

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Fox Corp. Request for Permanent Waiver of	)	MB Docket No. 20-378
Newspaper-Broadcast Cross-Ownership Rule	)	
	)	

**OPPOSITION OF FREE PRESS, UNITED CHURCH OF CHRIST, OC INC., AND  
COMMON CAUSE TO FOX CORP. REQUEST FOR PERMANENT WAIVER**

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## Executive Summary

Free Press, United Church of Christ, OC Inc., and Common Cause oppose Fox's request for a permanent waiver of the newspaper-broadcast cross-ownership rule for WWOR-TV, Secaucus, NJ, and the *New York Post* newspaper. The Commission must deny Fox's request for a permanent waiver for three reasons: (1) the request is legally deficient, failing to meet or even address the *2016 QR Order's* standard of review for an NBCO waiver; (2) Fox's past waiver requests and grants alone do not support granting a permanent waiver now; and (3) the Commission should not rule on the waiver during this time, with the pending transition in the presidential administration and at the Commission as well, plus the pending Supreme Court review of the proceeding setting forth this rule Fox has been dodging for the past nineteen years.

First, the Commission should reject the request because it is not tethered to the law, and Fox's minimal attempt to plead a case for such extraordinary relief is deficient. Fox fails to articulate any waiver standard by which its request for a permanent waiver should be measured.

Second, the Commission should deny Fox's request because it obscures the two-decade long history of opposition to its impermissible cross-ownership of WWOR and the *Post*, as well as the history of Commission actions that led to Fox obtaining its string of temporary waivers, all in order to pretend that granting the waiver it now seeks is somehow justified by the purported public interest benefits and compliance plans Fox promised but never delivered.

Finally, Fox may fear its cross-ownership's future under a new administration, but that is no reason to steam ahead with a permanent waiver, especially with the pending transition and pending Supreme Court review of the rules. The Commission must adhere to its own standards for waiver requests, and doing so should only lead to one outcome: denying Fox's request for a permanent waiver of the NBCO rule.

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**OPPOSITION TO FOX CORP. REQUEST FOR PERMANENT WAIVER**

Free Press, United Church of Christ, OC Inc., and Common Cause oppose the Fox Corp. and Fox Television Stations, LLC (together, “Fox”) request for a permanent waiver of the newspaper-broadcast cross-ownership (“NBCO”) rule for WWOR-TV, Secaucus, NJ (“WWOR”) and the *New York Post* (“*Post*”) newspaper. Fox filed the request on October 5, 2020,<sup>1</sup> and the Media Bureau put it out for comment on November 13, 2020.<sup>2</sup>

The Commission should reject Fox’s request because it is not tethered to the legal standard set by the Commission for such waivers, and its minimal attempt to plead a case for such extraordinary relief is deficient. Fox fails to articulate any waiver standard by which its request for a permanent waiver should be measured. If the Commission were to grant this

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<sup>1</sup> Fox Corp. Request for Permanent Waiver of Newspaper-Broadcast Cross-Ownership Rule, 47 C.F.R. § 73.3555(d), MB Docket No. 20-378 (filed Oct. 5, 2020) (“Fox Permanent Waiver Request”).

<sup>2</sup> *Media Bureau Seeks Comment on Request for Permanent Waiver of Newspaper-Broadcast Cross-Ownership Rule Filed by Fox Corp.*, MB Docket No. 20-378, Public Notice, DA 20-1350 (Med. Bur. rel. Nov. 13, 2020) (“*Public Notice*”). The Bureau subsequently granted a four-day extension in the time for filing these initial comments, setting December 1 as the new deadline. *See Fox Corp. Request for Permanent Waiver of Newspaper-Broadcast Cross-Ownership Rule*, MB Docket No. 20-378, Order Granting Extension of Time to File Comments and Reply Comments, DA 20-1401 (Med. Bur. rel. Nov. 24, 2020).

waiver, it would set a perilous precedent by lowering barriers that a requesting entity must meet to obtain such waivers.

Fox's request obscures the two-decade long history of opposition to its impermissible cross-ownership of WWOR and the *Post*. The request also elides the history of Commission actions that led to Fox obtaining its string of temporary waivers, all in order to pretend that granting the waiver it now seeks is somehow justified by the purported public interest benefits and compliance plans Fox promised but never delivered.

