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January 18, 2011

VIA ELECTRONIC MAIL AND HAND DELIVERY

Chairman Julius Genachowski
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Meredith Atwell Baker
Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Applications for Renewal of Licenses of WNYW(TV)
and WWOR-TV and Supplement to Petition for
Modification of Permanent Waiver
File Nos. BRCT-20070201AJS and BRCT-
20070201AJT; MB Docket No. 07-260

Dear Mr. Chairman and Commissioners:

By and through its undersigned counsel, Fox Television Stations, Inc. ("Fox"), licensee of television stations WNYW(TV), New York, NY and WWOR-TV, Secaucus, New Jersey, hereby submits this response to the letter submitted to the Commission on December 7, 2010 by Media Access Project, the Office of Communication of United Church of Christ, Inc., Rainbow/PUSH Coalition and Free Press (collectively, "MAP") in connection with the above-referenced matters.¹

¹ See Letter from Andrew Jay Schwartzman, Media Access Project, to Chairman Julius Genachowski and Commissioners, Federal Communications Commission, MB Docket No. 07-260 (dated Dec. 7, 2010) (the "MAP Letter").

First and foremost, among the litany of topics melded together in the MAP Letter is not a single new fact or allegation that is not already the subject of the extensive written record in these proceedings. Rather than encumber the Commission's limited resources with yet another point-by-point rebuttal, Fox instead requests that the Commission look to, and Fox hereby incorporates by reference, its previous filings that amply respond to MAP's charges related to Fox's compliance with the newspaper/broadcast cross-ownership ("NBCO") rule and WWOR-TV's service to New Jersey (including, without limitation, Fox's letters to the Commission in MB Docket No. 07-260 dated January 5, 2010, November 13, 2009 and September 15, 2009, copies of which are included herewith as Exhibit A). The filings collectively demonstrate both that Fox at all times has fully complied with the NBCO rule as applicable to it and that WWOR-TV has provided exemplary service to its community of license and the greater northern New Jersey geographic area.

With respect to the MAP Letter's allegations regarding misrepresentation and lack of candor, however, Fox feels that it is appropriate to respond in greater detail. Fox takes extremely seriously its obligation to be honest and fair in its dealings with the FCC and its staff. For that reason, Fox does not take lightly MAP's erroneous charges that it misled the Commission or that it failed to provide fulsome information. As more fully explained below, Fox believes that the gist of this dispute stems from a relatively simple misunderstanding. Fox, however, *never intended to mislead* the Commission, and there is no evidence that Fox knowingly or intentionally attempted to deceive anyone. As the Commission has cautioned: "Misrepresentation and lack of candor charges are very grave matters. They ought not to be bandied about."²

Summary

MAP alleges that, on August 25, 2009, Fox utilized at two *ex parte* meetings and submitted to the Commission a summary document that among other things described WWOR-TV's quantities of news and public affairs programming (and staffing levels) in the present tense, notwithstanding that certain changes had taken place at WWOR-TV in July 2009. As a matter of fact, although Fox naturally does not recall with precision exactly what was said at the two meetings (which took place more than 16 months ago), to the best of its recollection and belief, Fox *did*

² *In re New Bohemia Group, Inc.*, 24 FCC Rcd 1357, 1360, n. 22 (2009) (citing *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983); *Scott and Davis Enterprises*, 88 FCC 2d 1090, 1099 (Rev. Bd. 1982)).

share with Commission staff general information about changes at WWOR-TV that had taken place in July 2009 as necessitated by the economy. In any event, in connection with two subsequent *ex parte* meetings that took place just weeks later, Fox voluntarily – and without prompting from the Commission or MAP – revised the text of the document to put the statements about WWOR-TV’s programming and staffing into proper context. Fox submitted the revised document as part of this docket after each meeting. That same month, Fox also brought its President of Station Operations to the FCC for meetings, including with a Commissioner, to discuss how the economy was impacting broadcast television stations – a discussion that necessarily included general information about the changes at WWOR-TV that, MAP alleges without support, Fox kept hidden. Significantly, MAP does not assert that Fox actually intended to mislead the FCC, and as the Commission has made emphatically clear, “intent to deceive is a *necessary* and *essential* element” of misrepresentation and lack of candor.³

Fox submits that its voluntary efforts to address any confusion caused by its August 2009 filings conclusively demonstrate that Fox had neither the motive nor the intention to deceive the Commission. MAP has presented no evidence to the contrary. In short, because MAP has not shown – and cannot show – that Fox *intended* to deceive or mislead the Commission, it cannot sustain its burden of demonstrating a *prima facie* case of either misrepresentation or lack of candor.⁴

Applicable Legal Standards

By way of background, it is undisputed that Fox filed a license renewal application for WWOR-TV on February 1, 2007. That application covered a license term running from July 31, 2001, when Fox acquired the station, until June 1, 2007, the date on which the station’s then-current license term was set to expire. Petitions to deny WWOR-TV’s license renewal application were filed by Voice for New Jersey (“VNJ”) as well as Office of Communication of the United Church of Christ, Inc. and the Rainbow/PUSH Coalition. As MAP notes, Fox “vigorously opposed” those petitions.⁵ The renewal application remains pending.

³ *In re Citadel Broadcasting Co.*, 22 FCC Rcd 7083, 7090 (2007) (emphasis supplied).

⁴ *See, e.g., In re Liberty Productions*, 16 FCC Rcd 12061, 12085 (2001).

⁵ MAP Letter, at 2.

The Commission's review of the application is governed by Section 309(k) of the Communications Act (the "Act"), 47 U.S.C. § 309(k), which mandates that the Commission is obliged to grant a station's license renewal "if it finds, with respect to that station, during the *preceding term of its license*" that the station has served the public interest and that there have been no serious violations of the Act or the FCC's Rules (and no other violations that taken together constitute a pattern of abuse).⁶ The statute clearly precludes, as part of the inquiry regarding the pending WWOR-TV renewal application, any consideration of the station's performance since June 1, 2007 – the date upon which WWOR-TV's *preceding* license term was set to expire.

The Commission has emphasized that "consideration of post-[license] term developments is fundamentally at odds with [the] backwards-looking standard" embodied in Section 309(k) of the Act.⁷ For that reason, the FCC consistently has refused to evaluate a licensee's or station's actions that occur "outside the license term for which the renewal application was filed."⁸ Even the instructions to FCC Form 303-S, the license renewal application, make clear that a licensee is "required to disclose *only* violations of the [Act] or the Rules of the Commission that occurred at the subject station *during the license term . . .*"⁹ MAP curiously ignores Section 309(k) of the Act altogether. It does not acknowledge that Fox invoked Section 309(k) to defend itself against VNJ's identical charges of misrepresentation and lack of candor,¹⁰ let alone explain how these latest repetitious allegations can be squared with the statutory standard.

In fact, the fundamental legal standard embodied in Section 309(k) is of seminal importance to MAP's allegations. For the "*sine qua non* of

⁶ 47 U.S.C. § 309(k) (emphasis supplied).

⁷ *In re Birach Broadcasting Corp.*, 16 FCC Rcd 5015, 5020 (2001).

⁸ *In re K Licensee, Inc.*, 23 FCC Rcd 7824, 7827 (2008); see also *In re Citicasters Licenses, L.P.*, 22 FCC Rcd 19324, 19326 (2007) (construing Section 309(k) as requiring review of a renewal application to be based on "*the preceding term of the station's license . . .*") (emphasis supplied); *In re Rust Communications Group, Inc.*, 73 F.C.C.2d 39, ¶ 29 (1979) ("we will not consider post-term actions . . . which exist independently of license-term conduct").

⁹ FCC Form 303-S, Instructions for Application for Renewal of Broadcast Station License, at 7 (emphasis supplied). In the application itself, Section II, Question 4 directs licensees to certify that no violations have occurred "during the preceding license term."

¹⁰ See Letter to Chairman Genachowski from Antoinette Cook Bush and Jared S. Sher, Counsel to Fox, MB Docket No. 07-260 (dated Jan. 5, 2010).

misrepresentation or lack of candor is *intent* to deceive the Commission.”¹¹ If developments related to WWOR-TV since June 1, 2007 cannot form the basis for evaluation of the station’s pending license renewal application, Fox could not conceivably have had any motive to mislead the Commission about changes made at WWOR in the Summer of 2009. Thus, even assuming all of MAP’s allegations to be true – which they are not – there is no legal basis to support MAP’s claims that Fox engaged in misrepresentation or lack of candor under Commission precedent.

MAP does not even attempt to demonstrate that Fox had the requisite “intent” to deceive.¹² The Commission has defined “misrepresentation” as “a false statement of fact *made with intent to deceive*.”¹³ Similarly, “lack of candor” has been defined as “concealment, evasion, or other failure to be fully informative, *accompanied by intent to deceive*.”¹⁴ Thus, “intent to deceive is a *necessary and essential* element” of misrepresentation and lack of candor.¹⁵ Moreover, the Commission has made clear that it will not “infer actual or attempted deceptions or improper motives from an enumeration of alleged . . . errors, omissions, or inconsistencies, accompanied by speculation and surmise but lacking factual support.”¹⁶ Rather, the Commission looks to an accuser to provide “proof that the party making [a misrepresentation] had knowledge of its falsity.”¹⁷ Likewise, to demonstrate lack of candor, an accuser must show not just that information was withheld, but also “that the party knew that the information was relevant and intended to withhold it.”¹⁸ Accordingly, any party charging another with either of

¹¹ *In re Wireless Telecommunications, Inc.*, 24 FCC Rcd 3162, 3168 (2009) (citing *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983)) (emphasis supplied).

¹² In fact, in the section of the MAP Letter purporting to describe the “Applicable Law,” MAP recites black letter principles of misrepresentation and lack of candor without once acknowledging that “intent” is an essential element of the charges. See MAP Letter, at 5.

¹³ *In re Pendleton C. Waugh, et al.*, 22 FCC Rcd 13363, 13376 (2007).

¹⁴ *Id.*; see also *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994).

¹⁵ *Citadel Broadcasting Co.*, 22 FCC Rcd at 7090 (emphasis supplied); see also *In re Family Broadcasting, Inc.*, 20 FCC Rcd 9463, 9474 (2005) (“misrepresentation or lack of candor requires an ‘actual intent to deceive the Commission’”) (internal citation omitted).

¹⁶ *New Bohemia*, 24 FCC Rcd at 1360, n. 22.

