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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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1998 Biennial Regulatory Review –	)	
Review of the Commission's Broadcast	)	MM Docket No. 98-35
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	

To: The Commission

REQUEST OF VIACOM INC.
FOR INTERIM RELIEF

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To: The Commission

REQUEST OF VIACOM INC.
FOR INTERIM RELIEF

On February 19, 2002, the U.S. Court of Appeals for the D.C. Circuit remanded the national television station ownership cap to the Commission for further proceedings. The Court found that, in the *1998 Biennial Review Order*,[1] the FCC had failed to provide an adequate justification for retention of the rule.[2] In light of this ruling, and pursuant to Section 1.41 of the Commission's rules, Viacom Inc. ("Viacom") respectfully requests that the Commission extend the time for the company to come into compliance with the 35% station ownership cap[3] until 12

[1] *1998 Biennial Regulatory Review*, 15 FCC Rcd 11058 (2000) ("*Biennial Review Order*").

[2] *Fox Television Stations, Inc. v. FCC*, No. 00-1222, -- F.3d --, 2002 WL 233650 (D.C. Cir. Feb 19, 2002) ("*Fox*").

[3] Viacom is under an obligation to have applications on file at the FCC, upon expiration of the Court-ordered stay in the *Fox* case, which, when granted and consummated, would reduce its current broadcast holdings of approximately 39% to the current national broadcast ownership cap of 35%. *Applications of Shareholders of CBS Corporation, (Transferor) and Viacom, Inc. (Transferee) For Transfer of Control of CBS Corporation and Certain Subsidiaries*, 15 FCC Rcd 8230 (2000) (Memorandum Opinion and Order) ("*Divestiture Order*"); *Fox*, 2002 WL 233650, at *5. In *Fox*, the D.C. Circuit vacated its stay order without prejudice to Viacom's ability to seek a further stay from the Commission pending completion of FCC proceedings after remand. *Fox*, 2002 WL 233650, at *24.

months after a final decision[4] by the FCC on remand from the D.C. Circuit's recent decision in *Fox Television Stations, Inc. v. FCC* (hereinafter "*Fox*").[5] Such interim relief would merely preserve the *status quo* while the Commission complies with the remand ordered by the Court.[6]

I. SUMMARY

The four criteria for interim relief pending review are: (1) the threat of irreparable harm to the petitioner absent interim relief; (2) the likelihood that the petitioner will succeed or prevail on appeal; (3) the harm to other parties from the granting of interim relief; and (4) the harm to the public interest. The circumstances here satisfy all these criteria.

First, denial of interim relief would inflict irreparable injury on Viacom by causing the company to lose unique and irreplaceable assets. In the absence of the relief requested, Viacom would have to divest promptly its ownership of television stations serving markets that reach approximately 4% of U.S. television households ("TVHH"). This represents approximately 10% of Viacom's current potential audience reach. If the rule is ultimately repealed or modified, there is very little chance that Viacom could re-purchase these facilities, or any other equivalent facilities in the same markets, in the future. Each station is highly unique, with differing technical characteristics -- as well as differing audiences that are carefully cultivated -- and representing significant goodwill. Each market has certain distinctive characteristics as well.

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4 Viacom respectfully submits that the term "final" should be construed to mean that action shall have been taken by the FCC resolving the remand proceeding, and the decision is no longer subject to judicial review.

5 A 12 month divestiture period is consistent with the FCC's decision in *Fox Television Stations*, 16 FCC Rcd 14975 (2001). There, the Commission extended the time for Fox Television Stations to come into compliance until 12 months after a final court decision upholding the national broadcast ownership cap or dismissing the issues in the *Fox* proceeding. It is now apparent, however, that the issues in this matter will be resolved in the remand proceeding. Accordingly, Viacom requests an extension for 12 months following resolution of the remand proceeding.

6 Viacom respectfully advises that if the Commission does not act on this Request by March 23, 2002, Viacom intends to seek interim relief from the D.C. Circuit. The D.C. Circuit's stay in the *Fox* appeal expires upon issuance of the mandate by the Court, which could occur as soon as April 12, 2002.

For these and other reasons, adequate compensatory or other corrective relief for the harm caused by such divestitures would not be available at a later date.

Second, there is also a substantial likelihood that the Commission (or a reviewing court) will repeal or modify the national television station ownership cap. In its *Fox* decision, the D.C. Circuit systematically dismissed each of the Commission's assertions arguing for the retention of the rule. The Court held that the Commission had not presented any justification for the rule that rebutted the presumption for repeal or modification of the rule created by the Biennial Review provisions of the Telecommunications Act of 1996 ("1996 Act").[7] The Court also found that the Commission failed to reconcile its past analysis calling for the repeal of the rule. The trend in the marketplace has been towards increased competition and diversity, not less. Without sufficient justification to retain the ownership cap, the Commission must act on remand to repeal or modify the rule.

