

Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 2014

Released: August 8, 2014

By the Chief, Media Bureau:

1. The Commission, by the Chief, Media Bureau, pursuant to delegated authority, has before it for consideration the application for the renewal of license of television station WWOR-TV, Secaucus, New Jersey, filed by Fox Television Stations, Inc. ("Fox").1 We also have before us the application for the renewal of license of television station WNYW(TV), New York, New York, filed by Fox.2 Previously, Fox filed a Petition for Modification of Permanent Waiver ("Modification Petition") seeking to modify its current permanent waiver of the newspaper/broadcast cross-ownership rule, 47 C.F. R §73.3555(d)("NBCO"), which permits it to own both WNYW(TV) and the New York Post ("Post") in order to encompass the ownership of WWOR-TV.3 Finally, there is also a pending petition for reconsideration filed by Free Press of the Commission's order on reconsideration in Murdoch Recon.4 In the interest of administrative efficiency, we are consolidating these proceedings.

2. A petition to deny the renewal application of WWOR-TV was filed by the Voice for New Jersey ("VNJ") and an informal objection was filed by Aristides Martinez. On November 28, 2007, a public forum was held at Rutgers University in Newark, New Jersey, (the "Rutgers Forum") regarding

1 File No. BRCT-20070201AJT. On November 23, 2007, this proceeding was assigned docket number MB 07-260. Media Bureau Announces Agenda and Witnesses for Public Forum on WWOR-TV License Renewal in New Jersey, Press Release, November 27, 2007.

2 File No. BRCT-20070201AJS.

3 See ¶ 43. Fox later filed a Supplement to Petition for Modification of Permanent Waiver ("Supplement").

4 See K Rupert Murdoch, Memorandum Opinion and Order on Reconsideration, 24 FCC Rcd 5824 (2009)("Murdoch Recon").

the renewal application.<sup>5</sup> Petitions to deny the renewal applications of WWOR-TV and WNYW(TV) were filed jointly by the United Church of Christ and Rainbow/PUSH Coalition (“UCC”). An Opposition was filed by UCC, Rainbow/Push, and Free Press to the Supplement. For the reasons stated below, we deny the petitions to deny and the informal objection, deny the Modification Petition and the Supplement, and deny the petition for reconsideration. We grant the renewal application of WWOR-TV and grant a temporary waiver of the NBCO rule in the New York DMA to permit the common ownership of WNYW(TV)/WWOR-TV and the *Post* pending the outcome of the Commission’s decision in its *2014 Quadrennial Review*.<sup>6</sup>

## I. SUMMARY

3. In this Memorandum Opinion and Order, we grant the application for renewal of television station WWOR-TV.<sup>7</sup> In doing so, we consider the arguments of VNJ and other parties that WWOR-TV has failed in its obligations to serve the needs of the citizens of Northern New Jersey. After thorough review of the record and the station’s issues/programs lists, we find that from 1999 through the quarter ending March 31, 2014, WWOR-TV met its special obligations to serve Northern New Jersey. We also grant Fox a temporary waiver of our newspaper/broadcast cross-ownership rule to permit the joint ownership of WNYW(TV)/WWOR-TV and the *Post* in the New York market pending the outcome of the Commission’s decision in its *2014 Quadrennial*. Finally, we deny the outstanding petition for reconsideration of the Commission’s order in *K. Rupert Murdoch Recon*.

## II. STANDARD OF REVIEW

4. In determining whether to grant an application for renewal of a broadcast license under Section 309(k)(1) of the Communications Act, the Commission considers whether, during the preceding term of that station’s license:

- (A) the station has served the public interest, convenience, and necessity;
- (B) there have been no serious violations of this Act or the rules and regulations of the Commission; and
- (C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission, which, taken together, would constitute a pattern of abuse.<sup>8</sup>

5. If a petition to deny has been filed against a renewal application, the Commission reviews the petition to determine whether it “demonstrates by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest.”<sup>9</sup> If so, the Commission examines the record to determine whether a “substantial and material question of fact is presented to

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<sup>5</sup> See *Media Bureau Announces Agenda for Public Forum on WWOR-TV License Renewal in New Jersey*, Press Release, November 8, 2007. The transcript of the Rutgers Forum and the filings made in connection with it are part of the record in this proceeding. MB Docket 07-260. Several members of the public filed comments in the docket expressing general dissatisfaction with the station’s programming.

<sup>6</sup> *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking and Report and Order, MB Docket No. 14-50, FCC 14-28 (rel. Apr. 15, 2014)(“*2014 Quadrennial Review*”).

<sup>7</sup> Due to matters outside the scope of this Memorandum Opinion and Order, we will withhold final adjudication on the renewal of WNYW(TV) at this time.

<sup>8</sup> 47 U.S.C. § 309(k)(1).

<sup>9</sup> *Astroline Communications Co. v FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

warrant further inquiry in a hearing.”<sup>10</sup> If it does, the Commission will designate the application for hearing. If it does not, the Commission will grant the application, although it may impose conditions on the grant.

### III. WWOR-TV’S PROGRAMMING

6. **Background.** In 1980, the Commission adopted a Notice of Proposed Rulemaking,<sup>11</sup> proposing to reassign Channel 9 from New York City, New York, to a community in Northern New Jersey within the then current city-grade contour of Station WOR-TV (Channel 9).<sup>12</sup> During the pendency of that rulemaking, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982, which added Section 331 to the Communications Act of 1934, as amended.<sup>13</sup> Section 331 requires the Commission to reallocate a VHF commercial television station to a community within a state that does not have such a station, upon notification from a licensee that it agrees to the reallocation.<sup>14</sup>

7. Following the adoption of Section 331, RKO General, Inc. (“RKO”), the then current licensee of the station,<sup>15</sup> notified the Commission that it would move to Secaucus, New Jersey, if the Commission would grant it a five-year license as provided by Section 331. In the *Channel 9 Reallocation Order*, the Commission reallocated Channel 9 from New York City to Secaucus and granted RKO a five-year license to operate on that channel effective April 20, 1983.<sup>16</sup> In interpreting the intent of Section 331, the Commission quoted from the remarks of Senator Bill Bradley, the sponsor of the legislation, that the reallocation “will mean that the license-holder will move its studio and offices to New Jersey and operate in New Jersey for the benefit of the people in [that] State.”<sup>17</sup> It also

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<sup>10</sup> *Id.*

<sup>11</sup> *In the Matter of Petition to Reallocate VHF-TV Channel 9 from New York, New York, to a City Within the City Grade Contour of Station WOR-TV*, Notice of Proposed Rulemaking, 84 FCC 2d 280 (1982).

<sup>12</sup> The previous call sign of WWOR-TV was WOR-TV.

<sup>13</sup> 47 U.S.C. § 331(a). Section 331 states:

VERY HIGH FREQUENCY STATIONS.—It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934.

<sup>14</sup> *Id.*

<sup>15</sup> The station was assigned from RKO to GTH-101, Inc in 1986 and, after subsequent sales, ultimately assigned from Chris-Craft Industries, Inc. to Fox in September 2000.

<sup>16</sup> See *In the Matter of Petition to Reallocate VHF Television Channel 9 from New York, New York*, 53 RR 2d 469 (1983), *aff’d sub nom., Multi-State Communications, Inc. v. FCC*, 728 F. 2d 1519 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984) (“*Channel 9 Reallocation Order*”). In a companion item, the Commission terminated WOR-TV’s then pending renewal proceeding and dismissed a competing application. See *RKO General, Inc. (WOR-TV)*, Order, 53 RR 2d 671 (1983).

