relevant to the criteria for determining permissible two-station combinations.[18] Accordingly, FTS explained that the creation of a two-station combination in New York would have no unacceptable or otherwise adverse effect on diversity, nor would it undermine the rationale of the 1993 waiver decision.[19] Although News Corp's contentions correctly presaged the analysis and conclusions of the *2003 Biennial Review Order*[20] (in which the FCC repealed the NBCO rule), the Commission, without addressing this argument, concluded that the existing permanent waiver did not cover the new combination of WWOR-TV, WNYW(TV) and the *Post*.[21]

FTS alternatively requested a temporary waiver of the NBCO rule pending conclusion of the rulemaking proceeding that the Commission had committed to initiate in the *1998 Biennial Review Report*.[22] Although the anticipated proceeding did ultimately lead to repeal of the rule, the Commission in 2001 denied FTS' request for interim relief. Instead, the Commission crafted its own solution, granting FTS a

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18 *See* Joint Opposition of FTS and Chris-Craft to Petition to Deny, November 9, 2000, at 22.

19 *See Chris-Craft Assignment Application*, Exhibit 4, at 20-21.

20 *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) ("*Prometheus*").

21 *See Fox/Chris-Craft Order*, ¶ 40.

22 *See In re 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, ¶ 95 (2000) ("*1998 Biennial Review Order*").

temporary 24-month waiver to come into compliance with the NBCO rule.[23] The Commission based its decision to grant the temporary waiver on "the diverse nature of the New York market, the clearly non-dominant position of the *Post* in that market, as well as the *Post*'s unique history of significant financial difficulties."[24] The Commission added that a "temporary loss of diversity, if any, in the New York market during this period will be outweighed by the benefits of permitting an orderly sale" in the event that the NBCO rule remained in effect and a sale became necessary at the conclusion of the temporary waiver period.[25] The Commission specifically 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 *Post* or one of the television stations to come into compliance."[26]

The Commission did, in fact, vote to repeal the NBCO rule as part of the *2003 Biennial Review Order*, concluding that the rule may actually harm the FCC's localism goal without benefiting competition or diversity.[27] The Third Circuit ultimately affirmed the Commission's conclusion that the rule fails to serve the public interest, agreeing that "the newspaper/broadcast cross-ownership ban undermined localism" and

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23 *See Fox/Chris-Craft Order*, ¶ 45.

24 *Id.*

25 *Id*; *see also id.* ¶ 50 ("It is Further Ordered, That . . . [FTS] is granted a temporary 24-month period within which to come into compliance with the [NBCO rule] . . . *insofar as it is necessary under our rules at that time*") (emphasis supplied).

26 *Id.* ¶ 45 n.73. K. Rupert Murdoch was and remains the Chairman and Chief Executive Officer of News Corporation, which is now FTS' ultimate parent company.

27 *See 2003 Biennial Review Order*, ¶ 359.

that a blanket ban was not necessary to protect diversity.[28] The court issued a blanket stay, however, precluding all of the new rules from going into effect while the Commission addressed other ownership issues on remand.[29]

2004 Modification Petition. Faced with the potential for an even longer wait, FTS and News Corp filed the Modification Petition. The continuing cloud over News Corp's ownership of the *Post* was discouraging investment in the further development of the newspaper, ultimately harming the public interest. While the repeal of the NBCO rule for the New York market seemed certain in view of the Commission's findings in the *2003 Biennial Review Order* (as reinforced by the Third Circuit), News Corp, which has spent hundreds of millions of dollars improving the facilities and operations of the *Post* in reliance on the permanent waiver, could not rationally continue to invest in further improvements in light of the regulatory uncertainty. Thus, in the Modification Petition, FTS and News Corp asked the FCC to expand the permanent waiver to include WWOR-TV.[30]

2005 Corporate Reorganization. Subsequently, on August 19, 2005, Fox Television Holdings, Inc. ("FTH"), K. Rupert Murdoch and Fox Entertainment Group, Inc. ("FEG") filed applications for transfer of control in order to seek Commission consent to a recapitalization of the stock of FTH. The recapitalization was intended to transfer control of FTH's license-holding subsidiaries (including FTS) from K. Rupert

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28 *Prometheus*, 373 F.3d at 399-400.

29 *See id.* at 398, 435.

30 *See* Modification Petition, at 14.