¹⁷ *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991) (quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

¹⁸ *In re Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995) (citing *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993) (no lack of candor where filing was misleading,

these two forms of wrongdoing carries a heavy burden of showing, by “substantial evidence,”¹⁹ the “requisite ‘*prima facie* demonstration of deception, and of a desire, motive or logical reason to mislead’ that is the crux” or misrepresentation and lack of candor.²⁰

The MAP Letter contains no such evidence whatsoever. Instead, it merely lobs grenade after grenade of extremely serious charges, based on nothing more than speculation and surmise. MAP does not offer any factual information, let alone evidence, that anyone associated with Fox had actual knowledge that *ex parte* presentations contained incorrect information.²¹ In fact, MAP does not even specifically allege that Fox *intended* to mislead the Commission. MAP simply leaves the Commission to assume as much from MAP’s conclusory assertions. Absent evidence of intent, however, the FCC has made clear that “the submission of erroneous information through carelessness, inadvertence, or even gross negligence does not constitute misrepresentation.”²²

but made without intent to deceive). *See also Century Cellunet*, 6 FCC Rcd 6150, 6151 (1991) (rejecting charge of misrepresentation when record did “not contain any evidence to refute [party’s] explanation that it merely made a . . . mistake” and when accuser “attempted to establish by *mere allegation* that [the] error was part of an intentional plan”; holding that “speculation . . . unsupported by any evidence tending to show an intent to deceive” is insufficient) (emphasis supplied).

¹⁹ *Liberty Productions*, 16 FCC Rcd at 12085.

²⁰ *See In re Robert J. Kern et al.*, 23 FCC Rcd 13930, 13932 (internal citation omitted). *See also In re Mary V. Harris Foundation*, 22 FCC Rcd 16948, 16951, n. 28 (“party alleging misrepresentation has the burden of proof to make a *prima facie* showing of intent to deceive”) (citing *Merrimack Valley Broadcasting, Inc.*, 99 F.C.C.2d 680, 683, n.9 (1984)).

²¹ Among other things, the MAP Letter is not supported by a sworn declaration of someone with personal knowledge of the facts alleged. Although the MAP Letter itself is not a petition to deny, it seeks to have the renewal applications for WNYW(TV) and WWOR-TV designated for evidentiary hearing on the basis of MAP’s allegations. If the Commission considers the merits of the letter at all, given the seriousness of the charges, it at least should hold MAP to the same standard as other petitioners. Allegations of “ultimate, conclusory facts or more general allegations on information and belief, supported by general affidavits . . . are not sufficient.” *In re North Idaho Broadcasting Co.*, 8 FCC Rcd 1637, 1638 (1993) (quoting *Gencom, Inc. v. FCC*, 832 F.2d 171, n. 11 (D.C. Cir. 1987)). And “allegations must be specific, not those capable of supporting more than one plausible conclusion.” *In re Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992); *see also* 47 C.F.R. § 309(d).

²² *See In re KM Radio of St. Johns, LLC*, 19 FCC Rcd 5847, 5819 (2004) (rejecting “conclusory” allegations as insufficient to support charge of misrepresentation). The MAP Letter, at 5-6, also accuses Fox of violating Section 1.65 of the FCC’s Rules, 47 C.F.R. § 1.65. As the MAP Letter notes, however, violations of Section 1.65 are akin to lack of candor violations. *See id.* at 6. Like

Moreover, in cases involving allegations of misrepresentation and lack of candor, the FCC consistently has observed that licensees' voluntary self-correction of purportedly incorrect facts, or their submission of additional information of their own accord, "belies any intent to deceive the Commission."²³ As explained herein, to the extent that there was any confusion with respect to Fox's *ex parte* presentations in this case, Fox voluntarily submitted to the FCC an edited and revised version of the document in question, without prompting from the Commission and prior to MAP, VNJ or anyone else alleging misrepresentation or lack of candor. As noted, MAP has not even accused Fox of having the requisite intent to deceive, but even if it had, the FCC has said that any "alleged intent to conceal is at odds with [a party's voluntary] disclosure"²⁴

For that matter, the FCC also has refused to "ascribe" to a party a "motive" to deceive when the factual allegations relate to subjects not properly before the Commission for review and when the party, therefore, "would gain no benefit from falsely informing the Commission"²⁵ In *Fatima Response*, for example, the FCC observed that the accused party "would have no reason to misrepresent" its corporate status since charges about the validity of its incorporation were not matters about which the Commission had reason "to inquire."²⁶ The Commission also has rejected allegations about motive to deceive in situations where submitting purportedly incorrect information "would not have changed the outcome of [a] proceeding."²⁷ Likewise, in this case, the renewal standard embodied in Section 309(k) of the Act compels the conclusion that Fox would have no motivation or intention to deceive the FCC about developments at WWOR-TV outside of its

the latter, an essential element of the former is "intent" to deceive. *See, e.g., In re Calvary Chapel of Honolulu, Inc.*, 22 FCC Rcd 17654, 17656 (2007) ("Section 1.65 violations are potentially disqualifying only if an applicant has an intent to conceal information or if omissions of reportable information are so numerous and serious as to undermine the applicant's basic qualifications"). Accordingly, Fox's responses herein with respect to misrepresentation and lack of candor apply with equal force to MAP's unavailing claims regarding Section 1.65.

²³ *In re Woods Communications Group, Inc.*, 12 FCC Rcd 14042, 14047 (1997).

²⁴ *In re State of Oregon Acting By and Through The State Board of Higher Education*, 22 FCC Rcd 17663, 17669 (2007).

²⁵ *In re Fatima Response, Inc.*, 14 FCC Rcd 18543, 18546 (1999), (*recon. dismissed*, 15 FCC Rcd 10520 (2000)) ("*Fatima Response*").

²⁶ *Id.*

²⁷ *See Mary V. Harris Foundation*, 22 FCC Rcd at 16951.

preceding license term, which could not form the proper basis for a Commission review of the pending renewal application.²⁸

In short, because MAP has not shown – indeed has not even alleged – that Fox intended to mislead or conceal information from the Commission, MAP’s misrepresentation and lack of candor allegations warrant no further attention. As the Commission has explained, “failure to demonstrate any motive for deception . . . preclude[s] the need for further inquiry into the possibility of an intentional misrepresentation or lack of candor”²⁹ Regardless of whether certain Fox *ex parte* presentations may have inadvertently caused confusion, there is no legal basis to support a charge of misrepresentation or lack of candor in this case.

Factual Background

Notwithstanding the legal standards outlined above, Fox would like to take this opportunity to again clarify the record with respect to the facts alleged by MAP (and previously by VNJ).

At various times since Fox filed its license renewal application for WWOR-TV, it has met with Commission staff about the renewal standards applicable to broadcast stations and about the station’s service to New Jersey. The Commission designated the license renewal proceeding as permit-but-disclose for purposes of the *ex parte* rules on June 19, 2007, and later announced that it would hold a public hearing in New Jersey about the station’s renewal application.³⁰ As a result, in preparation for engaging in *ex parte* discussions with the FCC staff, and for its appearance at the public hearing, Fox drafted a summary of key issues related WWOR-TV’s renewal application. The document, entitled “WWOR-TV: A Strong Commitment and Record of Service,” dealt with three overarching subjects: (i) it refuted erroneous arguments about the purported “unique” legal standard applicable

²⁸ See also *In re Station WKVE*, 18 FCC Rcd 23411, 23420 (2003) (allegations of misrepresentation did not call into question licensee’s qualifications when “factual question” was “not decisionally significant”).

²⁹ *Century Cellunet*, 6 FCC Rcd at 6151.

³⁰ See Public Notice, Commission Announces Permit-But-Disclose Ex Parte Status for Renewal Applications Filed by Fox Television Stations, Inc., FCC 07-114 (rel. June 19, 2007); Public Notice, FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey (rel. Nov. 8, 2007).

to review of WWOR-TV's service; (ii) it provided a review of WWOR-TV's service to New Jersey during its preceding license term; and (iii) it detailed the legal standards applicable to FCC review of all broadcast license renewal applications under Section 309(k) of the Act (and the First Amendment). The document was first prepared in 2007; Fox has utilized the document (or a form of it) at numerous *ex parte* meetings with the Commission between 2007 and 2009.³¹

In the Summer of 2009, in response to the national economic recession and the substantial economic challenges afflicting the broadcast business, WWOR-TV was forced to make certain adjustments to its programming and staffing levels.³² During approximately the same general timeframe, new staff arrived at the Commission following Chairman Genachowski's June 2009 swearing-in. Because Fox felt – and continues to feel – that the station's license renewal application should be reviewed under the standards established by Section 309(k) of the Act, and given that Fox has demonstrated that WWOR-TV's "obligation to serve the issues and concerns of northern New Jersey is not different in kind or degree from any licensee's obligation to serve its community of license,"³³ Fox scheduled *ex parte* meetings with the new Chief of the Media Bureau and the new General Counsel (and their staffs) for August 25, 2009 to reiterate Fox's view as to the applicable legal standard. Fox focused in both meetings on the legal issues, including the fact that Section 309(k) and Commission precedent regarding WWOR-TV mandate renewal of the station's license (subjects (i) and (iii) in the WWOR-TV paper).³⁴

At these meetings, Fox discussed the same WWOR-TV summary document that it previously had discussed and provided to Commission staff numerous times. Fox submitted written copies of the paper to the FCC along with the *ex parte* notices that it filed on August 26, 2009. Although Fox naturally does not recall with precision exactly what was said at each meeting (which took place more than 16 months ago), to the best of its recollection and belief, Fox *did* share with Commission staff general information about the changes at WWOR-TV that

³¹ See, e.g., Letters to Marlene H. Dortch, Secretary, FCC, from Antoinette Cook Bush and Jared S. Sher, Counsel to Fox (dated Aug. 22, 2008, Sept. 3, 2008, and Sept. 5, 2008).

³² See Declaration of Maureen O'Connell, Senior Vice President, Government Relations, News Corporation (which is Fox's parent company), attached hereto as Exhibit B (the "O'Connell Declaration").

³³ *In re RKO General, Inc.*, 1 FCC Rcd 1081, 1087 (1986).

³⁴ See O'Connell Declaration.

had been necessitated by the economy.³⁵ Again, however, since Fox did not (and does not) view these changes as significant to the pending renewal application, Fox did not focus on these changes during the meetings.³⁶

Because the August 25, 2009 meetings were the first that Fox held with Commission staff in which the quantities of WWOR-TV's news and public affairs programming or staffing were substantively different than those quantities during the preceding term of WWOR-TV's license, it belatedly occurred to Fox following the meetings that some of the text of the WWOR summary document may have been confusing.³⁷ Specifically, a portion of the document – describing the quantities of WWOR-TV's news and public affairs programming, as well as the size of its staff – originally was drafted in the present tense because, at the time that the document was prepared in 2007, the stated quantities were accurate. Although Fox always has believed that the document was intended to reflect (and used to facilitate discussion about) WWOR-TV's service during the time period preceding the filing of its renewal application, it concluded following the August 25, 2009 meetings that the use of present tense was a potential source of confusion.³⁸

Accordingly, Fox directed its counsel to edit and revise the WWOR summary so that, going forward, its text would more precisely characterize the station's stated quantities of news and public affairs programming and staffing levels as those applicable to the legally relevant time period under review.³⁹ *Fox affirmatively and voluntarily took this step, without prompting from the Commission or third parties, in an effort to avoid precisely the types of accusations that nonetheless have arisen here.* Fox felt that, in light of the July 2009 changes, it would be more appropriate to describe certain facts about WWOR-TV in the past

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ MAP erroneously claims that Fox's so-called "misrepresentations were highly material" because VNJ's petition to deny WWOR-TV's renewal application centers on the station's service to New Jersey, including its news and public affairs programming. Map Letter, at 3. MAP, however, ignores the Section 309(k) standard and does not explain how a "misrepresentation" could be "highly material" in a situation where the underlying facts are not even pertinent to the Commission's review. The FCC has emphasized that materiality in connection with misrepresentation and candor cases requires the "underlying matter" to be of "decisional import," which plainly cannot be the case here. *See Pendleton C. Waugh, et al.*, 22 FCC Red at 13376.