<sup>17</sup> 53 RR 2d at 470.

noted that the lack of local VHF television service in the Northern New Jersey area had warranted the imposition of special service obligations on New York City commercial TV stations (i.e., the establishment of a visible, recognizable, and accessible physical presence in New Jersey and a description, at renewal time, of their utilization of the New Jersey facilities and the programming broadcast that was designed to serve the problems, needs, and interest of New Jersey residents.)<sup>18</sup> Accordingly, the Commission stated that “we expect RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee.”<sup>19</sup> At renewal time, RKO was to be judged by how it met the obligation to serve the needs of Northern New Jersey, which the Commission viewed as broader than the specific needs of Secaucus.<sup>20</sup>

8. In 1986, the Commission approved RKO’s opposed application to assign the license of WOR-TV to GTH-101, Inc.<sup>21</sup> In that item, the Commission decided to review RKO’s performance as a licensee due to the unique circumstances of the case, stating that “...the licensee has specifically represented that it would serve as a New Jersey outlet under Section 331, and... that performance has been challenged by petitioners.”<sup>22</sup> Noting that a licensee taking advantage of Section 331 was expected to move its studios and offices to an unserved state, such as New Jersey, the Commission reviewed RKO’s representations in that regard and its description of the extent of its news department. The Commission found that RKO had “fully met the ‘physical presence’ requirement underlying 331.”<sup>23</sup> Based on the programming showing proffered by RKO and the petitioners’ failure to identify any New Jersey issues that they believed should have been addressed, the Commission concluded that “RKO has programmed for the benefit of Northern New Jersey, which is the equivalent of another licensee’s community of license.”<sup>24</sup>

9. In September 2000, the Commission approved the application to assign the license of WWOR-TV from its then licensee, Chris-Craft Industries, to Fox.<sup>25</sup> In the WWOR-TV assignment application, Fox certified that it was “cognizant of and will comply with its obligation as a Commission licensee to present a program service responsive to the issues of public concern facing that station’s community of license and service area.”<sup>26</sup> On February 1, 2007, Fox filed its application for renewal of the license of WWOR-TV.

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<sup>18</sup> See *CBS, Inc.*, 91 FCC 2d 167 (1982). Philadelphia stations have a similar obligation. *Id.*

<sup>19</sup> 53 RR 2d at 471.

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

<sup>21</sup> *RKO General, Inc.*, Decision, 1 FCC Rcd 1081 (1986).

<sup>22</sup> *Id.* at 1085-86.

<sup>23</sup> *Id.* at 1087.

<sup>24</sup> *Id.* at 1088.

<sup>25</sup> *UTV of San Francisco, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 14975 (2001) (“*UTV of San Francisco*”).

<sup>26</sup> In the case of WWOR-TV, this certification would require Fox to meet the special obligation to serve not just the needs of Secaucus, but of Northern New Jersey. See *RKO General, Inc.*, *supra*, 1 FCC Rcd at 1087 (“The move of station WOR-TV to Secaucus does mean that it should focus primarily on the issues facing Secaucus and northern New Jersey, not New York City.”); *id.* at 1085 (noting that, when the Commission re-allocated channel 9 from New York to New Jersey, RKO “promis[ed] to become a Secaucus/northern New Jersey outlet under section 331, and to place a primary emphasis on the issues and concerns of Secaucus and northern New Jersey, instead of New York City.”)

10. **Renewal Application.** In its current renewal application, Fox submitted an extensive exhibit totaling hundreds of pages in which it detailed WWOR-TV's service to New Jersey from 1999 through 2006.<sup>27</sup> In its opposition to VNJ's petition to deny, at the Rutgers Forum and in subsequent filings, Fox has submitted additional showings in which it states, *inter alia*, that the station produced a one-hour nightly newscast and that it devoted a significant amount of time to covering issues relevant to New Jersey viewers during the period covered by the renewal application. Fox states that WWOR-TV also produced two weekly public affairs programs: *New Jersey Now* and *Real Talk*. According to Fox, *New Jersey Now* provides a forum for New Jersey politicians to address issues of importance to New Jersey residents.<sup>28</sup> Fox describes *Real Talk* as a program that presented local social, economic, and cultural issues, as well as local personalities, providing viewers access to civic and community leaders. These programs were broadcast at midday Sunday. Fox states that WWOR-TV has also broadcast special news and public affairs programming, including the New Jersey Governor's budget address, Amber alerts, and special weather reports.<sup>29</sup>

11. In an *ex parte* filing, Fox states that from 1999 through 2007, WWOR-TV broadcast significantly more news than other similarly ranked stations.<sup>30</sup> Citing the *2006 Quadrennial Review*, it states that over 60% of stations ranked fifth or below provided no local news at all during the period studied by the Commission. The remaining 40% provided 458 minutes over a two-week period. In contrast, Fox states that WWOR-TV, which at the time of the filing was ranked sixth in its DMA, provided 850 minutes of local news over any given two-week period from 1999 through 2007.<sup>31</sup> Fox stated that, at the time of the *ex parte*, other stations licensed to New Jersey were providing less than 3.0 hours of local news and public affairs programming per week while WWOR-TV was broadcasting over 8.0 hours of such programming per week.<sup>32</sup>

12. In its petition to deny, VNJ alleges that WWOR-TV has failed to meet its obligations to serve the people of Northern New Jersey, in terms of both the quality and the quantity of its programming. Specifically, VNJ alleges that WWOR-TV has not provided adequate coverage of New Jersey government and elections at the state and local levels.<sup>33</sup> It also alleges that the station has not

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<sup>27</sup> Stations do not normally file a programming exhibit this extensive as part of their renewal application. Fox timely filed the renewal application on February 1, 2007. Issues/programs lists for the first quarter of 2007 are not due until 10 days after the first quarter of 2007. Therefore, the information that Fox filed with the application only went up through 2006. As indicated elsewhere in this item, our review extended beyond the date of the filing of the application. See, e.g. ¶ 21. Also, in *ex parte* filings submitted to the Commission, Fox submitted evidence regarding its service to New Jersey that included 2007. See, e.g., n. 30.

<sup>28</sup> As discussed at ¶¶ 33 to 37, *infra* a dispute has arisen about whether WWOR-TV continued to provide such programming after July 13, 2009 and whether the change in programming was properly reported to the Commission. No party has contended that the programming did not take place as reported from 1999 to 2007, even though the parties disagree about whether the programming met the standard for renewal.

<sup>29</sup> Fox opposition at 22; *Letter to Marlene Dortch, Secretary, Federal Communications Commission, from Jared S. Sher*, dated September 4, 2009, Exhibit A at 3.

<sup>30</sup> *Letter to Marlene Dortch, Secretary, Federal Communications Commission, from Jared S. Sher*, dated September 4, 2009, Exhibit A at 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> As VNJ recognizes in its Petition to Deny, the Commission has "eliminated programming guidelines as to quantities of news and public affairs programming which would be presumed to constitute service in the public interest." Petition to Deny at 3. VNJ does not provide any specificity as to what it would consider "adequate."

properly identified itself with its community of license in its marketing, branding, and advertising.

13. As part of its petition, VNJ has attached the declaration of Ingrid W. Reed, Director of the Eagleton New Jersey Project and a study prepared by the Eagleton Institute of Politics, Rutgers University (“Eagleton Study”).<sup>34</sup> VNJ states that the Eagleton Study is an analysis of the coverage of the 2005 New Jersey elections.

14. According to Ms. Reed, the Eagleton Study analyzes the highest-rated nightly news programs on 12 stations that serve New Jersey in the 30 days before the November 2005 elections. VNJ admits that the study does not capture all news coverage, but alleges that it is the most comprehensive analysis of local television election coverage that has ever been conducted in New Jersey. According to the Eagleton Study, of the 44 WWOR-TV news broadcasts captured during the study period, 25% had an election story, while the average for all New York stations was 52%. According to the Eagleton Study, there were 13 election stories in the 11 WWOR-TV broadcasts that carried such stories, 10 of which focused on New Jersey elections. Of those 10, 9 dealt with the race for governor. The Eagleton Study classifies half of the WWOR-TV election stories as dealing with the strategy of the campaigns and half as dealing with the issues. The Eagleton Study concludes that WWOR-TV “barely covered the 2005 elections.”