Murdoch to FEG.[31] As the *2005 Transfer Application* made clear, the proposed recapitalization would not result in the acquisition by any new party of an attributable interest in WNYW(TV) or WWOR-TV.[32]

As part of the *2005 Transfer Application*, FTH submitted an exhibit detailing 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.[33] In particular, the application explained that the proposed transaction should not affect the permanent waiver that the Commission granted to News Corp and K. Rupert Murdoch in 1993 permitting common ownership of the *Post* and WNYW(TV). Noting that the waiver had enabled News Corp to ensure the survival and subsequent expansion of the *Post* as a unique media voice, and pointing out that the New York market is exceptionally diverse and competitive, the application also urged the Commission to modify the permanent waiver to include ownership of WWOR-TV.[34]

Alternatively, given the Commission's decision in 2003 to repeal the NBCO rule in markets such as New York – upheld in *Prometheus* – the application again asked that the Commission extend, at least temporarily, the waiver to permit common ownership of WNYW(TV), WWOR-TV and the *Post* pending a final determination of

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31 *See In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, File No. BTCCT-20050819AAF, *et al.*, (filed August 19, 2005) (the "*2005 Transfer Application*").

32 *See id.* at Exhibit No. 18. Exhibit No. 18 was submitted to the Commission as part of an amendment to the *2005 Transfer Application*, which FTS and FEG filed on September 21, 2005.

33 *See id.*

34 *See id.*

the status of the rule following consideration of the Third Circuit remand.[35] On August 15, 2006, the Commission granted the *Transfer Application*; a memorandum opinion and order was released October 6, 2006.[36]

In the *2006 Transfer Order*, the Commission determined that the existing waivers "were granted primarily to preserve the operation of the [*Post*]" and that "competition in [New York] would not be adversely affected. The demonstrable public interest benefits that have resulted from the common ownership of these media properties have justified the existing waivers."[37] In support of its conclusions, the Commission acknowledged that the previous waivers had enabled News Corp "to invest in an expansion of the newspaper by adding a Sunday edition and build a $300 million state-of-the-art plant in the economically depressed South Bronx area."[38] Accordingly, the Commission left in place the permanent waiver permitting common ownership of WNYW(TV) and the *Post*. The Commission also granted FTS and News Corp a new, temporary 24-month waiver to permit continued common ownership of WWOR-TV along with WNYW(TV) and the *Post*. The FCC logically concluded that a waiver to permit continued ownership of WWOR-TV and the *Post* was fully justified in light of the

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35 *See id.*

36 *See In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion & Order, 21 FCC Rcd 11499 (2006) ("*2006 Transfer Order*").

37 *Id.* ¶ 7.

38 *Id.* ¶ 6.

exceptional diversity of the New York market and the detrimental effect that the uncertainty regarding the applicability of the NBCO rule was having on the paper.[39]

II. EVEN IF THE PERMANENT WAIVER DOES NOT ENCOMPASS ACQUISITION OF WWOR-TV, WHICH IT DOES, THE COMMISSION SHOULD GRANT THE RELIEF REQUESTED BASED ON THE 2004 MODIFICATION PETITION

A. Before Submission of the Modification Petition, the Commission Repealed the NBCO Rule in 2003 in Recognition that the Rule Fails to Serve the FCC's Media Ownership Policy Objectives

The Commission originally promulgated the NBCO rule on the primary theory that it would promote diversity – though the FCC lacked conclusive evidence that the ban would in fact achieve that result.[40] The subordinate goal of promoting economic competition provided the second of the rule's "two foundations."[41] Doubts as to the efficacy of the rule, however, and concern that it may in fact harm diversity by hastening the demise of newspapers, culminated in a series of rulemakings that ultimately led to rejection of the underlying rationale for the NBCO rule and to its 2003 repeal.[42]

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39 *See id.* ¶ 6.

40 *See Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, Order & Notice of Proposed Rulemaking, 16 FCC Rcd 17283, ¶ 2 (2001) (describing history of the NBCO rule).

41 *Id.*

42 *See In re Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13003 (1996). Comments filed in that proceeding were then consolidated into the Commission's 1998 Biennial Regulatory Review. *See In re 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 FCC Rcd 11276 (1998). In 2000, the Commission adopted the *1998 Biennial Review Order*, in which it determined that the NBCO rule should be retained, but indicated that there may be circumstances in which the rule may not be necessary to achieve its intended public interest benefits. The Commission specifically indicated that it would

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In July 2003, the FCC dealt what appeared to be the final blow to the NBCO rule when it concluded that the rule is no longer necessary in the public interest.[43] Specifically, the Commission concluded that "[m]ost media markets are diverse, obviating a prophylactic ban on newspaper-broadcast combinations in all markets."[44] "[T]he magnitude of the growth in local media voices shows that there will be a plethora of voices in most or all markets absent the rule."[45] In fact, the Commission concluded that the NBCO rule may actually harm diversity. The NBCO rule "may be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming

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consider whether the rule appropriately reflected "contemporary market conditions" and whether, based on the size of the market and the particular newspaper and station involved, diversity and competition would remain after a combination. Accordingly, the Commission stated that it would initiate a proceeding to consider tailoring the rule. *See 1998 Biennial Review Order*, 15 FCC Rcd ¶ 95. The Commission then released a notice of proposed rulemaking in late 2001, with the Commission noting that the local media market had changed dramatically since the rule was adopted. *See Cross-Ownership of Broadcast Stations and Newspapers*, Order & Notice of Proposed Rulemaking, 16 FCC Rcd 17283, ¶ 8 (2001). The Commission found that while there had been a substantial increase in the number of media outlets, the number of daily newspapers had decreased since 1975. *See id.* ¶¶ 9-10. After comments were received at the Commission, and the record appeared ripe for decision, the Commission consolidated the NBCO comments along with other ownership proceedings into the larger 2002 Biennial Review. *See 2003 Biennial Review Order*, 18 FCC Rcd ¶ 1.

43 *See 2003 Biennial Review Order*, ¶ 369.

44 *Id.* ¶ 330.

45 *Id.* ¶ 367.

diversity."[46] The Commission added that "commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice."[47]

The Commission also decided that "the rule cannot be sustained on competitive grounds."[48] It noted that advertising is the relevant product market,[49] and found that "most advertisers do not view newspapers, television stations, and radio stations as close substitutes."[50] As a result, the Commission determined that newspaper and broadcast combinations have no adverse effect on competition in any relevant product market.[51] In short, the Commission forcefully repudiated its earlier conclusions regarding the connection between the rule and its twin foundations of diversity and competition.

But the Commission did not stop there – it went on to conclude that the rule undermines additional regulatory objectives, including the promotion of localism and high-quality programming. The Commission has explicitly stated that its "rules should promote the ability of newspapers, television stations, and all other sources of local news and information to serve their communities."[52] The NBCO rule, however, prohibits the formation of newspaper-broadcast combinations, which "can promote the public interest

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46 *Id.* ¶ 359.

47 *Id.* ¶ 361 (citing Media Ownership Working Group ("MOWG") Study No. 2).

48 *Id.* ¶ 330.

49 *See id.* ¶ 331.

50 *Id.* ¶ 332.

51 *See id.* ¶ 368.

52 *Id.* ¶ 342.

by producing more and better overall local news coverage . . . ."[53] Moreover, the Commission found that newspaper-affiliated stations provide more local news and public affairs programming.[54] Thus, the NBCO rule had not only undermined its original objectives, it was impeding other vital Commission policies.

Before the new rules went into effect, however, the United States Court of Appeals for the Third Circuit stayed implementation of the *2003 Biennial Review Order*, including repeal of the NBCO rule, pending the court's review.[55] While the court reversed much of the Commission's decision and remanded the case back to the agency for further consideration, it specifically found that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."[56] Nonetheless, the court continued the effectiveness of its blanket stay of the *2003 Biennial Review Order's* implementation,[57] delaying repeal of the NBCO rule.[58] But for the Third Circuit stay, News Corp's ownership of the *Post*, WNYW(TV) and WWOR-TV would have been entirely consistent with the Commission's rules.

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53 *Id.* ¶ 368.

54 *See id.* ¶ 344 (citing MOWG Study No. 7).

55 *See Prometheus*, 373 F.3d at 382.

56 *Id.* at 398.

57 *See id.* at 382.

58 On September 3, 2004, the court denied a request by Tribune Company to lift the stay with respect to elimination of the NBCO rule in large markets. *See Prometheus Radio Project v. FCC*, Third Circuit Order dated September 3, 2004.