³⁹ *See* O'Connell Declaration.

tense, even though the changes were not of decisional significance with respect to the pending renewal application. To be absolutely clear, as the O’Connell Declaration stresses, Fox *never had any desire, intention, goal, design or plan to mislead the Commission*.⁴⁰ Indeed, Fox thought that voluntarily revising the document was the best way to *avoid* an accusation of misrepresentation or lack of candor.⁴¹ As MAP notes,⁴² Fox subsequently used the revised WWOR-TV document (and filed it with the Commission) in connection with *ex parte* meetings held with staff from Commissioner Baker’s and Commissioner Clyburn’s offices on September 3 and September 22, 2009 – literally within weeks of the August 25 meetings.

Moreover, Fox did advise the Commission about the July 2009 changes that had taken place at WWOR-TV. On September 23, 2009, Fox held another set of *ex parte* meetings with Commissioner Clyburn and one of her legal advisors and with a legal advisor to Commissioner Baker at which Dennis Swanson attended. Mr. Swanson, the President of Station Operations for Fox, came to Washington from his office in New York for the express purpose of describing how economic circumstances had impacted the broadcast television station business. This discussion necessarily involved Mr. Swanson providing a general description about the July 2009 changes at WWOR-TV. As the *ex parte* notice submitted the following day specified, “Mr. Swanson . . . explained how the global financial crisis has dramatically hurt the station’s economic fortunes. Furthermore, he pointed out that once the financial crisis ends, WWOR-TV still will have to compete against a whole variety of alternative media, from cable and satellite channels to the Internet –

⁴⁰ See O’Connell Declaration.

⁴¹ See *id.* Fox regrets that it inadvertently may have compounded the misunderstanding here because it did not specifically provide copies of the revised document to the Commission staff with whom it met on August 25, 2009. Given that the purpose and focus of its meetings was the legal standard – and not the facts related to WWOR-TV’s service – and because Fox recalls that it *did* orally provide the staff with general information about the July 2009 changes, Fox did not think that it was necessary to redistribute the revised document. Notwithstanding MAP’s assertion to the contrary, however, Commission precedent makes clear that there is no legal obligation to correct unintentionally misleading information submitted to one office of the Commission if a correction is made elsewhere in the FCC’s records. See, e.g., *Wireless Telecommunications*, 24 FCC Rcd 3162 at 3168 (FCC “declin[ing] to infer intent to deceive . . . when information is elsewhere disclosed or available in its records”); see also *Mary V. Harris Foundation*, 22 FCC Rcd at 16951 (application with incorrect ownership information did not show lack of candor because the corrected information was available in ownership reports separately filed with the Commission; thus, no evidence of intent to deceive).

⁴² See MAP Letter, at 3.

all of which are luring away more and more of the advertising dollars that have comprised WWOR-TV's revenue stream."⁴³

Mr. Swanson's attendance at meetings, including with a Commissioner, to discuss WWOR-TV's service following the July 2009 changes "cuts against [the] theory that [a party] was trying to conceal" anything from the Commission.⁴⁴ Likewise, Fox's voluntary decision to revise the WWOR-TV paper and to file it as part of the record in this proceeding "belies any intent to deceive the Commission."⁴⁵ Finally, because of the backwards-looking renewal standard embodied in Section 309(k) of the Act, any incorrect facts related to WWOR-TV's July 2009 changes would not be relevant to the Commission's review here, and there can be no finding of the requisite intent to deceive if erroneous information "would not have changed the outcome of [the] proceeding."⁴⁶ The FCC has said that the "bare existence of a mistake . . . without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation"⁴⁷ The bottom line here is that even if it made a mistake, and even if its actions could be deemed "careless[]" or "slipshod[]," there still can be no finding of misrepresentation or lack of candor.⁴⁸

Put simply, it would defy logic for Fox to engage in a scheme to intentionally misinform certain Commission staff about WWOR-TV and then weeks later provide the very information it is accused of hiding to other staff, including a Commissioner. If Fox had wanted to conceal facts (to the extent it even could "conceal" the broadcast schedule of programming transmitted over-the-air to the public), why would it have provided that very same information to other key decision-makers just weeks after attempting this supposed artifice? It makes no

⁴³ Letter to Marlene H. Dortch, Secretary, FCC, from Maureen A. O'Connell, News Corporation, MB Docket No. 07-260 (dated Sept. 24, 2009).

⁴⁴ *Calvary Chapel of Honolulu*, 22 FCC Rcd at 17656.

⁴⁵ *Woods Communications Group*, 12 FCC Rcd at 14047.

⁴⁶ *Mary V. Harris Foundation*, 22 FCC Rcd at 16951.

⁴⁷ *Century Cellunet*, 6 FCC Rcd at 6150 (quoting *Kaye-Smith Enterprises*, 71 F.C.C.2d 1402, 1415 (1979)).

⁴⁸ *Citadel Broadcasting*, 22 FCC Rcd at 7090. The Commission also has rejected the notion that "amendments always indicate a known falsehood Our acceptance of that argument would discourage correction of legitimate mistakes or misunderstandings." See *In re Station WKVE*, 18 FCC Rcd 23411, 23417 (2003).

sense, and MAP's conclusory assertions and assumptions cannot show otherwise.⁴⁹ In fact, the MAP Letter appears to seriously misconstrue the applicable legal standard when it claims that "misstatements, standing alone, justify designation of a hearing to examine whether Fox intentionally made material misrepresentations to the Commission."⁵⁰ Quite clearly, if MAP were to have had any chance at sustaining its charges here, it is the one that bore the burden of providing evidence of an intent to deceive. In other words, only if MAP (and VNJ before it) were capable of providing *prima facie* evidence of intent would the Commission be permitted to call for a hearing to determine whether there exists a substantial and material question of fact; MAP should not be permitted to invert the law by simply positing that the existence of misstatements warrants a hearing to question Fox's motives.⁵¹

Even assuming all of the facts in the MAP Letter to be true, there can be no doubt that Fox *did not intend* to deceive the Commission. MAP has not provided any evidence to the contrary. Accordingly, it has not met its burden of demonstrating that there is even a *prima facie* case of misrepresentation or lack of candor in this case.⁵²

⁴⁹ See *New Bohemia*, 24 FCC Rcd at 1360, n. 22 ("Commission will not infer actual or attempted deceptions or improper motives from an enumeration of alleged . . . errors, omissions, or inconsistencies, accompanied by speculation and surmise but lacking factual support").

⁵⁰ MAP Letter, at 6.

⁵¹ MAP also observes that Fox's corrections to the WWOR-TV paper did not provide FCC staff with updated information about the current quantities of news and public affairs programming (and employees) at the station. See MAP Letter, at 7. This is of no import since, as set forth above, developments outside of the station's preceding license term are not pertinent to the pending renewal application. In any event, as Fox explained in its January 5, 2010 letter (at 3) (included herewith at Exhibit A), "[r]egardless of the 'backwards-looking' legal standard, WWOR-TV since the end of its most recent license term has continued to provide the viewers of northern New Jersey with outstanding broadcast service." For instance, even though WWOR-TV is the 6th-ranked English-language station in its market in terms of audience share, the station continues to provide a daily local newscast and it continues to broadcast a weekly public affairs program. The Commission itself found in 2008 that 60 percent of all stations ranked fifth or below in markets nationwide provide *no local news whatsoever*. See *2006 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*, 23 FCC Rcd 2010, 2046 & n. 204 (2008).

⁵² Fox finds it extremely frustrating to have to answer these allegations from MAP even while MAP itself has continued to provide the Commission with information in this proceeding that also could be characterized as misleading. In particular, the MAP Letter was accompanied by a copy of an October 16, 2009 letter submitted by MAP's cohort Office of Communication of United

* * *

The bottom line is that MAP has not supported its misrepresentation and lack of candor allegations with any evidence that Fox intended to deceive the Commission. Because intent is a necessary element of these charges, the Commission should dismiss the MAP Letter and proceed to adjudicate the WNYW(TV) and WWOR-TV license renewal applications on their merits. If it does so, the FCC will find that it has no choice but to conclude that both stations have served the public interest and that, under Section 309(k) of the Act, each deserves to have its license renewal application granted without delay.

Respectfully submitted,



Antoinette Cook Bush

Jared S. Sher

Counsel to Fox Television Stations, Inc.

Church of Christ, Inc. That letter contained a so-called “Fox Ownership Chronology” that purported to describe the history of Fox’s compliance with the NBCO rule. Fox’s November 13, 2009 letter responded by pointing out the numerous factual and legal inaccuracies in this “Chronology.” (For example, the “Chronology” criticizes Fox for allegedly failing to make any effort to come into compliance with the NBCO rule by July 2003, without noting that *the rule had been repealed as of that time*; the “Chronology” also neglects to mention that MAP’s own counsel told a Third Circuit judge that a stay of the order repealing the rule would “effectively continue” existing waivers). The MAP Letter once again references and relies on this “Chronology,” passing it off as a reliable summary of the history of this proceeding, without ever acknowledging any of the significant errors and omissions and the fact that Fox had contested its accuracy. Fox does not by this mean to accuse MAP of misrepresentation or lack of candor, but rather to point out the irony that can result from cavalier attacks of this nature. Perhaps this is why the Commission has recognized that “[m]isrepresentation and lack of candor charges are very grave matters. They ought not to be bandied about.” *See New Bohemia Group*, 24 FCC Rcd at 1360, n. 22 (internal citations omitted).

Chairman Julius Genachowski and Commissioners
January 18, 2011
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Enclosures

cc (via email): William Lake
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Barbara Kreisman
Rick Kaplan
Sherrese Smith
Marilyn Sonn
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Rosemary Harold
Krista Witanowski
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EXHIBIT A

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January 5, 2010

VIA ELECTRONIC MAIL AND HAND DELIVERY

Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Petition to Deny Renewal of Station License of
WWOR-TV; File No. BRCT-20070201AJT
and MB Docket No. 07-260

Dear Chairman Genachowski:

By and through its undersigned counsel, Fox Television Stations, Inc. ("Fox"), licensee of television station WWOR-TV, Secaucus, New Jersey, hereby submits this response to the letter recently submitted to the Commission by Voice for New Jersey ("VNJ") in connection with the above-referenced matters.¹

In its letter, and the accompanying exhibit, VNJ repeats a wide variety of unsubstantiated claims and erroneous legal conclusions that VNJ originally included as part of its 2007 Petition to Deny WWOR-TV's renewal application.²

¹ See Letter from Donna Sandorse, Member, Voice for New Jersey, to Chairman Julius Genachowski, Federal Communications Commission, MB Docket No. 07-260 (dated Nov. 27, 2009) (the "VNJ Letter").