**I. Fox Has Consistently Failed to Comply With The Terms of Its Temporary Waivers and the Promises It Made to Obtain Them.**

Adopted in 1975, the NBCO rule prohibits common control of daily newspapers and a broadcast station serving the same market.<sup>3</sup> In its current filing, where Fox seeks its second permanent waiver of the Commission's rules in the same market, Fox argues that the NBCO rule is not necessary because the internet and smartphones have changed the "modern media landscape."<sup>4</sup> Even if we set aside Fox's attempt to bootstrap a pending rulemaking into this adjudication, this argument is meritless.

No matter the changes in that landscape, the NBCO rule is still relevant today because of the persistent digital divide. As Free Press has explained, "[i]t is extremely hypocritical for the Commission to pay lip service to the seriousness of the digital divide while also suggesting . . . that online news alternatives provide sufficient competition to consolidating broadcasters when people are on the wrong side of the digital divide cannot access such alternatives."<sup>5</sup>

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<sup>3</sup> 47 C.F.R. § 73.3555(d).

<sup>4</sup> See Fox Permanent Waiver Request at 3.

<sup>5</sup> Comments of Free Press, MB Docket No. 17-318, at 10 (filed Mar. 19, 2018).

Moreover, even when people can access them, digital news operations often fail to fulfill critical functions of local broadcast media. According to the most recent studies and research directly on the topic and before the Commission, local television newsrooms provide significantly more local news coverage than online media platforms,<sup>6</sup> and broadcasters and newspapers remain the public’s most trusted source of news.<sup>7</sup> Although online aggregators may compete with broadcast newsrooms for eyeballs and ad dollars, they rely heavily on those newsrooms for access to original reporting, and thus cannot be said to be true substitutes for local broadcasters.

The evolving media landscape on which Fox relies is therefore an unnecessary distraction and irrelevant to the Commission’s analysis of Fox’s request for a permanent waiver of the still relevant and still effective NBCO rule. Fox does not dare suggest that broadcast outlets and newspapers are unimportant sources for local news, and in fact suggests in conclusory fashion but with no supporting documentation (other than fourteen-year old Commission decisions) that the string of WWOR temporary waivers “benefits competition and the public interest by allowing the [Fox] Stations and the *Post* to invest more in local news coverage . . . .”<sup>8</sup>

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<sup>6</sup> See Matthew Hindman, “Less of the Same: The Lack of Local News on the Internet,” at 10 (Apr. 6, 2011), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-307476A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-307476A1.pdf) (“The big picture is that there is little evidence . . . that the Internet has expanded the number of local news outlets. And while the Internet adds only a pittance of new sources of local news, the surprisingly small audience for local news traffic helps explain the financial straits local news organizations now face.”).

<sup>7</sup> See Pew Research Center, “For Local News, Americans Embrace Digital but Still Want Strong Community Connection” (Mar. 26, 2019), <https://www.journalism.org/2019/03/26/nearly-as-many-americans-prefer-to-get-their-local-news-online-as-prefer-the-tv-set> (“The results show that local TV stations are the top type of source for local news. . . . Radio stations . . . and daily newspapers [ ] serve as the next most popular providers of local news.”); see also Media Insight Project, “The Personal News Cycle: How Americans choose to get their news” (Mar. 17, 2014), <https://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/>.

<sup>8</sup> Fox Permanent Waiver Request at 5.

Yet Fox makes no attempt to show with particularity that this changing “landscape” has changed the specific fortunes of WWOR and the *Post*, or that retaining common ownership of both Fox broadcast stations in the New York City market and the *Post* is essential to preserving these historical benefits that Fox’s pleading alleges but fails to prove.

In other words, Fox’s latest filing does nothing to suggest that the general history and merits of the NBCO rule should bear on its specific waiver request here. But it has failed to show too that its specific waiver request has any merit in its own right, beyond its odd durability and repeated renewals based on little more than maintaining a “status quo”<sup>9</sup> that was never intended to be permanent in the first place. We set forth below the lowlights of the two-decade history of Fox’s string of temporary waivers, and the continuous public interest opposition to them, to show that the supposed benefits of this cross-ownership have not materialized over the years—and to show that the Commission should adhere to the NBCO rule and reject Fox’s request for a permanent waiver now.

#### **A. Fox’s Permanent Waiver for WNYW and the *Post*.**

In 1993, Fox, the licensee of New York station WNYW, requested a permanent waiver of the NBCO rule so that Rupert Murdoch could re-purchase the then-bankrupt *Post*. At the time, the Commission could waive this rule only if the applicant met one of four criteria: (1) the licensee is unable to sell the station; (2) the only sale possible would be at an artificially depressed price; (3) separate ownership and operations of broadcast stations and newspapers could not be supported in the locality; or (4) the purposes of the rule would be disserved by its application.<sup>10</sup> Additionally, the burden was on the applicants to plead the particular facts and

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<sup>9</sup> Fox Permanent Waiver Request at 1, 4.

<sup>10</sup> See *Multiple Ownership of Standard FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 589 (1975).

circumstances to support deviation from the rule.<sup>11</sup> Applying that four-part waiver test, the Commission granted Fox a permanent waiver of the NBCO rule to own WNYW and the *Post*.<sup>12</sup>

### **B. Fox's First Waiver for WWOR and the *Post*.**

In 2000, Fox proposed to acquire several television stations from Chris-Craft Industries, Inc., including WWOR.<sup>13</sup> United Church of Christ, the Rainbow/PUSH Coalition (“UCC/RPC”) and others opposed Fox’s acquisition of WWOR.<sup>14</sup> Nonetheless, in 2001, the Commission granted Fox a 24-month waiver of the NBCO rule so that it could acquire television station WWOR, licensed to Secaucus, NJ, but still within the New York designated market area, as part of the larger transaction,<sup>15</sup> and noted that Fox would have time to divest either the *Post* or one of the television stations and avoid a “forced sale.”<sup>16</sup> UCC/RPC appealed this decision to the United States Court of Appeals for the D.C. Circuit. Fox’s brief assured the court that it understood the waiver was not a “free pass,” but was instead intended to allow Fox time to “locate a new buyer for a fragile . . . enterprise.”<sup>17</sup> The D.C. Circuit affirmed the Commission’s ruling, holding that it

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<sup>11</sup> See United Church of Christ, *et al.*, Application for Review, MB Docket No. 07-260 *et al.*, at 14-15 (filed Oct. 8, 2014) (summarizing history of public interest organizations and local viewers opposition to Fox’s acquisition of WWOR).

<sup>12</sup> *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5354 (1993).

<sup>13</sup> See Opposition to Request for Waiver of United Church of Christ, OC Inc. *et al.*, MB Docket No. 07-260, at 1 (filed Apr. 10, 2017) (“UCC 2017 Opposition”) (setting forth history).

<sup>14</sup> Petition to Deny by The Office of Communication, Inc. of the United Church of Christ, *et al.*, File Nos. BALCT-20000918ABB, *et al.* (filed Oct. 27, 2000).

<sup>15</sup> *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14990 (2001).

<sup>16</sup> *Id.* at 14988-90.

<sup>17</sup> Br. by Fox Television Stations, Inc., *United Church of Christ v. FCC*, 51 F. App’x. 21 (D.C. Cir. 2002), (No. 01-1374, filed July 15, 2002).

was within its discretion to grant a temporary waiver for 24-months to allow Fox time to divest a property and come into compliance with the NBCO rule.<sup>18</sup>

### **C. Fox's Second Waiver for WWOR and the *Post*.**

Fox's two-year waiver expired in July 2003. During those two years Fox made no attempt to comply with the NBCO rule. The month before the first temporary waiver's expiration, the Commission had voted to replace the NBCO rule with a more relaxed rule as part of its 2002 Biennial Review.<sup>19</sup> However, before that new rule took effect, it was stayed by the Third Circuit.<sup>20</sup> Fox waited an entire year, until September 2004, to request an extension of its expired waiver.<sup>21</sup> The Commission failed to act on Fox's request.

Then in 2005, Fox proposed a corporate restructuring that required the Commission's approval. The Commission placed Fox's transfer application on public notice in August 2005, but gave no indication that approval of the request necessitated a new waiver or that Fox had attached its September 2004 waiver request to the transfer application.<sup>22</sup> In August 2006, the Commission voted 3-2 to approve the transfer. At the same time, it granted Fox a second 24-month temporary waiver until December 27, 2008, to provide "sufficient certainty to assure that [Fox] and News Corp. will continue to take appropriate action or expend necessary capital to preserve and expand the *Post* without a concern that it would have to forfeit that investment by

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<sup>18</sup> See *United Church of Christ v. FCC*, 51 F. App'x. 21 (D.C. Cir. 2002).

<sup>19</sup> See *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) ("*2002 Biennial Review*"), *rev'd and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

<sup>20</sup> See *Prometheus Radio Project v. FCC*, 2003 WL 22052896 (3d Cir. 2003).

<sup>21</sup> *Fox Television Stations, Inc.*, Petition for Modification of Permanent Waiver (filed Sept. 22, 2004).

<sup>22</sup> Fox was required to file a Form 315 Transfer of Control Application with the FCC and attached a copy of the 2004 waiver request to its Form 315.

closing the newspaper or by forced sale of a media interest at an artificially depressed price to achieve compliance with the multiple ownership rules.”<sup>23</sup>

#### **D. Fox’s Third Waiver for WWOR and the *Post*.**

In February 2007, Fox filed applications for the renewal of the licenses for WWOR and WNYW. UCC/RPC filed a Petition to Deny, alleging that renewing both licenses would violate the NBCO rule, and would thus be *prima facie* inconsistent with the public interest.<sup>24</sup> The Commission waited seven years—almost an entire license term—to act on Fox’s application for renewal of WWOR.<sup>25</sup> On August 8, 2014, the Media Bureau denied UCC/RPC’s Petition to Deny and granted WWOR’s renewal along with a waiver of the NBCO rule.<sup>26</sup> Unlike the previous 24-month waiver, however, this waiver gave Fox “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

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<sup>23</sup> *K. Rupert Murdoch, (Transferor) and Fox Entertainment Group (Transferee)*, 21 FCCR 11499, 11502 (2006).

<sup>24</sup> *Fox Television Stations, Inc.*, UCC/RPC Petition to Deny Fox’s License Renewals of WWOR-TV and WNYW(TV), File No. BRCT-20070201AJT, at 10-17, (filed May 1, 2007) (“UCC/RPC Pet. to Deny”). This Petition to Deny also requested that the Commission act on the pending Petition for Reconsideration of the *2006 Order*. *Id.* at 9. The Petition for Reconsideration argued that: (1) the FCC decision to grant Fox another waiver offended basic due process requirements by failing to give public notice and take comment on Fox’s waiver request; (2) the decision was arbitrary and capricious because FCC based it on incorrect factual assumptions; (3) Fox failed to show it met any of the qualifications for waiver because it had failed to attempt to divest and could not show an increase in diversity; and (4) the Commission must consider Fox’s lack of candor and character issues. UCC/RPC Petition for Reconsideration, File No. BCTCCT-20050819AAF (Nov. 6, 2006). Additionally, Voices for New Jersey also filed a petition to deny presenting detailed evidence showing that WWOR and ignored Northern New Jersey in pursuit of the New York City market.

<sup>25</sup> WNYW(TV)’s renewal was still pending at the time, however. *See Order* at n. 7.

<sup>26</sup> *Fox Television Stations, Inc.*, MB Docket 17-260, Memorandum Opinion and Order, 29 FCC Rcd 9564, ¶ 2 (2014).

waiver of such rule.”<sup>27</sup> The Bureau also denied Free Press’s Petition for Reconsideration without addressing the merits.<sup>28</sup>

#### **E. Fox’s Fourth Waiver for WWOR and the *Post*.**

On October 8, 2014, UCC/RPC and Free Press filed an Application for Review<sup>29</sup> requesting that the Commission reverse the Bureau’s renewal of WWOR’s license and grant of an indefinite waiver of the NBCO rule because those actions were “in conflict with statute, regulation, case precedent, or established Commission policy” and involved a “question of law or policy which has not previously been resolved by the Commission.”<sup>30</sup> In 2015, Fox filed applications for renewal of both stations’ licenses. UCC, RPC and Free Press again filed a petition to deny.<sup>31</sup> That petition urged the FCC to act on their application for review of the 2014 waiver before acting on Fox’s 2015 license renewal applications.

In August 2016, the Commission issued its decision in the 2014 Quadrennial Review (“*2016 QR Order*”).<sup>32</sup> Despite what the Fox Permanent Waiver Request falsely asserts, when it claims that “the Commission’s basic determination that the NBCO Rule does not advance the public interest has never been disputed,”<sup>33</sup> this 2016 order concluded definitively that the NBCO

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<sup>27</sup> *Id.* ¶ 44.

<sup>28</sup> *Id.* ¶ 46.

<sup>29</sup> UCC/RPC and Free Press, Application for Review, MB Docket No. 07-260 (filed Oct. 8, 2014).

<sup>30</sup> 47 C.F.R. § 1.115(b)(2)(i)-(ii)

<sup>31</sup> Petition to Deny filed by United Church of Christ, Rainbow/PUSH Coalition, and Free Press against Applications for Renewal of License of WWOR-TV and WNYW(TV), File No. BRCDT-20150202ACT (filed May 1, 2015).

<sup>32</sup> See *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 *et al.*, 31 FCC Rcd 9864 (2016) (“*2016 QR Order*”).

<sup>33</sup> Fox Permanent Waiver Request at 3.

rule served the public interest and remained necessary to promote viewpoint diversity.<sup>34</sup> The Commission in 2016 also adopted a new standard for granting waivers of the NBCO rule.<sup>35</sup> This order took effect on December 1, 2016, and Fox’s waiver expired 90 days later, on March 1, 2017.

On February 28, 2017, the day before the waiver expired but a month after Chairman Pai’s tenure at the head of the agency began, Fox requested another temporary waiver extension of the NBCO rule until 90 days after the Commission acted on the National Broadcasters’ petition for reconsideration of the *2016 QR Order*. On March 8, 2017, UCC, RPC, Free Press, and Voices for New Jersey jointly opposed Fox’s Request for yet another temporary waiver of the NBCO rule,<sup>36</sup> and supplemented their opposition on April 10, 2017.<sup>37</sup>

Among the arguments raised in the opposition was Fox’s failure to meet its burden under the waiver standard established by the *2016 QR Order*.<sup>38</sup> In the *2016 QR Order*, the Commission stated it would consider waivers of the NBCO rule on a “case-by-case basis” and rejected a “presumptive waiver approach,”<sup>39</sup> reasoning that examining the “totality of the circumstances”

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<sup>34</sup> *2016 QR Order* ¶¶ 142-150.

<sup>35</sup> *Id.* ¶¶ 176-189.

<sup>36</sup> See *United Church of Christ, OC Inc. et al., Opposition to Fox Television Stations, LLC’s Request for Temporary Waiver of the Newspaper-Broadcast Cross-Ownership Rule*, MB Docket No. 07-260 (filed Mar. 8, 2017).

<sup>37</sup> See *Opposition to Request for Waiver of United Church of Christ, OC Inc. et al.*, MB Docket No. 07-260 (filed Apr. 10, 2017) (“UCC *et al.* 2017 Opposition”).

<sup>38</sup> See *UCC et al. 2017 Opposition* at 4-5.

<sup>39</sup> *2016 QR Order* ¶ 133.

would allow “the Commission to focus its attention immediately on the evidence that is most relevant for each waiver request.”<sup>40</sup>

On November 20, 2017, the Pai Commission issued an Order on Reconsideration in the 2014 quadrennial review docket that purported to eliminate the NBCO rule, as well as several other local ownership limits.<sup>41</sup> Then on July 12, 2018, the Commission upheld the Media Bureau’s decision to grant Fox’s applications for license renewals of WWOR-TV and WNYW(TV) and denied the Application for Review filed by UCC/RPC and Free Press.<sup>42</sup> The Commission also noted that “[b]ecause of our action in the 2014 Quadrennial Recon repealing the NBCO rule, Fox’s joint ownership of these properties is now permissible under our current rules and the challenge to the Bureau’s grant of temporary waiver is therefore moot.”<sup>43</sup>

However, the Commission’s actions in its 2017 Order on Reconsideration were challenged, and the case is now before the Supreme Court.<sup>44</sup> In the meantime, the United States Court of Appeals for the Third Circuit issued its decision to vacate and remand the 2017 Order on Reconsideration in *Prometheus Radio Project v. FCC*, reinstating the NBCO rule and other ownership rules.<sup>45</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 *et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017) (“*2017 Reconsideration*”).

<sup>42</sup> *In re Fox Television Stations, Inc.*, MB Docket No. 07-260, Memorandum Opinion and Order, 33 FCC Rcd 7221, ¶ 3 (2018) (“Fox 2018 License Renewal”).

<sup>43</sup> *Id.* ¶ 3.

<sup>44</sup> *See Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019) (“*Prometheus IV*”), *cert. granted*, 591 U.S. \_\_\_\_, Nos. 19-1231, 12,1241 (Oct. 2, 2020).

<sup>45</sup> *Prometheus Radio IV*, 939 F.3d at \_\_\_\_, *petition for rehearing en banc denied* (3d Cir. Nov. 20, 2019).

On November 29, 2019 the Third Circuit issued its mandate,<sup>46</sup> and the Commission released an order on December 20, 2019 to reflect the changes in the rules and the reinstatement of the *2016 QR Order* as required by the court.<sup>47</sup> In that order, the Commission reinstated the *2016 QR Order* “case-by-case” standard of review for waivers of the NBCO rule.<sup>48</sup> It is this standard of review that applies to Fox’s current request for a permanent waiver.

## **II. The Commission Must Deny Fox’s Request for a Permanent Waiver for WWOR and the *Post*.**

In its latest permanent waiver request, Fox embraces an alternative, disingenuous and skewed version of its two-decades long history of temporary waivers.<sup>49</sup> It uses twisted logic to argue that “a cloud of regulatory uncertainty” would justify the Commission granting Fox a permanent waiver of the NBCO rule.<sup>50</sup> The Commission must deny Fox’s request for a permanent waiver for three reasons: (1) the request is legally deficient, failing to meet or even address the *2016 QR Order*’s standard of review for an NBCO waiver; (2) Fox’s past waiver requests and grants alone do not support granting a permanent waiver now; and (3) the

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<sup>46</sup> Letter from Patricia S. Dodszeit, Clerk, *Prometheus Radio Project v. FCC*, Nos. 17-1107 *et al.* (3d Cir. Nov. 29, 2019).

<sup>47</sup> *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 *et al.*, Order, DA 19-1303 (rel. Dec. 20, 2019) (“*2019 Order*”). The posture of the Commission in duly following the Third Circuit’s mandate even while seeking Supreme Court Review makes all the more curious Fox’s strange assertion that no party to *Prometheus IV* contends giving “interim” effect to the NBCO rule would serve the public interest. *See* Fox Permanent Waiver Request at 5-6. Regulated entities like Fox that are subject to Commission rules bear the burden of complying with them, whether or not parties to litigation over such rules assert that the Commission ought to enforce them.

<sup>48</sup> *2019 Order*, Appendix n. 12 (noting that “Parties seeking waiver of paragraph (d)(1) of this section, or an exception pursuant to paragraph (d)(2) of this section involving failed or failing properties, should refer to the Second Report and Order in MB Docket No. 14-50, FCC 16-107 (released August 25, 2016)”).

<sup>49</sup> *See* Fox Permanent Waiver Request.

<sup>50</sup> *See id.* at 2.

Commission should not rule on the waiver during this time, with the pending transition in the presidential administration and at the Commission as well, plus the pending Supreme Court review of the rules Fox has been dodging for the past nineteen years.

**A. Fox’s request for a permanent waiver of the NBCO rule is legally and factually deficient.**

In its request, Fox concedes that the NBCO rule is currently in place, but fails to cite or address the Commission’s *2016 QR Order* standard of review for NBCO waiver requests. Instead, Fox argues that failing to grant a permanent waiver would “introduce uncertainty as to the [Fox properties’] future, potentially reducing competition and diversity in the market.”<sup>51</sup>

In the *2016 QR Order*, the Commission rejected a presumptive waiver approach and said it would examine the totality of the circumstances to determine whether a waiver of the NBCO rule is appropriate. The burden is therefore on Fox to demonstrate why the Commission should grant a permanent waiver; but that is a burden it fails to meet by hinging its request for a waiver on nothing more than the regulatory uncertainty that would result from the Commission’s refusal to grant it. If the Commission were to accept Fox’s utterly circular argument, basing the necessity of any waiver grant on little more than the applicants’ own self-serving opinion of its necessity, then it would render the agency’s own rules useless. Indeed, taking Fox’s position here would create perverse incentives to make a “permanent” end-run around existing rules any time they are subject to any rulemaking or litigation.

Throughout its request, Fox obscures facts to justify its permanent waiver. Fox begins by stating that WWOR and the *Post* have been “commonly owned for decades,”<sup>52</sup> yet omits to note that the Commission granted WWOR and the *Post* temporary waivers based on Fox’s repeated

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<sup>51</sup> *See id.* at 5 (citation omitted).

<sup>52</sup> Fox Permanent Waiver Request at 4.

promise of eventual divestiture and unique circumstances around the Chris-Craft acquisition.<sup>53</sup> Fox then claims that a permanent waiver would “protect an arrangement that provides substantial benefits to the public,”<sup>54</sup> but fails to demonstrate with particularity what those benefits may be. Though Fox pretends that “uncertainty” over possible future enforcement of the rule is a standalone reason for a permanent waiver, it cannot escape the fact that the Commission must apply its standard of review established in the *2016 QR Order* in order to issue any waiver—and there is no uncertainty in that. In sum, Fox’s claims that the Commission should grant a permanent waiver of the NBCO rule merely due to the “cloud of regulatory uncertainty” are not based on the Commission’s authority to waive its rules for good cause shown or on any sound legal precedent.

**B. Fox’s string of temporary waivers does not create a precedent to support granting it a permanent waiver, nor demonstrate its compliance with those temporary waivers.**

Fox states that permanent waiver would “preserve the status quo”<sup>55</sup> since both WWOR and the *Post* have been commonly owned for nearly two decades, conveniently omitting the consistent opposition to such waivers from local viewers and public interest advocates, and ignoring the fact that many of these temporary waivers were predicated on Fox’s promise that it simply needed more time to come into compliance with the NBCO rule.<sup>56</sup>

If anything, the regulatory uncertainty Fox now cites is a predicament of its own making, created through its repeated but unfulfilled representations that it would eventually come into

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<sup>53</sup> See *supra* Section I.

<sup>54</sup> Fox Permanent Waiver Request at 4.

<sup>55</sup> See Fox Permanent Waiver Request at 4.

<sup>56</sup> See *supra* Section I.

compliance with the NBCO rule. Contrary to what Fox characterizes as temporary waivers handed out solely due to the supposed public interest benefits created by common ownership of WWOR and the *Post*, those temporary waivers were in fact predicated on Fox's repeated promises to divest and come into compliance with the NBCO rule. And the facts reveal Fox's pattern of ignoring its obligations to provide local news and serve the New Jersey community of license for WWOR rather than meeting those obligations in exchange for the waivers it received.

These kinds of fast and loose representations continue even in Fox's current request, which erases public interest input over the course of the two decade-long history by stating that "the Commission's basic determination that the NBCO rule does not advance the public interest has never been disputed."<sup>57</sup> Nothing could be further from the truth, even with respect to the Commission's own decisions such as the *2016 QR Order* passage noted above, to say nothing of public interest submissions regarding the NBCO rule in general and the specific application of it in the instant proceeding. If Fox's characterizations were true, then the *2017 Reconsideration* would not exist and *Prometheus IV* would not be pending before the Supreme Court.

Moreover, prior to the issuance of *Public Notice*, New Jersey Senators Bob Menendez and Cory Booker wrote a letter to the Commission regarding this waiver, explaining that granting Fox's request "would undermine the Commission's own goals of diversity, localism, and competition" and "reward Fox . . . even though the company has failed to meet its responsibilities to New Jersey" and therefore "flouted its responsibility under the law and under its license."<sup>58</sup> WWOR has long failed to provide enough local New Jersey content, and in 2013

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<sup>57</sup> See Fox Permanent Waiver Request at 3.

<sup>58</sup> See Letter from Senator Menendez and Senator Booker to Hon. Ajit V. Pai, Federal Communications Commission (Nov. 9, 2020), <https://www.menendez.senate.gov/newsroom/press/menendez-booker-demand-fcc-hold-wwor-tv-to-its-legal-obligation-to-provide-local-news-coverage-to-njans>.

closed its news department and began airing a TMZ-style news program called “Chasing New Jersey” with a mix of local and national stories.<sup>59</sup> In September 2018, Fox sold its Secaucus building and moved its studio to New York, an act that was described by Senator Menendez as “the final nail in the coffin on any legitimate claim to calling themselves a New Jersey broadcast station.”<sup>60</sup>

In considering the permanent waiver request, the Commission must examine WWOR’s history and whether it is currently meeting its public interest obligations and serving New Jerseyans. The Commission should also request that Fox demonstrate how granting a permanent waiver “would not harm competition or viewpoint diversity,”<sup>61</sup> and not merely take the statement at face value.

**C. Even if Fox's filing had attempted to address the legal standard the waiver request ignores, the Commission should delay consideration of its permanent waiver request.**

Setting aside the (lack of) merit in Fox’s waiver request, the fact that the proceeding determining the NBCO rule’s status is now before the Supreme Court illustrates there is no need now to rush a “permanent” decision. As Free Press noted in its Motion for Extension of Time, the Commission should delay consideration of this permanent waiver “in light of the truncated pleading cycle, ongoing transition, and pending litigation cited by Fox.”<sup>62</sup>

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<sup>59</sup> Adrienne Romero, “Bye, bye Channel 9: Demolition begins at Secaucus-based TV station,” NJ.COM (June 4, 2019), <https://www.nj.com/hudson/2019/06/bye-bye-channel-9-demolition-begins-at-secaucus-based-tv-station.html>.

<sup>60</sup> Dana Floberg, “How can we save New Jersey’s local news from the wrecking ball? media advocate asks,” NJ.COM (June 27, 2019), <https://www.nj.com/opinion/2019/06/how-can-we-save-new-jerseys-local-news-from-the-wrecking-ball-media-advocate-asks.html>.

<sup>61</sup> Fox Permanent Waiver Request at 5.

<sup>62</sup> FP Extension at 4.

First, the compressed timeline for public participation tips the scale heavily in Fox's favor when, as nearly two decades of frustration show, Fox has gotten plenty of second and third and fourth chances to make good on its promises and rarely if ever been held accountable for meeting its promises on which the temporary waivers were predicated.

Second, moving forward with this proceeding flies in the face of a request from the chairmen of the Commission's authorizing committee and subcommittee in the House of Representatives, requesting that the agency "immediately stop work on all partisan, controversial items under consideration, consistent with applicable law and regulation, and follow the norms set by past transfers of power."<sup>63</sup> With the transition will come a change in the Commission's majority and in its chair, making it all too clear that Fox likely initiated this proceeding in a rush to get a "permanent" waiver from the same Chairman who repealed the NBCO rule in 2017 before he departs the agency.

Third, the rulemaking proceeding dealing with the cross-ownership rule at issue is subject to pending Supreme Court review. It's a waste of the Commission's time to consider Fox's transparent attempt to beat that decision out of the gate with a "permanent" waiver grant now. Fox's filing itself points to that case, and suggests the waiver is necessary protection against some kind of "interim" application of the cross-ownership rule; yet it asserts improperly that parties adverse to Fox, opposed to this waiver, and party to the Supreme Court litigation may have been obligated to call for such an "interim" measure.<sup>64</sup>

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<sup>63</sup> See Letter from Chairman Pallone, Committee on Energy and Commerce, and Chairman Doyle, Subcommittee on Communications and Technology, to Hon. Ajit V. Pai, Federal Communications Commission (Nov. 10, 2020), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Letter%20re%20stop%20work%20request.pdf>.

<sup>64</sup> See Free Press Motion for Extension of Time at 4, *citing* Fox Permanent Waiver Request at 5-6.

As noted above, the Commission clarified in its *2019 Order* that the rules do indeed apply at present, and the burden is on Fox to demonstrate its need for a waiver of the NBCO rule—not on parties like Free Press to demonstrate why the rules on the books should actually apply. Yet in light of the history of this proceeding, Fox’s fear of some kind of interim enforcement action is a hollow one, and its arguments at every turn fall well below meeting its burden.

### **III. Conclusion**

The Commission must reject Fox’s request for permanent relief from the NBCO rule. There is no need now to rush a “permanent” decision due to supposed the “cloud of regulatory uncertainty,” for which Fox only has itself to blame, after its repeated but unfulfilled promises that it would sell either WWOR or the *Post* in order to come into compliance with the NBCO rule. Fox may fear its cross-ownership’s future under a new administration, but that is no reason to steam ahead with a permanent waiver, especially when the request is not tethered to the law, and fails to meet the Commission’s standard for review established in the *2016 QR Order* and reinstated in the *2019 Order*. Fox attempts to obscure the two-decade long history here, and all while the rule in play is still in court. The Commission must follow its own standards for reviewing such waiver requests, and doing so should only lead to one outcome: denying Fox’s request for a permanent waiver of the NBCO rule.

Respectfully Submitted,

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