B. Under the Standards in Effect Prior to the 2003 Biennial Review Decision, the News Corp/FTS Ownership Combination's Lack of Impact on Competition, Localism and Diversity Merited Expansion of the Permanent Waiver

Since the implementation of the NBCO rule in 1975, the Commission consistently has entertained requests for waiver of the rule in instances where (i) an owner has been unable to sell a media property (or would have to sell it at an artificially depressed price), (ii) a given market simply could not economically support separate ownership and operation of a newspaper and a broadcast station, or (iii) it can be shown "for whatever reason that the purposes of the rule would be disserved by divestiture, if the rule, in other words, would be better served by continuation of the current ownership pattern, then waiver would be warranted."[59]

FTS and News Corp submitted the Modification Petition in light of this framework, and demonstrated compellingly that they were entitled to a permanent waiver permitting ownership of the *Post*, WNWY(TV) and WWOR-TV. The Commission never acted on the Modification Petition prior to issuing the *2008 Report & Order*, but News Corp and FTS submit that because they submitted their petition in 2004, the Commission should have granted their request for a permanent waiver under the standards that guided the FCC for more than 30 years. Specifically, the Commission should have granted the waiver request because it has long been clear that the "purposes of the rule would be disserved" by forcing a separation of News Corp's media properties.[60]

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59 *See In re Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, Second Report & Order, 50 FCC 2d 1046, ¶ 119 (1975).

60 *See id.*

At the time FTS and News Corp submitted the Modification Petition, the *Post*, WNYW(TV) and WWOR-TV had been commonly owned for more than three years (and the newspaper and WNYW(TV) had been under common ownership for 11 years). News Corp's and FTS' record of stewardship of these outlets revealed that common ownership did not result in any public interest harms. In the Modification Petition, moreover, News Corp and FTS took great pains to show that the New York Designated Market Area ("DMA") was incredibly diverse and competitive. If anything, the intervening years since 2004 have only served to increase the variety and breadth of media in the market while, at the same time, the additional four years of common ownership of these outlets still has not led to a single public interest harm.

As detailed in the Modification Petition, News Corp and its executives have been unwavering in their commitment to the *Post* since rescuing it from bankruptcy in 1993, but they explained that they could not rationally continue to invest in its future without the certainty afforded by a modification of the permanent waiver to include WWOR-TV.[61] Before News Corp's ownership of the *Post* was placed into doubt by the NBCO rule, News Corp had been able to devote its full resources toward improving the paper. News Corp made these long-term investments with the expectation of continued ownership of the paper in light of the permanent waiver. The changes at the *Post* not only have improved an important media outlet in the New York market, they have enabled hundreds of employees to keep their jobs. For all of these reasons, the Commission already should have granted the relief sought in the Modification Petition.

61 *See* Modification Petition, at 14. *See also* Declaration of Geoff Booth, General Manager of the *New York Post*, attached as Exhibit A to the Modification Petition (noting that the paper's willingness to continue to invest in the future has been severely hampered by the NBCO rule and the Third Circuit stay decision).

C. Since the Filing of the Modification Petition, the New York Market has Become Even More Diverse and Competitive

News Corp's investment in the *Post* has vindicated the Commission's reasoning for granting a permanent waiver and further supports the requested modification to permit ownership of WWOR-TV. Nonetheless, News Corp remains severely hampered by the regulatory uncertainty surrounding its ownership of the paper, which continues to hinder the company's ability to invest in and plan for the future. Particularly in an era that even the Commission recognizes as a "pessimistic picture"[62] for newspapers, this uncertainty eventually will cripple the *Post* and threaten its ability to survive as a diverse voice for New York residents. In short, further uncertainty fails to serve the interest of the public, threatens the continued development of the *Post* and warrants modification of FTS' permanent waiver.

Modification of the waiver to encompass a second station in the New York market is not only equitable, given News Corp's huge investment in the *Post*, it also best serves the Commission's diversity, competition and localism interests. The Modification Petition included a wealth of data depicting the incredible diversity and competition that characterize the New York market. The following information confirms that market conditions have only led to additional diversity and enhanced competition since 2004.

Diversity. As demonstrated below and in the tables attached hereto as Exhibit A, New York is an extremely diverse media market.

- Even taking into account common ownership of WNYW(TV) and WWOR-TV, the New York DMA is still served by 18 independent owners that operate 23 full power television stations.[63]

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62 *2008 Report & Order*, ¶ 27.

63 *See* Exhibit A, at Table 4.

- More than 255 commercial and noncommercial radio stations, with over 125 separate owners, are licensed to communities within the New York DMA.[64]

- Cable penetration in the New York DMA is 81 percent,[65] and at least 8 independently-owned cable television systems serve communities within the New York DMA.[66]

- More than 345 additional program channels are available over the various satellite and cable systems serving the New York DMA, many of which are devoted to the provision of news and information. In particular, two cable channels – News 12 and New York 1 News – offer New York viewers 24 hours of news programming each day with a *local* focus.[67] Additional channels focus on financial news, sports news, and weather.[68]

- Direct broadcast satellite (DBS) services, such as DirecTV and EchoStar, offer hundreds of channels of digital entertainment and informational programming to households in the New York DMA.[69]

- As to the level of print media diversity in New York, 26 daily newspapers are published within the New York DMA. Indeed, New York City is one of the few remaining cities in the country with more than one daily newspaper. A total of 8 papers have circulations exceeding 100,000 homes in the DMA.[70] In addition, hundreds of weekly newspapers are published within the New York DMA.[71]

- The *Post* ranks fifth among the five largest daily newspapers serving New York City in terms of advertising revenues,[72] and its total circulation has declined more than 3 percent in the last six months alone.[73]

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64 *See id.* at Table 5.