² See *In re Application for Renewal of Station License of WWOR-TV, Secaucus, NJ, File No. BRCT-20070201AJT*, Petition to Deny, Voice for New Jersey (filed April 30, 2007) (the "VNJ Petition to Deny").

The VNJ Letter also attempts to introduce into the record of this proceeding certain new allegations about WWOR-TV's performance since the expiration of the station's most recent license term. Pursuant to the Communications Act of 1934 (the "Act") and well-settled Commission precedent, however, neither the repetitive – and thoroughly-refuted – original assertions nor the new claims possibly could justify a Commission decision to deny WWOR-TV's license renewal application. On the contrary, the evidence in the record of this proceeding overwhelmingly demonstrates that WWOR-TV has provided exemplary service to its community of license and to the greater northern New Jersey geographic area. Accordingly, the VNJ Petition should be dismissed and the WWOR-TV license should be renewed.

As a preliminary matter, the Commission should reject VNJ's attempt to introduce into this proceeding evidence about WWOR-TV's performance since the expiration of its most recent license term.³ As Section 309(k) of the Act makes clear, the Commission is obliged to grant a station's license renewal application "if it finds, with respect to that station, during the *preceding term of its license*" that the station has served the public interest and that there have been no serious violations of the Act or the FCC's Rules (and no other violations that taken together constitute a pattern of abuse).⁴ Quite clearly, the statute precludes, as part of the inquiry regarding the pending WWOR-TV renewal application, consideration of allegations about the station's performance since June 1, 2007 – the date upon which WWOR-TV's *preceding* license term was set to expire.

Indeed, the Commission has emphasized that "consideration of post-[license] term developments is fundamentally at odds with [the] backwards-looking standard" embodied in Section 309(k) of the Act.⁵ For that reason, the FCC consistently has refused to evaluate a licensee's or station's actions that occur "outside the license term for which the renewal application was filed."⁶ Even the instructions to FCC Form 303-S, the license renewal application, make clear that a licensee is "required to disclose *only* violations of the [Act] or the Rules of the

³ See VNJ Letter, at 2, and Exhibit A, at 4-11.

⁴ 47 U.S.C. § 309(k) (emphasis supplied).

⁵ *In re Birach Broadcasting Corp.*, 16 FCC Rcd 5015, 5020 (2001).

⁶ *In re K Licensee, Inc.*, 23 FCC Rcd 7824, 7827 (2008).

Commission that occurred at the subject station *during the license term . . .*”⁷ In short, VNJ’s allegations about WWOR-TV’s service since June 1, 2007 cannot form the basis for an evaluation of the station’s performance during its most recent license term and are therefore irrelevant to the currently-pending license renewal application.⁸

Let there be no mistake, though. Regardless of the “backwards-looking” legal standard, WWOR-TV since the end of its most recent license term has continued to provide the viewers of northern New Jersey with outstanding broadcast service. Even though it is the 6th-ranked English-language station in its market in terms of audience share, WWOR-TV continues to provide a daily local newscast and it continues to broadcast a weekly public affairs program.⁹ Both of these programs

⁷ FCC Form 303-S, Instructions for Application for Renewal of Broadcast Station License, at 7 (emphasis supplied). In the application itself, Section II, Question 4 directs licensees to certify that no violations have occurred “during the preceding license term.”

⁸ In this connection, the Commission also can disregard VNJ’s assertion that Fox has engaged in “significant misrepresentations” to the FCC. *Id.* at 4. VNJ appears to base this claim entirely on an exhibit that Fox submitted with an *ex parte* letter in this proceeding; the exhibit detailed WWOR-TV’s service to New Jersey and addressed certain legal matters – in each case related to the station’s performance during its most recent license term. See Letter from Jared S. Sher, Counsel to Fox, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-260 (dated Aug. 26, 2009), at Exhibit A. VNJ alleges that this exhibit misrepresents the current levels of news and public affairs programming on WWOR-TV. See VNJ Letter, Exhibit A, at 4. As noted above, WWOR-TV’s *current* programming is not relevant to the license term performance that is at issue in this proceeding. Moreover, Fox on its own accord, well before becoming aware of VNJ’s allegations, updated and revised the text of the exhibit to make clear that its representations were intended only to describe the station’s performance during the license term in question. See, e.g., Letters from Antoinette Cook Bush and Jared S. Sher, Counsel to Fox, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-260 (dated Sept. 4 and 23, 2009), at Exhibit A (describing WWOR-TV’s service from 2001 “until the end of its most recent license term” and noting that the station “provided more news coverage” than other New Jersey stations). The VNJ Letter simply ignores these changes when it incorrectly upbraids Fox, in all CAPS, for “RE-SUBMITT[ING]” the same exhibit. VNJ Letter, Exhibit A, at 5. In any event, for the FCC to find that Fox engaged in a misrepresentation, it would have to conclude not only that there was a “false statement of material fact” but also that a false statement was “made with an intent to deceive the Commission.” *In re Citadel Broadcasting Co.*, 22 FCC Rcd 7083, 7090 (2007). Plainly, VNJ’s allegation cannot support either of these elements.

⁹ The Commission itself found in 2008 that 60 percent of all stations ranked fifth or below in markets nationwide provide *no local news whatsoever*. See *2006 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*, Report and Order and Order on Reconsideration, MB Docket No. 06-121, FCC 07-216 (released Feb. 4, 2008), at ¶ 62, n.204. This comes as no surprise, given that lower-ranked stations (especially those not affiliated with a

provide New Jersey viewers with critical news and informational programming, but they certainly are not the only examples of the station's service or commitment to its community. As detailed in its renewal application, and as further described in Fox's Opposition to the VNJ Petition to Deny,¹⁰ WWOR-TV goes out of its way to embed itself in the fabric of its community. From its broadcasts of important community events to its participation in local community causes and activities, the station and its employees are deeply ingrained in New Jersey.

Aside from attempting to introduce new and irrelevant evidence, the VNJ Letter otherwise essentially repeats the arguments raised in VNJ's Petition to Deny. In particular, VNJ asserts that WWOR-TV's license "carries with it a special obligation" to serve New Jersey.¹¹ VNJ also claims, based on the same limited and distorted analysis of the station's performance that undermined the Petition to Deny, that WWOR-TV has failed to meet its public interest obligations.¹² Fox's Opposition thoroughly rebutted each of these arguments, and there is no need here to respond in detail to each and every repetitious claim made by VNJ. Fox does feel, however, that it is important to point out that VNJ continues to misconstrue Commission precedent with regard to both WWOR-TV's so-called "special obligation" and the appropriate degree of governmental oversight of stations' editorial decisions.

First, as Fox made clear in its Opposition, the Commission already expressly considered and rejected the argument that WWOR-TV's service should be judged by a higher standard of review than is applicable to any other station.¹³ FCC precedent makes clear that WWOR-TV's "obligation to serve the issues and concerns of northern New Jersey is not different in kind or degree from any

major broadcast network) cannot generate advertising revenues comparable to higher-ranked stations. VNJ, incidentally, attempts to have it both ways, arguing with equal force that WWOR-TV *should not* receive any *credit* for local programming related to the greater New York metropolitan area but that it *should* be judged *in comparison* to other stations located in New York, "the largest and most lucrative market in the country." VNJ Letter, Exhibit A, at 11.

¹⁰ See *In re Application for Renewal of Station License of WWOR-TV, Secaucus, NJ, File No. BRCT-20070201AJT*, Opposition to Petition to Deny, Fox Television Stations, Inc. (filed May 30, 2007) (the "Fox Opposition").

¹¹ VNJ Letter, Exhibit A, at 1.

¹² See *id.* at 2.

¹³ Fox Opposition, at 16.

licensee's obligation to serve its community of license,"¹⁴ and that WWOR-TV's "performance should be judged in the same manner as any other television station in it[s] overall performance, except that its performance will be tied to northern New Jersey, not primarily Secaucus."¹⁵ The VNJ Letter charges Fox with "misquotation" in citing to the FCC's precedent, but offers no explanation or support for this clearly erroneous accusation.¹⁶ To the extent that the VNJ Letter concedes that WWOR-TV's "special obligation" is limited to, at most, a requirement that the station serve northern New Jersey, rather than just Secaucus,¹⁷ Fox concurs. In fact, Fox noted in its Opposition that any historic reference to a "special obligation" related only to the geographic scope of WWOR-TV's service obligation.¹⁸ If VNJ now agrees that any "uniqueness" applicable to review of WWOR-TV's programming arises at most "from the different 'community' to be served" and does not "give[] the Commission the right or obligation to second-guess the program content or the editorial discretion of this or any other licensee," that would represent substantial progress.¹⁹

¹⁴ *In re RKO General, Inc.*, 1 FCC Rcd 1081, 1087 (1986).

¹⁵ *Id.* at 1086.

¹⁶ VNJ Letter, Exhibit A, at 1. Based on an earlier VNJ filing in this proceeding, VNJ's misquotation allegation appears to stem from a Commission discussion of WWOR-TV's historic obligation to serve its Grade B service area, rather than just its community of license. *See In re Application for Renewal of Station License of WWOR-TV, Secaucus, NJ, File No. BRCT-20070201AJT*, Reply to Opposition, Voice for New Jersey (filed June 20, 2007), at 6 (*citing RKO General*, 1 FCC Rcd at 1087 (describing WWOR-TV's service obligation as the same as other stations "except to the extent of geographic coverage . . .")). Quite clearly, this quotation has nothing to do with any obligation for WWOR-TV to provide a level of service different in kind or degree, in terms of quantity or content, from any other station.

¹⁷ *See* VNJ Letter, Exhibit A, at 1 (arguing that WWOR-TV's is obligated "to give special emphasis to the needs of northern New Jersey").

¹⁸ Fox Opposition, at 4-5.

