but with the Commission's ruling in this very case. When Fox previously asked for a contingent waiver for WWOR pending the outcome of the 2002 Biennial Review Order, the Commission flatly rejected the argument in favor of a 24-month temporary waiver. The Commission stated that "the fact that such a proceeding was on the horizon would not be sufficient to warrant an interim waiver."<sup>72</sup> Thus, the Commission has already ruled that Fox is not entitled to a contingent waiver pending the outcome of an ownership review.

That decision followed established precedent that "the Commission has consistently held that it will not grant a temporary waiver of [the NBCO rule] because of the pendency of a rulemaking."<sup>73</sup> The principles can be seen in the Commission's handling of Tribune's request for a waiver of the NBCO rule for Hartford, Connecticut.

In 2001, the FCC approved an application filed by Tribune Television Company ("Tribune"), seeking a "failing station waiver" of the licensee of Hartford station WTIC-TV, to acquire a second television station, WTXN in Waterbury, CT, from Counterpoint Communications, Inc.<sup>74</sup> While that application was pending, Tribune purchased the *Hartford Courant* and sought a two-year waiver to come into compliance with the NBCO rule. After analyzing the impact of a temporary waiver on diversity in the Hartford market, the Commission determined that a 6-month waiver was appropriate.<sup>75</sup> The Commission subsequently granted a second six-month waiver of the NBCO rule, while making clear that "where an extension of

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<sup>72</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd at 14988.

<sup>73</sup> *Applications of Shareholders of Tribune Company*, 22 FCC Rcd 21266 (2007); *see also Counterpoint Communications*, 20 FCC Rcd 8582 (2005); *Mobilemedia Corporation*, 14 FCC Rcd 8017 (1999).

<sup>74</sup> *Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001) (*Counterpoint I*).

<sup>75</sup> *Counterpoint I*, 16 FCC Rcd at 15047.

waiver is requested, such as here, the Commission expects to see evidence of efforts to come into compliance with the rules, including among other things, efforts to divest, details of offers received, and reasons those offers were not reasonable.”<sup>76</sup> The Commission required Tribune to use its best efforts to divest WTXX and file status reports every 45 days detailing its efforts.<sup>77</sup>

Then in August 2002, Tribune requested a permanent waiver, claiming that despite its best efforts, it had been unable to sell WTXX.<sup>78</sup> The Commission denied a permanent waiver, finding that waivers based on an inability to sell should be “of reasonable duration, so that we shall not always be bound by a result based on outdated information.”<sup>79</sup> Further, the Commission stated that it did not contemplate that problems in disposing of these interests would “endure indefinitely,” since Tribune had not demonstrated that market or economic conditions would not improve.<sup>80</sup> The record also demonstrated that the public interest would be served by another temporary waiver because of the significant risk that requiring immediate divestiture would severely curtail the service that WTXX provided or eliminate it altogether.<sup>81</sup> While granting Tribune another temporary waiver, the Commission clarified its policy with respect to temporary waivers:

In the future, we expect that the Commission will make determinations concerning the compliance or noncompliance of licensees with the terms and conditions of waivers granted by the Commission. We also do not intend to continue the practice of allowing waivers to remain in force through inaction for long periods of time. Rather, we expect to address compliance with the terms of waivers as their expiration dates approach.<sup>82</sup>

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<sup>76</sup> *Counterpoint Communications, Inc.*, 20 FCC Rcd 8582, 8585 (2005) (*Counterpoint II*).

<sup>77</sup> *Id.* at 8583.

<sup>78</sup> *Counterpoint Communications, Inc.*, 17 FCC Rcd 3243, 3245 (2002).

<sup>79</sup> *Counterpoint II* at 8589.

<sup>80</sup> *Id.*

<sup>81</sup> *Counterpoint II* at 8588.

<sup>82</sup> *Counterpoint II* at 8590.