Turning to the third interim relief factor, no interested party would suffer substantial harm from the grant of interim relief. In fact, the temporary relief requested would not cause any cognizable harm to other parties, including viewers, network affiliates, and competitors.

Finally, a grant of interim relief would not be adverse to the public interest. This relief would merely permit maintenance of the *status quo* for a limited period of time -- under the management of a company that has a long record of exemplary service in the public interest.

Granting Viacom's request for interim relief will also provide parity with other parties aggrieved by the Commission's *Biennial Review Order* vacated by the D.C. Circuit.[8]

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7 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h) 110 Stat. 56 (1996).

8 As discussed below, Fox Television Stations, Inc., the only other entity with a national television audience reach of over 35%, has been granted a period of 12 months from the issuance of a final order in the *Fox* case to divest stations in excess of the national cap.

Accordingly, the Commission should promptly grant Viacom's request for interim relief to maintain the *status quo* while the FCC completes its proceeding on remand from the D.C. Circuit.

II. BACKGROUND

On February 19, 2002, the United States Court of Appeals for the D.C. Circuit issued a ruling vacating the Commission's decision to retain the national television station ownership cap and remanding the proceeding to the FCC to determine whether to "repeal or modify" the rule.[9] Integral to the Court's ruling was the Commission's failure to address adequately its own earlier decisions finding that repeal of the rule would serve the public interest.

A. History of the National Television Station Ownership Rule

The original version of the national broadcast ownership cap, promulgated in 1940, limited to three the number of stations that a single entity could own.[10] In 1953, the station limit was raised to seven, where it remained for more than three decades.[11] At that time, the FCC outlined two purposes behind the so-called "Seven Station Rule:" "to promote diversification of ownership in order to maximize diversification of program and service viewpoints" and to "prevent any undue concentration of economic power contrary to the public interest."[12] However, in 1984 the Commission acknowledged that the rule, *at its inception*, was not the result of "empirical proof" but rather was based on "assumptions which at the time were untestable."[13]

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9 *Fox*, 2002 WL 233650, at *20, *24.

10 *FCC Seventh Annual Report* 34 (FY 1941) (1941).

11 *Amendment of Sections 3.35, 3.240 and 3.36 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcasting Stations*, 18 FCC 288 (1953).

12 *Id.* at 292-293.

13 *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17, 24 (1984) (Report and Order) ("*1984 Report*").

Specifically, the proposition "[t]hat the Seven Station Rule promotes" diversity or competition "was assumed, but this assumption was not based on hard evidence in the record."[14]

After "consider[ing] the [relevant] data for the first time,"[15] the Commission in its *1984 Report* decided to modify the rule and increase the cap to 12 stations. The Commission observed that "the more correct focus for addressing viewpoint diversity and economic competition concerns" is "the number and variety of information and advertising outlets on local markets, a matter that [is] not addressed by a nationwide restriction on ownership."[16] The *1984 Report* concluded that because national ownership concerns are disconnected from competition and diversity concerns in local markets, a "*national ownership ceiling is no longer warranted.*"[17] The FCC thus determined that the rule should "sunset" after six years when the cap would be completely eliminated. The agency came to this conclusion as a result of weighing "evidence in the record which indicate[d] that the Commission in the past failed to recognize some of the advantages of group ownership and overestimated the potential dangers of such ownership."[18]

On reconsideration of its ruling at the urging of Congress, the Commission stated that it was "convinced that [the] underlying conclusions in the [1984] Report and Order remain correct."[19] The agency reaffirmed its finding "that national ownership diversity is not of primary

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14 *Id.*

15 *Id.*

16 *Id.* at 20.

17 *Id.* at 28 (emphasis added).

18 *Id.*

19 *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, 76 (1985) ("*Reconsideration Report*").

relevance in promoting viewpoint diversity."[20] "Similarly, [the Commission] conclude[d] that the petitioners [had] not shown that the seven station rule [was] needed to prevent undue economic concentration."[21] The FCC also confirmed the conclusion "that group ownership affirmatively promotes diversity of viewpoints."[22]

Likewise, both the Department of Justice and the National Telecommunications & Information Administration ("NTIA") strongly supported the FCC's reasoning and conclusions. The Justice Department argued that eliminating restrictions on national station ownership would "raise little risk of adverse competitive effects in any market" and that there was "no basis for concluding that allowing the networks to acquire additional broadcast stations will raise any significant risk of increased network market power."[23] The NTIA similarly advocated immediate repeal of the national multiple ownership rules, observing that both "First Amendment diversity and economic diversity will be protected."[24]

Despite these findings, on reconsideration of the *1984 Report* the Commission *eliminated* the sunset provision it had adopted for the new Twelve Station Rule, and, for the first time, *added* a national audience reach cap of 25%.[25] It is striking that, at the very inception of the

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20 *Id.* at 81-82.