15. Fox objects to both the methodology of the Eagleton study and the conclusions that VNJ draws from it. Fox states that, because the study by its own terms only covers 1% of the time that Fox has been the licensee of WWOR-TV, it relies on a manifestly unfair sample size and cannot serve as the basis for a thorough analysis of WWOR-TV’s overall coverage of New Jersey politics. In spite of Fox’s criticism of the Eagleton Study, Fox states that the study still finds that “at least a quarter of the analyzed WWOR-TV newscasts included election coverage during the study period.”<sup>35</sup>

16. In addition to the Eagleton Study, VNJ also reviewed WWOR-TV’s issues/programs lists for all of 2006 and the first quarter of 2007. Based on this review, VNJ argues that the quantity of news coverage provided by WWOR-TV is inadequate to serve its community of license because the station reported less than 10 hours of total news coverage during the first three quarters of 2006. It states that WWOR-TV stopped reporting the airtime of its stories during the last quarter of 2006 and the first quarter of 2007, and that it reported only 7 stories in total for the first quarter of 2007. VNJ also claims that of the total stories reported by WWOR-TV, too many hours of coverage were dedicated to New York stories. VNJ opines that many of the stories listed focused on crime and that too few were dedicated to general news and issues. In its opposition, Fox states that, using VNJ’s definition of New Jersey-focused stories, there were more than 1,350 New Jersey-centric stories from 1999 through 2007, which Fox argues is more than a nominal amount of coverage. In addition, Fox argues that VNJ’s definition of New Jersey-focused coverage is too narrow in that it excludes any story whose parameters are not confined to the borders of New Jersey. Finally, Fox points out that an issues/programs list is meant to be a representative list of a station’s programming, not an exhaustive list of every news story that a station carries.

17. VNJ also alleges that WWOR-TV has not met its obligations with respect to localism in that, except for Newark, the station has not adequately covered the largest municipalities in Northern New Jersey. It claims that WWOR-TV has not provided an adequate number of news stories regarding events in those communities and that many of the stories that it has covered have been negative in tone. In response, Fox asserts that it does not make sense for VNJ to claim that a story is relevant to a particular New Jersey township, such as Edison, only if it deals with events in that particular township.

<sup>34</sup> See Attachment B to VNJ Petition to Deny and Exhibit A thereto.

<sup>35</sup> Fox Opposition to VNJ Petition to Deny at 20.

Instead, Fox asserts that residents of communities of northern New Jersey are interested in issues outside of their own particular town and that the breadth of New Jersey-centric issues addressed by WWOR-TV programming responds to the issues of concern to viewers across the service area.

18. To further support its contentions that WWOR-TV has failed in its duty to adequately cover issues of concern to its community of license, VNJ states that it undertook its own study, monitoring two weeks of WWOR-TV's 10 p.m. newscast over a 12-day period from April 9 to April 20, 2007.<sup>36</sup> VNJ claims that WWOR-TV's New Jersey coverage during this period was higher than normal due to the presence of what it characterizes as three nationally significant news stories during this period. These stories were the injuries sustained by Governor Jon Corzine in an automobile accident, the controversy generated by comments made by radio personality Don Imus regarding the Rutgers Women's Basketball Team, and storm damage caused to the state by a Nor'easter. Although it does not provide a statistical breakdown, VNJ claims that WWOR-TV "clearly" allocated more time to New York stories than New Jersey stories during the review period and failed to cover many stories that VNJ believed to be important. In its opposition, Fox argues that no rational conclusion about a station's overall level of performance can be drawn from such a limited sample of programming. Nevertheless, Fox contends that the sample selected indicates that Fox spent significant time during the days selected covering New Jersey related stories. Fox also states that it is patently unfair for VNJ to criticize WWOR-TV for devoting extra coverage to the three stories mentioned above relative to other New Jersey news stories just because those stories were also of national interest.

19. Finally, although VNJ concedes that WWOR-TV has not moved out of New Jersey, it argues that the station seems "to be relocating in spirit." VNJ claims that the station's branding makes repeated references to New York and does not make any references to New Jersey. In response, Fox states that it has no plans to relocate the station's operations and that it is committed to maintaining a significant physical presence in the state. It states that it maintains a large employee presence and also maintains multiple live news trucks to serve its news gathering operations. Fox also states that its branding does not in any way relate to its level of service to the Northern New Jersey area.

20. On November 28, 2007, a public forum was held at Rutgers University in Newark, New Jersey, to solicit public comment on whether WWOR-TV had met its public service obligations. More than forty speakers, including the late Senator Frank Lautenberg, representatives from VNJ, representatives from local citizens' groups, activist organizations, police and firemen's groups, other broadcasters, and representatives from WWOR-TV spoke at the forum. Several speakers alleged that WWOR-TV failed to adequately cover issues of concern to Northern New Jersey in general or issues of concern to their constituency in particular.<sup>37</sup> Other speakers commended WWOR-TV for its news coverage and for its community service.<sup>38</sup> Fox made a presentation on its own behalf, highlighting WWOR-TV's service to New Jersey.

**21. Programming Changes at WWOR-TV.** In a letter dated November 27, 2009, VNJ

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<sup>36</sup> VNJ states that the April 18<sup>th</sup> newscast was omitted due to a recording error.

<sup>37</sup> See, e.g. Testimony of Ms. Ingrid Reed, Eagleton Institute New Jersey Project, *Transcript of Media Bureau Public Forum on WWOR-TV License Renewal in New Jersey* ("Transcript"), pp. 47-53; Testimony of Ms. Donna Sandorse, Voice for New Jersey, *Transcript*, pp. 34-41; Testimony of Mr. Chuck Lovey, Voice for New Jersey, *Transcript*, pp. 58-60; Testimony of Mr. Bill Hassal, *Transcript*, pp. 58-61; William Terry, One Organization, *Transcript*, pp. 123-126; Daniel Schoenberg, *Transcript*, pp. 107-108.

<sup>38</sup> See, e.g. Testimony of Ms. Wendy White, Three Doctors Foundation, *Id.* at pp. 53-57; the Rev. Jacques DeGraff, Newark Community Health Centers, *Transcript*, pp. 72-74; Mr. Dale Alexander, United Negro College Fund, *Transcript*, pp. 78-80; Larry Petrillo, New Jersey Division of Fire Safety, *Transcript*, pp. 122-123; Sharon Brown, African American Festival, *Transcript*, pp. 87-89.

alleged that Fox had reduced its level of news and public affairs programming at WWOR-TV.<sup>39</sup> VNJ stated that, as of July 13, 2009, WWOR-TV had cut its news programming from one hour per day to two and one-half hours per week and its public affairs programming from one hour per week to one-half hour.

22. In a letter dated January 5, 2010, Fox responded to VNJ's allegations.<sup>40</sup> In the letter, Fox argues that, even at its reduced level of service, it still meets the required level of service to warrant renewal.

23. In 2013, Fox reported to the Commission that it made further changes in its news programming when it revised the format of its regular news program, renaming it *Chasing New Jersey*.<sup>41</sup> Fox describes *Chasing New Jersey* as a "radically new approach that allows reporters to engage more deeply in reporting and with one another to analyze important local and national news issues."<sup>42</sup> Fox states that the program includes stories with local and national interest including politics, investigative reporting, sports, and weather.<sup>43</sup> Shortly after *Chasing New Jersey's* premiere, VNJ wrote to the Commission expressing its concern about the program's news content, but acknowledged that it was premature, at that time, to judge the program's quality.<sup>44</sup>

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<sup>39</sup> *Letter to Chairman Julius Genachowski from Donna Sandorse*, dated November 27, 2009. This letter is the subject of allegations made by VNJ against Fox discussed below.

