

# COVINGTON

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October 5, 2020

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Request for Permanent Waiver of Newspaper-Broadcast  
Cross-Ownership Rule, 47 C.F.R. § 73.3555(d)**

Dear Ms. Dortch:

Fox Corp., on behalf of its wholly-owned subsidiary, Fox Television Stations, LLC, (collectively, “Fox”), respectfully requests a permanent waiver of the Newspaper-Broadcast Cross-Ownership rule, 47 C.F.R. § 73.3555(d), (the “NBCO Rule”) to confirm the longstanding public interest benefits of common ownership of WWOR-TV, Secaucus, New Jersey, (“WWOR”) and the *New York Post* (the “*Post*”). Together with the existing, permanent waiver permitting common ownership of WNYW(TV), New York, New York, (“WNYW,” and with WWOR, the “Stations”) and the *Post*, a permanent waiver for WWOR will preserve the status quo by which viewers in the New York television market benefit from the service these stations long have provided.<sup>1</sup>

**I. The Stations and the *Post* Have Been Commonly Owned for Decades.**

WNYW and the *Post* have been commonly owned since 1993, when the Commission granted Fox a permanent waiver of the NBCO Rule.<sup>2</sup> In 2001, Fox acquired WWOR, and the Commission granted—and repeatedly has extended—a temporary waiver of the NBCO Rule,

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<sup>1</sup> For the avoidance of doubt, to the extent there is any question that the permanent waiver permitting common ownership of WNYW and the *Post* was not reinstated along with the NBCO Rule’s reinstatement following the Third Circuit most recent decision in *Prometheus Radio Project v. FCC*, 939 F.3d 567, 573 (3d Cir. 2019), Fox respectfully requests that the Commission clarify that the WNYW–*Post* permanent waiver remains in effect or, if necessary, grant a new permanent waiver.

<sup>2</sup> *In re Fox Television Stations, Inc.*, Memorandum Opinion and Order, FCC 18-97, MB Docket No. 07-260, ¶ 45 (rel. July 12, 2018) (“*License Renewal Order*”).

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permitting common ownership of WNYW, WWOR, and the *Post*.<sup>3</sup> The Commission justified these waivers of the NBCO Rule because it determined that common ownership of these entities has resulted in “demonstrable public interest benefits.”<sup>4</sup>

Despite the Commission’s explicit recognition of the public interest benefits, a cloud of regulatory uncertainty currently hangs over the Stations. Most recently, in 2018, the Commission renewed the Stations’ licenses without addressing the merits of Fox’s waiver request because the NBCO Rule had appropriately been eliminated in the prior year and thus at the time the waiver request was moot.<sup>5</sup> With the Rule’s reinstatement following the September 2019 panel decision in *Prometheus IV*,<sup>6</sup> the Stations once again have apparently become subject to an outdated rule, threatening a common-ownership arrangement that benefits the New York media market.

## **II. The Commission Repeatedly Has Concluded That the NBCO Rule Does not Serve the Public Interest.**

### **A. The NBCO Rule is outdated.**

The Commission adopted the NBCO Rule in 1975, and the Rule reflects the media environment of that era. It is a relic from a time when broadcasters and print newspapers were the dominant means by which Americans received news, entertainment, and other programming.

But that market structure has not existed for decades. As Congress found in 1995, technological changes have sparked an “explosion of video distribution technologies and subscription-based programming sources,” giving consumers new media options and challenging the dominance of newspapers and “free over-the-air broadcasting.” H.R. Rep. No. 104-204, at 55 (1995). In this newly “competitive environment, arbitrary limitations on broadcast ownership” are “no longer necessary” to protect consumers and instead are harmful to “the industry’s ability to compete effectively in a multichannel media market.” *Id.*

That conclusion is all the more true now. Since 2002, when the Commission first determined that the NBCO Rule should be eliminated, myriad new digital media distribution technologies have emerged, including social media networks, smartphones, and streaming video

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<sup>3</sup> *License Renewal Order* ¶ 45–46.

<sup>4</sup> See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee) Applications for Transfer of Control of Fox Television Stations, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd. 11499 ¶ 7 (2006) (“*FEG Order*”).

<sup>5</sup> *License Renewal Order* ¶ 54–55 & n.199.

<sup>6</sup> See *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019) (“*Prometheus IV*”), cert. granted, 591 U.S. ---, Nos. 19-1231, 19-1241 (Oct. 2, 2020).

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services. As the Commission concluded in its *Reconsideration Order*, “the Internet has transformed the American people’s consumption of news and information.”<sup>7</sup> As a result, it is no longer the case “that people have a primary or single source for most of their local news and information.”<sup>8</sup> Rather, the modern media landscape is made up of a “nuanced ecosystem of community news and information ... in which Americans turn to a wide range of platforms to get local news and information.”<sup>9</sup>

Newspapers have been severely impacted by these changing currents in the media landscape. The Commission’s *Reconsideration Order* ably surveyed the record evidence in this regard. For example, a 2016 study by the Pew Research Center found that only 20 percent of U.S. adults often get news from print newspapers, with more substantial declines in certain demographics—only 5 percent of those aged 18 through 29.<sup>10</sup> This decline has devastated newspapers’ revenue streams: “print newspaper advertising revenue ha[s] decreased more than 50 percent since 2008 and nearly 70 percent since 2003,” while digital advertising has failed to compensate for those losses.<sup>11</sup>

In the face of these extremely challenging market dynamics, the Commission can encourage newspapers and broadcast stations to invest more resources in newsgathering and the production of local content by allowing these entities to be commonly owned.

### **B. The Commission repeatedly has attempted to eliminate the NBCO Rule.**

The Commission’s attempts to repeal the NBCO Rule are well chronicled, but it is worth noting that the Commission’s basic determination that the NBCO Rule does not advance the public interest has never been disputed.

In 2002, the Commission first voted to repeal the NBCO Rule, reasoning that the Rule no longer served the public interest because—among other reasons—it “undermines localism by preventing efficient combinations that would allow for the production of high-quality local

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<sup>7</sup> *In re 2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, FCC 17-156, MB Docket No. 14-50, ¶ 20 (rel. Nov. 20, 2017) (“*Reconsideration Order*”) (citation and internal quotation marks omitted).

<sup>8</sup> *Id.* (citation and internal quotation marks omitted).

<sup>9</sup> *Id.* (citations and internal quotation marks omitted).

<sup>10</sup> *Id.* ¶ 21 & n.74.

<sup>11</sup> *Id.* ¶ 24.

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news.”<sup>12</sup> In *Prometheus I*, the Third Circuit set aside the Commission’s decision despite agreeing with the Commission’s conclusion that the NBCO Rule no longer served the public interest.<sup>13</sup> During the 2006 Quadrennial Review cycle, the Commission again attempted to revise the NBCO Rule, but the Third Circuit again set aside the Commission’s decision, this time on procedural grounds.<sup>14</sup> The Commission most recently attempted to eliminate the NBCO Rule in its 2017 *Reconsideration Order* during the 2014 Quadrennial Review cycle.<sup>15</sup> Even though no party disputed the Commission’s market analysis or its conclusion that the Rule no longer serves a useful purpose, the Third Circuit overturned the Commission’s decision on unrelated grounds.<sup>16</sup>

In sum, as the Commission stated in renewing the Stations’ licenses in 2018: “the Commission has already found that banning newspaper/broadcast cross-ownership is not in the public interest.”<sup>17</sup> Indeed, it has reached this conclusion repeatedly over the course of twenty years. And yet, the bottom line result of all this has been to leave in place the NBCO Rule, “even though,” in the words of the Third Circuit, “the FCC determined more than a decade ago that it is no longer in the public interest”—an outcome “that has come at significant expense to parties that would be able, under some of the less restrictive options being considered by the Commission, to engage in profitable combinations.”<sup>18</sup>

### **III. The Commission Should Extend the Permanent Waiver to Include WWOR.**

The Commission should extend the permanent waiver of the NBCO Rule that permits common ownership of WNYW and the *Post* to include WWOR, permitting common ownership of all three entities. A permanent waiver would preserve the status quo as both Stations and the *Post* have been commonly owned for decades. It would remove the uncertainty following *Prometheus IV* when the NBCO Rule sprang back to life. And it would protect an arrangement that provides substantial benefits to the public.

Because the Commission has concluded “that banning newspaper/broadcast cross-ownership is not in the public interest,” it “need not determine” whether common ownership of

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<sup>12</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398 (3d Cir. 2004) (“*Prometheus I*”).

<sup>13</sup> See *Prometheus Radio Project v. FCC*, 824 F.3d 33, 51 (3d Cir. 2016) (“*Prometheus III*”) (citing *Prometheus I*, 373 F.3d at 398–400).

<sup>14</sup> *Id.* (citing *Prometheus Radio Project v. FCC*, 652 F.3d 431, 445 (3d Cir. 2011) (“*Prometheus II*”).

<sup>15</sup> *Reconsideration Order* ¶ 8.

<sup>16</sup> See *Prometheus IV*, 939 F.3d at 592 (Scirica, J., concurring in part).

<sup>17</sup> *License Renewal Order* ¶ 54.

<sup>18</sup> *Prometheus III*, 824 F.3d at 51–52.

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the Stations or the *Post* “contravenes the public interest.”<sup>19</sup> But in any event, the Commission in 2018 expressly found that that common ownership of the Stations and the *Post* does not harm the public interest.<sup>20</sup> Moreover, the Commission in the past has concluded this common-ownership arrangement benefits competition and the public interest by allowing the Stations and the *Post* to invest more in local news coverage as well as creating and preserving jobs.<sup>21</sup> These investments would not have been feasible absent the common ownership of these entities.<sup>22</sup> Indeed, the *Post* was literally rescued from bankruptcy as a result of common ownership.<sup>23</sup>

Moreover, the New York media market is incredibly diverse and competitive. None of the Stations or the *Post* hold a dominant position in the market.<sup>24</sup> Thus, granting a permanent waiver would not harm competition or viewpoint diversity. To the contrary, disrupting the current ownership structure of the Stations and the *Post* would introduce uncertainty as to their future, potentially reducing competition and diversity in the market.<sup>25</sup>

Finally, the Supreme Court’s recent grant of the petitions to review *Prometheus IV*<sup>26</sup> provides further support for extending the permanent waiver. At a minimum, the Court’s action shines a light on the Third Circuit’s problematic decision to resurrect the NBCO Rule despite the multiple prior findings that it no longer serves the public interest. There is no justification for

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<sup>19</sup> *License Renewal Order* ¶ 54.

<sup>20</sup> *Id.*

<sup>21</sup> *FEG Order* ¶ 8.

<sup>22</sup> *See In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee) Applications for Transfer of Control of Fox Television Stations, Inc.*, Memorandum Opinion and Order on Reconsideration, 24 FCC Rcd. 5824 ¶ 19 (2006) (“*FEG Reconsideration Order*”).

<sup>23</sup> Letter from Antoinette Cook Bush to Marlene H. Dortch, *Re: BTCCT-20050819AAF, et al.*, at 6 (Dec. 24, 2008).

<sup>24</sup> *See FEG Order* ¶ 7. The facts that informed the Commission’s decision in the *FEG Order* in 2006 are still true today. For example, according to Nielsen’s 2019–2020 data, WNYW is the fourth-ranked station in the New York DMA, and WWOR falls outside of the top four, in the Adults 18–54 demographic. The *Post*’s daily print edition is read by 6% of the population in the New York DMA. And it secured 21% of 2019 advertising dollars spent with newspapers in the New York DMA—figures that do not include *The New York Times* and *The Wall Street Journal* due to their national reach.

<sup>25</sup> *FEG Reconsideration Order* ¶ 18 (“The purpose of the NBCO rule is to promote diversity of voices. ... [A] significant purpose of the waiver was to preserve the viability of the *New York Post*. Loss of the *New York Post* would decrease the diversity of voices in the New York markets and, thereby, disserve the purpose of the rule.”).

<sup>26</sup> *See FCC v. Prometheus Radio Project*, No. 19-1231 (U.S. cert. granted Oct. 2, 2020). Fox joined the industry coalition whose petition for certiorari also was granted. *See NAB v. Prometheus Radio Project*, No. 19-1241 (U.S. cert. granted Oct. 2, 2020).

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giving effect to the NBCO Rule—which no party to *Prometheus IV* contends is in the public interest—during this interim period. Rather, the Commission has an opportunity to act now to provide immediate relief from a rule that was appropriately repealed and should never have been reinstated. Doing so would further the public interest for all the reasons that the Commission stated in the *Reconsideration Order*. Put simply, the Commission should remove any continued uncertainty regarding WWOR’s ownership and expeditiously grant a permanent waiver of the NBCO Rule.

Respectfully submitted,

/s/ Matthew S. DelNero

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