¹⁹ *RKO General, Inc.*, 1 FCC Rcd at 1086. To the degree that VNJ also complains (Exhibit A, at 3) about the specific quantities of news stories on WWOR-TV related to any particular locale in northern New Jersey, the Commission has emphatically rejected a "quantitative approach" to analyzing licensee performance. *RKO General, Inc.*, 1 FCC Rcd at 1087 (*citing In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d 1076, 1093-94 (1984)). Rather, licensees have broad discretion to select the specific types and amounts of programming necessary to respond to community needs. The Commission already has refused to find that WWOR-TV should be entitled to less latitude than a typical station in the exercise of reasonable editorial discretion. "Our review of [WWOR-TV]'s programming need be no more extensive than we generally undertake in reviewing whether the issues and concerns of a particular service area have been met." *RKO General, Inc.*, 1 FCC Rcd at 1087. Thus, "[j]ust as we would not

Second, as Fox stressed in its Opposition, the First Amendment, the Act and Commission and judicial precedent all make clear that the FCC cannot sit in judgment over a licensee's editorial choices.²⁰ "[B]ecause news and comment programming are at the core of speech which the First Amendment is intended to protect, we have long believed that a particularly high threshold should govern Commission intervention in this area."²¹ Thus, a petitioner to deny can make a *prima facie* case against a license renewal application only if it includes specific allegations of fact which, if true, demonstrate that a "license's *overall* past programming could not reasonably have met the needs and interests of the people within [its] service area"²² A renewal opponent cannot merely allege, as VNJ has done, that a licensee failed to cover certain events that the opponent deems important, for a "licensee is under no obligation to cover each and every newsworthy event which occurs within a station's service area."²³

Moreover, VNJ did not make any attempt in its Petition to Deny to evaluate WWOR-TV's *overall* level of performance.²⁴ Nor does the VNJ Letter do so now. Instead, VNJ continues to assert that WWOR-TV purportedly failed to "provide adequate news coverage," as well as coverage of state elections and government, based only on an incredibly limited analysis that completely excludes the vast majority of WWOR-TV's programming during its most recent license term.²⁵ Indeed, VNJ's allegations rest entirely upon: (i) a 30-day review of local newscasts in 2005; (ii) a review of just 5 issues/programs lists (out of 21 full quarters

purport to tell a licensee of New York City how much coverage it should devote to New York high school sports, neither will we intrude in the editorial discretion of a New Jersey station." *Id.* at 1088.

²⁰ Fox Opposition, at 11-15.

²¹ *In re Liability of NPR Phoenix, L.L.C.*, 13 FCC Rcd 14070, 14072 (1998).

²² *In re Dena Pictures, Inc., et. al.*, 71 F.C.C. 2d 1402, 1405 (1979) (internal citation omitted) (emphasis supplied).

²³ *In re American Broadcasting Companies, Inc.*, 83 F.C.C. 2d 302, 303 (1980). In fact, because a license has "broad discretion to choose, in good faith, which issues are of concern to the community. . . [t]he Commission will not interfere with the broadcaster's judgment without a showing that the broadcaster was unreasonable or discriminatory in its selection of issues" or unless "the licensee has offered such nominal levels of issue responsive programming as to have effectively defaulted on its obligation to the discussion of issues facing its community." *In re: License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, 5 FCC Rcd 3847, 3847-48 (1990).

²⁴ See Fox Opposition, at 9.

²⁵ VNJ Letter, Exhibit A, at 2.

during the term in which Fox operated WWOR-TV); and (iii) VNJ's "analysis" of local news coverage during a 2-week period in 2007.²⁶

Fox's Opposition makes clear that each of these efforts at quantitative analysis is egregiously flawed.²⁷ Not only does VNJ's selective examination of the station's record constitute a woefully deficient sample in comparison to WWOR-TV's overall service, it is also patently unfair for VNJ to credit WWOR-TV with covering an issue relevant to New Jersey viewers only if the story originates within the geographic boundaries of the state. Surely national and international news – not to mention news about the greater metropolitan area in which New Jersey citizens live and work – would be relevant in any legitimate evaluation of a broadcaster's effort to serve its viewers. The station's programming efforts, including its news coverage of events important to northern New Jersey viewers, leaves no doubt that WWOR-TV has satisfied its public interest obligations.²⁸

At base, VNJ's concern is with the editorial choices that WWOR-TV has made in serving New Jersey, but VNJ has no right to appoint itself the editorial judge and jury for all of WWOR-TV's viewers. Fox's Opposition described the precedent pursuant to which the Commission consistently has concluded that it does "not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste."²⁹ Moreover, the FCC has said that "it is not the proper concern of this Commission why a licensee" presents one particular story in lieu of another.³⁰ Those choices are "matters for the journalistic judgment" of licensees and are not reviewable.³¹

²⁶ See *id.* at 2-3.

²⁷ See Fox Opposition, at 18-29.

²⁸ See, e.g., *In re Chicago Media Action and Milwaukee Public Interest Media Coalition*, 23 FCC Rcd 10608, 10609-10 (2008) (rejecting petition to deny that focused only on early and late evening local newscasts, which did "not provide a comprehensive analysis of programming aired on these stations" and "did not demonstrate that television programming in Chicago and Milwaukee has generally been unresponsive") (internal citations omitted).

²⁹ Fox Opposition, at 12 (citing *In re Complaints Concerning Network Coverage of the Democratic National Convention*, 16 F.C.C. 2d 650, 654 (1969)).

³⁰ *Democratic National Convention*, 16 F.C.C. 2d at 655.

³¹ *Id.* See also *In re Oregon Alliance to Reform Media*, 22 FCC Rcd 15183, 15184 (2007) (rejecting a petition to deny that alleged a failure to "present adequate programming related to state and

Finally, the Commission should disregard the unsupported allegations contained in the VNJ Letter with respect to the employee presence at WWOR-TV's headquarters in Secaucus, New Jersey.³² VNJ asserts, in entirely vague terms and without any supporting declaration or affidavit from an individual with personal knowledge of the charges, that WWOR-TV is only "keeping the lights on in New Jersey" and that the station's staff "spends the bulk of their time in New York."³³ The VNJ Letter also claims that during an unspecified "visit" by one of its unnamed members to the Secaucus facility, the building appeared nearly "deserted."³⁴ These allegations are completely without merit. WWOR-TV maintains a management and production staff with more than 75 employees *in its New Jersey facility every day*.³⁵ Staffers are in the building from approximately 7 a.m. until 11:45 p.m. each day; indeed, the WWOR-TV local newscast is produced live from the Secaucus facility.³⁶ A visitor to the station's public inspection file would hardly be expected to tour the entire 110,000 square foot facility, and it is entirely unclear on what basis VNJ could claim with any reliability that the building appeared "deserted."³⁷

VNJ fares no better in challenging WWOR-TV's "regulatory compliance" with respect to record-keeping of viewer correspondence.³⁸ VNJ claims that one of its members recently reviewed the station's public file "in an effort to gauge community reaction" to the station's current programming schedule.³⁹ VNJ then expresses incredulity that the station received a total of only five viewer comments regarding programming issues during a 90-day period over the Summer of

local elections and ballot issues" because the petition failed to "provide evidence that the named licensees exercised their editorial discretion in bad faith").

³² VNJ Letter, Exhibit A, at 5.

³³ *Id.*

³⁴ *Id.* at 6.

³⁵ *See* Declaration of Audrey Pass, Senior Director of Communications and Public Affairs, WWOR-TV, attached hereto as Exhibit A.

³⁶ *See id.*

³⁷ VNJ also suggests that WWOR-TV on-air talent has been shifted to another station, claiming (again without support) that longtime WWOR-TV news anchor Harry Martin "has recently been absent from WWOR's new broadcasts." VNJ Letter, Exhibit A, at 6. To be clear, Mr. Martin remains anchor of the WWOR-TV news. *See* Declaration of Audrey Pass.

³⁸ VNJ Letter, Exhibit A, at 7.

³⁹ *Id.*

2009.⁴⁰ Although it does not allege that any viewer comments were in fact missing, VNJ “urge[s]” the Commission to “look closely into this matter.”⁴¹ Despite VNJ’s professed surprise about the volume of programming-related comments in WWOR-TV’s public file, its subjective concerns do not amount to a specific allegation of fact that warrants any Commission review.⁴² Moreover, in a touch of irony apparently lost of VNJ, the group’s expression of shock at the volume of programming-related public comments comes notwithstanding the fact that VNJ itself did not submit any of its own comments to the station during the Summer of 2009.

* * *

In sum, the VNJ Letter raises no new issues that bear on the WWOR-TV license renewal proceeding. To the extent that VNJ presents allegations about the station’s service outside of the license term under review, Commission precedent makes clear that these allegations are not germane to the pending application. Aside from the these unripe allegations, the VNJ Letter merely rehashes arguments that have been thoroughly rebutted by Fox’s Opposition to the VNJ Petition to Deny. Accordingly, given WWOR-TV’s exemplary service to northern New Jersey, Fox respectfully requests that the Commission dismiss the Petition to Deny and promptly grant the station’s license renewal application.

⁴⁰ See *id.* at 8.

⁴¹ *Id.*

⁴² As the VNJ Letter notes (*id.*), WWOR-TV acknowledged to VNJ’s representative that a handful of viewer emails had been mis-filed during July, August and September 2009. After a VNJ representative visited the station to review the public file and asked questions about viewer comments related to news and public affairs programming, WWOR-TV staff conducted a thorough search and discovered that a temporary staffer employed during the Summer of 2009 had mis-filed 5 viewer emails related to news programming (all of which related to the rescheduling of the station’s weeknight local newscast from 10 p.m. until 11 p.m.). WWOR-TV promptly notified VNJ’s representative of this information and placed the mis-filed emails into the proper location in the station’s public file. WWOR-TV has taken steps to ensure that employees responsible for filing viewer emails receive better training in the future. See Declaration of Audrey Pass. In any case, as described above, even if there were issues relating to the WWOR-TV public file in 2009, they would have no bearing on the station’s pending renewal application.

Chairman Julius Genachowski
January 5, 2010
Page 10

Respectfully submitted,



Antoinette Cook Bush
Jared S. Sher

Counsel to Fox Television Stations, Inc.

cc (via email): Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
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EXHIBIT A

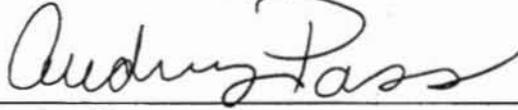
DECLARATION

I, Audrey Pass, hereby state as follows:

1. I am Senior Director of Communications and Public Affairs for WWOR-TV, Secaucus, New Jersey. I submit this Declaration in connection with Fox Television Stations, Inc.'s letter responding to the letter from Voice for New Jersey ("VNJ"), dated November 27, 2009, submitted as part of the record in MB Docket No. 07-260.
2. WWOR-TV continues to operate out of a 110,000 square-foot headquarters facility in Secaucus, New Jersey. The facility serves as the station's main studio. WWOR-TV employs more than 75 people. The Secaucus facility is staffed with employees daily between the hours of approximately 7 a.m. and 11:45 p.m. WWOR-TV originates its live broadcast of a local newscast from the Secaucus facility each weekday.
3. Harry Martin continues to serve as the co-lead anchor (with Brenda Blackmon) for WWOR-TV's local newscast.
4. On or about November 4, 2009, an individual who identified himself as Charles Lovey (who previously has submitted filings to the Commission as a member of VNJ) visited WWOR-TV's Secaucus, New Jersey main studio and requested to inspect the public file. After he was given access to the file, he asked if the station had received any viewer comments during July, August and September 2009 related to WWOR-TV's decision to eliminate its regularly-scheduled weekend newscast and its public affairs program entitled "Real Talk."
5. On or about November 5, 2009, I called Mr. Lovey and informed him that I was looking into his question. I conducted research and determined that, with respect to viewer comments related to news and public affairs programming that the station received during July, August and September 2009, five emails had been mis-filed. All five of these emails related to WWOR-TV's decision to reschedule its local newscast from 10 p.m. to 11 p.m. on weeknights.
6. Promptly thereafter, I called Mr. Lovey again and informed him that five viewer emails related to news programming had been found mis-filed. I described the correspondence to him and invited him to return to WWOR-TV's main studio to view the emails (which by then had been placed in the proper file). Mr. Lovey expressed surprise that the station had not received any additional programming-related viewer correspondence, particularly related to weekend news and public affairs programming, during July, August and September 2009.
7. Upon further research, I determined that the five emails had been mis-filed by a temporary staff member employed by the station during the Summer of 2009. I determined that this staff member had not received adequate training, and I

coordinated with WWOR-TV's Vice President who oversees viewer services to ensure that supervisors provide better training for employees responsible for filing viewer emails.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, information and belief. Executed on January 5, 2010.