<sup>40</sup> *Letter to Chairman Julius Genachowski, Federal Communications Commission from Antoinette Cook Bush*, dated January 5, 2010. Fox begins by arguing that it is inappropriate to introduce evidence into this proceeding regarding its performance during the period after it filed its license renewal application. Citing *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5018 (2001), Fox contends that the Commission has refused to evaluate a licensee's actions that occur outside the license term for which the renewal application was filed. Citing *In re K Licensee, Inc.*, Letter, 23 FCC Rcd 7824, 7827 (Vid. Div. 2008). Contrary to Fox's contention, its performance while its renewal application was pending is properly considered in determining whether to grant its renewal application. When the Commission makes its public interest determination on a license renewal application, it considers the licensee's performance since the beginning of its most recent license term. 47 U.S.C. § 309(k)(1); 47 U.S.C. § 307(c)(3) (directing the Commission to "continue [a] license in effect" pending its review of a renewal application). Although Fox has been lawfully operating WWOR-TV since grant of its last renewal application, its new renewal period does not commence until the grant of its next renewal application. 47 C.F.R. § 307(c), 503(b)(6) ("A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) pending a decision on an application for renewal of the license."); *see, e.g., Linfield College*, 26 FCC Rcd 7949, 7951, Forfeiture Order (Aud. Div. 2011). The Commission has long considered acts that occur while a license renewal is pending in deciding whether to grant a renewal application. *See RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927, 456 U.S. 1119 (1982); *Committee for Open Media v. FCC*, 543 F.2d 861, 870 (D.C. Cir. 1976). *Birach Broadcasting* did not alter this practice. Rather, *Birach* reflects the Commission's traditional reluctance to afford greater weight to improved performance during the pendency of a renewal proceeding than to past negative performance. Fox's reliance on *K Licensee* is similarly misplaced because the language at issue in that case refers to whether violations from a previous 8-year cycle were properly reported on a license renewal form, which is not at issue in this case.

<sup>41</sup> *See Notice of Ex Parte Communication from Maureen A. O'Connell*, dated July 26, 2013, filed in MB Docket 07-260 ("O'Connell Letter").

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Letter from Charles Lovey, Member, Voice of New Jersey, to Mignon Clyburn, Acting Chairwoman, Federal Communications Commission*, dated July 10, 2013. In his letter, Mr. Lovey refers to the "unique nature of the New Jersey media landscape, with only one high-power commercial television station to serve a huge and diverse (continued....)



24. **Discussion.** As discussed above, the Commission has stated in previous decisions that the “higher” level of service expected from WWOR-TV means that, although the station’s overall performance should be judged in the same manner as any other television station, its performance will be evaluated with respect to Northern New Jersey, not primarily Secaucus. “WOR-TV should serve Northern New Jersey,” stated the Commission, “in the same manner as a station licensed to Chicago . . . serves that city.”<sup>45</sup> This is in contrast to, for example, a Houston, Texas station, whose performance is tied primarily to Houston and not to the Texas Gulf Coast. While this means that WWOR-TV’s primary focus should remain on its community of license, Northern New Jersey, it does not preclude coverage of surrounding communities, anymore than a Houston station is precluded from covering Galveston. Also, as with any station “[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee’s good faith discretion,” and “the Commission will not review the licensee’s news judgments.”<sup>46</sup> Instead, we will look to see whether the station is acting to ascertain issues of concern to its community of license and to respond to those needs.

25. Although VNJ asserts that the results speak for themselves and indicate that the station has failed to serve its community of license, the examples that it proffers do not support the allegations that WWOR-TV has failed to meet its public service obligations. The Eagleton Study on which VNJ relies indicates that WWOR-TV produced substantial coverage of New Jersey elections during the survey period and that the average length of stories on WWOR-TV was significantly longer than those on the New York-based commercial stations.<sup>47</sup> Also, the Eagleton Study was extremely limited in that it focused only on 30 days out of a license term that spans years and did not include the station’s weekly public affairs programs, which were broadcast for an hour per week from 1999 through 2007. Furthermore, we do not believe that a snapshot survey like the Eagleton Study, which covers a short period of time and does not take into account a station’s total news and public affairs programming during an election cycle, much less during its total license term, is a meaningful measure in and of itself of whether a station is meeting its public interest obligations.

26. VNJ also tries to use WWOR-TV’s issues/programs lists to demonstrate that the station’s programming was inadequate. Like the Eagleton Study, WWOR-TV’s issues/programs lists do not support VNJ’s assertions. Issues/programs lists, although fundamental in reviewing a station’s performance during its license term,<sup>48</sup> are not required to report every single story reported by a station during its license term or to account for every minute of news reporting. Instead, at the end of every quarter, each station is to place in its public inspection file “a list of programs that provided the station’s

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market...” In fact, there are ten full power commercial television stations currently licensed to the state of New Jersey.

<sup>45</sup> *RKO General, Inc.*, 1 FCC Rcd at 1086.

<sup>46</sup> *American Broadcasting Companies, Inc.*, 83 F.C.C.2d 302, 305 (1980). See also *Dr. Paul Klite*, Letter, 12 Com. Reg. (P&F) 79, 81-82 (MMB 1998), *recon. denied sub nom, McGraw-Hill Broadcasting Co.*, Memorandum Opinion and Order, 16 FCC Rcd 22739 (2001) (denying petition that cited excess of news stories dedicated to “mayhem” and under-coverage of issues involving the environment, arts, science, education, poverty AIDS, children and local elections).

<sup>47</sup> Two of the stations cited in the study, News 12 and CN8, are not broadcast stations. They are cable networks, one of which markets itself as a news network. The study found that the average New Jersey election story on all evaluated station lasted under 2.5 minutes, but WWOR-TV’s average story length was over 4 minutes. Eagleton Study at 15-16.

<sup>48</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1075, 1107-11 (1984).

most significant treatment of community issues during the preceding three month period.”<sup>49</sup> In WWOR-TV’s case, the issues/programs lists reflect large numbers of New Jersey-centric stories from 1999 through 2007.<sup>50</sup>

27. Finally, a random survey of twelve days of programming, like the one performed by VNJ, although well-intentioned, is not representative of a station’s efforts over an 8-year license term.<sup>51</sup> As Fox notes, even that limited random sample indicated significant coverage of New Jersey-focused programming during the observation period. In each of these instances, the Eagleton Study, the issues/programs lists, and the twelve-day survey by VNJ, there is evidence of significant coverage of New Jersey issues by WWOR-TV from 1999 through 2007.

28. With its one-hour nightly news program and its two half-hour weekly public affairs programs, WWOR-TV provided regular substantive coverage of local issues to Northern New Jersey residents from 1999 through 2007. In addition, WWOR-TV provided coverage of special events, such as the Governor’s budget address, that were of direct concern to local citizens.

29. Following the period from 1999 through 2007, WWOR-TV continued to broadcast a news program five nights per week and *New Jersey Now*. It also broadcast special public affairs programming including the August 11, 2013 New Jersey Senatorial Debate. Although it has changed the format of its evening news program from a traditional, anchor-centered format to the one used on *Chasing New Jersey*, staff review of the station’s issues/programs lists and of samples of *Chasing New Jersey* on the station’s web site indicates that WWOR-TV covers local politics, local stories, local weather, and local sports.<sup>52</sup>

30. Although we recognize that the programming for a single quarter does not give a valid basis to review a station’s performance for an entire license term, we note that, based on the stations’

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<sup>49</sup> 47 C.F.R. § 3526(e)(11)(i)(emphasis added). The lists must now also be filed electronically as part of the station’s on line public file. *In the Matter of Standardized and Enhanced Disclosure Requirements*, Second Report and Order, 27 FCC Rcd 4535, 4569 (2012); *Effective Date Announced for Online Publication of Broadcast Television Public Inspection Files*, Public Notice, 27 FCC Rcd 7478 (2012).

<sup>50</sup> Early in its license term, WWOR-TV offered three public affairs programs: *Black Experience*, *Hispanic Horizons*, and *Garden State Matters*. *Hispanic Horizons*, for example, offered news and commentary on dozens of issues of interest to New Jersey residents of Latino origin, including education, health care, culture, immigration, overcoming the digital divide, discrimination during elections and ensuring access to voting for Latino residents, among many others. The Station more recently offered two weekly public affairs programs tackling New Jersey issues: (i) *Ask Congress/New Jersey Now*, on which U.S. representatives and U.S. senators from New Jersey frequently appeared and (ii) *Real Talk*, which includes interviews with numerous New Jersey civic and community leaders. Throughout the license term, news broadcasts offered more than a thousand stories specifically pegged to New Jersey residents, on topics including: politics, with extensive coverage of four gubernatorial elections and the service of six New Jersey governors during the license period; the racial profiling controversy involving the N.J. State Police; child care, including issues with New Jersey’s foster care system; and crime, including the New Jersey nurse that killed dozens of his patients. The Station also broadcast stories about other topics of specific interest to New Jersey residents including coverage of casino strikes, toll hikes, local elections for Bergen County sheriff and Jersey City mayor, digitized driver’s licenses, New Jersey’s efforts to secure its fair share of Homeland security funding, potential military base closures, and needle exchange programs. WWOR-TV only currently airs *New Jersey Now*.