21 *Id.* at 87.

22 *Id.* at 83-84.

23 Comments of the U.S. Department of Justice, *Multiple Ownership of AM, FM and Television Broadcast Stations*, Gen. Docket No. 83-1009, at 2 (1984); Reply Coments of the U.S. Department of Justice, *Multiple Ownership of AM, FM and Television Broadcast Stations*, Gen. Docket No. 83-1009, at 2 (1984).

24 Reply Comments of the NTIA, *Multiple Ownership of AM, FM and Television Broadcast Stations*, Gen. Docket 83-1009, at 6 (1984).

25 *Reconsideration Report* at 76.

station ownership audience reach cap the FCC conceded that it had identified no harm the new rule would address and that the rule was not based on any evidence whatsoever:

> [R]elaxing the numerical cap from seven stations to twelve stations may provide an opportunity for a single group owner to increase its audience base substantially, particularly if acquisitions are made in the largest markets. A numerical cap does not affect this type of restructuring. *While there is no evidence in the record* that would lead us to believe that such an eventuality would necessarily have an adverse result, we now believe that the potential for this type of restructuring warrants a more cautious approach.[26]

Indeed, the Commission stated in the attached *Regulatory Flexibility Analysis* that:

> [w]hile we continue to believe that, as a policy matter, there is *no need* for national multiple ownership regulations in order to promote our traditional policy objectives, we have retained the above stated ownership rules in order to avoid *potential* adverse restructuring of the industry.[27]

The FCC did not explain what "adverse" public interest consequences might be expected to flow from such industry restructuring.

In 1996, Congress effectively removed the Twelve Station/25% Cap Rule adopted in 1984 and directed the Commission to increase the national audience reach limit to 35%.[28] The FCC then implemented the required change in the national ownership cap to the 35% level without discussion.[29]

B. <u>The Biennial Review</u>

As part of the same legislation changing the national television station ownership cap, Congress also enacted the "biennial review" process.[30] This new requirement "direct[ed] the

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26 *Id.* at 89 (emphasis added).

27 *Id.* at 98 (emphasis added).

28 1996 Act § 202(c)(1).

29 *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, 11 FCC Rcd 12374 (1996).

30 1996 Act § 202(h).

Commission to review its rules adopted under section 202 and all of its ownership rules biennially. In its review, the Commission shall determine whether any of its ownership rules, *including those adopted pursuant to this section*, are necessary in the public interest as the result of competition."[31] The 1996 Act further requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest."[32]

On June 20, 2000, the Commission issued its now-vacated 1998 *Biennial Review Order*. In that Order, the agency found that, among other things, the national ownership cap "warrants retention."[33] It cited three primary reasons for keeping the rule -- to monitor the industry after the recent changes in the duopoly rule, to observe the effect of the 35% cap, and to preserve the balance of power between networks and their affiliates.

In dissent, however, then-Commissioner (now Chairman) Michael Powell noted that:

> [T]he Commission's decision is deficient in several ways. It fails to fully examine the video market and consider the changes in that market. It merely assumes a valid link between a national limit and local competition and diversity, despite fairly substantial evidence to the contrary. And, it fails to consider the public interest harms that may flow from the rule. I believe there is more than enough on the record of this proceeding to call into question whether the public is being served by the 35 percent audience reach cap.[34]

C. **The *Fox* Decision**

In analyzing the Commission's decision to retain the rule in the *Biennial Review Order*, the D.C. Circuit found that the Commission "has not adduced a single valid reason to believe the national television station ownership rule is necessary in the public interest, either to safeguard

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31 H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess., 1996 WL 46795, at *365 (*emphasis added*).

32 1996 Act § 202(h).

33 *1998 Biennial Review Order*, 15 FCC Rcd at 11122.

34 *Id.* at 11154.

competition or to enhance diversity."[35] Specifically, the Court dismissed the Commission's "wait and see" rationales, finding that they could not be reconciled with Congress's statutory mandate to review these rules every two years.[36] The Court also found the Commission's affiliate bargaining power argument to be devoid of any support in the record.[37] Finally, the Court ruled that the agency's failure to address adequately its conflicting decision in the *1984 Report* precludes retention of the rule. Thus, the Court stated that "[s]o long as the reasoning of the *1984 Report* stands unrebutted, the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account for its decision."[38]

Accordingly, the D.C. Circuit vacated the Commission's decision to retain the rule and remanded the matter to the Commission to conduct further proceedings to consider repealing or modifying the national television station ownership cap. In light of this mandate from the Court, Viacom now respectfully requests that the Commission suspend the time for it to come into compliance with the rule until the agency has had an opportunity to comply with the Court's remand.