A handwritten signature in cursive script that reads "Audrey Pass". The signature is written in black ink and is positioned above a horizontal line.

Audrey Pass
Senior Director of Communications
and Public Affairs
WWOR-TV, Secaucus, New Jersey
9 Broadcast Plaza
Secaucus, NJ 07096

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November 13, 2009

Marlene H. Dortch
Secretary
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445 12th Street, S.W.
Washington, D.C. 20554

RE: *Fox Television Stations, Inc. Applications for Renewal of Licenses of WNYW(TV) and WWOR-TV and Supplement to Petition for Modification of Permanent Waiver, Files Nos. BRCT-20070201AJS and BRCT-20070201AJT, and MB Docket No. 07-260*

Dear Ms. Dortch:

By and through their counsel, Fox Television Stations, Inc. ("Fox") and News Corporation ("News Corp") hereby submit this brief response to the letters from Adrienne Biddings to the Commission reporting on *ex parte* meetings between Commission staff and representatives of the Office of Communication of United Church of Christ, Inc. ("UCC") in connection with the above-referenced matters.¹ During its meetings, UCC made certain representations to the Commission regarding the status of Fox's license renewal applications for WNYW(TV) and WWOR-TV, as well as Fox's and News Corp's request for waiver of the newspaper-broadcast cross-ownership ("NBCO") rule in the intensely competitive and diverse New York market. Fox and News Corp submit this letter to set the record straight with respect to the several incorrect or incomplete assertions contained in the UCC Letters.

¹ See Letters from Adrienne Biddings, Institute for Public Representation, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-260 (dated Oct. 16, 2009 and Oct. 30, 2009) (the "UCC Letters").

In particular, Fox and News Corp strongly dispute the accuracy of the so-called “Fox Ownership Chronology” that UCC discussed at its October 15 meeting (and which was appended to one of the UCC Letters).² The chronology inexplicably omits several key facts, utterly ignores important steps taken by the Commission and the courts, and ultimately paints an exceedingly misleading picture of the history of Fox’s and News Corp’s efforts to seek relief from the NBCO rule – a rule that the Commission twice now has concluded abrogates the public interest. For example, even as UCC cites favorably to the decision of the U.S. Court of Appeals for the Third Circuit in the *Prometheus* case,³ the chronology makes no mention whatsoever of the fact that the court found that “reasoned analysis support[ed] the Commission’s determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest.”⁴ Collectively, this and other flaws so thoroughly undermine the validity of the UCC chronology that it simply should not be relied upon in making any substantive determinations about these proceedings. Attached hereto for the Commission’s reference is a revised clean version of the chronology that corrects UCC’s omissions and errors, together with a redline marked to show the changes.

Moreover, contrary to UCC’s erroneous assertion, Fox and News Corp are and always have been in compliance with the NBCO rule, as it has been applicable to them based on Commission waivers. UCC disingenuously asserts that “although the FCC’s approval of Fox’s acquisition of WWOR in July 2001 had been conditioned on its compliance with the [NBCO rule] within 24 months, it has been more than eight years, and Fox still has not complied with the NBCO rule.”⁵ In order to make this misguided claim, though, UCC totally disregards the facts. The reality is that when the Commission consented to Fox’s acquisition of WWOR-TV, it specifically said that Fox would need to come into compliance with the NBCO rule only “*insofar as it is necessary under our rules at that time.*”⁶

² See UCC Oct. 16 Letter, at Attachment (consisting of the “Fox Ownership Chronology”).

³ See *id.* at 2-3 (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus*”).

⁴ *Prometheus*, 373 F.3 at 398.

⁵ UCC Oct. 16 Letter, at 1; see also UCC Oct. 30 Letter, at 1.

⁶ *In re Applications of UTV of San Francisco, Inc., et al. (Assignors) and Fox Television Stations, Inc. (Assignee)*, Memorandum Opinion & Order, 16 FCC Rcd 14975, ¶ 50 (2001) (“It is Further Ordered, That . . . [FTS] is granted a temporary 24-month period within which to come into

The Commission also noted that “[i]f our rules should change during that period to permit the proposed combination, then FTS and [K. Rupert Murdoch, News Corp’s chief executive officer] will not need to divest the [*New York Post* or one of the television stations to come into compliance.”⁷ As is clear from the corrected chronology, the NBCO rule *did* change during the intervening 24 months – the Commission voted to repeal the rule in June 2003.⁸ Furthermore, as UCC acknowledges, the Commission subsequently granted Fox and News Corp an additional temporary waiver in 2006 as part of the reorganization of Fox Television Holdings, Inc.⁹ And throughout the past 8 years, Fox and News Corp repeatedly and consistently have demonstrated both that this outmoded regulation should be repealed and that they are entitled to relief from its application in the nation’s most competitive and diverse media market. There is simply no basis for UCC’s implication that Fox has ignored or flouted the NBCO rule for any period of time.

In addition, UCC attempts to question Fox’s and News Corp’s basis for maintaining their ownership of WNYW(TV), WWOR-TV and the *New York Post* during the pendency of their requests for extension and modification of the waiver.¹⁰ Fox and News Corp filed with the Commission a letter in December 2008, prior to the scheduled expiration of the 2006 waiver, explaining that, since the Commission had not yet acted on the multiple pending filings, the “existing temporary waiver will remain in effect pending a Commission decision on the merits of their requests.”¹¹ The letter added that, “[s]hould there be any question about the status of their temporary waiver,” Fox and News Corp “request, out of an abundance of caution, a temporary extension of their waiver of the NBCO rule . . . to permit common ownership” of these three media outlets “while the FCC completes its review.”¹² Commission precedent makes clear that Fox’s and News Corp’s temporary waiver

compliance with the [NBCO rule] . . . *insofar as it is necessary under our rules at that time*”) (emphasis supplied).

⁷ *Id.* at ¶ 45 n.73.

⁸ *See In re 2002 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*, 18 FCC Rcd 13620 (2003) (*rev’d and remanded*, *Prometheus*, 373 F.3d at 372).

⁹ *See* UCC Oct. 16 Letter, at 1; UCC Oct. 30 Letter, at 1.

¹⁰ *See* UCC Oct. 16 Letter, at 2; UCC Oct. 30 Letter, at 1-2.

¹¹ Letter from Antoinette Cook Bush and Jared S. Sher, Counsel, Fox Television Stations, Inc. and News Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, BTCCT-20050819AAF, *et al.*, Status of Waiver (filed Dec. 24, 2008), at 2.

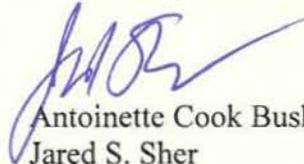
¹² *Id.*

“remain[s] in force” inasmuch as the Commission has not yet acted on their extension request or the modification petitions.¹³ Although UCC has “questioned the legal basis” for this precedent, it cites to no countervailing authority.¹⁴ UCC’s discomfort with the law notwithstanding, Fox and News Corp have not violated any Commission rule or requirement.

If there is one thing about which Fox and News Corp can agree with UCC, it is that these proceedings – together with Fox’s and News Corp’s various efforts to seek a final, permanent answer to the questions raised here – have been pending for far too long.¹⁵ Rather than suggest that an NBCO waiver in New York is unjustified as UCC alleges, however, the passage of time has served only to underscore that grant of the requested waiver would promote the public interest by preserving a diverse media outlet in an incredibly difficult economic environment for daily newspapers and television stations.

In short, there can be no doubt that in a market as diverse and competitive as New York, common ownership of WNYW(TV), WWOR-TV and the *New York Post* causes no public interest harms and should be permitted. Accordingly, Fox and News Corp again request that the Commission grant their waiver request and finally bring to a close this years-long proceeding.

Respectfully submitted,



Antoinette Cook Bush
Jared S. Sher

*Counsel to Fox Television Stations, Inc.
and News Corporation*

¹³ *In re Counterpoint Communications, Inc. (Transferor) and Tribune Television Co. (Transferee)*, 20 FCC Rcd 8582, 8590 (2005) (affirming the Media Bureau’s determination that the holder of an NBCO rule waiver “was ‘in full compliance’ with the Commission’s multiple ownership rules” while its request for a waiver extension was pending) (citing *Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. c/o R. Clark Wadlow, Esq.* (Sept. 5, 2003)).

¹⁴ UCC Oct. 16 Letter, at 2; UCC Oct. 30 Letter, at 1-2.

¹⁵ See UCC Oct. 16 Letter, at 2; UCC Oct. 30 Letter, at 2.

Marlene H. Dortch
November 13, 2009
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Enclosures

cc (via email): William Lake
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Mania Baghdadi
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Alexis Zayers
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University Law Center

COMPLETE FOX OWNERSHIP CHRONOLOGY

- 1976** -News Corporation (“News Corp”), through a subsidiary distinct from Fox Television Stations, Inc. (“Fox”), purchased the *New York Post*.
- 1986** -Fox acquired WNYW, a television station located in the New York DMA, and pursuant to its 1985 license transfer, was given two years to divest its interests in the *New York Post*. *Metromedia Radio & Television, Inc.*, 102 FCC2d 1334 (1985).
- Mar. 1988** -Pursuant to the FCC’s two year divestiture requirement, Fox sold the *New York Post* to real estate developer Peter S. Kalikow.
- 1993** -Fox reacquired the *New York Post* after Mr. Kalikow’s financial difficulties led the paper’s parent company to declare bankruptcy.
- Due to the lack of qualified purchasers or other viable alternatives that would ensure the survival of the newspaper, News Corp agreed to reassume management of the paper upon obtaining a permanent waiver of the newspaper/broadcast cross-ownership (NBCO) rule. Thus, Fox requested and received a permanent waiver of the NBCO rule to allow common ownership of the *New York Post* and WNYW. *Fox Television Stations Inc.*, 8 FCC Rcd 5341, 5354 (1993).
- Sept. 2000** -Fox proposed to acquire ten television stations from Chris-Craft Industries, Inc., including WWOR-TV, another television station located in the New York DMA.
- Fox argued that its 1993 permanent waiver should extend to its acquisition of WWOR-TV, or in the alternative, that it should receive an “interim waiver” until conclusion of the rulemaking proceeding that the Commission committed to initiate in the 1998 Biennial Regulatory Review of the Commission’s broadcast ownership rules.
- UCC, Rainbow/PUSH, and others opposed Fox’s acquisition of WWOR-TV.
- July 2001** -The Commission concluded “that it would be in the public interest to grant [Fox] a temporary 24-month period within which to come into compliance with the television/newspaper cross-ownership rule in the New York market . . .”, but only “insofar as it is necessary under our rules at that time . . .” *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14989-14990 (2001) (“Chris-Craft Order”). In an unpublished opinion, the D.C. Circuit affirmed the FCC’s ruling. It found that the FCC had made an adequate public interest finding to approve the transfer, noting that “[a]lthough Fox could not fully complete Form 314 because it required waivers, to the extent that Fox required these waivers, the Commission found that granting temporary waivers would serve the public interest, and, therefore, the acquisition was in the public interest.” *Office of Comm’n of the United Church of Christ v. FCC*, 51 Fed. Appx. 21 (2002).

-The Commission rejected Fox's claim that the 1993 permanent waiver extended to the acquisition of WWOR-TV because a waiver granted during one set of market conditions "is not automatically extended to cover new combinations several years later under potentially changed market conditions." Chris-Craft Order, 16 FCC Rcd at 14977.

June 2003 -The Commission repealed the NBCO rule, finding that "neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market . . . nor a cross-service restriction on common ownership of radio and television outlets in the same market . . . remains necessary in the public interest"; the FCC replaced the rule with cross media limits allowing cross-ownership in most markets, including New York. *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003).

July 2003 -Absent the Commission's decision to repeal the NBCO rule, Fox's two-year temporary waiver would have expired on July 31, 2003. As the Commission said in the Chris-Craft Order, "[i]f our rules should change during [the 24 month waiver period] to permit the proposed combination, then FTS and Murdoch [News Corp's chief executive officer] will not need to divest the *Post* or one of the television stations to come into compliance." 16 FCC Rcd at 14990. Given that the rule had been repealed, Fox filed a letter with the Commission on July 21, 2003, seeking a temporary extension of the waiver to the extent necessary to permit the new ownership rules to go into effect.

Sept. 2003 -The Third Circuit stayed implementation of all the Commission's proposed new rules, ordering that the *status quo ante* remain in effect pending judicial review. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398, 435 (3d. Cir. 2004). At oral argument before issuing the stay, Judge Scirica specifically asked appellant's counsel: "A stay would not affect any of the temporary waivers?" Counsel responded: "It would effectively continue them." Judge Scirica followed: "It would effectively continue them, but it would not abrogate them?" Counsel replied: "That's correct." *Prometheus Radio Project et. al. v. FCC*, Case No. 03-3388, Transcript of Hearing on Motion to Stay, September 3, 2003, at 36.

July 2004 -The Third Circuit reversed the FCC's adoption of the cross media limits, but specifically found that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast crossownership was no longer in the public interest," that "the newspaper/broadcast cross-ownership ban undermined localism" and that the ban was not necessary to promote diversity; the court clarified that all of the old ownership rules would remain in effect pending judicial review of the FCC's decision on remand. *Prometheus*, 373 F.3d at 398-99, 435.

- Sept. 2004** -Fox and News Corp filed a “Petition for Modification of Permanent Waiver,” requesting that the Commission either modify their existing permanent waiver to permit common ownership of WWOR-TV, WNYW, and *The New York Post*, or to grant an additional temporary waiver until after the Commission’s action on remand from the 2002 Biennial Regulatory Review.
- Aug. 2005** -While its 2004 waiver request was pending, Fox sought FCC consent to undertake a corporate restructuring, necessitating the filing of a Form 315 transfer of control application, which detailed why the proposed recapitalization should have no bearing on the existing waivers of the NBCO rule permitting common ownership of the *Post* together with WNYW(TV) and WWOR-TV; a copy of the 2004 Modification Petition also was included as part of the application.
- Oct. 2006** -Almost three years after the FCC’s 2001 two-year waiver initially was set to expire for WWOR- TV, and more than three years after the FCC’s decision to repeal the NBCO rule, the FCC voted three to two to approve the corporate restructuring that transferred control of WWOR-TV and WNYW. *K. Rupert Murdoch, (Transferor) and Fox Entertainment Group (Transferee)*, 21 FCC Rcd 11499 (2006). The FCC has withheld the dissents of both Commissioners Adelstein and Copps.
- The FCC granted a new permanent waiver for WNYW and *The New York Post*, and granted a new 24-month temporary waiver permitting continued common ownership of WWOR-TV (which was scheduled to expire December 29, 2008). *Id.*
- The temporary waiver for WWOR-TV was granted to provide “sufficient certainty to assure that [Fox] and News Corp. will continue to take appropriate action or expend necessary capital to preserve and expand *The New York Post* without a concern that it would have to forfeit that investment by closing the newspaper or by a forced sale of a media interest at an artificially depressed price to achieve compliance with the multiple ownership rules” and “to ensure that the very purpose of the [NBCO] rule – to preserve competition and existing service to the public – is not disserved by a forced divestiture . . . in a market more than sufficiently competitive to withstand the harms that the rule was designed to prevent.” *Id.* at 11502.
- Nov. 2006** -The UCC and Rainbow/PUSH filed a petition for reconsideration with the FCC, asking it to reconsider and reverse its October 2006 Order; Fox filed an opposition to the petition.
- Feb. 2007** -Fox filed license renewal applications for WNYW and WWOR-TV. *See* http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101167338&formid=303&fac_num=74197.
- May 1, 2007** -UCC and Rainbow/PUSH filed a petition to deny these applications.

- May 31, 2007** -Fox filed an opposition to UCC and Rainbow/PUSH's petition to deny.
- Nov. 28, 2007** -Media Bureau held public forum in Newark, NJ to receive public input regarding sufficiency of WWOR-TV's programming effort in New Jersey.
- Feb. 2008** -The Commission released its order concluding the 2006 Quadrennial Review, "reaffirm[ing] [its] decision to eliminate the blanket ban on newspaper/broadcast cross-ownership . . .," and relaxing the NBCO rule and abandoning the cross-media limits adopted in 2003. The implementation of the Commission's relaxed NBCO rule is still under a stay pending the Third Circuit's review of the rule. *In re 2006 Quadrennial Review*, 23 FCC Rcd 2010, 2021 (2008).
- Although numerous licensees with outstanding license applications were referenced in the Commission's Order, Fox was not mentioned.
- June 23, 2008** -Fox and News Corp filed Supplement to Petition for Modification of Waiver, sought waiver under either old or new test.
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- May 22, 2009** -FCC released the order adopted Jan. 15, 2008, denying UCC's and Rainbow/PUSH's petition for reconsideration of the order granting consent to Fox's transfer of control. The Commission "reaffirm[ed] that our decision to renew the permanent waiver permitting ownership of WNYW-TV and the *New York Post* and to grant a temporary waiver permitting the further ownership of WWOR-TV was supported by the facts in the record and was in the public interest." See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion and Order on Reconsideration, FCC 08-15 (rel. May 22, 2009), at ¶¶ 13, 19.
- July 15, 2009** -UCC, Rainbow/PUSH and Free Press filed an opposition to Fox's and News Corp's Supplement to Petition for Modification of Permanent Waiver.
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(2002). ~~The Commission granted the waiver in order to permit an orderly disposition of assets and avoid forced sales.~~ 16 FCCR at 14989.

-The Commission rejected Fox's claim that the 1993 permanent waiver extended to the acquisition of WWOR-TV because a waiver granted during one set of market conditions "is not automatically extended to cover new combinations several years later under potentially changed market conditions." ~~Id.~~ Chris-Craft Order, 16 FCC Rcd at 14977.

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July 2003 -~~Fox~~ Absent the Commission's decision to repeal the NBCO rule, Fox's two-year temporary waiver expires without Fox having made any effort to come into compliance with the rule would have expired on July 31, 2003. As the Commission said in the Chris-Craft Order, "[i]f our rules should change during [the 24 month waiver period] to permit the proposed combination, then FTS and Murdoch [News Corp's chief executive officer] will not need to divest the Post or one of the television stations to come into compliance." 16 FCC Rcd at 14990. Given that the rule had been repealed, Fox filed a letter with the Commission on July 21, 2003, seeking a temporary extension of the waiver to the extent necessary to permit the new ownership rules to go into effect.

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NBCO ownership rules would remain in effect pending judicial review of the FCC's decision on remand. Prometheus, 373 F.3d at 398-99, 435. Id.

~~Fox still had made no efforts to come into compliance with the NBCO as the Commission ordered 3 years prior in July 2001.~~

Sept. 2004 -Fox and News Corp filed a "Petition for Modification of Permanent Waiver," requesting that the Commission either modify their existing permanent waiver to permit common ownership of WWOR-TV, WNYW, and The New York Post, or to grant an additional temporary waiver until after the Commission's action on remand from the 2002 Biennial Regulatory Review.

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Feb. 2007 -Fox filed license renewal applications for WNYW and WWOR-TV. *See* http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101167338&formid=303&fac_num=74197.

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~~May 22, 2009 -FCC releases order adopted Jan. 15, 2008, denying UCC's Pet for recon. Of transfer for failure to demonstrate good cause.~~

[May 22, 2009 -FCC released the order adopted Jan. 15, 2008, denying UCC's and Rainbow/PUSH's petition for reconsideration of the order granting consent to Fox's transfer of control. The Commission "reaffirm\[ed\] that our decision to renew](#)

[the permanent waiver permitting ownership of WNYW-TV and the *New York Post* and to grant a temporary waiver permitting the further ownership of WWOR-TV was supported by the facts in the record and was in the public interest.” See *In re K. Rupert Murdoch \(Transferor\) and Fox Entertainment Group \(Transferee\)*, Memorandum Opinion and Order on Reconsideration, FCC 08-15 \(rel. May 22, 2009\), at ¶¶ 13, 19.](#)

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Insertions	95
Deletions	70
Moved from	0
Moved to	0
Style change	0
Format changed	6
Total changes	171

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September 15, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Files Nos. BRCT-20070201AJT and -20070201AJS
MB Docket No. 07-260
Fox Television Stations, Inc. and News Corporation
Request for Waiver of the Newspaper/Broadcast Cross-
Ownership Rule for WWOR-TV and WNYW(TV)

Dear Ms. Dortch:

By and through their counsel, Fox Television Stations, Inc. ("Fox") and News Corporation ("News Corp") hereby submit this letter to briefly respond to the Opposition pleading submitted July 15, 2009 by the Office of Communication, United Church of Christ, Inc. ("UCC"), Rainbow/PUSH Coalition and Free Press (collectively, "UCC *et al.*") in connection with the above-referenced request for waiver of the newspaper/broadcast cross-ownership ("NBCO") rule in the intensely competitive New York market.¹ The Opposition, *submitted more than one year after Fox and News Corp* filed a supplement to bolster their long-standing request for waiver, raises no new issues and therefore warrants only a brief response.

¹ See *In re Fox Television Stations, Inc., Applications for Renewal of License of WWOR-TV and WNYW, Request for Waiver of the Newspaper-Broadcast Cross-Ownership Rule Relating to WWOR-TV and the New York Post*, File Nos. BRCT-20070201AJT, BRCT-20070201AJS; MB Docket No. 07-260, Opposition of Office of Communication, United Church of Christ, Inc., Rainbow/PUSH Coalition and Free Press, dated July 15, 2009 (the "Opposition").

First and foremost, Fox and News Corp continue to believe, as they set forth in the Supplement, that their request for waiver of the NBCO rule in New York should have been granted several years ago.² Fox and News Corp originally submitted their waiver request in 2004.³ Had the Commission acted on the request at that time, or during the subsequent four years, it would have been compelled to grant Fox and News Corp a waiver permitting common ownership of two television stations (WNYW(TV) and WWOR-TV) and a daily newspaper (the *New York Post*) in New York, the nation's most diverse and competitive media market. This was especially clear after the Commission's judicially-affirmed decision to repeal the NBCO rule in 2003 upon finding that the rule may harm the FCC's localism goal while providing no benefit to the goals of diversity or competition.⁴

Because their request remained pending for years without action, however, Fox and News Corp filed the Supplement in June 2008 as called for in the Commission's 2006 quadrennial media ownership review order.⁵ In the Supplement, Fox and News Corp reiterated the manifold justifications warranting relief from the NBCO rule in a media market as vibrant as New York; they also explained that common ownership of these three non-dominant media outlets could not possibly cause any harm to the public interest. The Supplement also set forth the reasons why, even if the Commission were to review the request under the new four-factor test established in the quadrennial review proceeding, Fox and News Corp still deserved a waiver in New York – a market with literally hundreds of independently-owned media voices.

² See *In re Fox Television Stations, Inc., et al.*, Supplement to Petition for Modification of Permanent Waiver, filed June 23, 2008 (the "Supplement").

³ See *In re Fox Television Stations, Inc. and The News Corporation Limited, Request for Waiver of the Newspaper/Broadcast Cross-Ownership Rule Relating to WNYW(TV), WWOR-TV and the New York Post*, Petition for Modification of Permanent Waiver, filed September 22, 2004 (the "Modification Petition").

⁴ See *In re 2002 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*, 18 FCC Rcd 13620 (2003) ("2003 Biennial Review Order"), *rev'd and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (but court finding that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest").

⁵ See *In re 2006 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*, Report & Order, MB Docket No. 06-121, FCC 07-216 (rel. February 4, 2008) (the "2008 Report & Order").

Shortly thereafter, Rainbow/PUSH and UCC submitted a letter to the Commission expressing an intent to oppose the Supplement.⁶ They waited more than a year, however, to actually file the Opposition (without offering any good reason to justify their delay). In the meantime, UCC and Free Press separately sought reconsideration of (and filed an appeal in the D.C. Circuit relating to) the Commission's decision to grant consent to Fox's recapitalization transfer of control (which included a temporary extension of Fox's and News Corp's NBCO rule waiver in New York).⁷ Apparently, UCC *et al.* have now filed the Opposition because they are dissatisfied that the Commission consistently has ruled against them in the transfer of control proceeding. They should not be permitted, however, to serially file repetitive opposition documents one after another each time they encounter a defeat on the merits. Fox and News Corp submit that the Commission should not countenance these types of delay tactics, which can only be intended to impede finality in a waiver proceeding that has now been pending for nearly five years.

In any event, with regard to the arguments raised in the Opposition, Fox and News Corp submit that the filings that already comprise the record of these proceedings amply demonstrate that grant of a waiver is warranted here. Indeed, this ground has been trod heavily before. Rather than repeat all of the various arguments in response to UCC *et al.*'s latest salvo, Fox and News Corp simply request that the Commission consider its recently-filed opposition to Free Press' petition for reconsideration⁸ (together with the other record filings in these proceedings) as a fulsome response to the repetitious claims raised in the Opposition.⁹

⁶ See Letter to Marlene H. Dortch, Secretary, FCC, from Jessica J. Gonzalez, Counsel to Rainbow/PUSH and UCC, dated June 30, 2008.

⁷ See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion and Order, 21 FCC Rcd 11499 (2006); *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion and Order on Reconsideration, FCC 08-15 (rel. May 22, 2009).

⁸ See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group, Inc. (Transferee)*, File Nos. BTCCCT-20050819AAF *et al.*, Opposition of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., filed July 8, 2009.

⁹ As noted above, the Commission's new four-factor test is not controlling, since Fox and News Corp deserve to have their waiver request adjudicated on the basis of the original Modification Petition. Yet Fox and News Corp do think that it is worth pointing out at least two substantial flaws undermining UCC *et al.*'s reasoning in addressing the showing made in the Supplement relating to the four-factor test. First, the Opposition incongruously argues that Fox failed to show that its New York media outlets will exercise independent news judgment because the stations

In short, whether evaluated pursuant to the long-pending Modification Petition or the new four-factor test, there can be no doubt that in a market as diverse and competitive as New York, common ownership of WNYW(TV), WWOR-TV and the *New York Post* causes no public interest harms and should be permitted. Indeed, the record now overwhelmingly reflects that common ownership of these three outlets has been a boon to localism, competition and diversity. Accordingly, Fox and News Corp request that the Commission grant their waiver request and finally bring to a close this years-long proceeding.

Respectfully submitted,



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and the newspaper are “ultimately responsible to Rupert Murdoch.” Opposition, at 20. Of course, when media outlets are commonly-owned, they *always* will be ultimately responsible to the common parent (and its executive leadership). The truism that the news directors of each of WWOR-TV and WNYW(TV) and the publisher of the *New York Post* report ultimately to Mr. Murdoch can hardly be relevant, or else the Commission’s determination in the 2008 *Quadrennial Review Order* to make editorial separation a factor in its waiver analysis would be nugatory. Second, UCC *et al.* criticize Fox’s showing in the Supplement that the New York market is highly competitive, alleging for example that Fox should not have considered media outlets on Long Island as competitive with WWOR-TV – a station licensed to Secaucus, NJ – due to their lack of geographic proximity. See Opposition, at 22. Fox continues to believe that its HHI analysis, as set forth in the Supplement, constitutes a valid and rational measure of the tremendous competition that characterizes the New York market. Taking UCC *et al.*’s criticism at face value, however, would only *support* Fox’s waiver request. Even if the Commission were to find that a television station in New Jersey does not compete with outlets located in other parts of the New York market, that would compel a conclusion that common ownership of WWOR-TV with WNYW(TV) and the *New York Post* has no bearing on competition in the market, and thus that a waiver would not impact the allegedly distinct media consumers of WWOR-TV.

EXHIBIT B

DECLARATION

I, Maureen A. O'Connell, hereby state as follows:

1. I am Senior Vice President, Regulatory & Government Affairs, News Corporation, which is the indirect parent of Fox Television Stations, Inc. ("Fox"). I submit this Declaration in connection with Fox's letter to the Commission as part of MB Docket No. 07-260, dated January 18, 2011 (the "Letter").
2. I have reviewed the Letter, as well as a letter to the Commission, dated December 7, 2010, submitted by Media Access Project ("MAP") as part of this proceeding, and I am familiar with their contents. I also am familiar with the issues related to the renewal application filed by television broadcast station WWOR-TV, Secaucus, New Jersey, which is licensed to Fox, including with respect to petitions to deny filed by Voice for New Jersey, the Office of Communication of United Church of Christ, Inc. and the Rainbow/PUSH Coalition.
3. WWOR-TV filed its license renewal application on February 1, 2007. In June 2007, the Commission by public notice designated issues related to the station's renewal proceeding as permit-but-disclose pursuant to the *ex parte* rules. In November 2007, the Commission announced plans to hold a public hearing in New Jersey with respect to WWOR-TV's license renewal application. As a result, in preparation for engaging in *ex parte* discussions with the FCC staff, and for Fox's appearance at the public hearing, I directed Fox's counsel to draft a summary of key issues related WWOR-TV's renewal application. The document, entitled "WWOR-TV: A Strong Commitment and Record of Service," dealt with three overarching subjects: (i) it refuted erroneous arguments about the purported "unique" legal standard applicable to review of WWOR-TV's service; (ii) it provided a review of WWOR-TV's service to New Jersey during its preceding license term; and (iii) it detailed the legal standards applicable to FCC review of all broadcast license renewal applications under Section 309(k) of the Act (and the First Amendment). Fox has utilized the document (or a form of it) at various *ex parte* meetings with members of the Commission and its staff.
4. In the Summer of 2009, in response to the national economic recession and the substantial economic challenges afflicting the broadcast business, WWOR-TV was forced to make certain adjustments to its programming and staffing levels.
5. Following the swearing-in of Chairman Genachowski to the Commission in June 2009, I scheduled *ex parte* meetings with the new Chief of the Media Bureau and the new General Counsel (and their staffs) for August 25, 2009 to reiterate Fox's view as to the applicable legal standard governing WWOR-TV's license renewal application.
6. Together with Fox's outside counsel, I attended meetings with the Media Bureau and Office of General Counsel on August 25, 2009. During the meetings, the

discussion focused on legal issues, including the statutory renewal standard set forth in Section 309(k) of the Communications Act, as well as FCC precedent regarding the applicable standard of review for WWOR-TV (subjects (i) and (iii) in the WWOR-TV paper described above). Although I do not recall with precision exactly what was said at each meeting (which took place more than 16 months ago), to the best of my knowledge, recollection and belief, I did share with Commission staff general information about the changes at WWOR-TV that had been necessitated by the economy. But because I did not (and do not) view these changes as significant to the pending renewal application, these changes were not the focus of discussion during the meetings.

7. Following the meetings, Fox filed a copy of the same WWOR-TV summary document that it previously had discussed and provided to Commission staff. The August 25, 2009 meetings were the first that Fox held with Commission staff in which the quantities of WWOR-TV's news and public affairs programming or staffing were substantively different than those quantities during the preceding term of WWOR-TV's license. As a result, it only belatedly occurred to me following the meetings that some of the text of the WWOR summary document may have been confusing. Specifically, a portion of the document – describing the quantities of WWOR-TV's news and public affairs programming, as well as the size of its staff – originally was drafted in the present tense because, at the time that the document was prepared in 2007, the stated quantities were accurate.
8. I therefore directed Fox's counsel to edit and revise the WWOR summary so that, going forward, its text would more precisely characterize the station's stated quantities of news and public affairs programming and staffing levels as those applicable to the preceding term of the station's license. Although I did not and do not believe that the changes made at WWOR-TV are of decisional significance with respect to the station's pending renewal application, I directed Fox's counsel to take this step with the hope that modifying the document would avoid the types of accusations that nonetheless arose in MAP's letter.
9. I directed that the WWOR-TV summary document be modified without prompting from the Commission or any third party.
9. At no time during the August 25, 2009 meetings or thereafter did I ever have any intention, desire, goal, design or plan to mislead anyone at the Commission.
10. Fox utilized the revised version of the WWOR-TV document in connection with *ex parte* meetings held with staff from Commissioner Baker's and Commissioner Clyburn's offices on September 3 and September 22, 2009. Following each of those meetings, Fox filed a copy of the revised document with the FCC.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, information and belief. Executed on January 18th, 2011.



Maureen A. O'Connell

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