<sup>51</sup> *Oregon Alliance to Reform Media*, Letter, 22 FCC Rcd 15183 (Vid. Div. 2007), *aff’d Portland Area Commercial Television Stations Application for Renewal of License*, Memorandum Opinion and Order, 28 FCC Rcd 2762 (2013).

<sup>52</sup> WWOR-TV online public file, <https://stations.fcc.gov/station-profile/wwor-tv/document-uploads/>. *Chasing New Jersey Online*, <http://www.my9nj.com/category/267012/chasing-new-jersey>.

issues programs lists for the fourth quarter of 2013, WWOR-TV reported at least as many New Jersey-centric stories than the four other commercial TV stations licensed to the northern New Jersey area.<sup>53</sup> All four of those stations were renewed in the last cycle.

31. Whether the station might have selected different stories to cover or presented its stories using different formats is not a part of our review. It is well-settled law that the Commission does not substitute its own editorial judgment for that of a licensee.<sup>54</sup> Stations may exercise their own discretion in how to attract an audience to their news and public affairs programming. Similarly, viewers may strongly express their opinion of such choices directly to stations and by advocating for different content. The only question before us is whether the licensee met its obligation to serve its community of license and, based on the record before us, we find that WWOR-TV met that obligation by airing programming that is responsive to the issues of concern to its community, in this case Northern New Jersey.<sup>55</sup> For that reason, the petition to deny filed by VNJ is denied.<sup>56</sup>

32. Even though we are denying VNJ's petition and we find, in this particular proceeding, that WWOR-TV has met its obligation to serve its community of license, we emphasize that we continue to carefully consider citizen complaints as we have in this instance. In this regard, we encourage an ongoing, good faith dialogue between citizens, citizens' groups, and stations to develop responsive programming that is both welcomed by the community and financially viable for the station.

#### IV. VNJ'S ALLEGATIONS REGARDING FOX'S *EX PARTE* PRESENTATIONS

33. On August 26, 2009, Fox submitted two *ex parte* letters, which included an exhibit ("Exhibit") containing information regarding WWOR-TV's daily local newscasts; its weekly public affairs programs; its public service announcements; its local sports and entertainment programming; and its presence in northern New Jersey, including the number of employees working for WWOR-TV.<sup>57</sup> The Exhibit, which was undated, also contained legal arguments in support of Fox's positions in this proceeding.<sup>58</sup> Fox had submitted this Exhibit to the Commission more than once in connection with *ex parte* communications with Commission staff. On September 4, 2009, in connection with a permit-but-disclose *ex parte* communication with Commission staff, Fox attached a slightly revised version of the

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<sup>53</sup> The stations used for comparison were WMBC-TV, Newton, NJ; WFUT-DT, Newark, NJ; WNJU(TV), Linden, NJ; and WXTV-DT, Paterson, NJ. <https://stations.fcc.gov/station-profile/>

<sup>54</sup> *Complaints Concerning Network Coverage the Democratic National Convention*, Decision, 16 FCC 2d 650, 654 (1969).

<sup>55</sup> An informal objection to deny the renewal of the license of WWOR-TV was filed by Aristides Martinez based on the alleged failure of the station to serve the needs of Hispanics, who he describes as a significant minority in its community of license. In opposition, Fox argues that it does present programming serving the issues of concern to this portion of the community. As discussed above, the Commission does not substitute its own editorial judgment for that of a licensee. While we recognize that some viewers may prefer certain programming, the government is generally precluded by law from regulating any licensee's program presentation based on its content. In the case of WWOR-TV, having already found that the station has met its overall obligations to serve Northern New Jersey, there is no basis for us to dictate that its coverage focus on one group over another.

<sup>56</sup> We agree with Fox that the issue of branding raised by VNJ, *see* ¶12, is not relevant to our consideration of WWOR-TV's renewal application. No allegation has been made that the station has failed to comply with our rules on station identification. *See* 47 C.F.R. § 73.1201.

<sup>57</sup> *Letters to Marlene Dortch, Secretary, Federal Communications Commission from Jared S. Sher*, dated August 26, 2009, Exhibit A.

<sup>58</sup> *Id.*

Exhibit (“Revised Exhibit”) in which some passages had been changed to the past tense.<sup>59</sup>

34. In a letter dated November 27, 2009, VNJ alleged that Fox had over-stated its level of news and public affairs programming at WWOR-TV in the Exhibit when it was filed August 26, 2009 because of significant programming cuts as of July 13, 2009.<sup>60</sup> VNJ also claimed Fox had reduced its staff, and essentially merged its operations with co-owned WNYW(TV).<sup>61</sup>

35. In a letter dated January 5, 2010, Fox responded to VNJ’s allegations.<sup>62</sup> Fox stated that it always intended that its statements regarding its programming and staffing to refer only to the period from 1999 to 2007.<sup>63</sup> Fox stated that the Revised Exhibit makes that clear but that, even at its reduced level of service, it still met the required level of service to warrant renewal.<sup>64</sup>

36. The Commission investigated the matter<sup>65</sup> in a Letter of Inquiry (“LOI”), to which Fox replied in a submission dated April 10, 2011.<sup>66</sup> In that submission, Fox stated that in July 2009, as a result of the national economic recession, WWOR-TV made changes to its programming and staffing levels.<sup>67</sup> Fox next stated that, although the changes were openly made and evident to the viewing public, it inadvertently failed to revise the text of the Exhibit when it was resubmitted on August 26, 2009.<sup>68</sup> Fox then pointed out that it did submit the Revised Exhibit without prompting and states that “days later,” its President of Station Operations attended meetings with two Commissioners’ offices in which he stated that staff reductions had been made at the station.<sup>69</sup> With the LOI Response, Fox also submitted the declaration of Maureen O’Connell, Senior Vice President, Regulatory & Government Affairs, News Corporation, who stated that, to the best of her knowledge, recollection and belief, she shared with Commission staff general information about the changes at WWOR-TV that had been necessitated by the economy in meetings on August 25, 2009.<sup>70</sup> She went on to state that it belatedly occurred to her that the attachment to the *ex parte* filing submitted in conjunction with those meetings might be confusing.<sup>71</sup> Therefore, she said that she directed Fox’s counsel to edit and revise the

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<sup>59</sup> *Letter to Marlene Dortch, Secretary, Federal Communications Commission from Jared S. Sher*, dated September 4, 2009, Exhibit A.

<sup>60</sup> *Letter to Julius Genachowski, Chairman, Federal Communications Commission from Donna Sandorse, Member, VNJ*, dated November 27, 2009.

<sup>61</sup> *Id.*

<sup>62</sup> *Letter to Chairman Julius Genachowski, Federal Communications Commission from Antoinette Cook Bush*, dated January 5, 2010. We have already rejected Fox’s argument expressed in this letter that the only appropriate period for review is the period from 1999 to 2007. *See* n. 40, *supra*.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Letter from William T. Lake, Chief, Media Bureau*, 26 FCC Rcd 1298 (Vid. Div. 2011)(“LOI”).

<sup>66</sup> *Letter to Marlene Dortch, Secretary, Federal Communications Commission from Antoinette Cook Bush*, dated April 11, 2011(“LOI Response”).

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.*

<sup>70</sup> Declaration of Maureen A. O’Connell, Senior Vice President, Regulatory & Government Affairs, News Corporation, dated January 18, 2011, attached to LOI Response.