65 *See Broadcasting & Cable Yearbook 2008*, at C-8.

66 *See* Exhibit A, at Table 6.

67 *See id.* at Table 8.

68 *See id.* at Table 7.

69 *See id.*

70 *See id.* at Table 1.

71 *See id.* at Table 2.

72 *See id.* at Table 9.

- At least 22 weekly and monthly magazines have average circulations in excess of 100,000 in the New York DMA. For example, *Time* sells 341,595 copies on average each week; *Newsweek*, 222,872; and *U.S. News and World Report*, 160,478.[74]

- And the Internet has cemented its status as a powerful source of diverse viewpoints. As of December 2007, 75 percent of U.S. adults were online on an average day,[75] and scores of different websites are New York-based and oriented.[76]

Localism. Aside from the obvious – that elimination of the *Post* as a media voice would reduce the overall amount of local coverage of issues relevant to residents of New York – the Commission also has consistently found that cross-owned outlets "can enhance localism."[77] As the *2008 Report & Order* explained, three of the FCC's media ownership studies suggested that newspaper/broadcast combinations have a positive effect on the amount of local news and public affairs programming available to consumers.[78] News Corp's commitment to the *Post* not only has led to the retention of hundreds of jobs and investment in New York City, it also has ensured the continued existence of a unique and important source of diverse news and information.

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73 *See* Mark Harrington, *New York Newspapers' Circulation Slips*, Newsday, Apr. 29, 2008, at A40.

74 *See* Exhibit A, at Table 3.

75 *See Demographics of Internet Users*, Pew Internet & American Life Project, http://www.pewinternet.org/trends/User_Demo_2.15.08.htm (last visited June 20, 2008).

76 *See* Exhibit A, at Table 10.

77 *See 2008 Report & Order*, ¶ 42.

78 *See id.*

Competition. The Commission also reaffirmed in the *2008 Report & Order* its findings in the *2003 Biennial Review Order*: "A newspaper-broadcast combination . . . cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition."[79] In light of this conclusion, the addition of WWOR-TV in 2001 to the combination of the *Post* and WNYW(TV) had *no* effect on competition in any product market in New York and modification of the permanent waiver poses no threat to competition.

In 2001, moreover, the Department of Justice ("DOJ") did not object to the combination of WWOR-TV with the *Post* and WNYW(TV). Likewise, in 1993, the DOJ did not object to FTS' request for permanent waiver of the NBCO rule. And, as the FCC noted in 1993, the DOJ and the Federal Trade Commission generally have primary antitrust jurisdiction regarding competitive matters.[80] The Commission further specifically noted that objecting parties are always free to file civil suits under the antitrust laws or to seek redress at the DOJ.[81]

Common ownership of WWOR-TV, WNYW(TV) and the *Post* does not raise concentration concerns even if the relevant market is narrowly defined to include only broadcast stations and newspapers. In fact, FTS and News Corp submitted with the Modification Petition a report from Mark Fratrik, Ph.D., Vice President of BIA Financial Network, which demonstrated that the New York market as so defined was even less

79 *See id.* ¶ 39 n.131 (citing *2003 Biennial Review Order*, 18 FCC Rcd ¶ 341).

80 *See 1993 Permanent Waiver*, 8 FCC Rcd ¶ 51 n.43.

81 *See id.*

concentrated in 2004 than when FTS acquired WWOR-TV in 2001 without objection from the DOJ.[82] FTS and News Corp retained Dr. Fratrik to update his 2004 report to reflect current marketplace conditions. The revised report, attached hereto as Exhibit B, confirms that the New York market remains subject to enormous competition. Ownership of the *Post* together with WNYW(TV) and WWOR-TV has not had any adverse effect on competition.