III. ARGUMENT

The D.C. Circuit held in *Fox* that "the Commission has adduced not a single valid reason to believe the [35% national broadcast ownership cap] is necessary in the public interest, either to safeguard competition or to enhance diversity."[39] Accordingly, it is not only likely -- but it has already been authoritatively determined by a court of law -- that the 35% national broadcast

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35 *Fox*, 2002 WL 233650, at *14.

36 *Id.* at *13.

37 *Id.*

38 *Id.* at *15.

39 *Id.* at *14.

ownership cap cannot be sustained based on the current state of the record. Indeed, as demonstrated below, each of the factors considered in deciding whether to grant interim relief[40] weigh in favor of a grant of the extension requested herein. These factors are: (1) the threat of irreparable harm to the moving party absent interim relief; (2) the likelihood that the moving party will succeed or prevail; (3) the harm to other parties from the grant of interim relief; and (4) any harm to the public interest.[41]

A. <u>Viacom Would Suffer Irreparable Injury if Interim Relief Were Denied</u>

A denial of interim relief will force Viacom to divest stations[42] broadcasting in markets that represent approximately 4% of the national television audience -- scarce assets valued in the many hundreds of millions of dollars. As a result, Viacom could be forced out of the business of owning and operating television stations in numerous markets. Neither a court nor the Commission would be in a position to cure this loss once the stations had been divested -- there would be no way to "undo" the forced sales. Nor could Viacom reasonably expect to buy back those same stations or acquire like operations in the same market at a later date.[43] Each station is highly unique, with differing technical characteristics including distinctive signal contours -- as

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[40] A stay is a form of interim relief. Whether a stay is warranted is evaluated under the same general standard as a request for preliminary injunctive relief. *Program Exclusivity in the Cable and Broad. Indust.*, 4 FCC Rcd 6476, 6476-77 (1989) (Order Denying Stay Request). These standards are set forth in *The Interstate, Interexchange Marketplace*, 12 FCC Rcd 15739, 15748 & n.56 (1997) (Order) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), *as modified, Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

[41] *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

[42] *See Divestiture Order*, 15 FCC Rcd at 8235.

[43] *Declaration of Fredric G. Reynolds ("Reynolds Dec.")*, at ¶ 5.

well as differing audiences that are carefully cultivated -- representing significant goodwill.[44] Each market has certain distinctive charateristics as well.

Such divestiture would also preclude Viacom from using these stations to communicate its chosen messages, selected through its editorial control of these stations, to an audience representing a potential 4% of television households. As such, it would exclude Viacom from the the business of owning and operating television stations in several geographic markets. Such losses are routinely treated as "irreparable harm." In *Holiday Tours*, for example, the court preserved the *status quo* by staying an agency order that would have terminated a tour operator's provision of bus tours while allowing the operator to continue providing limousine service. The court found that "[t]he harm to Holiday Tours in the absence of a stay would be its destruction in its current form as a provider of bus tours."[45] Such harm would be irreparable because "[t]he destruction of a business is . . . not . . . [a] 'mere' economic injur[y] . . . for which 'adequate compensatory or other corrective relief will be available at a later date.'"[46]

The FCC has followed these generally accepted principles as well. For example, in *CBS Communications Services, Inc. and Centennial Wireless PCS License Corporation*,[47] the

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44 *Id.*

45 559 F.2d at 843. *Accord Holmes v. United States*, 815 F. Supp. 429, 431 (M.D. Ala. 1993) (finding "that the plaintiff [grocer] will suffer irreparable harm" if agency order removing grocery from food stamp program was not stayed, "[s]ince it is undisputed that that plaintiff derives 75% of his income from food stamps and that he will probably lose his business if he is disqualified from the program. . . ."), *stay dissolved on other grounds*, 868 F. Supp. 1348 (M.D. Ala. 1994), *aff'd*, 67 F.3d 314 (11th Cir. 1995).

46 *Id.* at 843 n.2 (quoting *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925). The D.C. Circuit has held that even "[r]ecoverable monetary loss may constitute irreparable harm" if "the loss threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Indeed, because there is no adequate form of restitution available, it is unrealistic to view "the serious, irreparable damage caused by the summary shutdown of an ongoing business enterprise" in any other light. *United States v. All Assets of Statewise Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992); *see also Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co. of New York, Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (loss of a "distributorship, an ongoing business" constitutes irreparable harm).