<sup>71</sup> *Id.*

WWOR-TV summary so that it would more clearly indicate that it referred to the period from 1999 to 2007.<sup>72</sup> Ms. O’Connell declared that she did not and does not believe these changes were of decisional significance to the pending renewal application and she did not intend to mislead anyone at the Commission.<sup>73</sup>

37. We find that any confusion created by Fox’s filing was unintentional and was harmless error. It is true that Licensees have an obligation to provide correct information to the Commission and, when that information is found to be incorrect for any reason, to promptly bring the error to the Commission’s attention and correct it.<sup>74</sup> However, Fox did revise the information it was providing in its *ex parte* Exhibit. In addition, according to the record, Fox told the offices of Commissioners and Commission staff about changes that had been made to the station’s staff and programming. In fact, the change in the programming was public because it was broadcast on the station.<sup>75</sup> The record indicates that Fox did make an effort to indicate that the claims it was making were confined to the period before Fox filed the license renewal application, and Fox asserts that it believed this was the only period under review. While that understanding was mistaken,<sup>76</sup> it explains why Fox believed it was not required to disclose its correction of the *ex parte* filing. Finally, as we have found above, even at the reduced amount of programming Fox met its obligations to serve its community of license. Therefore, we do not believe that this issue warrants further review.

## V. THE NEWSPAPER BROADCAST CROSS OWNERSHIP RULE

38. In 1985, K. Rupert Murdoch, as the controlling principal of the News Corporation (“News Corp”) subsidiary News America Television Incorporated, acquired WNYW(TV) in connection with a multi-station, multi-market transaction by which 7 full-service broadcast television stations were acquired from Metromedia Radio and Television, Inc. At that time, Mr. Murdoch controlled the *Post*. As a condition to the grant of the application to acquire the television stations, the Commission required Mr. Murdoch to divest his interest in the *Post* within two years in order to conform to the requirements of the broadcast/newspaper cross-ownership rule.<sup>77</sup> In March 1988, News Corp complied with the condition, selling its interest in the *Post* to a company controlled by real estate developer Peter S. Kalikow. Following his personal bankruptcy, Mr. Kalikow was unable to support the *Post*’s operations as he had planned with funds from his real estate holdings. As a result, Mr. Kalikow made several unsuccessful attempts to secure alternate funding for the *Post*. After these attempts failed, Mr. Kalikow placed the *Post*’s parent company in bankruptcy. During the bankruptcy proceeding, Mr. Murdoch agreed to assume management of the paper conditioned on obtaining a permanent waiver of the cross-ownership rule. Subsequently, Mr. Murdoch sought a waiver from the Commission that would permit a News Corp subsidiary to acquire the *Post* and allow News Corp subsidiary Fox Television Stations (“FTS”) to retain the license of WNYW(TV).

39. Mr. Murdoch based the request for a permanent waiver of the television/newspaper cross-ownership rule on two grounds. First, he argued that he was the only “viable” purchaser who demonstrated a willingness to undertake the financial burden of stabilizing and revitalizing the *Post*.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 47 C.F.R. §§ 1.17 and 1.65.

<sup>75</sup> LOI Response at 4.

<sup>76</sup> *See n.* 40.

<sup>77</sup> *Metromedia Radio and Television, Inc.*, Memorandum Opinion and Order, 102 FCC 2d 1334 (1985), *aff’d*, *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038 (D.C. Cir. 1987).

Mr. Murdoch stated that his commitment to the *Post* involved infusing up to \$350,000 in cash per week, as well as providing the managerial, technical, and editorial skills necessary to operate the *Post* in the highly competitive New York market.<sup>78</sup> He contended that a strict application of the television/newspaper cross-ownership rule would dissuade the underlying policy of diversity by eliminating an important voice in the New York market. Second, as support for his contention that permitting common ownership of the *Post* and WNYW(TV) would not unduly impact diversity in the New York market, he noted that the New York City area of dominant influence (ADI) at that time contained “20 television stations, 97 AM and FM radio stations, 62 percent cable penetration and cable systems providing at least 56 different satellite-delivered program services, 36 daily newspapers with an average aggregate daily circulation of 4.5 million, and 338 weekly newspapers.”<sup>79</sup> Given the size and competitive nature of the New York market, Mr. Murdoch maintained that common ownership of WNYW(TV) and the *Post* would preserve diversity by rescuing “an important competitive voice and source of viewpoint diversity,” without resulting in either excessive media control or competitive advantage to Fox.<sup>80</sup>

40. The Commission analyzed the waiver request by examining the “special circumstances” under which the proposed combination was to be formed, and by assessing the diversity and competitiveness of the New York City market. The Commission concluded that the request had been amply justified, “comporting with the high burden necessary to warrant grant of a waiver” of the television/newspaper cross-ownership rule.<sup>81</sup> With respect to the “special circumstances,” the Commission looked to the financial condition of the *Post*, whose bankrupt status threatened the existence of a media voice in the New York market.<sup>82</sup> The Commission stated that the substantial funds necessary for capital improvements and to carry continuing operating losses raised an issue as to whether any alternative buyer would be willing to risk future liabilities of such magnitude in order to preserve the *Post* as an alternative voice. Consequently, the Commission concluded that Mr. Murdoch’s involvement with the *Post* may have been “pivotal to the newspaper’s survival.”<sup>83</sup>

41. With respect to diversity and competition, the Commission found that any loss of diversity resulting from common ownership of WNYW(TV) and the *Post* would be outweighed by the benefit to diversity that would result from preservation of the *Post* as a viable voice.<sup>84</sup> The Commission further found that “[g]iven the wide array of voices in New York City, any detriment to diversity caused by common ownership of two media outlets would be negligible,” even were one to consider only full-service television stations and the four major daily newspapers then serving the New York market.<sup>85</sup> In addition, the Commission determined that the proposed combination would not result in undue market concentration as the addition of the *Post* would only add 1% to FTS’s 5% share of the combined television-newspaper advertising market.<sup>86</sup> The Commission concluded that, therefore, grant of the

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<sup>78</sup> *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5345 (1993) (“*Post Waiver*”).

<sup>79</sup> *Id.*

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

<sup>81</sup> *Id.* at 5353.

<sup>82</sup> *Id.* at 5349.

<sup>83</sup> *Id.* at 5350.

<sup>84</sup> *Id.* at 5352.

<sup>85</sup> *Id.* at 5351.

<sup>86</sup> *Id.* at 5352.

waiver would not disserve the twin purposes of the television/newspaper cross-ownership rule, diversity and competition.<sup>87</sup> In deciding to grant a permanent rather than a temporary waiver, the Commission found that failure to do so would hamper the *Post* in its attempts to attract advertisers and readers and to negotiate with labor unions, suppliers, and distributors. The Commission concluded that only a permanent waiver could provide the degree of certainty that was necessary to revitalize the bankrupt *Post*.<sup>88</sup>

42. In 2001, Fox acquired ten television stations from Chris-Craft Industries, Inc.,<sup>89</sup> including WWOR-TV. In granting the assignment applications, the Commission rejected Fox's arguments that its original permanent waiver was adequate to permit the combined ownership of WNYW(TV)/WWOR-TV and the *Post*. The Commission held that a waiver granted under market conditions that exist at a given place and time is not automatically extended to cover new combinations several years later under potentially changed market conditions.<sup>90</sup> Therefore, the Commission found that a new waiver would be necessary to authorize the combination that was requested in that proceeding. Based on the record before it, the Commission did not disturb the permanent waiver between WNYW(TV) and the *Post*, and it gave Fox twenty-four months to come into compliance with the NBCO rule by divesting either the *Post* or WWOR(TV), unless the NBCO rule was amended before the deadline to make divestiture unnecessary.<sup>91</sup> Based on the tremendous diversity and competition in the New York market, combined with the non-dominant position of the *Post* in the market, the Commission concluded that the benefit of an orderly sale outweighed any disadvantages of a temporary loss in diversity.