In a product market defined to include only the daily and weekly newspapers published in the New York DMA, the commercial radio stations in the New York City radio market as defined by Arbitron, and the commercial television stations in the New York DMA, common ownership of WNYW(TV), WWOR-TV, and the *Post* produces a Herfindahl-Hirschman Index ("HHI") of 763, which is firmly below the HHI cut-off for unconcentrated markets.[83] Even if WWOR-TV were owned separately from News Corp's and FTS' other New York properties, the HHI would be reduced only by a modest 27 points.[84] Common ownership of the two-station combination and the non-dominant *New York Post* therefore raises no concerns of undue market concentration in a product market defined to include only newspapers and broadcast (radio and television)

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82 *See* Modification Petition, at Exhibit C.

83 *See Analysis of the Level of Concentration in the New York Media Market*, Mark R. Fratrik, Ph. D., BIA Financial Network, June 23, 2008, at 3 (attached hereto as Exhibit B) ("Fratrik Report"). Under the Department of Justice Horizontal Merger Guidelines, a market with post-merger HHI below 1000 is considered unconcentrated. *See* Department of Justice, Horizontal Merger Guidelines, Section 1.57.

84 *See* Fratrik Report, at 3.

stations.[85] As Dr. Fratrik explains, "the New York media market is characterized as being highly competitive and unconcentrated."[86] He concludes that "News Corporation's continued ownership of WWOR-TV does not affect the level of market concentration in any meaningful way."[87]

These conclusions are not surprising in view of the intense competition the *Post* faces from other daily newspapers published in the DMA:

- At the end of 2007, the *Post* ranked last among the five major dailies in terms of advertising dollars in the New York DMA, behind *The New York Daily News*, *The New York Times*, *Newsday*, and *The Newark Star-Ledger*.[88]

- The circulation of the *New York Post* covers only 7.8 percent of the households in the New York DMA on any given day. And the *Post* only accounts for approximately 9.5 percent of advertising dollars spent on the top five daily newspapers in the New York DMA, which obviously translates to an even smaller percentage of the ad dollars spent on all newspapers (let alone all media) in the market.[89]

In short, the New York media market is both extraordinarily diverse and intensely competitive. There has never been any reason whatsoever to fear adverse

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85 As Dr. Fratrik notes, the definition of the market used in his studies overstates the concentration levels of the local media market within the larger New York DMA. *See id.* at 3-4. In particular, the analyses do not include (1) local cable television advertising sales (which compete against the local sales of television stations); (2) advertising on local Internet sites or local out-of-home companies; or (3) pending sales transactions involving New York media. *See id.* Since neither FTS nor News Corp owns radio stations or cable television systems, the companies' overall revenue share would be lower if radio and local cable advertising revenue were included.

86 *Id.* at 4.

87 *Id.*

88 *See* Exhibit A, at Table 9.

89 *See id.*

consequences from modifying FTS' and News Corp's cross-ownership waiver in New York, the nation's largest media market.

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Given the diversity and competition that characterize the New York market, and in light of the Commission's continuing recognition that the NBCO rule is not needed to promote the FCC's policy objectives, there has long been more than ample justification for granting News Corp and FTS a permanent waiver to permit common ownership of WNWY(TV), WWOR-TV and the *Post*.

III. NEWS CORP AND FTS ARE ENTITLED TO A PERMANENT WAIVER OF THE CROSS-OWNERSHIP RULE EVEN IF THE FCC APPLIES ITS 2008 STANDARDS TO ANALYZE NEWSPAPER/BROADCAST COMBINATIONS

A. The *2008 Report & Order* Emphasized that the Commission Will Evaluate Waiver Requests Based on the Specific Characteristics of Each Market, and No Market Is More Deserving of Relief from the NBCO Rule than New York

In the *2008 Report & Order*, the FCC "reaffirm[ed] the Commission's decision to eliminate the blanket ban on newspaper/broadcast cross-ownership . . . ."[90] The Commission once again recognized that the NBCO rule is "not necessary in the public interest as a result of competition, diversity or localism,"[91] citing with favor the *Prometheus* court's findings that the rule is not necessary to promote competition in local markets because advertisers do not view television stations and newspapers as close substitutes; that the rule could undermine localism by preventing efficient combinations that allow for the production of high-quality local news; and that it is not needed to

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90 *2008 Report & Order*, ¶ 18.