47 13 FCC Rcd 4471 (1998) (Memorandum Opinion and Order).

Commission found irreparable injury where "immediate compliance with the [order] could cause substantial disruption to Centennial's operation" in one of its markets.[48] In that case, the movant faced the shut down of a portion, but not all, of its wireless telephony network. The FCC made clear that a party is not "required to show that its entire network would be adversely affected in order to show irreparable injury."[49]

Divestiture in the instant case would *with certainty* remove Viacom from a number of important business operations. Thus, although Viacom would remain in the business of television broadcasting, both as an owner of networks and as an owner of television stations in other cities, it would be ousted from the business of owning stations in areas covering approximately 4% of television households.

The "irreparable" nature of the loss of a business through divestiture is especially compelling where, as is the case here, the business and related assets are not easily replaceable. As explained in the attached *Declaration of Frederic G. Reynolds*, television stations in large and medium-sized markets do not frequently become available for acquisition.[50] As a result, if a station were lost through divestiture or otherwise, there would be relatively little likelihood that the original owner would later have an opportunity to re-purchase that station, or be able to acquire a comparable one in the same market.[51] Thus, forcing Viacom to move forward with the scheduled divestiture would deprive it of the efficiencies and other benefits of owning and

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48 *Id.* at 4479.

49 *Id.*

50 *Reynolds Dec.*, at ¶ 5.

51 *Id.*

operating stations in the affected markets. Further, as noted above, each individual station is "unique" and distinctive.[52]

In addition, Viacom's losses would not, in any event, be compensable in money damages. First, Viacom would have no right to make a claim against the FCC for money damages it suffers as a result of an action of the agency that is later found to be invalid. Second, any losses would be impossible to measure, representing lost profit and potential benefits. Thus, the harm to Viacom, absent a grant of the requested interim relief, unquestionably meets the legal definition of irreparable injury.

B. Viacom is Likely to Prevail on the Merits

1. There is a Presumption in Favor of Repeal

As the D.C. Circuit held, Section 202(h) of the 1996 Act "carries with it a presumption in favor of repealing or modifying the ownership rules."[53] In concrete terms, the FCC must "start with the proposition that the rules are no longer necessary" and must "justify [the] continued validity" of any rule it declines to repeal or relax.[54] Simply put, "the statute imposed upon the Commission a duty to examine critically the new 35% [national cap] and to retain it *only* if it continues to be necessary."[55] As the D.C. Circuit stated, the Commission has thus far "provided no analysis of the state of competition in the television industry to justify its decision to retain

52 *See, e.g., Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) (recognizing "irreparable harm in the loss of a relatively unique product"); *Starlight Sugar, Inc. v. Soto*, 114 F.3d 330, 332 (1st Cir. 1997) ("the loss of a unique or fleeting business opportunity can constitute irreparable injury"). *Cf. United Church of the Med. Ctr. v. Medical Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury.").

53 *Fox*, 2002 WL 233650, at *18.

54 *1998 Biennial Review Order*, 15 FCC Rcd at 11151 (Separate Statement of Commissioner Michael K. Powell); *see id.* at 11132 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

55 *Fox*, 2002 WL 233650, at *13 (emphasis added).

the national ownership cap" and has "failed even to address meaningfully the question that Congress required it to answer."[56] And it is highly unlikely that the Commission will be able to justify the rule on remand.

2. No Surviving Rationale Exists for Retaining the Rule

In *Fox*, the D.C. Circuit rejected each and every one of the rationales that the Commission had previously advanced for retaining the rule. The Court first rejected the broad competition and diversity rationales advanced by the FCC in favor of the rule. As to competition, the Court accepted the networks' argument that there is "no evidence that broadcasters have undue market power, such as to dampen competition, in any relevant market."[57] Rejecting the Commission's attempt to rely on "a single, barely relevant study" that "plainly does not . . . suggest that broadcasters have undue market power," the Court concluded that "the Commission has no valid reason to think the [national ownership cap] is necessary to safeguard competition."[58] With respect to the agency's attempt to rely on a need to protect competition in the national advertising and program production markets, the Court determined that the FCC's reasoning was "wholly unsupported and undeveloped."[59] As to diversity, the Court found that, although the Commission "mentioned national diversity as a justification for retaining" the rule, it "never elaborated upon the point."[60] Not only did the FCC "fail[ ] to explain why it was no longer adhering to the view it expressed in the *1984 Report* that national

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56 *Id.* at *15.

57 *Id.*

58 *Id.* at *11.

59 *Id.*

60 *Id.* at *12.

diversity is irrelevant," but it also had done "nothing to explain why the rule is necessary to further that end."[61]

The Commission had also advanced three "more specific" reasons for retaining the rule: (1) to allow it to observe the effects of recent changes in the rules governing local ownership of television stations; (2) to allow it to observe the effects of the national ownership cap, having been raised to 35% by Congress; and (3) to preserve the power of local affiliates to bargain with their networks to promote diversity of programming. The D.C. Circuit also rejected each of these rationales.

The first reason was found insufficient "because there is no obvious relationship between the relaxation of the local ownership rule . . . and retention of the national ownership cap," and the Commission had done "nothing to suggest that there is any non-obvious relationship."[62] Moreover, the Court determined that the FCC's "wait-and-see approach cannot be squared with its statutory mandate promptly -- that is, by revisiting the matter biennially -- to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[63] The Court also found the Commission's desire to observe the effects of implementation of a 35% cap by Congress to be inadequate to support maintenance of the rule. Noting that "the statute imposed upon the Commission a duty to examine critically the new 35% [national broadcast ownership] rule and to retain it only if it continued to be necessary," the Court found that the FCC had "default[ed] upon [its] ongoing duty."[64] Finally, the Court determined that the Commission's third reason – that

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61 *Id.*

62 *Id.* at *13.

63 *Id.*

64 *Id.*

the rule is necessary to strengthen the bargaining power of network affiliates and thereby promote diversity of programming -- lacked sufficient support in the record.[65]

Thus, following a lengthy biennial review process, the Commission was unable to justify the retention of the ownership cap. In these circumstances, the marketplace trend continues to produce increased competition and diversity.[66] Therefore, it makes no sense to believe that the 35% national broadcast ownership cap will survive the remand intact. Certainly, it is reasonable to assume that some modification will, at a minimum, result from the upcoming proceedings on remand.

3. Retention Of The Rule Today Cannot Be Reconciled With The 1984 Report

The D.C. Circuit found that "[t]he Commission's failure to address its *1984 Report* in the course of its contrary *1998 Biennial Review Report* is yet another way in which the decision to retain the [national broadcast cap] was arbitrary and capricious."[67] In the *1984 Report*, as the Court noted, the Commission concluded that the national cap should be repealed because of its focus on national rather than local markets, and because even by 1984, the level of competition had undermined the need for the rule.[68] Specifically, the FCC's *1984 Report* relied upon four factors to conclude the rule was no longer necessary:

- "changes in the broadcasting and communications markets";
- "new evidence of the [positive] effects of group ownership" on quality and diversity;

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65 *Id.*

66 *See* Michael L. Katz, Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition, Sept. 1999 (Attachment B to *Emergency Request Of Viacom Inc. For Interim Relief Pending Judicial Review* in MM Docket No. 98-35 (filed March 8, 2001)) ("*Katz Study*").

67 *Fox* at *15.

68 *Id.*

- "the lack of evidence of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets;" and

- the potential for the rule to "be an obstacle to the broadcast of the types of programming" that diversity of ownership was supposed to promote.[69]

As the D.C. Circuit noted, even upon reconsideraion of the *1984 Report*, as dictated by Congress, the Commission "expressly reaffirmed the conclusions reached in the report."[70] Yet in the *Biennial Review Order*, the agency utterly failed to address the contrary conclusions that it reached at that time in concluding that the cap remained in the public interest.[71] As the D.C. Circuit put it, this is "simply arbitrary."[72]

Of course, the Commission is free to change its mind, but it must provide a reasoned basis for doing so.[73] However, "[s]o long as the reasoning of the *1984 Report* stands unrebutted, the agency has not fulfilled its obligation, upon changing its mind, to give a reasoned account of such a decision."[74] In light of the tremendous increases in competition and diversity that have occurred since 1984,[75] the Commission's 1984 rationale is even more compelling today than it

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69 *1984 Report*, 100 FCC 2d at 19.

70 *Reconsideration Report*, 100 FCC 2d at 76 (1984); *Fox*, 2002 WL 233650, at *15.

71 For example, in the *1984 Report* the Commission said it had "*no evidence* indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming." *1984 Report*, 100 FCC 2d at 35. Without explanation, however, the Commission in 1998 speculated that independently owned affiliates play a valuable role by counterbalancing the networks' incentive to clear all network programming "'because they have the right . . . to air instead' programming more responsive to local concerns." *Fox*, 2002 WL 233650, at *13 (quoting *Biennial Review Order*, 15 FCC Rcd at 11075).

72 *Fox*, 2002 WL 233650, at *15.

73 *Id.* (citing *Motor Vehicles Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986)); *see NAACP v. FCC*, 682 F.2d 993, 998-90 (D.C. Cir. 1982) (collecting cases).

74 *Fox*, 2002 WL 233650, at *15.

75 *See generally Katz Study*.

was at the time. Particularly in light of the marketplace changes that have occurred, it is unlikely that the Commission will be able to justify a departure from the reasoning it advanced in favor of repealing the rule in 1984 on remand that would support retention of the cap in its current form.

C. No Interested Party Would Suffer Harm if the Interim Relief Were Granted

An order maintaining the *status quo* pending final resolution should be granted where there is "little indication that [such action] will result in substantial harm to either [the] Commission or to other [interested parties]."[76] Here, there is no credible evidence that the extension of time requested by Viacom would result in any harm to the FCC, television viewers, network affiliates, or competitors.

The various parties who opposed any change in the national ownership cap before the Commission raised arguments speculating on the effect of eliminating the cap on their ability to compete in various markets.[77] The D.C. Circuit, however, has determined that "the Commission has no valid reason to think the [national broadcast ownership cap] is necessary to safeguard competition."[78] Moreover, the hypothetical concerns raised by the rule's proponents are insufficient to deny the requested relief. "The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact."[79] In opposing such relief, parties cannot rely on mere conjecture about harms that *might* occur. There is neither any evidence that any of the supposed harms identified by these parties have occurred in the last two years, nor, as demonstrated above, can any such showing be made.

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[76] *Holiday Tours, Inc.*, 559 F.2d at 843.

[77] *Biennial Review Order*, 15 FCC Rcd at 11071-72.

[78] *Fox*, 2002 WL 233650, at *11.

[79] *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1067 n.6 (D.C. Cir. 1998) (quoting *Holiday Tours, Inc.*, 559 F.2d at 843 n.3).

In staying an agency order that would have ousted a bus and limousine tour company from its bus tour line of business, the D.C. Circuit in *Holiday Tours, Inc.* held that, "in the absence of substantiation of severe economic impact," continued competition with the petitioner in accordance with the *status quo* could not inflict a cognizable harm on other bus tour companies.[80] The present situation is identical. There has been no specific allegation -- let alone "substantiation" -- that extending the divestiture requirement of the *Divestiture Order* for 12 months following the conclusion of proceedings following remand by the D.C. Circuit would cause "severe economic impact" to any party. Thus, continued Viacom ownership of its existing television stations in accordance with the *status quo* cannot and would not cause a cognizable harm to other parties.

This calculus is not changed by the D.C. Circuit's refusal to vacate the rule because, in its view, doing so "could cause some but not a great loss to the viewing public."[81] That noncompliance with the rule "could" cause some harm is not enough to support denial of the requested interim relief -- to outweigh a showing of irreparable harm, the harm to the agency or the public must be actual.[82] Additionally, the Court's acknowledgment that the harm to viewers would not result in a "great loss" establishes that no party will suffer the *substantial* harm necessary to overcome a showing of irreparable injury.[83] Moreover, vacatur is an exceedingly

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80 559 F.2d at 843 n.3.

81 *Fox*, 2002 WL 233650, at *19.

82 *See, e.g.*, *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (staying an agency order that would have allowed reduction of a bison herd on federal lands, where, *inter alia*, "[a]ll of the supposed consequences that the federal defendants urge would occur should the bison hunt not go forward are *speculative*") (emphasis added).

83 *Holiday Tours, Inc.*, 559 F.2d at 843.

rare measure, warranted only in the most "extraordinary circumstances."[84] The Court's decision that the facts of this case did not constitute the "rarest and most compelling circumstances"[85] required to vacate an agency rule says nothing about the appropriateness of a grant of interim relief pending final FCC or court action regarding the rule.

D. Granting the Interim Relief Will Not Be Adverse to the Public Interest

As explained above, in the absence of interim relief, Viacom would suffer substantial and irreparable harm by being forced to divest televisions stations before the fate of the rule is resolved. Indeed, denying the requested relief would force Viacom to comply with a rule that has been found arbitrary and capricious, and may never be revived in its current form (or otherwise). By contrast, were the interim relief to be granted, no off-setting harms would be suffered by the Commission, interested parties, or the public. Currently the stations are being managed by a responsible and trustworthy owner, with a long and illustrious history of service in the public interest. Accordingly, the public interest would be served by extending the time Viacom has to come into compliance with the national ownership cap, which would merely maintain the *status quo* during the pendency of review proceedings.

E. A Grant of the Requested Relief is Consistent With Commission Precedent

The Commission has routinely recognized that , in order to permit orderly divestiture, parties should be entitled to a reasonable time after the issuance of a final order by the FCC resolving the issue under reconsideration. Specifically, the agency has adhered to a general "policy of avoiding forced sales."[86] Recognizing "the practical difficulty of divesting the

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84 *Fox*, 2002 WL 233650, at *18.

85 *Id.* (citing *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 7 (D.C. Cir. 1987)).

86 *Fox Television Stations*, 16 FCC Rcd 14975, ¶ 25.

necessary stations,"[87] the Commission has concluded that, in cases involving complex transactions, one year from the date that the parties' legal obligations are fixed constitutes a reasonable time within which to require any divestiture that may be necessary.[88] Thus, in *Fox Television Stations*, the Commission granted Fox 12 months following the entry of a final order upholding the national broadcast ownership cap to come into compliance with the ownership limits.[89]

Evidently, in granting Fox's waiver, the Commission assumed that the fate of the ownership cap would be resolved in the then-pending D.C. Circuit appeal. However, because the Court has now remanded the ownership cap proceeding to the Commission, it is now apparent that the future of the cap will be determined in the remand proceeding before the FCC. In these changed circumstances, the Commission's decision in *Fox Television Stations* strongly suggests that Viacom, Fox and others who might be required to divest stations to come into compliance with any national ownership cap decision the FCC might issue in the future should be afforded 12 months from the date that decision becomes final to come into compliance with the cap. Accordingly, Viacom requests that the Commission grant such an extension.

Courts and the Commission have long recognized the importance of treating similarly situated parties alike.[90] If the FCC wishes to treat similarly situated parties differently, it must

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87 *Id.*

88 *See, e.g.*, *Divestiture Order*, 16 FCC Rcd at 8236 (granting 12-month waiver to come into compliance with national ownership cap); *Stockholders of Renaissance Communications Corp.*, 12 FCC Rcd 11866, 11890 (1997) (granting 12-month waiver to come into compliance with newspaper/broadcast cross-ownership rule); *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5895 (1996) (same); *Multimedia, Inc.*, 11 FCC Rcd 4883, 4891 (1995) (same); *see also Stauffer Communications, Inc.*, 10 FCC Rcd 5165 (granting 18-month waiver to come into compliance with newspaper/broadcast cross-ownership rule).

89 *Fox Television Stations*, 16 FCC Rcd 14975, ¶ 27.

90 *See, e.g.*, *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987); *Crain Broad., Inc.*, 8 FCC Rcd 4406, 4408 (1993); *Ramon Rodriguez*, 3 FCC Rcd 407, 408 (1988).

adequately explain its actions.[91] In so doing, the Commission must "do more than enumerate factual differences, if any . . . it must explain the relevance of those differences to the purposes of the . . . Act."[92] In light of the weight of FCC precedent in favor of granting parties a reasonable period following the conclusion of a rulemaking to come into compliance with a rule that is the subject of an ongoing proceeding, the Commission should grant comparable relief in this case.

[91] *See Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.").

[92] *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1995) (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)).

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Viacom's request for interim relief to maintain the *status quo* by suspending the time for the company to come into compliance with the 35% cap until 12 months after the issuance of a final Commission decision on the cap.

Respectfully submitted,

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February 25, 2002

DECLARATION OF FREDRIC G. REYNOLDS

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of 1998 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 Docket No. 98-35

DECLARATION OF FREDRIC G. REYNOLDS

Pursuant to 28 U.S.C. § 1746, Fredric G. Reynolds under penalty of perjury states as follows:

1. I am currently President, Viacom Television Stations Group and have held that position since March of 2001.

2. I also served as Executive Vice President, Chief Financial Officer of Viacom Inc. from May 2000 until March 2001 and Executive Vice President, Chief Financial Officer of CBS Corporation (formally known as Westinghouse Electric Corporation) from March 1994 until May 2000.

3. I have personal knowledge of the facts stated in this declaration.

4. During the course of my duties as an officer in the broadcast industry, I have had extensive experience with the market for the acquisition of television stations in markets of varying size.

5. In my experience, individual television stations in large and mid-sized markets are rarely available for purchase. Each television station is highly unique, with differing technical characteristics and audiences and represents significant goodwill. If a station group owner were

forced to divest such a station, there would be relatively little likelihood that that entity would be able to re-enter the market by repurchasing that station or by purchasing one that is comparable.

6. Accordingly, the forced divestiture of a television station in a large or mid-sized market would, in all probability, exclude the group owner from that market indefinitely.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 22, 2002.

Fredric G. Reynolds
President
Viacom Television Stations Group

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2002, a copy of the foregoing Motion of Viacom Inc. for Interim Relief was delivered to the following:

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