Commissioners Copps and Adelstein concurred in this decision because “the Commission makes clear that it expects to see clear evidence of serious and sustained efforts to come into compliance with [Commission] rules before it will consider granting any extension.”<sup>83</sup>

In 2007, the FCC approved an application for transfer of control from Tribune’s existing shareholders to Sam Zell and the Tribune Employee Stock Ownership Plan, but again, declined to award a permanent waiver for Hartford and instead, gave Tribune 6 months to comply with the NBCO rule. The Commission reiterated that enforcing compliance with waivers in the face of pending ownership rule reviews is logical because “[t]he NBCO rule has been under review for a significant period of time.”<sup>84</sup> As a result,

applicants are engaging in speculation when they take the position that their particular newspaper/broadcast combinations will comply with whatever rules are ultimately adopted. Such speculation is not sufficient to overcome our long-standing policy against granting waivers pending the outcome of rulemakings, particularly in light of the fact that such rulemakings last for an indefinite period.<sup>85</sup>

The Commission’s concerns in the Hartford cases are also present in the Bureau *Order* under review. If Fox is allowed to evade the NBCO rule because of a pending periodic review of the ownership rules, all ownership rules could be evaded because there would never exist a time to enforce them. Indeed, there has been an open rulemaking docket on broadcast ownership at all times since 2002. And unlike in the case of Tribune, where the applicant presented evidence of multiple divestiture attempts, here there is no evidence that Fox tried to divest any of its three properties.

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<sup>83</sup> *Counterpoint II* at 8591 (Joint Statement of Commissioners Copps and Adelstein, Concurring).

<sup>84</sup> *Applications of Shareholders in Tribune Company*, MB Docket No. 07-11, 22 FCC Rcd 21266 (Nov. 30, 2007) (quoting *Counterpoint Communications*, Memorandum Opinion and Order, 20 FCC Rcd 8582 (2005)).

<sup>85</sup> *Id.*

The Media Bureau's 2014 *Order* gives Fox a free pass notwithstanding its complete disregard for Commission rules. If the Commission fails to reverse the Bureau *Order*, it will create incentives for other licensees hoping to avoid compliance with Commission ownership rules to file waiver requests pending the outcome of the next ownership review. It also allows the Bureau to grant those requests without any analysis of the facts, and essentially decline to enforce rules that it does not want to enforce. Licensees would not feel obligated to comply with temporary waivers, secure in the knowledge that the Bureau will not enforce the time limits and will accommodate their waiver requests until ownership rules are rolled back. The Bureau's extension of a contingent waiver in this case is therefore not only counter to Commission precedent, but it is an abuse of its delegated authority. The Bureau cannot ignore controlling Commission law on this point and refuse to enforce the NBCO rule.

### **Conclusion**

For the foregoing reasons, the full Commission should reverse the Media Bureau's *Order* denying the Petition to Deny filed by UCC/RPC and renewing the license for WWOR. The Commission should either deny the renewal or designate it for a hearing for the reasons stated in the Petition to Deny.

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October 8, 2014

## CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on October 8, 2014, pursuant to 47 C.F.R. §1.47(f), a copy of the forgoing Application for Review of the Media Bureau's decision in *Fox Television Stations, Inc. Application for Renewal of License of WWOR-TV, Secaucus, New Jersey & Application for Renewal of License of WNYW(TV), New York, New York*, Memorandum and Order, MB Dkt. No. 07-260 (Aug. 08, 2014) was served by first class U.S. mail, postage prepaid, upon the party at the address below.

Jared S. Sher  
Vice President, Associate General Counsel  
21<sup>st</sup> Century Fox, Inc.  
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Niko Perazich  
October 8, 2014

**CERTIFICATE OF SERVICE**

I, Jack O'Donnell, hereby certify on this 8<sup>th</sup> day of March, 2017, a copy of the foregoing Opposition to Petitions for Reconsideration was served by first-class mail, postage prepaid, upon the following:

Mace Rosenstein  
Michael Beder  
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/s/ Jack O'Donnell  
Jack O'Donnell