91 *Id.* ¶ 19.

preserve diverse viewpoints.[92] Indeed, the Commission found "ample evidence in the record" confirming that the nation's largest media markets "contain a robust number of diverse media sources" such that "the diversity of viewpoints would not be jeopardized by certain newspaper/broadcast combinations."[93]

The FCC also cited to the litany of technological changes that render the "media marketplace today [as] profoundly different."[94] For instance, the Commission noted the advent of the Internet as well as the rise of cable and satellite television systems that either did not exist or were in their infancy when the NBCO rule initially was adopted.[95] The *2008 Report & Order* also took cognizance of dramatic increases in the number of television and radio stations serving American consumers, which stands in stark contrast to the precipitous decline in the fortunes of daily newspapers in the United States.[96] Thus, the Commission concluded: "All of these post-1975 marketplace developments obviate the need for an across-the-board ban on newspaper/broadcast combinations."[97]

Notwithstanding these findings, instead of reconfirming its decision to repeal the NBCO rule, the FCC said only that these changed conditions "justify a

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92 *See id.* ¶ 18 (citing *Prometheus*, 373 F.3d at 398).

93 *2008 Report & Order*, ¶ 19.

94 *Id.* ¶ 24.

95 *See id.*

96 *See id.*

97 *Id.*

recalibration at this time."[98] In particular, the Commission retained the NBCO rule (with slight modifications) because it "continue[s] to believe that some restrictions on cross-ownership are necessary to protect diversity"[99] and because limits "are necessary to guard against 'an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.'"[100] Thus, the Commission adopted a presumption that a newspaper/broadcast combination outside of the top 20 markets (as well as common ownership of more than one television station and/or more than one newspaper – even in the largest markets) is inconsistent with the public interest.[101]

The majority of the Commission's discussion of this "negative" presumption focused on its concerns about the impact of cross-ownership in smaller markets, *i.e.*, DMAs outside of the top 20 markets. For instance, the FCC pointed out that the "top 20 DMAs are media-rich, highly populated markets"[102] but noted that it cannot be "certain that the degree of media consolidation that the largest, more competitive markets can withstand is yet mirrored in smaller markets . . . ."[103] In contrast, the Commission said almost nothing in the *2008 Report & Order* about its concerns with respect to ownership of more than one newspaper or broadcast station (regardless of market size). Indeed, to the extent that it addresses the topic at all, the *2008 Report &*

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98 *Id.* ¶ 19.

99 *Id.* ¶ 17.

100 *Id.* ¶ 49 (citing *2003 Biennial Review Order*, ¶ 442).

101 *See id.* ¶ 63.

102 *Id.* ¶ 64.

103 *Id.* ¶ 63.

Order said only that "[b]ecause [certain] combinations involve[] multiple newspapers and/or multiple broadcast stations, they potentially raise heightened diversity concerns, and it would be inappropriate" to grant automatic waivers or "grandfather these combinations across-the-board."[104] Instead, the FCC said that it will "examine them on a case-by-case basis."[105]

News Corp and FTS submit that, by any measure, an evaluation of media combinations in the diverse New York market can only lead to a conclusion that common ownership should be permissible. The Commission emphasized in the *2008 Report & Order* that "[t]he necessity of . . . cross-ownership limits for the protection of diversity depends on the particular nature of both the market at issue and the transaction at issue."[106] Thus: "*What may make sense for Portland, Maine does not necessarily make sense for New York City.*"[107] The FCC appropriately acknowledged that media combinations in New York intrinsically pose far less of a threat to diversity, and warrant far less scrutiny, even if the proposed combination falls under the rubric of the "negative" presumption.

B. Each of the Commission's Four Factors for Evaluating Waiver Requests Supports Permitting Common Ownership of the *Post*, WNYW(TV) and WWOR-TV

The Commission also stressed that its default view – that common ownership of multiple stations with a newspaper *potentially* disserves the public interest –

104 *Id.* ¶ 78.

105 *Id.*

106 *Id.* ¶ 50.

107 *Id.* (emphasis supplied).

is only a *presumption*, and a rebuttable one at that.[108] Applicants seeking a waiver of the NBCO rule in cases where the "negative" presumption applies must show that a newspaper/broadcast combination "will increase the diversity of independent news outlets . . . and increase competition among independent news sources in the relevant market."[109] The *2008 Report & Order* laid out four factors that will inform the FCC's evaluation as to whether any particular proposed combination should be permitted: (1) the extent to which cross-ownership will serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the owner's commitment to invest significantly in newsroom operations.[110]

As set forth below, each of these factors indicates that common ownership of WNYW(TV), WWOR-TV and the *Post* should be permitted, and that any "negative" presumption against FTS' and News Corp's common ownership is rebutted overwhelmingly by the unique attributes of these outlets and the New York market. At the outset, moreover, FTS and News Corp submit that the Commission must evaluate ownership of WNYW(TV), WWOR-TV and the *Post* in light of the fact that these outlets already are commonly-owned, and have been for more than 7 years. Accordingly, to the

108 *See id.* ¶¶ 63, 68.

109 *Id.* ¶ 15.

110 *See id.* ¶ 68.

extent that the four factors described in the *2008 Report & Order* contemplate an analysis of actions that will be taken "post-merger," or commitments that are forward-looking, the Commission should take into consideration everything that FTS and News Corp already have achieved with respect to diversity, localism and competition at these three media outlets.

(1) Local News Dissemination – As described above, common ownership of the *Post* together with FTS' broadcast stations has literally saved a unique media voice from extinction in the New York market. The *Post*, the oldest continuously published daily newspaper in the country, likely would have ceased to exist had it not been for News Corp's willingness to rescue the paper from bankruptcy and invest in its future. Prior to the WWOR-TV acquisition, when News Corp was not facing a possible divestiture of the paper, it moved aggressively to improve the quality of the *Post* by building a $300 million plant in the South Bronx, bringing 500 jobs to an economically depressed part of New York City. The *Post* also launched a Sunday edition, literally increasing the amount of news available in the DMA. Finally, the *Post* reduced its newsstand price in 2000 in an effort to better compete in the market. None of these investments would have been made absent common ownership of the *Post* with WNYW(TV) (but at the same time, until regulatory uncertainty about the future of the paper is removed, News Corp cannot rationally commit to further investments that will be necessary to ensure that the paper remains competitive going forward).

News Corp also has added local news and public affairs programming to its broadcast stations in the New York DMA. WNYW(TV), for instance, currently broadcasts 38 hours of local news each week, an increase of nearly 300% in comparison to the time before FTS owned the station. WWOR-TV, meanwhile, has expanded its weekly public affairs programming, which provides extensive news and information, especially about local political issues relevant to New Jersey viewers who reside in the New York DMA. WWOR-TV also has added hourly news updates from 4 p.m. to 7 p.m. each weekday. And the station has provided regular coverage of live breaking news, such as severe weather warnings, amber alerts, and coverage of New Jersey political races and the state governor's annual state-of-the-state address. In the last two years alone, the station has broadcast more than 20,000 public service announcements that provide viewers with information about issues of public importance within the market.[111] WWOR-TV operates out of a 110,000 square foot studio and office complex in Secaucus, New Jersey – a facility in which FTS has invested nearly $12 million dollars toward capital improvements since 2001.[112]

The Commission said in the *2008 Report & Order* that it will "evaluate whether a proposed newspaper/broadcast combination will increase the amount of local news disseminated and thereby further the goal of localism."[113] Quite clearly, common ownership of the *Post*, WNYW(TV) and WWOR-TV has led to a dramatic increase in the aggregate amount of news and information disseminated in the New York DMA. Standing alone, the preservation of the *Post* as a unique media voice in the market serves

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111 *See 2008 Report & Order*, ¶ 70 ("The term 'local news' includes traditional newscasts as well as programming that addressees issues of local political interest or issues of public importance in the market"); *see also* Fox Television Stations, Inc., Application for Renewal of Broadcast Station License, WWOR-TV, File No. BRCT-20070201AJT.

112 *See id.* (FCC noting that it will also "examine the resources that the broadcast entity will be devoting to the coverage of local news . . .").

113 *Id.* ¶ 69.

to foster the FCC's localism objectives. But adding the newspaper's contributions to the local news and information service provided by the FTS television stations leaves no doubt that common ownership of these outlets has been a tremendous boon to localism.

(2) Independent News Judgment. Noting its "long-standing view that independence of news sources is important to civic life and the public welfare," the FCC said that it will "analyze whether applicants have demonstrated that their respective media outlets will exercise independent news and editorial judgment."[114] In order to satisfy this factor, the Commission indicated that the combined entity "must have two separate editorial decisionmakers exercising independent judgment as to what news will be carried . . . ."[115] The critical question is whether "the broadcast outlet and the newspaper separately and independently decide their editorial positions, what stories to air and publish, how to edit those stories, and whether and how prominently to air or display them."[116]

As illustrated by the organizational charts attached hereto as Exhibit C, each of the *Post*, WNYW(TV) and WWOR-TV maintain separate editorial decision-making structures. The three outlets operate wholly independent from one another when it comes to the selection of news. In fact, the *Post* is owned by an entirely separate subsidiary of News Corp than the broadcast stations, and there is absolutely no overlap between the stations and the paper when it comes to editorial oversight. The *Post* and

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114 *Id.* ¶ 71.

115 *Id.*

116 *Id.*