43. In 2004, Fox filed its Petition for Modification of Permanent Waiver ("Modification Petition"). In 2008, Fox filed a Supplement to the Modification Petition ("Supplement"). In the Modification Petition, Fox asked the Commission to modify its permanent waiver that permitted the joint ownership of WNYW(TV) and the *Post* to encompass the ownership of WWOR-TV. It based this request on the Commission's relaxation of the NBCO rule in its decision in the 2002 biennial ownership review process,<sup>92</sup> a decision that was subsequently stayed and the proceeding remanded by the U.S. Court of Appeals for the Third Circuit. In the alternative, Fox asked that the twenty-four month temporary waiver be extended pending the conclusion of the remand. In the Supplement, Fox argued, as it has before, that its original permanent waiver permitting the ownership of WNYW(TV) and the *Post* automatically encompasses ownership of WWOR-TV. It also argued that the New York market is diverse and competitive enough to justify grant of the waiver. Fox further argued that its combination meets the standard for a permanent waiver of the NBCO rule set out in the Commission's 2008 decision setting new standards for cross-ownership waivers. UCC opposed both the Modification Petition and the Supplement.

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<sup>87</sup> *Id.* at 5350.

<sup>88</sup> *Id.*

<sup>89</sup> *UTV of San Francisco*, 16 FCC Rcd 14975 (2001).

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

<sup>91</sup> *Id.* at 14987.

<sup>92</sup> *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) ("2002 Biennial Review Order"), *rev'd and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("Prometheus").

44. On April 15, 2014, the Commission initiated the *2014 Quadrennial Review*.<sup>93</sup> In the rulemaking notice starting that proceeding the Commission reviews the history of the NBCO rule and seeks comment on whether to revise its rule in the current marketplace.<sup>94</sup> In light of the Commission's having just begun a proceeding that bears directly on the combination at issue here, which is admittedly unique (among other things, two television stations, one newspaper, the number one media market), we believe it is inappropriate to make a final ruling on Fox's request for a permanent waiver at this time. Therefore, we will deny its Modification Petition and Supplement.<sup>95</sup> Instead, we will afford the licensee 90 days after the effective date of an order in the *2014 Quadrennial Review* that either adopts a new NBCO rule or upholds our existing rule to (1) comply with the rule in effect at that time or (2) file a new request for a waiver of such rule.

## VI. FREE PRESS PETITION FOR RECONSIDERATION

45. In its order on reconsideration in the *Murdoch Recon*,<sup>96</sup> the Commission dismissed petitions for reconsideration and affirmed its earlier grant of the transfer of control of Fox Television Stations, Inc. from Mr. Murdoch to the Fox Entertainment Group, Inc. and also affirmed its decision to grant a temporary waiver to Fox of the NBCO rule permitting the joint ownership of WNYW(TV)/WWOR-TV and the *Post*. Subsequent to the Commission's decision on reconsideration, Free Press filed a petition for reconsideration of the order on reconsideration. The applications that formed the basis of the Commission's 2006 original decision in *K. Rupert Murdoch*<sup>97</sup> were filed on August 30, 2006, and neither Free Press nor any other party filed an opposition or participated in the proceeding before the Commission before the *2006 Decision* was issued.

46. In its petition, Free Press argues that: (1) the decision to grant Fox a waiver violated the stay imposed by the Third Circuit in *Prometheus*; (2) Fox's request for waiver of the NBCO rule is an untimely petition for reconsideration; (3) the Commission lacks good policy reasons for granting a waiver; and (4) the Commission failed to take into consideration News Corporation's ownership of the *Wall Street Journal* and 29 weekly newspapers in the New York market. For the reasons stated below, we find that Free Press lacks standing, that the petition is procedurally defective and that it is a collateral attack on the *2006 Decision*.

47. The Memorandum Opinion and Order announcing the grant was released on October 6, 2006. At that point, Rainbow PUSH Coalition and the Office of Communication of the United Church of Christ ("UCC") filed a petition for reconsideration, even though they had not previously participated in the proceeding. Subsequently, the Commission issued the order on reconsideration in the *Murdoch Recon*, which is the order at issue here.

48. Free Press, which also had not been a party to the original proceeding, filed an appeal of the *2006 Decision* with U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Free Press states that its appeal was held in abeyance pending resolution of UCC's petition for

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<sup>93</sup> *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking and Report and Order, MB Docket No. 14-50, FCC 14-28 (rel. Apr. 15, 2014) ("*2014 Quadrennial*").

<sup>94</sup> *Id.* at ¶ 113 to 199.

<sup>95</sup> Our ruling today does not have an effect on the permanent waiver previously granted to permit the co-ownership of WNYW(TV) and the *Post*, which remains in effect.

<sup>96</sup> *Murdoch Recon*, Memorandum Opinion and Order on Reconsideration, 24 FCC Rcd 5824 (2009).

<sup>97</sup> *K. Rupert Murdoch*, Memorandum Opinion and Order, 21 FCC Rcd 11499 (2006) ("*2006 Decision*").



reconsideration.<sup>98</sup> Three years after it filed its appeal of the *2006 Decision* with the D.C. Circuit, Free Press filed the petition for reconsideration of the *Murdoch Recon*, which is the petition before us. We find the petition to be procedurally defective and without merit. Specifically, Free Press was not a party to the proceeding and has not justified its failure to participate earlier; the petition was not filed within 30 days from the date of public notice of final Commission action in the *2006 Decision*;<sup>99</sup> it relies on arguments that have been fully considered and rejected by the Commission in the same proceeding;<sup>100</sup> it relates to an order for which reconsideration has been denied on similar grounds;<sup>101</sup> and it relates to matters outside the scope of the order for which reconsideration is sought.<sup>102</sup> Under section 1.106(p) of the Commission's Rules, it is therefore appropriate to resolve this petition for reconsideration of a Commission action at the Bureau level because it does not warrant consideration by the full Commission.

49. Under Section 1.106(b)(1) of the Commission's Rules, if a petition for reconsideration "is filed by a person who is not a party to the proceeding it shall . . . show good reason why it was not possible for him to participate in earlier stages of the proceeding."<sup>103</sup> As the Commission stated in regard to UCC in the *Murdoch Recon*:

It is uncontested that the applications were placed on public notice on August 30, 2005. The public notice named the parties and stations involved and included the call signs, communities of license, facility identification numbers and the type of application filed. FEG [Fox] states that public notice of the filing of the applications was also provided on-air on both WNYW(TV) and WWOR-TV, as well as in a New York daily newspaper. FEG states that the applications themselves were available for inspection at the stations and we note that they were also available in the Commission's public reference room and on our web site. The Commission has repeatedly held that public notice constitutes constructive notice to interested parties of the filing of an application. We did not grant the applications at issue here for almost a year after they appeared on public notice. Petitioners, therefore, had ample opportunity to file a petition to deny or an informal objection to the applications and cannot claim that public notice of the applications and the associated waivers was not given.<sup>104</sup>

Like the parties seeking reconsideration of the *2006 Decision* in the *Murdoch Recon*, Free Press cannot claim that it lacked ample opportunity to file a petition to deny prior to the Commission's original decision in the proceeding. Likewise, Free Press cannot claim that it lacked an opportunity to participate prior to the issuance of the earlier decision on reconsideration. Free Press asserts that a letter that it filed in a separate proceeding<sup>105</sup> in opposition to the Modification Application, more than four months before the applications at issue in the *2006 Decision* were filed, should be treated as a petition to deny against the proposed transaction and the accompanying requested waivers in that later proceeding. Free Press argues that, because Fox incorporated the Modification Application into the

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<sup>98</sup> Free Press Petition for Reconsideration at 3.

<sup>99</sup> 47 C.F.R. § 1.106(p)(7), (9).

<sup>100</sup> 47 C.F.R. § 1.106(p)(3).

<sup>101</sup> 47 C.F.R. § 1.106(p)(8). See *Murdoch Recon.*, 24 FCC Rcd 5824 (2009).

<sup>102</sup> 47 C.F.R. § 1.106(p)(5).

<sup>103</sup> 47 C.F.R. § 1.106(b)

<sup>104</sup> *Murdoch Recon.*, 24 FCC Rcd at 5827 (internal citations omitted).

<sup>105</sup> See Letter to Chairman Kevin Martin from Timothy Karr and Ben Scott, dated April 15, 2005 ("Letter").

transfer applications, its rights were preserved by the Letter and that Fox should have included or mentioned the Letter in the transfer applications. However, as noted above, Free Press had more than enough opportunity to file a timely petition to deny or to file an informal objection prior to the original decision in which it could have raised those points. Raising them here is grossly untimely and unjustified.<sup>106</sup> Furthermore, it is not credible to treat the Letter, which was not “supported by an affidavit of a person or persons with personal knowledge...” as required by Section 309(d),<sup>107</sup> as a petition to deny in a wholly separate proceeding. Further, the only affidavit Free Press submitted was untimely, having been executed and submitted nearly four years after petitions were due and more than four years after the letter was prepared.<sup>108</sup>

50. In any event, the legal arguments in the Letter were considered and rejected in the *Murdoch Recon*. Although Free Press was not a party to that proceeding, the *Murdoch Recon* states:

Nonetheless, even though the petitioners here lack standing, we think that it is appropriate to consider Free Press’s objections to the 2004 Modification Request because Fox incorporated that request by reference into the transfer application at issue here.<sup>109</sup>

51. In considering Free Press’ arguments, the Commission rejected its contention that granting the waiver violated the Third Circuit’s stay,<sup>110</sup> as well as the argument that the waiver request was an untimely petition for reconsideration of previous rejections of waiver requests.<sup>111</sup>

52. As a final justification for its belated attempt at reconsideration, Free Press cites to News Corporation’s acquisition of the *Wall Street Journal* and several weekly newspapers in the New York area in 2007, which it claims it had no previous opportunity to raise. This is meritless. The Commission has specifically excluded the *Wall Street Journal* from the NBCO rule because it is a national, not a local, newspaper<sup>112</sup> and the rule, by its own terms, does not cover weekly newspapers.<sup>113</sup> Therefore, News Corporation’s acquisition of those properties is irrelevant to any reconsideration of the Commission decision in the *Murdoch Recon*.<sup>114</sup> Finally, not only were the issues raised in the Letter

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<sup>106</sup> The issue is also moot in that we deny both the Modification Petition and its Supplement in this Memorandum Opinion and Order.

<sup>107</sup> 47 U.S.C. § 309(d).

<sup>108</sup> As the *Murdoch Recon* points out, the Letter suggests that Free Press planned to file a petition to deny if the Modification Petition were put on public notice, which it was when the transfer applications were filed. Free Press, with UCC, did later file an opposition to the Supplement to the Modification, which we rule on herein. See ¶ 37 and 44 *supra*. The Supplement, which was filed after the decision in the *Murdoch Recon* disposed of the Modification Petition, incorporates the Modification Petition.

<sup>109</sup> Free Press was not itself a party to the proceeding at *Murdoch Recon* and the Commission did not rule on its standing. The Commission denied standing to UCC and Rainbow/Push, the filers of the petition. *Murdoch Recon*, 24 FCC Rcd at 5828.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; see also *2006 Decision*, 21 FCC Rcd at 11502

<sup>112</sup> *Stockholders of CBS*, Memorandum Opinion and Order, 11 FCC Rcd 3733, 3779 (1995); *Evening News Association*, 102 FCC 2d 1263 (1986).

<sup>113</sup> 47 C.F.R. § 73.3555(d).

<sup>114</sup> News Corporation acquired the *Wall Street Journal* and at least one of the community newspapers to which Free Press objects in December 2007. The *Reconsideration Order* was not released until May 22, 2009. Free Press could have raised its concerns sooner in a letter to the Commission.

resolved in the *Murdoch Recon*, but we deny both the Modification Petition and its Supplement in this decision,<sup>115</sup> rendering the matter moot. For all of these reasons, the petition for reconsideration filed by Free Press of the Commission's order in the *Murdoch Recon*<sup>116</sup> is dismissed.

53. Under 47 C.F.R §1.106(p), petitions for reconsideration of Commission action may be resolved on delegated authority by the appropriate Bureau, if it does not warrant consideration by the full Commission and, among other things, the petition for reconsideration (1) is not filed within 30 days from the date of public notice of final Commission action;<sup>117</sup> (2) relies on arguments that have been fully considered and rejected by the Commission in the same proceeding;<sup>118</sup> (3) relate to an order on which reconsideration has previously been denied on similar grounds;<sup>119</sup> or (4) relates to matters outside the scope of the order for which reconsideration is sought.<sup>120</sup>

54. This petition for reconsideration was filed four years after the parties originally had the opportunity to participate in the proceeding and almost three years after release of the *2006 Decision*, long after the thirty (30) day limit for seeking reconsideration of that decision. Its arguments, insofar as they relate to the Letter and the validity of Fox's cross-ownership waivers, were considered and rejected in the *Murdoch Recon*. Finally, Free Press's allegations regarding the *Wall Street Journal* and community newspapers are not relevant to this proceeding, and in any event are untimely because they could have been raised earlier. Free Press' petition for reconsideration is, in effect, an untimely collateral challenge of the *2006 Decision*, since it challenges the Commission's determination in that order to grant the requested NBCO waiver. The Commission has stated that indirect challenges to decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.<sup>121</sup> For all of the foregoing reasons, this petition for reconsideration does not warrant consideration by the full Commission and is properly dismissed by the Bureau.

## VII. CONCLUSION

55. We have reviewed the applications, the petitions to deny, the informal objections, the modification request, the petition for reconsideration, and all supplementary and related pleadings and filings. We conclude that the applicant is fully qualified to hold the licenses and that grant of the applications, subject to the conditions set forth herein and with the waiver granted herein, will serve the public interest, convenience, and necessity.

## VIII. ORDERING CLAUSES

56. ACCORDINGLY, IT IS ORDERED That the petition to deny the renewal application of WWOR-TV filed by the Voice for New Jersey and the informal objection filed by Aristides Martinez

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<sup>115</sup> See ¶ 44 *supra*.

<sup>116</sup> 24 FCC Rcd 5824 (2009).

<sup>117</sup> 47 C.F.R. § 1.106(p)(7).

<sup>118</sup> 47 C.F.R. § 1.106(p)(3).

<sup>119</sup> 47 C.F.R. § 1.106(p)(8).

<sup>120</sup> 47 C.F.R. § 1.106(p)(5).

<sup>121</sup> *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 12752, 12757 (1999); *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, n. 38 (1990) *recon denied*, 5 FCC Rcd 3463 (1990) *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F. 2d 1259 (10<sup>th</sup> Cir. 1991)(*per curium*).

ARE DENIED.

57. IT IS FURTHER ORDERED That the petition to deny the renewal applications of WWOR-TV and WNYW(TV) filed by the United Church of Christ and Rainbow/PUSH Coalition IS DENIED.

58. IT IS FURTHER ORDERED That the petition for reconsideration filed by Free Press of the Commission's order on reconsideration in *K. Rupert Murdoch*, 24 FCC Rcd 5824 (2009) IS DISMISSED.

59. IT IS FURTHER ORDERED That the petition for modification of permanent waiver filed by Fox Television Stations and News Corporation Limited and the Supplement thereto IS DENIED.

60. IT IS FURTHER ORDERED That, Fox Television Stations IS GRANTED a temporary waiver of the television/newspaper cross-ownership rule, 47 C.F.R. §73.3555(d)(3), in the New York, New York DMA to permit the common ownership of the *New York Post*, WNYW(TV) and WWOR- such that the licensee shall ninety (90) days after the effective date of an order in the *2014 Quadrennial Review* that either adopts a new NBCO rule or upholds our existing rule (1) comply with the rule in effect at that time or (2) file a new request for a waiver of such rule.

61. IT IS FURTHER ORDERED That the application for renewal of license of television station WWOR-TV, Secaucus, New Jersey, File No. BRCT-20070201AJT IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau